

# Naming Baby: The Constitutional Dimensions of Parental Naming Rights

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## ABSTRACT

*This Article provides the first comprehensive legal analysis of parents' rights to name their own children. Currently, state laws restrict parental naming rights in a number of ways, from restrictions on particular surnames, to restrictions on diacritical marks, to prohibitions on obscenities, numerals, and pictograms. Yet state laws do not prohibit seemingly horrific names like "Adolf Hitler," the name recently given to a New Jersey boy. This Article argues that state laws restricting parental naming rights are subject to strict scrutiny under both the Due Process Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment. This Article concludes that although many restrictions are constitutional, prohibitions on diacritical marks, such as that employed by the state of California, are unconstitutional. If parents wish to name their child "Lucía" or "José," they have a constitutional right to do so. Similarly, current laws restricting parental choice of surnames fail strict scrutiny review. This Article also considers the constitutionality and desirability of statutory reforms that would address certain harmful names not prohibited by current law.*

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#### INTRODUCTION

The headline might have come from *The Onion*: “Local Man Fails to Buy Birthday Cake for Three-Year-Old Son.” But the national headlines describing Heath Campbell’s 2008 visit to a New Jersey supermarket bakery were no joke. Campbell’s cake request had one small detail rendering it instantly newsworthy. His child was named “Adolf Hitler Campbell,” and although the bakery was willing to inscribe many thoughts in frosting, wishing a happy birthday to Adolf Hitler was not one of them.<sup>1</sup>

The Campbell family’s fascination with white supremacy was vividly expressed in the names of Adolf’s two siblings, “Honszlynn Hinler Jeannie Campbell,” an homage to Heinrich Himmler, and

<sup>1</sup> Lisa W. Foderaro, *Naming Children for Nazis Puts Spotlight on the Father*, N.Y. TIMES, Jan. 20, 2009, at A28.

“JoyceLynn Aryan Nation Campbell.”<sup>2</sup> In selecting their children’s peculiar names, the Campbells had exercised a right specifically recognized in New Jersey statutory law, which states, “The designation of a child’s name including the surname is the right of the child’s parent(s).”<sup>3</sup> Indeed, “the child may be given *any* chosen name(s) or surname.”<sup>4</sup> New Jersey recognizes only a few limited exceptions to this right. The “State Registrar may reject a name that contains an obscenity, numerals, symbols, or a combination of letters, numerals, or symbols, or a name that is illegible.”<sup>5</sup> If the Campbells had named their son “R2D2,” state authorities would have intervened. “Adolf Hitler Campbell,” by contrast, presented no legal impediments.<sup>6</sup>

On the other side of the continent, several years earlier, *San Francisco Chronicle* writer Louis Freedberg tried to register his newborn daughter’s name with the state of California.<sup>7</sup> The girl’s name was Lucía. But the state of California refused to enter this name on her birth certificate.<sup>8</sup> California’s Office of Vital Records insists that birth names can be recorded using only “the 26 alphabetical characters of the English language with appropriate punctuation if necessary.”<sup>9</sup> The Office explicitly prohibits “pictographs, ideograms, [or] diacritical marks” (including “é,” “ñ,” and “ç”).<sup>10</sup> Because the name Lucía contained a diacritical mark, it could not be recorded as a legal name. The state offered, however, to record the name as “Lucia,” a name pronounced significantly differently.<sup>11</sup>

Welcome to the bizarre legal universe governing the naming of babies. In this universe, requiring a child to bear the name of history’s most infamous mass murderer is a parental right, but naming a child “Lucía” is not. The importance of this legal regime can scarcely be

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<sup>2</sup> *Id.*

<sup>3</sup> N.J. ADMIN. CODE § 8:2-1.4 (Supp. 2011).

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> State officials subsequently terminated the Campbells’ custody of their children, a decision upheld by a New Jersey appellate court. The termination, however, did not rest on the children’s names, but on the parents’ physical and psychological disabilities. Beth DeFalco, *Adolf Hitler Campbell’s Parents Denied Custody of Nazi-Named Children*, HUFFINGTON POST, Aug. 5, 2010, [http://www.huffingtonpost.com/2010/08/05/adolf-hitler-campbells-pa\\_n\\_672045.html](http://www.huffingtonpost.com/2010/08/05/adolf-hitler-campbells-pa_n_672045.html).

<sup>7</sup> Louis Freedberg, Editorial, *Claim Your Name*, S.F. CHRON., Oct. 7, 2002, at A20.

<sup>8</sup> *Id.*

<sup>9</sup> E-mail from Flora Alvarez, Chief Deputy Registrar, Yolo Cnty. Health Dep’t, Vital Records, to Rachel Anderson, Research Assistant to Professor Carlton Larson (Dec. 5, 2007, 7:34 PM) (on file with the author).

<sup>10</sup> *Id.*

<sup>11</sup> Freedberg, *supra* note 7.

overstated: the selection of a child's name, which he or she will likely bear for the rest of his or her life, is one of the most significant decisions parents will ever make. Yet it is a legal universe that has scarcely been mapped, full of strange lacunae, spotty statutory provisions, and patchy, inconsistent caselaw.

This Article attempts to illuminate this dark area of the law. I am interested in one overriding question: to what extent can the law constitutionally regulate the names that parents give to their children? The law is filled with the sad detritus of cases in which a child's parents disagree over what the child should be named.<sup>12</sup> These relentlessly depressing cases, usually arising between divorced or unmarried parents, do not particularly interest me. Rather, this Article focuses on situations in which parents agree on their child's proposed name, but the government nonetheless denies that name legal recognition.

Part I examines the current restrictions that states impose on parental choice of names. These restrictions vary widely by state, but some common themes recur. The most typical restrictions are prohibitions on obscenities, numerals, pictograms, diacritical marks, and overly lengthy names. Some states also restrict parental choice of surnames. Other states, by contrast, appear to have no explicit restrictions at all. This Part also offers an international comparison, noting that many countries restrict parental naming rights more extensively than do American jurisdictions.

Part II evaluates current state law under the relevant principles of the U.S. Constitution. Two strands of constitutional doctrine are directly applicable. First, the right to name one's child is likely a fundamental right subject to strict scrutiny under the Due Process Clause of the Fourteenth Amendment. Such a right is implicit in cases recognizing parental rights over their children, including, most recently, *Troxel v. Granville*.<sup>13</sup> Moreover, even under the relatively restrictive test for

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<sup>12</sup> See generally Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 *How. L.J.* 227 (1992); Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 *W. VA. L. REV.* 1 (1996); Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 *LAW & INEQ.* 91 (1985); Merle H. Weiner, "We Are Family": *Valuing Associationalism in Disputes over Children's Surnames*, 75 *N.C. L. REV.* 1625 (1997); Beverly S. Seng, Note, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 *VA. L. REV.* 1303 (1984) (proposing a compound surname as a solution to parental disagreements over their children's names); Jay M. Zitter, Annotation, *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children*, 40 *A.L.R.5th* 697 (1996) (collecting cases).

<sup>13</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

substantive due process rights set forth in *Washington v. Glucksberg*,<sup>14</sup> a parental right to name children is likely to be recognized. Such a right is deeply rooted in our nation's history and tradition and has been repeatedly recognized in practice and in law. State restrictions on parental naming rights date from the late nineteenth and early twentieth centuries, well after the adoption of the Fourteenth Amendment. Second, the right to name a child is a form of expressive activity protected by the First Amendment, and therefore state laws that restrict names on the basis of their content are subject to strict scrutiny under the First Amendment.

This Part then applies the strict scrutiny test to the various state laws that restrict parental naming rights. I conclude that laws against obscenities, ideograms, and pictograms are constitutional, as are certain length restrictions and requirements that the child receive at least two names. Current laws prohibiting certain surnames and laws prohibiting diacritical marks are unconstitutional because they are not narrowly tailored to serve a compelling state interest.

Part III turns to the entirely different question of whether state laws might be appropriately augmented in certain circumstances. One hundred years ago, an author in *The Yale Law Journal* noted that the law governing personal names resembled a "boarding house mattress, with lumps in one place, depressions in another. And while one admirable object of reform is to plane away the hillocks of excessive regulation, it is not improper to direct attention to holes that might be filled."<sup>15</sup> While Part II is devoted to the planing of regulatory hillocks, Part III turns to these holes, in particular the problem of children given names like "Adolf Hitler" that are not prohibited under current law. I conclude that there are significant constitutional hurdles to additional legislation, but that certain narrowly drawn statutes might be permissible. This Part also considers the "Boy Named Sue" problem, and concludes that laws requiring gender matching of names are unconstitutional.

## I. THE LAW OF BABY NAMES

The law governing the naming of babies is surprisingly difficult to ascertain. In some states, there is a complete absence of any law on the subject. A Connecticut judge recently discovered, to his astonishment, that Connecticut did not require a name to be placed on a

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<sup>14</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>15</sup> Frederick Dwight, *Proper Names*, 20 *YALE L.J.* 387, 387 (1911).

child's birth certificate, nor was there any authority whatsoever governing the acquisition of a legal name at birth.<sup>16</sup> The judge noted that "the court has inquired of dozens of Connecticut lawyers and judges, and no one has supplied even a portion of an answer to the question: How is a person's legal name established?"<sup>17</sup> A wide range of issues were thus unaddressed, including "the use of a number in a name, such as CP30 [sic]; the selection of a name not matching the sex of a child;" or "the repetition of the same word three times as first, middle, and last name, such as Smith Smith Smith."<sup>18</sup>

In other states, there are patchwork statutes that address some, but not all, of the potential legal issues. There is also a largely unwritten body of administrative practice, as well as informal practices that Professor Elizabeth Emens, in the context of marital name changes, has referred to as "desk-clerk law."<sup>19</sup> This can be described as "what the person at the desk tells you the law is," and although such assertions are often incorrect, they routinely remain unchallenged.<sup>20</sup>

In this Part, I highlight some of the key features of state law in this area, based on state statutes and regulations, as well as direct inquiries to state officials, many of whom were quite helpful in explaining their state's rules and procedures. A brief comparison with the quite different rules of some foreign jurisdictions follows.

## A. State Laws

### 1. Restrictions on Surnames

In some states, parents may only choose surnames that are directly connected to their own. Louisiana's law is the most restrictive, requiring that a child of a married couple bear the surname of the husband.<sup>21</sup> However, if both the husband and the wife agree, the surname "may be the maiden name of the mother or a combination of the surname of the husband and the maiden name of the mother."<sup>22</sup>

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<sup>16</sup> *Shockley v. Okeke*, 856 A.2d 1054, 1063–64 (Conn. Super. Ct. 2004) (Tierney, J.), *aff'd in part, rev'd in part*, 882 A.2d 1244 (Conn. App. Ct. 2005).

<sup>17</sup> *Id.* at 1063.

<sup>18</sup> *Id.*

<sup>19</sup> Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 764 (2007).

<sup>20</sup> *Id.* at 765, 824–27.

<sup>21</sup> LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iii) (2001).

<sup>22</sup> *Id.* Prior to 1983, Louisiana required that in such circumstances the child hold the father's surname. A 1977 opinion of the Louisiana Attorney General noted, "[A] child's surname is not a matter of discretion, but is recognized as an indication of certain legal relationships." La. Att'y Gen. Op. No. 76-1797, 1977 WL 39334 (Mar. 29, 1977). Louisiana law also states, "In the case of a child born of a surrogate birth parent who is a blood relative of a biological parent, the

Any other surname, such as the surname of the mother's mother, is prohibited.

Tennessee's law is similar, providing that married parents can select either the "surname of the natural father" or "the surname of the natural father in combination with either the mother's surname or the mother's maiden surname."<sup>23</sup> In other words, the father's surname must be included in the baby's surname. His name can be excluded only if both parents mutually agree.<sup>24</sup> If the parents cannot agree on a surname, then "the father's surname shall be entered on the birth certificate as the surname of the child,"<sup>25</sup> even if this is not a surname that either parent desired. Tennessee thus effectively guarantees to every married father a statutory right to pass on his surname to his child. There is no corresponding concern for the mother's surname, a troublesome omission under the Supreme Court's gender jurisprudence.<sup>26</sup>

The District of Columbia mandates that the "surname of the child shall be the surname of a parent whose name appears on the child's birth certificate, or both surnames recorded in any order or in hyphenated or unhyphenated form, or any surname to which either parent has a familial connection."<sup>27</sup> To invoke the familial-connection provision, parents must provide an "affidavit stating that the chosen surname was or is the surname of a past or current relative or has some other clearly stated familial connection."<sup>28</sup> Submission of a false affidavit can be punished by a fine of up to \$200 and imprisonment for up to 90 days.<sup>29</sup>

Similar restrictions occur more frequently with respect to unmarried mothers. In Tennessee, for example, an unmarried mother can select her own surname, her maiden surname, or some combination

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surname of the child's biological parents shall be the surname of the child," regardless, apparently, of any parental wishes to the contrary. LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii).

<sup>23</sup> TENN. CODE ANN. § 68-3-305(a)(1) (2006).

<sup>24</sup> *Id.* § 68-3-305(a)(2).

<sup>25</sup> *Id.* § 68-3-305(a)(3). The father's surname will be automatically entered on the birth certificate if the parents do not agree on a surname within ten days of birth, or earlier, if the father (not the mother) "file[s] and submit[s] a sworn statement to the hospital that states the parents do not agree on a surname." *Id.*

<sup>26</sup> *See, e.g.,* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that statutes that classify individuals on the basis of gender must be supported by "exceedingly persuasive justification[s]").

<sup>27</sup> D.C. CODE § 7-205 (2001).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; *See also id.* § 7-225.

thereof, but no others.<sup>30</sup> In Louisiana, nonmarital children will bear the mother's surname if the father is unknown or if the mother so chooses when the father does not acknowledge or refuses to support the child.<sup>31</sup> However, if the father is known, the child will bear his surname unless the parents agree to a combination of the father's surname and the mother's maiden name.<sup>32</sup>

Indiana requires the child of an unmarried couple to bear the surname of the mother unless there is a properly executed paternity affidavit.<sup>33</sup> Under North Dakota law, the surname of nonmarital children must be shown "on the birth record as the current legal surname of the mother at the time of birth unless an affidavit or an acknowledgment of paternity signed by both parents is received stating the surname to be that of the father."<sup>34</sup>

Mississippi provides that in cases of court-determined paternity, "the surname of the child shall be that of the father, unless the judgment specifies otherwise."<sup>35</sup> Rhode Island law similarly requires that if the mother is not married either at the time of birth or of conception, "the child shall bear the mother's surname" unless both the mother and father provide written consent.<sup>36</sup> If a court determines paternity, on the other hand, "the name of the father as determined by the court shall be entered on the birth certificate."<sup>37</sup>

South Dakota's law is even more bizarre, stating that if the mother was unmarried at conception, birth, or any time in between, "the mother's surname shall be shown on the birth certificate as the legal surname of the child" unless both parents sign an affidavit of paternity.<sup>38</sup> Under this law, a woman who becomes a widow (or whose partner dies) during her pregnancy must give the child her own surname because the father would be unavailable to sign an affidavit of paternity. Similarly, this law could even apply to the child of a wo-

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<sup>30</sup> TENN. CODE ANN. § 68-3-305(b)(1).

<sup>31</sup> LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iv) (2001).

<sup>32</sup> *Id.*

<sup>33</sup> IND. CODE ANN. § 16-37-2-13 (West 2007).

<sup>34</sup> N.D. CENT. CODE § 23-02.1-13.6 (2011).

<sup>35</sup> MISS. CODE ANN. § 93-9-9 (1) (West Supp. 2010). For criticism of this statute, see Jessica R. Powers, *An Illegitimate Use of Legislative Power: Mississippi's Inappropriate Child Surname Law in Paternity Proceedings*, 8 U.C. DAVIS J. JUV. L. & POL'Y 153, 188-95 (2004). The Mississippi Supreme Court, over a spirited dissent, recently interpreted the statute to mean that in disputed cases, the burden is on the mother to prove that the father's surname is not in the best interests of the child. *Rice v. Merkich*, 34 So. 3d 555, 559-60 (Miss. 2010).

<sup>36</sup> R.I. GEN. LAWS § 23-3-10(d)(2) (2008).

<sup>37</sup> *Id.*

<sup>38</sup> S.D. CODIFIED LAWS § 34-25-13.3 (2004).

man who divorced during pregnancy or to a married couple, if the woman had been in the final stages of a divorce to another man at the time of conception and before the remarriage.

Surname restrictions such as these were once even more common. Indeed, surname restrictions have triggered the only significant judicial decisions addressing parental naming rights. These decisions are discussed in Part II. For present purposes, however, it is worth noting that the highest court to consider a surname restriction, the United States Court of Appeals for the Eighth Circuit, upheld the law under the rational basis test.<sup>39</sup> Accordingly, no controlling legal authority requires states to modify these laws.

## 2. Requirement of at Least Two Names

Although many state laws are silent on this point, I suspect most states would require parents to select a first name and a surname, rather than just one name. Hawaii, for example, requires married parents to select “both a family name and a given name chosen by one of the child’s parents.”<sup>40</sup>

Curiously, very few states explicitly impose a duty on parents to name their child anything at all. Connecticut is not alone in not requiring a child’s name to be entered on the birth certificate. For example, Michigan statutory law does not explicitly require that a child’s given name be included on the birth certificate,<sup>41</sup> and indeed a Michigan official has stated that “a child does not have to be given a name at all.”<sup>42</sup> Under Nevada law, a birth certificate need not include the child’s name, but parents are given a form to submit “as soon as the child shall have been named.”<sup>43</sup>

Other states do seem to recognize a naming requirement, if only obliquely. An Ohio statute states that “the child shall be registered in the surname designated by the mother,”<sup>44</sup> arguably imposing a duty on the mother to provide a surname. Under Florida law, married par-

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<sup>39</sup> *Henne v. Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990).

<sup>40</sup> HAW. REV. STAT. § 574-2 (2010). If the parents do not agree on a name, a court selects a name “in the best interests of the child.” *Id.* If the parents are unmarried, the mother selects the name. *Id.* § 574-3.

<sup>41</sup> MICH. COMP. LAWS § 333.2824 (2011).

<sup>42</sup> E-mail from Kay Bertrau, Mich. Dep’t of Cmty. Health, Div. for Vital Records & Health Data Dev., to Craig Baumgartner, Research Assistant to Professor Carlton Larson (Aug. 11, 2008, 09:04 PDT) (on file with the author).

<sup>43</sup> NEV. REV. STAT. § 40.440.300(1) (2009).

<sup>44</sup> OHIO REV. CODE ANN. § 3705.09(F) (LexisNexis 2005).

ents select the given name and surname if they both have custody.<sup>45</sup> If they disagree on the surname, it is hyphenated; if they disagree on the given name, they must either reach an agreement, or a court selects a given name.<sup>46</sup> This resolves parental disputes over the name, although it arguably does not formally require a name if both parents prefer not to name the child at all.

### 3. *Prohibition of Ideograms and Pictograms*

A number of states, either through statute or administrative practice, prohibit the use of ideograms or pictograms as part of a child's name.<sup>47</sup> This would preclude, for example, parents from naming their child using the symbol denoting The Artist Formerly Known as Prince.<sup>48</sup>

### 4. *Prohibition of Numerals*

As far as I can determine, no state prohibits the use of a numeral if it is spelled out. It would be permissible, for example, to name a child "Eight." But several states prohibit the use of a numerical symbol, which would prohibit naming a child "8." New Jersey, for example, permits the State Registrar to reject names that contain "numerals" or a "combination of letters, numerals, or symbols."<sup>49</sup> In Illinois, administrative practice prohibits numerals when used as the first character in a child's name.<sup>50</sup> Texas prohibits numerals as part of the name or suffix, although Roman numerals may be used for suffixes.<sup>51</sup> Thus, a child could be named "John William Turner III," but not "John William Turner 3" or "John William 3 Turner."

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<sup>45</sup> FLA. STAT. § 382.013(3)(a) (2008).

<sup>46</sup> *Id.* § 382.013(3)(b); *cf.* WIS. STAT. § 69.14(1)(f)(1)(c) (2009–2010) (providing that when parents are divorced or separated, the parent with actual custody selects the name, as do unmarried mothers).

<sup>47</sup> *See, e.g.*, N.J. ADMIN. CODE § 8:2-1.4 (Supp. 2011); E-mail from Flora Alvarez to Rachel Anderson, *supra* note 9; E-mail from Kay Bertrau to Craig Baumgartner, *supra* note 42; E-mail from Victoria Williams, Ill. Div. of Vital Records, to Craig Baumgartner (Aug. 11, 2008, 6:58 AM PDT) (on file with the author); E-mail from Robin Wolfe, Kan. Office of Vital Statistics, to Craig Baumgartner (Aug. 12, 2008, 6:21 AM PDT) (on file with the author).

<sup>48</sup> *See infra* note 181 and accompanying text.

<sup>49</sup> N.J. ADMIN. CODE § 8:2-1.4.

<sup>50</sup> E-mail from Victoria Williams to Craig Baumgartner, *supra* note 47.

<sup>51</sup> E-mail from Sherry Crawford, Tex. Vital Statistics Unit, to Craig Baumgartner (Aug. 21, 2008, 1:32 PM PDT) (on file with the author).

### 5. *Length Restrictions*

Some states explicitly limit the length of names, whereas others undoubtedly do so informally. Iowa administrative practice, for example, prohibits names over a certain number of characters due to technological limitations associated with its electronic data systems.<sup>52</sup> In Massachusetts, the first, last, and middle names are limited to forty characters because of software limitations.<sup>53</sup>

### 6. *Prohibition of Diacritical Marks*

Prohibitions of accent marks and other diacritical marks are common. For example, the California Office of Vital Records provides a handbook to county vital records departments that states birth names can be recorded using only “the 26 alphabetical characters of the English language with appropriate punctuation if necessary.”<sup>54</sup> The handbook further specifies that “no pictographs, ideograms, diacritical marks” (including “é,” “ñ,” and “ç”) are allowed.<sup>55</sup> Hence the prohibition on “Lucía” discussed in the Introduction.<sup>56</sup> Kansas imposes similar restrictions.<sup>57</sup> In Massachusetts, the “characters have to be on the standard american [sic] keyboard. So dashes and apostrophes are fine, but not accent marks and the such.”<sup>58</sup> New Hampshire prohibits all special characters other than an apostrophe or dash.<sup>59</sup> Accordingly, “O’Connor” is a permissible name in New Hampshire, but “Chacón” is not.

### 7. *Prohibition of Obscenities*

At least two states explicitly prohibit obscenities, and I suspect many other states would prohibit obscene names as well. New Jersey statutory law permits the State Registrar to reject any chosen names or surnames that contain an obscenity.<sup>60</sup> Under Nebraska statutory law, the selection of a surname is the “parents’ prerogative, except

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<sup>52</sup> E-mail from Carol Barnhill, Iowa Dep’t of Pub. Health, to Craig Baumgartner (Aug. 8, 2008, 7:26 AM) (on file with the author).

<sup>53</sup> E-mail from Sharon Pagnano, Mass. Registry of Vital Records & Statistics, to Craig Baumgartner (Aug. 12, 2008, 6:28 AM PDT) (on file with the author).

<sup>54</sup> E-mail from Flora Alvarez to Rachel Anderson, *supra* note 9.

<sup>55</sup> *Id.*; see also Freedberg, *supra* note 7 (describing California officials’ refusal to use Spanish characters on driver’s licenses and birth certificates).

<sup>56</sup> See text accompanying notes 7–11.

<sup>57</sup> E-mail from Robin Wolfe to Craig Baumgartner, *supra* note 47.

<sup>58</sup> E-mail from Sharon Pagnano to Craig Baumgartner, *supra* note 53.

<sup>59</sup> E-mail from William R. Bolton, Jr., N.H. Div. of Vital Records Admin., to Craig Baumgartner (Aug. 22, 2008, 10:24 AM PDT) (on file with the author).

<sup>60</sup> N.J. ADMIN. CODE § 8:2-1.4 (Supp. 2011).

that the department [of Health and Human Services] shall not accept a birth certificate with a child's surname that implies any obscene or objectionable words or abbreviations."<sup>61</sup> The statute is curiously silent with respect to an obscenity in the child's first name.<sup>62</sup>

#### 8. *No Restrictions at All?*

Some states ostensibly impose no restrictions at all upon parents' choice of names. For example, under Kentucky statutory law, the child's surname is "any name chosen by the parents."<sup>63</sup> A Kentucky official has stated that the mother can give her child "any name she wishes."<sup>64</sup> In response to e-mail inquiries, state officials in Delaware, Maryland, and Montana all asserted that their states imposed no restrictions on parents' choice of names.<sup>65</sup> A Washington statute states that an unmarried mother may "give any surname she so desires to her child."<sup>66</sup> There is no similar statutory language with respect to married parents or with respect to first names.<sup>67</sup> South Carolina formerly required that every child be given the surname of the father;<sup>68</sup> now, however, a state official asserts that the state "does allow a mother to name her child without any restrictions."<sup>69</sup>

Yet one wonders if these statements are literally true. It seems unlikely that state officials would passively accept an expletive, a 700-letter name, or a name written entirely in Greek characters. Put to the acid test, these general statements about parents' unfettered ability to select a name may well prove unreliable.

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<sup>61</sup> NEB. REV. STAT. § 71-640.03 (2009).

<sup>62</sup> *See id.*

<sup>63</sup> KY. REV. STAT. ANN. § 213.046(9)(a) (West 2006).

<sup>64</sup> E-mail from Glenda Gordon, Ky. Cabinet for Health & Family Servs., Office of Vital Statistics, to Craig Baumgartner (Aug. 11, 2008, 7:07 AM PDT) (on file with the author).

<sup>65</sup> E-mail from Brenda H. Conner, Del. Dep't of Health & Soc. Servs., to Craig Baumgartner (Aug. 11, 2008, 11:44 AM PDT) (on file with the author) (a "mother can name a child whatever she wants"); E-mail from James Edgar, Mont. Office of Vital Statistics, to Craig Baumgartner (Aug. 8, 2008, 7:08 AM PDT) (on file with the author); E-mail from Denise Smith, Md. Dep't of Health & Mental Hygiene, to Craig Baumgartner (Aug. 8, 2008, 4:59 AM PDT) (on file with the author); *see also In re Custody of J.C.O.*, 993 P.2d 667, 669 (Mont. 1999) ("[S]election of a child's surname is a matter of choice, not law.").

<sup>66</sup> WASH. REV. CODE § 70.58.080 (8) (2010).

<sup>67</sup> *See id.*

<sup>68</sup> *See Op. No. 4720*, 1976 S.C. Att'y Gen. Ann. Rep. & Official Op. 88.

<sup>69</sup> E-mail from Luanne Miles, S.C. Div. of Vital Records, to Craig Baumgartner (Aug. 21, 2008, 1:21 PM PDT) (on file with the author).

### B. Foreign Practices

Many foreign jurisdictions are significantly more restrictive with respect to naming practices.<sup>70</sup> Portugal, for example, requires governmental approval of names; a list of previously approved and rejected names is available on the Internet.<sup>71</sup> It makes for fascinating reading, displaying a relentless enforcement of “authentic” Portuguese names.<sup>72</sup> Not surprisingly, “Svetlana,” “Johann,” “Ethel,” and “Andy” all fail to make the cut, but so do “Carmencita,” “Catelina,” and “Iglesias.”<sup>73</sup> Portugal also prohibits names that “raise doubts about the sex of the registrant.”<sup>74</sup> In 2007, Venezuelan lawmakers proposed legislation that would limit parents to 100 approved names, perhaps because at least 60 Venezuelans bore the first name “Hitler.”<sup>75</sup> Spain specifically prohibits “extravagant” or “improper” names.<sup>76</sup> French law permits officials to reject first names that are considered contrary to the welfare of the child.<sup>77</sup> One such name was “Fleur de Marie,” rejected by French courts as too eccentric.<sup>78</sup> Argentina prohibits names that are “extravagant, ridiculous, contrary to [its] customs, [or] that express or signify political or ideological tendencies.”<sup>79</sup> It has in the past also rejected certain non-Spanish names, such as “Malcolm.”<sup>80</sup>

## II. CONSTITUTIONAL PRINCIPLES GOVERNING THE REGULATION OF BABY NAMES

The limitations discussed in Part I raise two significant constitutional questions. First, do parents possess a constitutional right to

<sup>70</sup> For an overview, see Walter Pintens & Michael R. Will, *Names*, in IV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 45 (Aleck Chloros et al. eds., 2007).

<sup>71</sup> *Composição do nome*, INSTITUTO REGISTOS & NOTARIADO (Apr. 17, 2009, 03:24 PM), [http://www.irn.mj.pt/IRN/sections/irn/a\\_registral/registo-civil/docs-do-civil/dar-o-nome/](http://www.irn.mj.pt/IRN/sections/irn/a_registral/registo-civil/docs-do-civil/dar-o-nome/).

<sup>72</sup> To view the list of names, see *Vocábulos admitidos e não admitidos como nomes próprios*, INSTITUTO REGISTOS & NOTARIADO (June 30, 2011), [http://www.irn.mj.pt/IRN/sections/irn/a\\_registral/registos-centrais/docs-da-nacionalidade/vocabulos-admitidos-e/](http://www.irn.mj.pt/IRN/sections/irn/a_registral/registos-centrais/docs-da-nacionalidade/vocabulos-admitidos-e/).

<sup>73</sup> *Id.*

<sup>74</sup> *Composição do nome*, *supra* note 71 (translated from Portuguese).

<sup>75</sup> Simon Romero, *A Culture of Naming That Even a Law May Not Tame*, N.Y. TIMES, Sept. 5, 2007, at A4.

<sup>76</sup> Ralph Slovenko, *Overview: Names and the Law*, 32 NAMES 107, 108 (1984).

<sup>77</sup> CODE CIVIL [C. CIV.] art. 57 (Fr.).

<sup>78</sup> Aeyal M. Gross, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269, 280 (1996).

<sup>79</sup> Law No. 18248, June 10, 1969, [21.709] B.O. 1 (Arg.) (translated from Spanish); *see also* Phanor J. Edor, Comment, *The Right to Choose a Name*, 8 AM. J. COMP. L. 502, 502 (1959) (discussing a 1947 predecessor statute).

<sup>80</sup> Edor, *supra* note 79, at 504.

name their children, and if so, what is the specific source of that right? Second, assuming there is such a right, what standard of scrutiny is appropriate for restrictions on that right? How, precisely, are these laws to be evaluated?

The limited and dated caselaw and academic commentary is not especially helpful on either of these questions. For example, a federal district court in Hawaii has asserted that parents possess a common law right to name their children whatever they want.<sup>81</sup> Few rights are absolute, however, and it is hard to see why this one should be any different. Would the court really recognize a parental right to name a child with an especially vile epithet? An influential 1979 law review article concluded that when parents agree, they “should have the freedom to give their children any reasonable surname.”<sup>82</sup> Courts could disallow “a surname chosen for a child by his parents if it were so outrageous or obscene that it was clearly not in the child’s best interests to bear the surname.”<sup>83</sup> But terms like “reasonable” and “outrageous” are highly subjective and give little guidance to courts on what factors to take into account.

The most relevant bodies of constitutional doctrine are substantive due process jurisprudence under the Fourteenth Amendment and free speech jurisprudence under the First Amendment. This Part develops the arguments for a parental naming right under both bodies of law, and concludes that strict scrutiny is the relevant standard for analyzing restrictions on that right. It further concludes that current laws prohibiting certain surnames and laws prohibiting diacritical marks are unconstitutional, as they are not narrowly tailored to serve a compelling state interest. Laws against obscenities, ideograms and pictograms, and certain length restrictions pass strict scrutiny, as do requirements that the child receive at least two names.

#### A. *Substantive Due Process*

A number of courts have held that the Due Process Clause of the Fourteenth Amendment protects parental naming rights, at least to a certain extent. For example, in 1979, a federal district court in Hawaii held that the Supreme Court’s privacy jurisprudence under the Fourteenth Amendment protected “from arbitrary state action” the right

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<sup>81</sup> *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979).

<sup>82</sup> Richard H. Thornton, Note, *The Controversy over Children’s Surnames: Familial Autonomy, Equal Protection and the Child’s Best Interests*, 1979 UTAH L. REV. 303, 308.

<sup>83</sup> *Id.* at 308 n.25.

of parents to “give their child any name they wish.”<sup>84</sup> Other district courts quickly agreed. A federal district court in Florida held that “the due process clause of the Fourteenth Amendment protects the plaintiffs’ right to choose the name of their child from arbitrary state action.”<sup>85</sup> Similarly, a federal district court and a state appellate court in North Carolina invalidated, on due process grounds, North Carolina statutes that restricted parental choice of surnames.<sup>86</sup>

None of these decisions, however, explicitly rested on a heightened standard of scrutiny. In the Hawaii case, the court found that the state had failed to assert even a reasonable relation to a legitimate state purpose.<sup>87</sup> In the Florida case, the court held that state intrusions on parental naming rights must have a “reasonable relationship to some state purpose.”<sup>88</sup> Because the state had failed to show such a relationship, the court did not address “whether something more than a reasonable relationship must be shown.”<sup>89</sup> Similarly, in the North Carolina federal case, the district court held that the statute was “patently defective” under even “the most relaxed of standards.”<sup>90</sup>

The most thorough airing of the substantive due process issue came in the Eighth Circuit’s decision in *Henne v. Wright*.<sup>91</sup> At issue was a Nebraska statute that prohibited parents from selecting a surname other than their own. At trial, the district court had agreed with the other district courts that had weighed in on this issue, holding that “a parent’s right to name his or her child is protected under an extension of the right to privacy that is founded upon the Fourteenth

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<sup>84</sup> *Jech*, 466 F. Supp. at 719.

<sup>85</sup> *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1983); see also *Doe v. Hancock Cnty. Bd. of Health*, 436 N.E.2d 791, 793 (Ind. 1982) (Hunter, J., dissenting) (“The naming of one’s own child is a matter of personal choice in the area of family life which the United States Supreme Court has long held must be accorded special protection. . . . [F]reedom of personal choice in the matters of family life is one of the liberties protected by the due process clause of the Fourteenth Amendment.”); *Sec’y of the Commonwealth v. City Clerk*, 366 N.E.2d 717, 725 (Mass. 1977) (“We think the common law principle of freedom of choice in the matter of names extends to the name chosen by a married couple for their child.”).

<sup>86</sup> *O’Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981); *Jones v. McDowell*, 281 S.E.2d 192, 194 (N.C. Ct. App. 1981) (holding that Due Process Clause protection “extends to the interest of the mother of an illegitimate child in retaining the surname given the child at birth”).

<sup>87</sup> *Jech*, 466 F. Supp. at 721.

<sup>88</sup> *Sydney*, 564 F. Supp. at 413.

<sup>89</sup> *Id.* This point appears to have been lost on a Florida state appellate court that later interpreted *Sydney* as requiring only a reasonable justification to intrude on parental naming rights. *Robertson v. Pfister*, 523 So. 2d 678, 679 (Fla. Dist. Ct. App. 1988) (upholding a court order requiring a child to have the father’s surname in a case where the parents divorced during pregnancy).

<sup>90</sup> *O’Brien*, 523 F. Supp. at 496.

<sup>91</sup> *Henne v. Wright*, 904 F.2d 1208 (8th Cir. 1990).

Amendment's protection of individual liberty."<sup>92</sup> Similarly, the lower court held that it "need not decide whether the [state's] interests need be more than legitimate," because the state's "justifications fail to satisfy even this minimal standard."<sup>93</sup>

By a two-to-one vote, the Eighth Circuit reversed. The majority opinion by Judge Myron Bright described the alleged right narrowly: "[W]hether a parent has a fundamental right to give a child a surname at birth with which the child has no legally established parental connection."<sup>94</sup> The court held that earlier decisions, such as *Meyer v. Nebraska*<sup>95</sup> and *Pierce v. Society of Sisters*,<sup>96</sup> which had recognized parental rights with respect to training and education, were not controlling.<sup>97</sup> The choice of a surname, the court stated, "possesses little, if any, inherent resemblance to the parental rights of training and education recognized by *Meyer* and *Pierce*."<sup>98</sup> Claiming that "[t]he custom in this country has always been that a child born in lawful wedlock receives the surname of the father at birth," the court concluded that the asserted right was not grounded in the history and tradition of this Nation, and accordingly could not be recognized as a fundamental right under the Due Process Clause.<sup>99</sup> The statute could be sustained under rational basis review because it furthered at least three legitimate interests, including the prevention of a false implication of paternity.<sup>100</sup>

Judge Richard Sheppard Arnold dissented. He concluded that parents hold a fundamental right to name their own children.<sup>101</sup> Such a right was, "if anything, more personal and intimate, less likely to affect people outside the family, than the right to send the child to a private school or to have the child learn German."<sup>102</sup> He continued, "There is something sacred about a name. It is our own business, not the government's."<sup>103</sup> Judge Arnold found little support in tradition

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<sup>92</sup> *Henne v. Wright*, 711 F. Supp. 511, 513 (D. Neb. 1989), *rev'd*, 904 F.2d 1208.

<sup>93</sup> *Id.* at 514.

<sup>94</sup> *Henne*, 904 F.2d at 1213.

<sup>95</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing right to instruct a child in a foreign language).

<sup>96</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing right to send a child to a private school).

<sup>97</sup> *Henne*, 904 F.2d at 1214.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1215.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1216 (Arnold, J., dissenting).

<sup>102</sup> *Id.* at 1217 (citations omitted).

<sup>103</sup> *Id.*

for Nebraska's restrictive naming statute, because at common law people were free to choose their own surnames.<sup>104</sup> There was "no solid tradition of legislation denying any such right," and because people may choose their own names, "[i]t is only a small step to extend the same right to their children's names."<sup>105</sup>

*Henne* remains the only decision of a federal appellate court on the issue of parental naming rights. Despite the support of several of Judge Arnold's Eighth Circuit colleagues, an effort to take the case to the Eighth Circuit en banc failed.<sup>106</sup> Although Judge Arnold's argument is highly persuasive, the issue must nonetheless be reconsidered in light of intervening Supreme Court decisions.

The lower court substantive due process decisions all predate the Supreme Court's two most significant recent substantive due process rulings. In 2000, the Court in *Troxel v. Granville* invalidated a Washington statute permitting courts to award broad visitation rights over a custodial parent's objection.<sup>107</sup> Although no opinion commanded a majority of the Court, broad language in two of the opinions supports parental naming rights. More generally, in 1997, in *Washington v. Glucksberg*, the Court held that to be recognized as a fundamental right under the Due Process Clause, a right must be both carefully described and objectively deeply rooted in our nation's history and tradition, and implicit in the concept of ordered liberty.<sup>108</sup> For judges disinclined to find *Troxel* dispositive, *Glucksberg* would provide the relevant framework for evaluating parental naming rights.

### 1. *Troxel v. Granville*

Justice O'Connor's plurality opinion in *Troxel* (speaking for herself, Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer) concluded that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children."<sup>109</sup> This right,

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<sup>104</sup> *Id.* at 1218.

<sup>105</sup> *Id.* at 1219.

<sup>106</sup> POLLY J. PRICE, JUDGE RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH 255 (2009).

<sup>107</sup> *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality opinion).

<sup>108</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court recognized a right to same-sex intimacy under the Due Process Clause without specifying what level of scrutiny it was applying or analyzing the issue under *Glucksberg*. However, the Court has recognized the vitality of the *Glucksberg* test as recently as 2010 in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3023 (2010), and lower courts will almost certainly apply it to substantive due process cases.

<sup>109</sup> *Troxel*, 530 U.S. at 66.

Justice O'Connor stated, "is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>110</sup> Justice Souter, in concurrence, described the right slightly differently, as a "parent's interest[] in the nurture, upbringing, companionship, care, and custody of children," but the idea is basically the same.<sup>111</sup>

Taken together, Justice O'Connor's opinion and Justice Souter's opinion support a due process right of parents to name their own children. Surely, the right to name a child is an implicit component of "care, custody, and control" of children.<sup>112</sup> Although Justice O'Connor's opinion did not specifically state a standard of scrutiny, her recognition of a fundamental right indicates that strict scrutiny is the appropriate standard.<sup>113</sup> Lower courts seeking to faithfully apply existing Supreme Court precedent should conclude that *Troxel* compels recognition of a parental naming right that is subject to strict scrutiny.

As a predictive matter about future Supreme Court behavior, however, there are risks in overreading *Troxel*. Three of the five justices who recognized this broad right are no longer serving on the Court, and several of the justices who remain expressed skepticism about the breadth of Justice O'Connor's opinion. Justice Thomas, for example, voted to invalidate the Washington law only with the caveat that "neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights."<sup>114</sup> Justice Scalia was even more hostile, worrying about "a new regime of judicially prescribed, and federally prescribed, family law."<sup>115</sup> He observed that "[o]nly three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated."<sup>116</sup> In his view, "the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis*

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<sup>110</sup> *Id.* at 65.

<sup>111</sup> *Id.* at 77 (Souter, J., concurring in the judgment).

<sup>112</sup> *Id.* at 66 (plurality opinion).

<sup>113</sup> *Id.* at 65–66; *see also id.* at 80 (Thomas, J., concurring in the judgment) (observing that none of the opinions recognizing a fundamental right "articulate[] the appropriate standard of review" and stating that "I would apply strict scrutiny to infringements of fundamental rights").

<sup>114</sup> *Id.* at 80 (Thomas, J., concurring in the judgment).

<sup>115</sup> *Id.* at 93 (Scalia, J., dissenting).

<sup>116</sup> *Id.* at 92.

protection.”<sup>117</sup> Similarly, Justices Stevens and Kennedy declined to invalidate the Washington statute and expressed concern that the plurality opinion was insufficiently attentive to the state’s interests.<sup>118</sup>

It is thus far from certain that *Troxel* would be decided similarly by today’s Supreme Court. If a parental naming rights case were to reach the Court, at least some Justices might conclude that *Troxel* is not dispositive. For these Justices, the Court’s broader caselaw in the area of substantive due process would likely be more informative.

## 2. Washington v. Glucksberg

*Washington v. Glucksberg* remains the Court’s most comprehensive attempt at articulating a consistent substantive due process methodology. Under the *Glucksberg* analysis, to be recognized as fundamental a right must be both carefully described and objectively deeply rooted in our nation’s history and tradition.<sup>119</sup> The right of parents to name their children meets both of these tests, and should thus satisfy even those Justices who are most skeptical of substantive due process in general.

### a. Carefully Described

The best and most careful description of the right at issue is the right of parents to name their children. The contrary view, seemingly adopted by the Eighth Circuit in *Henne*, would describe the right almost precisely in terms of whatever law is being challenged.<sup>120</sup> Yet even under the Supreme Court’s admonishment that rights be carefully described, this approach is unduly narrow. Consider, for example, a state law that said state officials, not parents, will name every newborn child. Surely the right asserted in this case would be the right of parents to name their children themselves. Similarly, imagine a state law that prohibited parents from naming their child “Barack.” It would be nonsensical to contend that the alleged right is the right to

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 91 (Stevens, J., dissenting) (“It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.”); *id.* at 100 (Kennedy, J., dissenting) (“In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude that the right to be free of such review in all cases is itself implicit in the concept of ordered liberty.” (citations and internal quotation marks omitted)).

<sup>119</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>120</sup> *See Henne v. Wright*, 904 F.2d 1208, 1213 (8th Cir. 1990).

name a child “Barack” and then scour historical records looking for restrictions on that particular name. The right in *Meyer* was not the right to teach German, but the right to instruct children in any foreign language.<sup>121</sup> To be remotely meaningful, the right at issue has to be described at a slightly greater level of generality. Wisely, the Court in *Glucksberg* did not insist on the narrowest possible description of the right, as Justice Scalia had previously advocated.<sup>122</sup>

*b. Objectively Rooted in Our Nation’s History and Tradition, and Implicit in Ordered Liberty*

The right of parents to name their children is objectively rooted in the Nation’s history and tradition. Indeed, I am aware of no circumstances in American history, other than slavery,<sup>123</sup> in which this right has been exercised by anyone other than parents. Parents, not the government or anybody else, name children.

Indeed, governmental restrictions of any sort on parental naming rights were nonexistent in the eighteenth and early nineteenth centuries. In England, all birth records were maintained by churches until 1837.<sup>124</sup> This, too, was the practice in early America.<sup>125</sup> Only with the introduction of birth certificates in the late nineteenth and early twentieth centuries did American state governments become involved in the naming business. The earliest state law I have located requiring registration of births is an 1844 Massachusetts law that required city and town clerks to transmit birth records to the state.<sup>126</sup> The law provided that the “record of births shall state . . . the name of the child, (if it have any[ ]).”<sup>127</sup> California first required statewide birth registrations in 1858, but did not impose any formal restrictions on naming rights.<sup>128</sup> Most states did not follow Massachusetts’s lead until much

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<sup>121</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923).

<sup>122</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (stating that rights should be assessed under the “most specific tradition available”).

<sup>123</sup> See 2 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA 393 (Junius P. Rodriguez ed., 2007) (noting that slaves were named by their owners or salesmen).

<sup>124</sup> E.A. WRIGLEY ET AL., ENGLISH POPULATION HISTORY FROM FAMILY RECONSTITUTION, 1580–1837, at 19 (1997).

<sup>125</sup> A Pennsylvania statute in 1682 sought to create a state registry of births, but this law was abrogated by English authorities. Act of 1682, ch. 47, 1 Pa. Stat. 47–48. A subsequent statute simply confirmed that the birth records of religious societies would be deemed authentic. Act of May 1693, ch. 85, 1 Pa. Stat. 189.

<sup>126</sup> Act of Mar. 16, 1844, ch. 159, § 1, 1844 Mass. Acts 261, 261.

<sup>127</sup> *Id.*

<sup>128</sup> Act of Apr. 26, 1858, ch. CCCLVI, § 1, 1858 Cal. Stat. 342, 343.

later, however. Illinois began birth registration in 1877,<sup>129</sup> New York in 1880,<sup>130</sup> Florida in 1899,<sup>131</sup> Pennsylvania in 1906,<sup>132</sup> and Ohio in 1908.<sup>133</sup>

Americans exuberantly exercised their untrammelled right to name their children. The variety and creativity of American naming practices was well documented by H.L. Mencken in his masterwork *The American Language*.<sup>134</sup> His pages are filled with examples of children given truly awful names. English Puritans used names to convey stern moral lessons, employing names such as “Fear-Not,” “Praise-God,” and my personal favorite, “Fly-fornication.”<sup>135</sup> American Puritans enthusiastically embraced Biblical names, not only the well-worn “David” and “Rachel,” but the far more obscure figures of “Epaphroditus,” “Zipporah,” and “Mahershalalhashbaz.”<sup>136</sup> The prominent Massachusetts Puritan Samuel Sewall was seriously torn over whether to name his daughter “Sarah” or “Mehitabel.”<sup>137</sup> Another Massachusetts man named his son “Mene Mene Tekel Upharsin.”<sup>138</sup> In 1814, a Connecticut minister named his daughter “Encyclopedia Britannia.”<sup>139</sup>

Political names have been especially popular. In the first half of the nineteenth century, the governor of South Carolina named his son “States Rights.”<sup>140</sup> Perhaps proving that some names really are destiny, “States Rights” graduated from Harvard Law School but was killed in battle as a brigadier general in the Confederate Army.<sup>141</sup> Equally redolent of a Civil War history exam is the mid-nineteenth century family who named their sons “Kansas Nebraska,” “Lecompton Constitution,” and “Emancipation Proclamation,” while giving their daughters the apparently more feminine names of “Loui-

<sup>129</sup> Act of May 25, 1877, § 3, 1877 Ill. Laws 208, 209.

<sup>130</sup> Act of May 18, 1880, ch. 322, § 7, 1880 N.Y. Laws 465, 467.

<sup>131</sup> Act of May 11, 1899, ch. 4694, 1899 Fla. Laws 67.

<sup>132</sup> Act of May 1, 1905, No. 221, §§ 12–16, 1905 Pa. Laws 330, 336–38.

<sup>133</sup> Act of May 1, 1908, No. 467, §§ 12–15, 1908 Ohio Laws 296, 301–02.

<sup>134</sup> H.L. MENCKEN, *THE AMERICAN LANGUAGE* (Raven I. McDavid, Jr. ed., 4th ed. 1963).

<sup>135</sup> *Id.* at 612. “Fly” is used here in the older sense of “flee” or “begone,” and not as a reference to an insect.

<sup>136</sup> Diana Ross McCain, *What to Name the Baby*, *EARLY AM. LIFE*, Apr. 1989, at 11–12.

<sup>137</sup> Gloria L. Main, *Naming Children in Early New England*, 27 *J. INTERDISC. HIST.* 1, 13 (1996).

<sup>138</sup> DAVID HACKETT FISCHER, *ALBION’S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 94 (1989).

<sup>139</sup> McCain, *supra* note 136, at 13.

<sup>140</sup> MENCKEN, *supra* note 134, at 626.

<sup>141</sup> *Id.*

siana Purchase” and “Missouri Compromise.”<sup>142</sup> The outhouse was no doubt an important feature of daily life, but one wonders if it was truly necessary to commemorate it, as did one Tennessee family, by naming a girl “Latrina.”<sup>143</sup> Other children were given such gargantuan tongue-twisters as “Trailing Arbutus Vines,”<sup>144</sup> “Loyal Lodge No. 296 Knights of Pythias Ponca City Oklahoma Territory,”<sup>145</sup> and “John Hodge Opera House Centennial Gargling Oil Samuel J. Tilden.”<sup>146</sup>

Explicit decisions of American courts have also long recognized that parents have a right to name their children and that this right can be alienated. For example, in 1902 the Iowa Supreme Court held, “That the privilege of naming a child is a valid and legal consideration for a promise is well established by all the authorities.”<sup>147</sup> The court explained, “Defendant received the benefit of the name, and the parents parted with the right to give the child such name as they might choose. This, as has been seen, is a valuable consideration.”<sup>148</sup> The Indiana Supreme Court held in 1882, “The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent.”<sup>149</sup> The court noted, “The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it.”<sup>150</sup> More recently, a Massachusetts appellate court stated, “The naming of a child is a right and privilege belonging to the child’s parents.”<sup>151</sup>

The right would also appear to be implicit in the concept of ordered liberty. Although this strand of the *Glucksberg* analysis has not been well developed by courts, it is hard to imagine a functional, democratic society in which parents lack such a basic right as the right to name their own children. Indeed, as far as I am aware, even in the

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 622.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 627.

<sup>146</sup> *Id.*

<sup>147</sup> *Daily v. Minnick*, 91 N.W. 913, 914 (Iowa 1902) (enforcing an oral contract to give parents forty acres of land in exchange for naming their son after the defendant).

<sup>148</sup> *Id.* at 915; *see also Schumm v. Berg*, 231 P.2d 39, 44 (Cal. 1951) (“The privilege of naming a child is valid consideration for a promise.”).

<sup>149</sup> *Wolford v. Powers*, 85 Ind. 294, 307 (1882).

<sup>150</sup> *Id.*

<sup>151</sup> *D’Ambrosio v. Rizzo*, 425 N.E.2d 369, 370 (Mass. App. Ct. 1981); *see also Gardner v. Denison*, 105 N.E. 359, 360 (Mass. 1914) (“The privilege of naming a child is a valid consideration for a promise to pay money.”); *Eaton v. Libbey*, 42 N.E. 1127, 1127 (Mass. 1896) (“[W]e assume that the right to name a child belongs to its parents.”).

most dictatorial regimes in the world, parents still name their own children.

The foregoing analysis suggests that under *Glucksberg*, parents possess a fundamental constitutional right, rooted in the Due Process Clause of the Fourteenth Amendment, to name their children. Because this right is fundamental, restrictions on the right are subject to strict scrutiny—that is, restrictions must be narrowly tailored to serve a compelling state interest.

### B. First Amendment

If the issue is approached from the perspective of freedom of speech, the standard is likely to be strict scrutiny as well. In *Henne v. Wright*, Judge Arnold discussed the First Amendment, noting, “What I call myself or my child is an aspect of speech. When the State says I cannot call my child what I want to call her, my freedom of expression, both oral and written, is lessened.”<sup>152</sup> However, Judge Arnold concluded that freedom of speech had not been raised by the parties, and thus was not squarely at issue in the case.<sup>153</sup>

Judge Arnold’s insight has much to commend it. To return to an earlier example, suppose a state legislature prohibited parents from naming their children “Barack.” In this case, the freedom-of-expression aspect is brightly highlighted. Parents who wished to name their child after our President would be prohibited from doing so.<sup>154</sup> Indeed, the very purpose of such a prohibition would be to limit that form of political expression. Naming a child, even if not for a political figure, is a deeply expressive act.

The expressive aspect can be seen even in the naming of animals. I doubt that a strong substantive due process argument could be made for the rights of animal owners to name their animals. But the First Amendment could do the job nicely. Suppose a state passed a law prohibiting dog owners from naming their dog “Palin.” This law would directly inhibit a form of political expression, by singling out the name of one particularly controversial figure for prohibition.

If we assume that laws restricting the naming of children restrict free expression, then the general standard of review from First Amendment law is strict scrutiny. Content-based restrictions on pa-

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<sup>152</sup> *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990) (Arnold, J., dissenting).

<sup>153</sup> *Id.*

<sup>154</sup> Cf. Jennifer 8. Lee, *Like the Dwights and Lyndons of Old, Baby Baracks All Over*, N.Y. TIMES, Nov. 10, 2008, at A16 (explaining that presidents’ names often become popular after their elections).

rental naming choices must be narrowly tailored to serve a compelling state interest.<sup>155</sup>

### C. *State Interests (in General)*

All of the constitutional standards require identification of the state interests that justify the law. The state interests are stronger with respect to the names given to children than they are with respect to voluntary name changes by adults.<sup>156</sup> Similarly, the state interests are stronger with respect to children than to animals. A child will bear the consequences of an ill-chosen name in ways that a horse or a dog never will.<sup>157</sup>

At least two primary state interests are present with respect to almost any naming restriction. First, there is the state's interest in protecting the child. Children have no control over their names, and children's only protection from abusive names lies with the state. The state has a strong interest in ensuring that children are not saddled with names that are highly destructive to their development as functional adults.<sup>158</sup> Second, the state has an interest in ensuring the communicative function of names.<sup>159</sup> That is, our names are used frequently by other people, perhaps even more often than we use them ourselves. Both the state and other private parties will use the

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<sup>155</sup> See, e.g., *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). Arguably, several state restrictions might be viewed as content-neutral restrictions subject to a lower level of scrutiny. The strongest candidates for this treatment are the requirement of at least two names and the prohibitions on overly lengthy names. The line between content-based and content-neutral laws is far from sharp, but even these restrictions are likely content-based. Imagine a state law that prohibited novelists from naming their characters with only one name or with overly long names. Surely, this would be viewed as a content-based restriction on speech. If this is true for naming fictional characters, it is even more so for naming actual human beings. In any event, even if these laws were viewed as content-neutral under the First Amendment, they would still be subject to strict scrutiny under the Due Process Clause.

<sup>156</sup> For an analysis of the constitutional issues raised by adult name change petitions, see Julia Shear Kushner, Comment, *The Right to Control One's Name*, 57 UCLA L. REV. 313 (2009).

<sup>157</sup> Curiously, both The Jockey Club and the American Kennel Club have highly restrictive rules for the naming of horses and dogs. See THE JOCKEY CLUB, THE AMERICAN STUD BOOK: PRINCIPAL RULES AND REQUIREMENTS 17–19 (2008), available at [http://www.thejockeyclub.com/pdfs/rules\\_11\\_final.pdf](http://www.thejockeyclub.com/pdfs/rules_11_final.pdf) (prohibiting, inter alia, initials, lengthy names, numbers, and obscenities); *Naming of Dogs*, AM. KENNEL CLUB, <http://www.akc.org/reg/namingofdog.cfm> (last visited Sept. 5, 2011) (prohibiting, inter alia, lengthy names, diacritical marks, Roman numerals, and obscenities). The Jockey Club's refusal to register a horse under the name "Sally Hemings" resulted in litigation that reached the United States Court of Appeals for the Sixth Circuit. See *Redmond v. Jockey Club*, 244 F. App'x 663 (6th Cir. 2007). The Jockey Club won. *Id.* at 664.

<sup>158</sup> On the harm that certain names can cause, see Part III, *infra*.

<sup>159</sup> On this function of names, see Kushner, *supra* note 156, at 323. For a comparison of the law of personal names with the law of trademarks, see Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381 (2011).

name for identification, record keeping, and other forms of interaction. No name is an island; every parental naming choice will require other people, at some point, to use that name.

*D. Application to Particular Cases*

*1. Restrictions on Surnames*

Although surname restrictions have been invalidated in some states by judicial or legislative action, other states continue to enforce them.<sup>160</sup> Justifications based on administrative convenience and book-keeping requirements will be unavailing under strict scrutiny. The only state interest that could plausibly be described as compelling is the prevention of false implications of paternity. In the *Henne* case, Judge Arnold put it this way: “I would have an interest in keeping a stranger from naming her child ‘Richard S. Arnold, Jr.’ and the state would have an interest in defending my reputation against such a false implication.”<sup>161</sup>

Arnold’s example demonstrates that certain names can function as defamatory falsehoods. “Richard S. Arnold” is not a common name, and the attachment of “Jr.” to the name states that the child is the son of a Richard S. Arnold. The name thus makes a factual statement about paternity, which, if false, imposes significant reputational harm on the alleged father.

The Supreme Court has emphasized that intentionally false statements of fact are generally not entitled to constitutional protection. As Justice Brennan’s opinion for the Court in *Garrison v. Louisiana*<sup>162</sup> put it, “[c]alculated falsehood falls into that class of utterances which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”<sup>163</sup> None of the concerns about robust debate on public issues that were present in libel cases such as *New York Times v. Sullivan*<sup>164</sup> are present in this context. A court is likely to find that preventing the false implication of paternity is a compelling state interest (or perhaps, in the First Amendment context, that such assertions lie outside of the First Amendment entirely).

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<sup>160</sup> See *supra* Part I.A.1.

<sup>161</sup> *Henne v. Wright*, 904 F.2d 1208, 1216 n.1 (8th Cir. 1990) (Arnold, J., dissenting).

<sup>162</sup> *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>163</sup> *Id.* at 75 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

<sup>164</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

None of the existing state laws on surname selection, however, are narrowly tailored to serve this interest. Instead of prohibiting only those last names that falsely impute paternity, the statutes prohibit any surname other than those of the parents. This is grossly disproportionate to the state interest, and accordingly fails strict scrutiny.<sup>165</sup>

The state interests can be served in other ways. For example, a state might leave this issue to private civil litigation. An Ohio federal district court suggested that “any wrongful presumption or inference that may arise due to a similarity in surnames between a man and a child can be corrected through a civil paternity action.”<sup>166</sup> A judicial declaration of nonpaternity, however, does not completely eliminate the ongoing harm created by an individual’s use of the suffix “Jr.,” possibly for decades after his birth. A defamation action for money damages would be far more useful—a possibility noted by the district court in *Henne*, which suggested “a court action for damages could afford relief” to persons falsely accused of paternity.<sup>167</sup>

A defamation action raises several interesting issues. First, does the naming of a child with a false implication of paternity constitute slander or libel? Traditionally, libel is “defamation by written or printed words,” whereas slander “consists of communication of a defamatory statement by spoken words, or by transitory gestures.”<sup>168</sup> The distinction is relevant in some jurisdictions with respect to whether the plaintiff must plead and prove “special damages” (actual pecuniary harm).<sup>169</sup> Although I have located no authority that speaks to this question, a defamatory name seems closer to libel than to slander. The name is typically recorded on a written birth certificate, and is repeatedly used in written form throughout that person’s life. It is relatively permanent and fixed and thus is more analogous to a written publication than to words spoken only once.

Second, would money damages really solve the problem? If Google is correct, I am the only “Carlton F.W. Larson” in the world. If someone named her child “Carlton F.W. Larson, Jr.,” there would be an unmistakable reference to my alleged paternity, a reference that

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<sup>165</sup> Cf. *Sec’y of the Commonwealth v. City Clerk*, 366 N.E.2d 717, 726 (Mass. 1977) (“We reserve for another day the question whether, in the absence of a written request of both father and mother, the mother of an illegitimate child may give him substantially the same name as his putative father’s, for example his father’s entire name followed by ‘Junior.’”).

<sup>166</sup> *Brill v. Hedges*, 783 F. Supp. 340, 346 (S.D. Ohio 1991).

<sup>167</sup> *Henne v. Wright*, 711 F. Supp. 511, 516 (D. Neb. 1989), *rev’d*, 904 F.2d 1208 (8th Cir. 1990).

<sup>168</sup> 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1.11 (2d ed. 2010).

<sup>169</sup> *Id.* § 1:15.

would continue for the rest of the child's life, and perhaps beyond. My primary goal in litigation would be to have the name changed. Money damages would not be an entirely satisfactory alternative. Ideally, I would want an injunction requiring the mother to change the child's name to something else. A traditional maxim of equity, however, holds that "equity will not enjoin a libel."<sup>170</sup> In part, this maxim rests on an aversion to prior restraints on publication,<sup>171</sup> a concern that is far less salient in the context of naming a child. Courts are more willing than previously to consider injunctive relief in defamation cases,<sup>172</sup> but there is no guarantee that equitable relief would be available.

The possible unavailability of injunctive relief would provide further support for more narrowly tailored statutory remedies. Specifically, a state could require that any use of the suffix, "Jr.," be supported by proof of paternity. Although this would not completely solve the problem of defamatory implication from mere identity of last names, it would prevent the most egregious defamations at the outset.

## 2. *Requirement of at Least Two Names*

What about parents who refused to give their child any name at all? Such a refusal would amount to an especially brutal form of psychological child abuse. The 1959 United Nations Declaration of the Rights of the Child states that every child "shall be entitled from his birth to a name."<sup>173</sup> The 1978 American Convention on Human Rights states, "Every person has the right to a given name and to the surnames of his parents or that of one of them."<sup>174</sup> Surely, the state's interest in ensuring that every child has a name is compelling enough to outweigh any parental refusal.

Parents could potentially argue that forcing them to name a child constitutes impermissible compelled speech. Although the Supreme Court's compelled speech caselaw is not especially precise about the standard of scrutiny to be applied in compelled speech cases,<sup>175</sup> a re-

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<sup>170</sup> *Id.* § 9:85.

<sup>171</sup> *Id.* § 9:86.

<sup>172</sup> *Id.* § 9:85.

<sup>173</sup> Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 3, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 20 (Nov. 20, 1959).

<sup>174</sup> Organization of American States, American Convention on Human Rights art. 18, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>175</sup> See, e.g., *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 61–65 (2006).

quirement of naming a child would almost certainly pass strict scrutiny. At most, a judge could be asked to name the child (as happens in Florida when parents cannot agree on a name<sup>176</sup>), a solution that should obviate any compelled speech problem.

A trickier problem is presented by parents who might wish to give their child only one name. Adults with only one name are not unheard of. A New Jersey court held that a woman could change her name to “Koriander,” noting that there was no strict rule against single-word names.<sup>177</sup> The court responded to the state’s claims of administrative convenience by tartly noting, “Computers and record keepers, however, need not control individual liberties.”<sup>178</sup> A clinical professor at the University of Wisconsin Law School as a young adult successfully petitioned a court to be renamed “Mitch.”<sup>179</sup> The pattern is not uniform, however, and some states do not permit single names.<sup>180</sup>

The case for permitting adults to choose single names is far stronger than the case for permitting parents to select such names for their children. As noted above, the American Convention on Human Rights states that every child is entitled to both a first name and a surname. Single names are highly unusual, and a child saddled with this oddity is likely to encounter numerous problems. On balance, the state interest in ensuring that children have at least two names is likely to be compelling enough to overcome strict scrutiny. On the other hand, no such interest would be present with respect to middle names; parents who decline to give their child a middle name should be free to do so.

### 3. *Prohibition of Ideograms and Pictograms*

The case against the use of ideograms and pictograms is relatively straightforward. Such names are almost impossible for anyone else to reproduce, and, lacking any determinate pronunciation, are arguably not even names at all. The state’s interest in ensuring a communicable

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<sup>176</sup> FLA. STAT. § 382.013(3)(b) (2008). President Lyndon Johnson was known simply as “the baby” for three months, until his parents finally agreed on a name. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 66 (1982).

<sup>177</sup> *In re Ferner*, 685 A.2d 78, 81 (N.J. Super. Ct. Law Div. 1996).

<sup>178</sup> *Id.* at 83.

<sup>179</sup> Jim Stingl, *Cher, Sting and Bono Share Just One Thing with Mitch*, MILWAUKEE J. SENTINEL, Apr. 2, 2010, at B1; *Mitch*, UNIV. WIS. L. SCH., <http://law.wisc.edu/profiles/mitch@wisc.edu> (last updated Aug. 15, 2011).

<sup>180</sup> See, e.g., *In re Miller*, 617 N.Y.S.2d 1024 (N.Y. Civ. Ct. 1994) (rejecting name change to “Sena”).

name is surely compelling here, and the prohibition would be narrowly drawn to achieve it. The famous rock star who briefly changed his name to a pictogram was nonetheless known as “The Artist Formerly Known as Prince” because the pictogram could not be easily reproduced or pronounced.<sup>181</sup>

#### 4. *Prohibition of Numerals*

Numerals present a difficult issue. Many states prohibit the use of numerals, such as “8,” but permit the same numeral to be spelled out, as in “Eight.”<sup>182</sup> This was the approach taken by the North Dakota Supreme Court when confronted with a petition to change an adult name to “1069.”<sup>183</sup> The court rejected the petition, but suggested that the name would be permitted if spelled out.<sup>184</sup> This type of name is not completely unprecedented. American parents have employed every number from zero to twenty in their spelled-out forms as names for children.<sup>185</sup>

If a state permits the spelled-out version of the numeral, the parents arguably are not losing much. They can still name their child after a numeral; they just have to use Roman letters rather than Arabic numerals to do so. On the other hand, “1069” will be understood in many places throughout the world. The spelled-out version requires the parents to reduce the child’s name to a specific language, thereby potentially losing some of the name’s universality.

At least two potential state interests are at play. The first is in preventing the potential communicative difficulties such a name would pose to others. How would such a name be alphabetized, for example? It might cause problems in certain computer systems or data sets, although these problems could probably be overcome. More important, as the North Dakota Supreme Court pointed out, the name “1069” has no obvious pronunciation; it could be pronounced “ten sixty-nine,” “one zero six nine,” or “one thousand sixty-nine.”<sup>186</sup>

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<sup>181</sup> See Will Lee, *The Artist, Formerly Known as Prince*, ENT. WKLY. (Jun. 4, 1999), <http://www.ew.com/ew/article/0,,273604,00.html>.

<sup>182</sup> See *supra* Part I.A.4.

<sup>183</sup> *In re Dengler*, 246 N.W.2d 758 (N.D. 1976).

<sup>184</sup> *Id.* at 762; see also *Ritchie v. Superior Court*, 206 Cal. Rptr. 239 (Cal. Ct. App. 1984) (rejecting name change to “III,” to be used as the Roman numeral three).

<sup>185</sup> MICHAEL SHERROD & MATTHEW RAYBACK, *BAD BABY NAMES: THE WORST TRUE NAMES PARENTS SADDLED THEIR KIDS WITH—AND YOU CAN TOO!* 41 (2008). The journalist Jennifer 8. Lee is probably the most well-known person named with a numeral. She selected the middle name as a teenager. Jennifer 8. Lee, *Yes, 8 is My Middle Name*, BOS. GLOBE, Aug. 8, 1996, at E1.

<sup>186</sup> *Dengler*, 246 N.W.2d at 762.

The spelled-out form solves this problem. But this argument probably proves far too much. Many names are difficult to pronounce, as any experienced teacher can tell you. Difficulty of pronunciation alone cannot be a sufficient reason to prohibit a name.

The second interest, which is almost certainly driving the laws at issue, is protecting the child from the possibly dehumanizing aspect of a name that essentially looks like a bar code. For whatever reason, people fear being “reduced to a number.” A name with numerals is arguably not really a name at all. Under strict scrutiny, this is a very close case. On balance, a prohibition on numerals might survive strict scrutiny, as long as parents have the option of spelling out the name, although there are certainly decent arguments on the other side.

### 5. *Length Restrictions*

The state concern with lengthy names is that they are unwieldy both for the child and for others who must use them. A 300-letter name, for example, is unusable in almost every conceivable situation and a burden both on the child and on society at large. The problem, of course, is one of line drawing: how long is too long? This is not an easy question to answer, but several baselines are appropriate.

First, there is little reason for the state to limit the number of middle names a person may have. Like many persons of Swedish descent, I have two middle names. Such names are also common in England: for example, the famous writer J.R.R. Tolkien, and Prince Charles, whose full name is Charles Philip Arthur George, both have two middle names. There is no evidence that multiple middle names are harmful to children, and it takes only minimal effort for the state to include additional middle names on a birth certificate. Likewise, there is minimal impact on communication with others, most of which is restricted to first and last names.

Second, any length restrictions on each particular name should be permissive enough to accommodate typical names from a wide variety of cultures, including relatively lengthy Indian and Thai names. Moreover, no restrictions should be justified on the basis of software limitations. If parents could select longer names on typewritten birth certificates, it is preposterous to suggest that this right should disappear merely because the state selected inadequate computer software. Administrative convenience is simply insufficient to satisfy strict scrutiny.<sup>187</sup> Within this framework, length restrictions of fifty characters

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<sup>187</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 730 (1989).

per name may well satisfy strict scrutiny, and limits of fewer characters might do so as well.

#### 6. *Prohibition of Diacritical Marks*

Because diacritical marks are common in many countries, and are relatively common in the United States, it is difficult to argue that a name with diacritical marks poses a significant, inherent risk of harm to a child. Restrictions on diacritical marks, if justified at all, would likely rest on their communicative function. In this Subsection, I consider and reject a number of arguments that could be made to support these prohibitions.

First, a state could argue that prohibitions of diacritical marks serve to promote English as the official language. Under this reasoning, only names that can be expressed using the English (Roman) alphabet should be permitted. There are a number of problems with this argument. If this interest is compelling, it is startling how little else states actually do to promote it. No state, so far as I am aware, prevents the informal use of diacritical marks. In California, for example, Latinos routinely use diacritical marks even if such marks are excluded from their birth certificates. Moreover, states do not explicitly prohibit the use of such marks by individuals moving into the state from other countries. Nor do states prohibit non-English names that lack diacritical marks. It is hard to see why permitting the name “Changsurirothenom” while prohibiting “Lucía” serves any state interest in promoting the English language. Similarly, states permit Irish names such as “O’Connor” that use an apostrophe not found in strictly English names. The unwillingness of states to enforce “Englishness” in any of these other situations strongly suggests that the asserted state interest is not truly compelling, at least in this context.<sup>188</sup>

Second, a more plausible and more frequent argument is that diacritical marks create administrative problems such as confusion in state computer systems, difficulties in recording, and problems in alphabetizing. This argument, although surely sufficient under a rational basis test, is quite unpersuasive under strict scrutiny.

Consider, for example, the case of California, which insists that children’s names cannot contain diacritical marks. The state, however, uses diacritical marks in a wide variety of other circumstances. For example, California has two state parks whose official names in-

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<sup>188</sup> See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2740 (2011) (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”).

clude a diacritical mark. The state operates Año Nuevo State Park and Montaña de Oro State Park, both of which are labeled as such on California's State Parks website.<sup>189</sup> On Interstate 80, the state erected a sign noting the exit for Peña Adobe Road. If these names are manageable for naming parks and roads, why are they so difficult to manage for naming people? Indeed, under California's policy, parents cannot name their child for after one of the state's own parks.

California's first U.S. Senator was John C. Frémont.<sup>190</sup> Under current California practice, Senator Frémont could not officially pass his last name to his children. They would have to be named "Fremont." The current speaker of the California Assembly is John A. Pérez, noted as such on an official state website.<sup>191</sup> Yet Speaker Pérez cannot formally use his last name to name his children, apparently because it would be too difficult for the state's computers to handle.<sup>192</sup>

The California Legislature met for the first time under statehood in December 1849. The eighth law the legislature passed in January 1850 provided for the office of State Translator, "whose duty it shall be to make correct translations in Spanish of all laws, decrees, and documents required to be translated, by any law or any order of either House of the Legislature."<sup>193</sup> A few months later the legislature authorized the printing of 350 copies of the state's laws in Spanish.<sup>194</sup> These volumes were to be distributed to federal, state, and local officials and to county librarians.<sup>195</sup> The Spanish volumes, which continued to be printed for a number of years, are impressive—and filled with diacritical marks.<sup>196</sup> The technology of the 1850s was thus fully adequate to deal with diacritical marks in state documents. One wonders why technology 150 years later finds this to be such a challenge.<sup>197</sup>

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<sup>189</sup> *Año Nuevo SP*, CAL. ST. PARKS, [http://www.parks.ca.gov/default.asp?page\\_id=523](http://www.parks.ca.gov/default.asp?page_id=523) (last visited Sept. 5, 2011); *Montaña de Oro SP*, CAL. STATE PARKS, [http://www.parks.ca.gov/default.asp?page\\_id=592](http://www.parks.ca.gov/default.asp?page_id=592) (last visited Sept. 5, 2011).

<sup>190</sup> ANDREW ROLLE, JOHN CHARLES FRÉMONT: CHARACTER AS DESTINY 134 (1991).

<sup>191</sup> *Leadership*, CAL. STATE LEGISLATURE, [http://www.legislature.ca.gov/the\\_state\\_legislature/leadership\\_and\\_caucuses/leadership.html](http://www.legislature.ca.gov/the_state_legislature/leadership_and_caucuses/leadership.html) (last visited Sept. 5, 2011).

<sup>192</sup> *Cf.* *Bean v. Superior Court*, No. D048645, 2006 Cal. App. Unpub. LEXIS 10761, at \*4 (Cal. Ct. App. Nov. 28, 2006) (holding that an adult could change his name to end with an exclamation point).

<sup>193</sup> Act of Jan. 31, 1850, ch. 8, § 1, 1850 Cal. Stat. 51, 51.

<sup>194</sup> Act of Apr. 22, 1850, ch. 124, § 2, 1850 Cal. Stat. 340, 341.

<sup>195</sup> *Id.*

<sup>196</sup> *See, e.g.*, LEYES DE CALIFORNIA APROBADAS EN LA SESTA SESION DE LA LEGISLATURA (Augustina Ainsa, trans., Sacramento, B. Redding 1855).

<sup>197</sup> Going even further back, the first chaplain of the Continental Congress was Jacob

Third, a state might argue that diacritical marks make the name difficult for other people to use, thus significantly hindering the communicative function of the name. This argument has several serious flaws. To begin with, nothing requires private individuals to use the precise form of somebody else's name. If Costco decides to record a customer's name as "Mendez" rather than "Méndez," it is perfectly free to do so, although it may annoy that customer.<sup>198</sup> Unless the state intends to prohibit the informal use of these marks, a prohibition on the birth certificate does not advance this claimed state interest at all. Next, if a governmental entity does not want to record names with diacritical marks for certain purposes, it can probably choose not to do so. U.S. passports, for example, do not include diacritical marks, even for those persons for whom the mark is part of their legal name.<sup>199</sup> Nor do passports recognize the variant capitalization of names like "McDonald," instead printing everything in block capital letters.<sup>200</sup> Similarly, some states do not print hyphens or apostrophes on the names in driver's licenses.<sup>201</sup> Lastly, computer software makes the use of diacritical marks relatively easy in any event; handwritten documents are even easier. The alleged difficulties with communication are truly chimerical.

Fourth, a state can make a slippery slope argument. If names can include Spanish characters like "ñ," why not Greek characters, like "φ," or Cyrillic characters, like "Л," or Arabic characters, like "ع"? At some point, this would become ridiculous. A legal name composed of those characters would be indecipherable to the vast majority of Americans and would render the name completely unusable for communicative purposes. Because the line has to be drawn somewhere, this argument goes, the line should be drawn at the twenty-six standard characters of the English alphabet.

This argument has some force, but it is ultimately unpersuasive. The difference between Roman letters that have diacritical marks attached to them and characters that are not based on Roman letters at all is significant. In a pinch, the Roman letter with the diacritical mark

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Duché, noted as such in the *Journals of the Continental Congress*. 5 JOURNALS OF THE CONTINENTAL CONGRESS 530 (Worthington Ford ed., 1906).

<sup>198</sup> As someone with two middle names, I am regularly irritated by American businesses that insist on addressing me with only one middle initial.

<sup>199</sup> E-mail from Agent #1962, Nat'l Passport Info. Ctr., to Narresh Ravishanker, Research Assistant to Professor Carlton Larson (Feb. 11, 2010, 4:17 PM) (on file with the author).

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., IDAHO ADMIN. CODE r. 39.02.75.100.01 (2011) (declining to print hyphenated first or middle names on driver's licenses); MD. CODE REGS. 11.17.09.09(B) (2011) (same).

can be reproduced without the diacritical mark with little loss to clarity. The communicative function of the name is relatively unimpaired. By contrast, a name formed with these other characters cannot be readily reproduced. Under the narrowly tailored prong of strict scrutiny, this difference matters. The state can prohibit those names of nonfunctional communicability, but must permit those that can be communicated with little disruption.

Diacritical marks placed on letters where they are not normally found present a trickier problem. The classic example is from the movie *This is Spīñal Tap*,<sup>202</sup> which parodies heavy metal bands' affectation for using umlauts in their names.<sup>203</sup> The fictional band placed the umlaut above the "n," instead of above a vowel, where umlauts properly belong. Could a state prohibit these novel diacritical marks in children's names? Such names are silly, but probably not especially harmful to a child. They are very difficult to reproduce on computers, however, as I learned when writing this Article. Certainly the argument for prohibition is stronger than for more typical diacritical marks. It is a close case, on which reasonable judges could easily disagree. On balance, however, a prohibition of these names probably fails strict scrutiny, for the same reasons outlined above.

### 7. *Prohibition of Obscenities*

The case for prohibitions on obscene names is quite strong. Two significant interests distinguish the child-naming situation from other situations where obscenities are generally constitutionally protected.<sup>204</sup> First, a child whose name is an obscenity is likely to suffer continuing severe consequences. Indeed, an obscenity may be the worst possible name a child could ever receive. Second, an obscene name forces other people to use the obscene term, which is highly objectionable to many people. A California appellate court rejected a proposed adult name change to "Misteri (pronounced 'mister') Nigger" partly on the ground that this would force other people to use an extraordinarily distasteful racial epithet.<sup>205</sup> For similar reasons, a New

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<sup>202</sup> THIS IS SPİÑAL TAP (Embassy Pictures 1984). I am indebted to Jess Bravin of *The Wall Street Journal* for this example.

<sup>203</sup> See, e.g., *Metal Umlaut*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Metal\\_umlaut](http://en.wikipedia.org/wiki/Metal_umlaut) (last updated Sept. 3, 2011).

<sup>204</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric.").

<sup>205</sup> *Lee v. Ventura Cnty. Superior Court*, 11 Cal. Rptr. 2d 763, 768 (Cal. Ct. App. 1992).

Mexico appellate court rejected a proposed name change to “Fuck Censorship!”<sup>206</sup>

### III. THE CONSTITUTIONALITY OF MORE EXTENSIVE CHILD-PROTECTIVE LEGISLATION

The preceding Part addressed the constitutionality of existing laws on child naming. This part turns to the separate problem of horrific child names, such as “Adolf Hitler,” which escape prohibition under current laws.

The need for further prohibitions is at least debatable. After all, most parents do not give their children ridiculous and hurtful names. But it does happen. When I started researching this topic several years ago, I assumed that no one would name his or her child “Adolf Hitler.” But it happened. Indeed, at least sixty Venezuelans of voting age bear the first name “Hitler.”<sup>207</sup> Similarly, at least one child is alleged to be named for a venereal disease,<sup>208</sup> and other American children have been named “Satan.”<sup>209</sup> Parents in Japan sought to name their child, “Akuma,” which means “devil” or “demon.”<sup>210</sup> Since 1984, two children in the United Kingdom have been named “Superman,” and six have been named “Gandalf.”<sup>211</sup> A New Zealand judge ordered a girl named “Talula Does The Hula From Hawaii” into court guardianship so that her name could be changed.<sup>212</sup> The judge stated, “It makes a fool of the child and sets her up with a social disability and handicap.”<sup>213</sup> Other children in New Zealand have been named “Number 16 Bus Shelter,” and “Violence.”<sup>214</sup> Similarly, Swedish officials have rejected attempts by parents to name children “Metallica”

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<sup>206</sup> Variable v. Nash, 190 P.3d 354, 356 (N.M. Ct. App. 2008).

<sup>207</sup> Romero, *supra* note 75.

<sup>208</sup> Foderaro, *supra* note 1.

<sup>209</sup> J. Marion Tierney, *A Boy Named Sue, and a Theory of Names*, N.Y. TIMES, Mar. 11, 2008, at F1.

<sup>210</sup> Yukiko Matsushima, *Japan: Continuing Reform in Family Law*, 33 U. LOUISVILLE J. FAM. L. 417, 425 (1994–1995). The couple initially prevailed in court against a city’s refusal to accept the name, but later selected a different name for the child to avoid protracted litigation. *Id.* at 426.

<sup>211</sup> *What Can You Name Your Child?*, BBC NEWS (Aug. 10, 2007, 11:51 AM), <http://news.bbc.co.uk/go/pr/fr/-/1/hi/magazine/6939112.stm>.

<sup>212</sup> *Talula Does the Hula a No-No Name: Judge*, SYDNEY MORNING HERALD, July 24, 2008, <http://news.smh.com.au/world/talula-does-the-hula-a-nono-name-judge-20080724-3kc4.html>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

and “Brfxccxxmnpccclllmmnprxvclmncssqlbb11116.”<sup>215</sup> Danish officials rejected the proposed names “Anus” and “Monkey.”<sup>216</sup>

Closer to home, Michael Sherrod and Matthew Rayback scoured American census records searching for atrocious baby names.<sup>217</sup> The results are compiled in an amusing little book called *Bad Baby Names: The Worst True Names Parents Saddled Their Kids With—and You Can Too!*<sup>218</sup> Among the names they discovered were “Toilet Queen,”<sup>219</sup> “Leper,”<sup>220</sup> “Cholera,”<sup>221</sup> “Typhus,”<sup>222</sup> “Stud Duck,”<sup>223</sup> “Loser,”<sup>224</sup> “Fat Meat,”<sup>225</sup> “Meat Bloodsaw,”<sup>226</sup> “Cash Whoredom,”<sup>227</sup> “Headless,”<sup>228</sup> “Dracula,”<sup>229</sup> “Lust,”<sup>230</sup> “Sloth,”<sup>231</sup> “Freak Skull,”<sup>232</sup> “Sexy Chambers,”<sup>233</sup> “Tiny Hooker,”<sup>234</sup> “Giant Pervis,”<sup>235</sup> “Acne Fountain,”<sup>236</sup> “Legend Belch,”<sup>237</sup> and “Ghoul Nipple.”<sup>238</sup> The forces of darkness were particularly well represented, with a “Satan,”<sup>239</sup> a “Lucifer,”<sup>240</sup> a “Zombie,”<sup>241</sup> a “Demon,”<sup>242</sup> at least eight children named “Evil,”<sup>243</sup> and at least ten named “Hell.”<sup>244</sup>

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<sup>215</sup> *Baby Named Metallica Rocks Sweden*, BBC NEWS (Apr. 4, 2007, 10:55 AM), <http://news.bbc.co.uk/2/hi/6525475.stm>.

<sup>216</sup> David K. Israel, *Oh No, You Can't Name Your Baby THAT!*, CNN (July 3, 2010, 1:13 PM), <http://cnn.com/2010/LIVING/07/03/mf.baby.naming.laws/index.html?hpt=C2>.

<sup>217</sup> SHERROD & RAYBACK, *supra* note 185, at v.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 6.

<sup>220</sup> *Id.* at 7.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 12.

<sup>224</sup> *Id.* at 16.

<sup>225</sup> *Id.* at 21.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 43.

<sup>228</sup> *Id.* at 74.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 87.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 98.

<sup>233</sup> *Id.* at 105.

<sup>234</sup> *Id.* at 113.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 120.

<sup>237</sup> *Id.* at 66.

<sup>238</sup> *Id.* at 69.

<sup>239</sup> *Id.* at 60.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 70.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 93.

<sup>244</sup> *Id.* at 53.

Common sense tells us that a child named “Ghoul Nipple” or “Toilet Queen,” for example, will likely have a difficult time on the schoolhouse playground. This intuition is amply supported by social science literature. One study concluded that individuals with unusual first names show “more severe personality disturbance than those with common names.”<sup>245</sup> Another found that there was a “significant tendency for boys with peculiar first names to be more severely emotionally disturbed than boys with nonpeculiar first names.”<sup>246</sup> A more recent study determined that “unpopular names are positively correlated with juvenile delinquency for both blacks and whites,” although the authors caution against inferring causation.<sup>247</sup> Rather, unusual names are correlated with other factors “that increase the tendency toward juvenile delinquency, such as a disadvantaged home environment and residence in a county with low socioeconomic status.”<sup>248</sup>

This Part considers whether the law should prohibit more names than it currently does, bearing in mind that such restrictions are likely to be subject to strict scrutiny. Section A addresses names that may be harmful to a child’s development. Section B addresses the distinctive issue of gender-mismatched names.

#### A. *Names that Are Harmful to a Child*

Statutory drafters would face a number of hurdles in limiting parental choice of dreadful names. One possibility is a statute setting forth permitted names and requiring parents to select a name from the list, as some other nations do.<sup>249</sup> This option, however, is almost a complete nonstarter. Given the wide variety of naming practices and the numerous ethnic groups that compose modern American society,

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<sup>245</sup> A. Arthur Hartman et al., *Unique Personal Names as a Social Adjustment Factor*, 75 J. SOC. PSYCHOL. 107, 107 (1968). The authors reported that one of their study subjects was named “Lethal.” *Id.*

<sup>246</sup> Albert Ellis & Robert M. Beechley, *Emotional Disturbance in Children with Peculiar Given Names*, 85 J. GENETIC PSYCHOL. 337, 339 (1954).

<sup>247</sup> David E. Kalist & Daniel Y. Lee, *First Names and Crime: Does Unpopularity Spell Trouble?*, 90 SOC. SCI. Q. 39, 39 (2009).

<sup>248</sup> *Id.* Other studies have claimed even stronger and more startling connections between names and life outcomes. One study found that first names are somewhat predictive of income, social status and educational attainment. Saku Aura & Gregory D. Hess, *What’s in a Name?*, 48 ECON. INQUIRY 214, 223 (2010). Baseball players with a name starting with “K” are more likely to strike out, and students with names beginning with “C” or “D” earned lower GPAs than students with names beginning with “A” or “B.” Leif D. Nelson & Joseph P. Simmons, *Moniker Maladies: When Names Sabotage Success*, 18 PSYCHOL. SCI. 1106, 1107 (2007).

<sup>249</sup> See *supra* notes 70–73 and accompanying text.

it would be difficult to create a list of permitted names that would not be radically incomplete.<sup>250</sup>

Moreover, such a list would fail to reflect the dynamic nature of American naming practices.<sup>251</sup> In 2009, for example, there was a significant increase in the popularity of the name “Cullen,” the surname of a vampire character from the “Twilight” novels and movies.<sup>252</sup> This dynamism has only increased in recent years, as the possibility of Internet searches has made distinctive names even more desirable. A statute limiting naming options to preapproved names is therefore highly unlikely to survive strict scrutiny.

A more plausible option is a statute that specifies a narrow list of prohibited names, such as “Adolf Hitler.” As a matter of due process, such a list may well pass strict scrutiny. There is a compelling state interest in protecting children from truly horrific names, and a statute that specified those names precisely is narrowly tailored to achieve it.

The issue is more complicated under First Amendment doctrine. Courts are likely to distinguish between those prohibitions that are viewpoint discriminatory and those that are not. For example, a prohibition on the name “Anus” does not implicate any particular ideological debate, and a court would likely uphold such a restriction under strict scrutiny. Other prohibitions, however, are more problematic. A statute prohibiting the name “Adolf Hitler” is viewpoint discriminatory. If parents can name their children after Franklin Roosevelt or Winston Churchill, the state is choosing to permit a favored ideological message and to suppress a disfavored one. Formally, strict scrutiny applies here as well. As in due process cases, the state would have to show that the restriction was narrowly tailored to serve a compelling state interest. As a practical matter, however, there is a virtually per se rule against viewpoint discrimination when strict scrutiny is the governing standard. To my knowledge, no federal

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<sup>250</sup> See, e.g., Stanley Lieberman & Kelly S. Mikelson, *Distinctive African American Names: An Experimental, Historical, and Linguistic Analysis of Innovation*, 60 AM. SOC. REV. 928, 930–31 (1995) (finding that African-Americans are far more likely than white Americans to give their children distinctive names); Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 2 (1992) (discussing obstacles to using traditional Latino names in America).

<sup>251</sup> See, e.g., Daniel Scott Smith, *Child-Naming Practices, Kinship Ties, and Change in Family Attitudes in Hingham, Massachusetts, 1641 to 1880*, 18 J. SOC. HIST. 541, 545 (1985) (documenting the decline in the use of Biblical names from the early eighteenth century to the mid-nineteenth century).

<sup>252</sup> Jesse McKinley, *A Name for Newborns Thanks to the Undead*, N.Y. TIMES, May 8, 2010, at A10.

court has ever upheld a viewpoint distinction under strict scrutiny.<sup>253</sup> This is not necessarily fatal, however. There is a strong argument that the naming context is *sui generis*. No other form of human expression has such permanent, life-altering consequences for another human being who lacks any ability to counter it. Under these circumstances, viewpoint restrictions that would be impermissible in other contexts might be plausibly upheld. Nonetheless, this outcome is far from certain, and judicial invalidation is a very real possibility.

There is a further fundamental problem with statutes specifying certain prohibited names—they are wildly underinclusive. For example, no one, if asked to identify distinctively bad names, would have come up with “Talula Does the Hula From Hawaii” or “Ghoul Nipple.” Parental imagination and bad judgment will run far ahead of anything foreseen by legislators.

A legislature that specified certain prohibited names would therefore likely turn to a supplementary catchall prohibition that left implementation to state officials. Any such standard would need to encompass substantial procedural protections and prompt judicial review. There is little guidance for statutory drafters. A New Jersey trial court held in 1966 that the state could reject parental requests for name changes of their children if the names were “bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste.”<sup>254</sup> As statutory language, this standard would be too vague to satisfy strict scrutiny. What does “offensive to common decency and good taste” really mean? Several law review authors also have suggested statutory language. Ellen Jean Dannin proposes, “Parents may give a child any given names on which they agree as long as the names do not defraud or otherwise operate to create injustice.”<sup>255</sup> This is also too vague. What does it mean for a name to “create injustice?” Is it injustice to the child, or to someone else? Richard H. Thornton is

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<sup>253</sup> The closest I have found is dicta in a Second Circuit opinion suggesting that certain viewpoint restrictions might be permissible in the school context, even under strict scrutiny. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 n.11 (2d Cir. 2005) (“[V]iewpoint discrimination, taking into account the particularities of a school context and the vulnerability of young children in it, might be justified with respect to other forms of speech.”). The vulnerability of young children is, of course, especially salient in the context of children’s names. For an argument that the Supreme Court implicitly upheld a viewpoint distinction in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 71 (2011).

<sup>254</sup> *In re M.*, 219 A.2d 906, 907 (N.J. Super. Ct. Law Div. 1966).

<sup>255</sup> Ellen Jean Dannin, Legislative Note, *Proposal for a Model Name Act*, 10 U. MICH. J.L. REFORM 153, 174 (1976).

somewhat more precise, suggesting that when parents agree, they “should have the freedom to give their children any reasonable surname.”<sup>256</sup> Courts could only disallow “a surname chosen for a child by his parents if it were so outrageous or obscene that it was clearly not in the child’s best interests to bear the surname.”<sup>257</sup> Nonetheless, Thornton’s test is still rather imprecise, using such subjective terms as “reasonable” and “outrageous.” Moreover, the importation of the “best interests of the child” standard, widely used in child custody cases, is problematic, even in the narrow context Thornton proposes. It imposes too many limits on parental choices. Given societal discrimination, it may be better for parents to name a child “Greg” rather than “Jamal,”<sup>258</sup> but governmental interference on this basis would be highly inappropriate. Similarly, a child might be better off with his own distinctive name rather than being labeled a “Jr.,” but governmental intervention in this context would be equally unwarranted. For the government to intervene there must be something more compelling than the mere best interests of the child; there must be a risk of serious and substantial harm. Thus, if parents choose to give their child a name that is merely ridiculous, as did Alabama parents who recently named their son “Crimson Tide,”<sup>259</sup> the government could not intervene. Under strict scrutiny, the government can prohibit only names that are truly pernicious.

My best effort at statutory language is as follows:

The Registrar of Vital Statistics may reject a proposed name on a birth certificate if the Registrar determines that there is an overwhelming likelihood that the name will pose serious and lasting harm to the child’s emotional well being and social development. Any such rejection is subject to immediate review in a court of general jurisdiction, which shall review the determination de novo.

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<sup>256</sup> Thornton, *supra* note 82, at 308.

<sup>257</sup> *Id.* at 308 n.25; see also Laura Anne Foggan, Note, *Parents’ Selection of Children’s Surnames*, 51 GEO. WASH. L. REV. 583, 594 n.87 (1983) (arguing for parental choice but concluding that government can restrict “obscene or otherwise offensive” names).

<sup>258</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

<sup>259</sup> Matt Hinton, *Crimson Tide Fans Welcome Their New Son, Crimson Tide*, DR. SATURDAY (Mar. 31, 2010, 5:23 PM), [http://rivals.yahoo.com/ncaa/football/blog/dr\\_saturday/post/Crimson-Tide-fans-welcome-their-new-son-Crimson?urn=ncaaf-231447](http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/Crimson-Tide-fans-welcome-their-new-son-Crimson?urn=ncaaf-231447).

De novo review is important. Registrars are unlikely to have any special expertise in identifying horrific names, and there is no reason to defer to their initial determinations.

As a constitutional matter, a statute written in this fashion might pass strict scrutiny. Nonetheless, there are significant questions over the desirability of such a statute as a policy matter. The costs of such a statute are not trivial. There is a very real risk of sectarian abuse and parochialism on the part of registrars. Many parents with perfectly legitimate proposed names may simply accept a registrar's denial without further challenge. The key question is whether the prevention of certain harmful names warrants the risk of erroneous rejection of permissible names and the additional procedural costs such a statute would entail. In the absence of hard data, this is an exceptionally difficult question to answer. One might argue that the prevention of even a few horrific names is worthwhile, but more realistically, the number of harmful names would probably need to be rather significant to balance out the likely administrative errors and the additional expense of judicial proceedings.

In sum, the government likely has some ability to restrict certain abominable names more than it currently does. New restrictions, however, must be drawn exceedingly narrowly if they are to survive judicial scrutiny. Moreover, the potential difficulties of proper enforcement may render such restrictions undesirable as a policy matter. Without further data, it is difficult to reach a firm conclusion.<sup>260</sup>

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<sup>260</sup> An entirely different view of this problem is that the rights at issue are not those of the parents, but those of the child. William and Mary law professor James Dwyer has developed a theory of children's rights, in which he argues that children hold substantive due process rights with respect to relationships with other people. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006). In a recent law review article, Professor Dwyer argues that laws conferring parental status on manifestly unfit biological parents violate the constitutional rights of newborn infants. James G. Dwyer, *Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 *UCLA L. REV.* 755, 831 (2009).

Might one make the same argument with respect to names? Under this theory, a court could determine that a child holds a substantive due process right not to have an extremely harmful name. This is an intriguing argument, but it presents several difficulties. First, given the long tradition in this country of almost unfettered parental choice, it is hard to argue that such a right satisfies the *Glucksberg* test. Second, a baby is unlikely to be in a position to easily vindicate this right vis-à-vis its parents, making statutory reform the only likely method of vindication. *See id.* at 831–35 (advocating statutory reform to implement newborns' rights). It seems more likely that a court would approach the child's interest as part of the balancing to be considered with respect to the parents' rights, rather than identifying an independent right of the child. Indeed, it is possible that similar results may obtain either way, although Dwyer's theory would certainly weigh the result more heavily in the child's favor.

### B. Gender Restrictions

Johnny Cash's famous recording of Shel Silverstein's, *A Boy Named Sue*, describes the traumatic experiences of a boy given a distinctly feminine name.<sup>261</sup> Empirical evidence confirms the problematic nature of names of this sort. Boys with feminine names have more disciplinary problems in the first year of middle school than do boys with more masculine names.<sup>262</sup> Some other countries, such as Germany and Denmark, actually require boys to be named with male names and girls with female names.<sup>263</sup>

The harmful effects of a gender mismatched name may be stronger for boys than for girls. One study found that in South Carolina, women with more masculine names are more likely to be elected as judges than women with more feminine names.<sup>264</sup> Indeed, the investigators concluded that changing a female's name from "Sue" to something like "Cameron" would increase her odds of ultimately becoming a judge by a factor of three.<sup>265</sup> Surprisingly, though, the same study found that names with a seeming gender mismatch were not as rare as one might think. Indeed, there were 145 South Carolina men named "Hazel" and 144 named "Carol."<sup>266</sup> On the female side, there were 113 South Carolina women named "James" and 102 named "John."<sup>267</sup>

Governmental prohibition of gender mismatched names is unlikely to be constitutional. In addition to raising issues of gender classification and inappropriate stereotyping under the Equal Protection Clause, such laws would fail to recognize the dynamic nature of naming practices by locking in certain names as permanently male or permanently female. In fact, the gender identity of particular names is fluid. Researchers have found that "names tend to evolve from male to unisex and from unisex to female."<sup>268</sup> Locking in certain names as

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<sup>261</sup> JOHNNY CASH, *A Boy Named Sue*, on JOHNNY CASH AT SAN QUENTIN (Columbia Records 1969).

<sup>262</sup> David N. Figlio, *Boys Named Sue: Disruptive Children and Their Peers*, 2 EDUC. FIN. & POL'Y 376, 380 (2007).

<sup>263</sup> Israel, *supra* note 216.

<sup>264</sup> Bentley Coffey & Patrick A. McLaughlin, *Do Masculine Names Help Female Lawyers Become Judges? Evidence from South Carolina*, 11 AM. L. & ECON. REV. 112, 132 (2009).

<sup>265</sup> *Id.* at 128.

<sup>266</sup> *Id.* at 119.

<sup>267</sup> *Id.* at 118.

<sup>268</sup> Herbert Barry III & Aylene S. Harper, *Evolution of Unisex Names*, 30 NAMES 15, 21 (1982).

permanently male or female is to engage in precisely the type of gender stereotyping that the Supreme Court has consistently rejected.<sup>269</sup>

#### CONCLUSION

If the tone of this Article is at times lighthearted, the issues it raises are nonetheless serious. Parental control of names is likely to increase in significance as a legal issue as parents seek ever more distinctive names for their children. The issue is also quite difficult, as it poses questions that go to the heart of individual freedom in a liberal society. To what extent should parental choice be balanced against the rights of children and against the interests of society at large? There are often no easy answers to these questions, so some of my conclusions are necessarily tentative. This is hardly surprising, since this is also the first law review article to address comprehensively the existing restrictions on parental naming rights.

The oddity introduced in this Article's Introduction—the prohibition of "Lucía," but the acceptance of "Adolf Hitler" as valid children's names—demonstrates just how strange and unintuitive this area of law is. There are both needless prohibitions and seemingly gaping lacunae, both of which cry out for coherence and reform.

With respect to needless prohibitions, restrictions on surnames and diacritical marks could be eliminated through constitutional litigation. It is appalling that some American parents cannot legally name a child with the surname of a maternal grandmother or with the first names "Lucía" or "José." If legislatures do not fix this problem, courts should. With respect to various gaps, legislatures, at a minimum, should consider clarifying and specifying the content of state law with respect to parental naming rights and consider the possibility of additional, narrowly drawn restrictions.

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<sup>269</sup> See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).