THE STATE DUE PROCESS JUSTIFICATION FOR
A RIGHT TO COUNSEL IN SOME CIVIL CASES

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INTRODUCTION

In this article, I analyze one Civil Gideon Litigation theory: procedural due process grounded in state constitutional provisions. I argue that this approach has real potential to expand the right to counsel in civil cases through state court litigation. The basic principles are well-established and flexible, and the theory is the logical one to use in enhancing process. I analyze one group of cases — “private” adoption proceedings in which the first step is the termination of parental rights.1 State courts have held that indigent parents who are respondents in these cases are entitled to counsel under due process provisions of state constitutions.2

The procedural due process theory has real limits, as well. In the twenty-first century, any litigation theory is a limited tool to accomplish law reform. The most direct way to increase the numbers of lawyers who represent the poor would be to increase federal funding for civil legal services programs. During the last decade, however, Congress has drastically reduced funding for the National Legal Services Corporation.3

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1. I use quotation marks because, as these cases indicate, the state is substantially involved in these cases and therefore they are not truly private adoptions. See discussion infra Part II(A).

2. See discussion infra Part II(A). There are other Civil Gideon litigation theories. See infra note 21 (citing cases that have applied equal protection principles to justify finding a right to counsel in adoption cases); Mary Helen McNeal, Toward a “Civil Gideon” Under the Montana Constitution: Parental Rights as the Starting Point, 66 MONT. L. REV. 81, 86 (2005) (noting the use in Civil Gideon litigation of “open courts” and “right to remedy” provisions in state constitutions); Clare Pastore, Life after Lassiter: An Overview of State Court Right to Counsel Decisions, 40 CLEARINGHOUSE REV. 186, 191-94 (2006) (discussing theories under equal protection, inherent powers of courts, and pauper statutes); Deborah Perluess, Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest, 2 SEATTLE J. SOC. JUST. 571, 573 (2004) (basing right to counsel on Washington’s access to justice provision). See also Frase v. Barnhart, 840 A.2d 114, 129 (Md. 2003) (describing argument that Maryland’s common law incorporates a 1494 Act of Parliament, 11 Henry VII, ch. 12, which required English judges to appoint counsel for indigent plaintiffs in civil cases and requires Maryland’s courts today to do the same). In this last respect, see infra note 248 and accompanying text (elaborating on argument that 11 Hen. 7, ch. 12 may be incorporated into state constitutions).

3. See infra notes 28 and 29 and accompanying text.
Moreover, a state-based due process strategy involves a long-term, state-by-state process. Even if it were successful in a number of states, it would produce a patchwork result nationally, with substantial variations from state to state.

If there were a viable alternative litigation theory that might persuade the United States Supreme Court to establish an expansive Civil Gideon right, I certainly would choose it, but I am not able to identify such a theory, at least one that has been accepted by federal courts.4

There is another obstacle, of course. In Lassiter v. Department of Social Services,5 the Supreme Court announced a presumption against the right to counsel in civil cases that do not involve a potential loss of physical liberty and imposed a case-by-case approach to determine whether that presumption has been overcome.6 I do not believe, however, that Lassiter forecloses due-process based litigation, especially when it is based on state constitutional provisions in state courts. Indeed, the Court in Lassiter virtually invited state courts to construct a broader right to counsel in civil cases than it had. It ended its opinion by stating that “wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution.”7 It said: “Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well.”8 By failing to recognize such an automatic right to counsel, the Court said, it did not wish to imply “that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”9

The Court’s acceptance of the Mathews v. Eldridge10 balancing test11 in Lassiter is sound. The most objectionable parts of Lassiter are its no-counsel

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4. There is a right of access to the courts that I believe should include, in some cases, when necessary to implement that right, a subsidiary right to counsel. As recognized in Bounds v. Smith, 430 U.S. 817, 828 (1977), abrogated by Lewis v. Casey, 518 U.S. 343, 351, 354 (1996), the access right requires prisons to guarantee that prisoners “have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement.” Id. at 356. Prisons must do this by, at a minimum, providing prisoners with “adequate law libraries or adequate assistance from persons trained in the law.” Id. (quoting Bounds, 430 U.S. at 828) (emphasis omitted). See Murray v. Giarratano, 492 U.S. 1, 14-15 (1989) (Kennedy, J., concurring in result) (providing necessary fifth vote to plurality opinion which held that death-sentenced prisoners have no constitutional right to counsel in post-conviction process, stating that “meaningful access can be satisfied in various ways,” and that the State had done so here by providing prisoners, inter alia, “with institutional lawyers to assist in preparing petitions for post-conviction relief”). The Supreme Court, however, has failed to “deinstitutionalize” this access right by recognizing that it gives free-world people a right to legal assistance in filing and litigating meritorious claims in court.
6. Id. 25-27. See discussion infra Part I.
7. Lassiter, 452 U.S. at 33.
8. Id. at 33-34.
9. Id. at 34.
11. Lassiter, 452 U.S. at 27 (explaining the three elements of the Mathews balancing test as “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions”) (paraphrasing Mathews, 424 U.S. at 335).
presumption\textsuperscript{12} and its imposition of the case-by-case approach to determine whether there is a right.\textsuperscript{13}

There is analysis in \textit{Lassiter}, however, that suggests that the presumption is a weak one.\textsuperscript{14} In addition, the presumption arises out of a line of federal decisions, and state courts should apply their own lines of counsel decisions in deciding whether there is a right to counsel in civil cases. In any event, state courts are free to reject the federally-derived presumption in going beyond \textit{Lassiter} and a number have done so.\textsuperscript{15}

Moreover, the Court in \textit{Lassiter} makes two critical judgments that are not binding on state courts: (1) that there was no substantial chance, under the facts of \textit{Lassiter}, that the absence of counsel produced an erroneous decision, and (2) if there was a substantial risk of error, it was constitutionally tolerable.\textsuperscript{16} State courts must reach their own decisions on these points, and I believe it is on these two points that Civil Gideon litigants should focus. The state decisions that hold there is a right to counsel in adoption proceedings generally reach different conclusions than the \textit{Lassiter} Court did on these two points.\textsuperscript{17}

In Part I, I analyze \textit{Lassiter}. I also analyze one pre-\textit{Lassiter} decision by the Supreme Court, \textit{Gagnon v. Scarpelli},\textsuperscript{18} and one post-\textit{Lassiter} decision, \textit{M.L.B. v. S.L.J.}.\textsuperscript{19} I argue that both decisions contain some important clues in interpreting \textit{Lassiter}, particularly in identifying the showing that is necessary to rebut the \textit{Lassiter} presumption.

In Part II(A), I analyze decisions by state courts in Alaska, California, Florida, and Kansas that have recognized a right to counsel in adoption cases. These decisions comprise the second step in a right-to-counsel progression, the first step being the right to counsel in state-initiated proceedings to terminate parental rights ("TPR proceedings"). These decisions are important for several reasons. First, they reflect the substantial extent to which state courts have gone beyond \textit{Lassiter} in recognizing a categorical right to counsel in state-initiated TPR proceedings.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 25-27.
\item \textsuperscript{13} \textit{Id.} at 31-32.
\item \textsuperscript{14} \textit{Id.} (emphasizing the importance of the parent's interest, the shared interest with the State in seeking a correct decision, and the chance of an "insupportably high" risk of erroneously depriving the parent of his or her rights in some cases). \textit{See discussion infra Part I.}
\item \textsuperscript{15} \textit{See discussion infra Part II(A).}
\item \textsuperscript{16} \textit{Lassiter}, 452 U.S. at 32-33.
\item \textsuperscript{17} \textit{See discussion infra Part II.}
\item \textsuperscript{18} 411 U.S. 778 (1973).
\item \textsuperscript{19} 519 U.S. 102 (1996).
\item \textsuperscript{20} Recognition of the right in those cases is the building block for recognition of it in the adoption cases. \textit{Lassiter} did not stem the movement in the states to provide counsel to parents in state-initiated termination-of-parental rights (TPR) proceedings.
\end{itemize}

At the time of the decision in \textit{Lassiter}, all but seventeen states had recognized such rights, either as a matter of constitutional law or statute . . . . \textit{[S]ince 1979, only one state has curtailed rights to counsel available prior to \textit{Lassiter}, and seven states that had previously limited appointments now provide statutorily for the mandatory appointment of counsel in termination cases, either automatically or on request of a financially-eligible parent.}

Second, they provide a basis for advocates in other states who have not done so, to seek to establish a similar right to counsel in adoption proceedings. 21 Third, the progression identifies a logical next step in a Civil Gideon strategy: the recognition of the right to counsel in child custody cases.22

In Part II(B), I argue that these decisions are generally justified by principles of federalism (I believe they are right on the merits as well), and I identify several ways in which the state courts’ development and applications of the Mathews test differ from those in Lassiter. These differences support litigation strategies that can, I believe, substantially expand the right to counsel in civil cases.

In Part II(C)(1), I address some confusion in the discussion of state action in right-to-counsel decisions, and argue that the only state action that is necessary to trigger the application of constitutional provisions is the state’s failure to provide counsel to the litigant.

In Part II(C)(2), I identify an important state interest that I believe is missing in most of the federal and state civil right-to-counsel cases. It is the fundamental and self-legitimating interest that the state has in implementing the laws that it enacts, which should “count” in the Mathews balance on the “pro” side of the right-to-counsel calculation.

Finally, I conclude by summarizing my arguments and suggesting some possible next steps in civil right-to-counsel litigation.

I note two additional features of today’s legal world that are relevant in the Civil Gideon discussion.

First, there is an extraordinary degree of unmet legal need, which underscores the importance of the Civil Gideon arguments. Although there are many legal services programs for the poor, most poor persons cannot obtain essential legal help

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21. The decisions I analyze are based on procedural due process. There are, in addition, a number of courts that have based a right to counsel in adoption cases on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and/or equal privileges or immunities provisions of state constitutions. See, e.g., In re Adoption of K.L.P., 735 N.E.2d 1071, 1079, 1080 (Ill. App. Ct. 2000), aff’d, 763 N.E.2d 741 (Ill. 2002) (rejecting procedural due process claim, but finding that provision of counsel to indigent parents in state-initiated TPR proceedings, but not in adoption proceedings, denies parents equal protection of the law); In re S.A.J.B., 679 N.W.2d 645, 646 (Iowa 2004) (indicating that because counsel is mandated statutorily in state-initiated TPR proceedings, there is a right to counsel in adoption proceedings based on the state Equal Protection Clause and the state Equal “Privileges or Immunities” Clause); In re Adoption of K.A.S., 499 N.W.2d 558, 566-67 (N.D. 1993) (stating that construction of statute to avoid unequal grant of “privileges or immunities” requires the state to provide counsel to indigent parents in adoption proceedings when the state provides counsel to indigent parents in two types of state-initiated TPR proceedings); Zockert v. Fanning, 800 P.2d 773, 778 (Or. 1990) (explaining that the state’s failure to provide counsel to indigent parents in adoption, while providing counsel to indigent parents in state-initiated TPR proceedings, violates the state constitutional provision prohibiting unequal grant of “privileges or immunities”); Hunt v. Weiss, 8 P.3d 990, 992-93 (Or. Ct. App. 2000) (same, applying Zockert).

22. See CONCLUSION infra for discussion of such litigation.
with civil legal problems. The primary funding source for civil legal services for the poor is Congress, which funnels its appropriations through the national Legal Services Corporation (LSC). In the last ten years, the Congressional appropriations for the LSC have decreased from $400,000,000 to $330,803,705. When adjusted for inflation, last year's appropriation for the LSC was approximately fifty-one percent less than that in Fiscal Year 1981. We now spend less than $8.54 per poor person for civil legal services, which means that three or four out of every five poor people in this country cannot obtain the legal help they need. Congress also has placed unconscionable restrictions on the limited funding it provides. This substantially reduces the effectiveness of the legal services that LSC-funded lawyers can provide.

The inability of many poor people to obtain the legal services that they need has resulted in a "surge in self-represented litigation," which "is unprecedented and shows no signs of abating."

There is a second feature of today's legal delivery system, related to unmet legal need, which may strengthen the Civil Gideon arguments. In increasing numbers, lawyers are providing to clients what a task force of the American Bar Association calls "limited scope legal assistance." By "limited scope legal assistance," the task force means "a designated service or services rather than the full package of traditionally offered services." The task force notes that "limited scope legal assistance" has several other names, including 'unbundled' or 'discrete task' representation.

The task force warns: "Limited scope legal assistance is not for all lawyers, all clients, or all legal problems." It gives a number of examples, however, of when lawyers can and have used this form of legal assistance to help clients resolve problems. These types of limited scope legal assistance include limited advice and self-help information that many programs (including on-line programs) now

25. JUSTICE GAP, supra note 23, at 18.
27. JUSTICE GAP, supra note 23, at 18.
29. See, e.g., Pub. L. No. 104-134, § 504(a)(7), (d)(1), 110 Stat. at 1321-56 (banning the use of Legal Services Corporation funds, whether from federal funding or "non-Federal funds," for "initi[ating or partici]pat[ing] in a class action suit").
32. Id. at 4.
33. Id. at 5.
34. Id. at 12.
provide to otherwise "self-represented litigants,"[35] including; "[h]otline advice,[36] [s]tand alone interviews and advice,"[37] "[coaching in mediation,"[38] "[p]reparation or review of documents and pleadings,"[39] "[coaching throughout litigation,"[40] "[r]epresentation, including coaching, in litigation with limited disputes,"[41] "[r]epresentation in an initial case or proceeding that helps the client in a subsequent case or proceeding in which the person appears pro se,"[42] and representation through "[l]awyer of the day programs."[43]

When such a form of limited representation is appropriate, it will reduce the cost of providing counsel, and thereby reduce the State's disinterest in providing counsel. In the Mathews balance of interests, this could help to tip the balance in favor of a right to counsel.[44]

35. Id. at 18-20. The task force notes that there are over 150 such programs across the country. Id. at 18. "These programs provide legal information in brochures, videotapes, audiotapes, and sometimes interactive computer terminals or kiosks. In many states, they provide simplified pleading forms, with instructions about how and when to use them." Id. at 18-19.

36. Id. at 20-21. Through such hotlines, "[l]awyers conduct telephone interviews, perform diagnostic assessments, and provide legal information, advice, discrete and continuing coaching and other assistance (including preparation of forms), to clients." Id. at 21.

37. ABA SECTION OF LITIGATION, supra note 31, at 24-25. The task force explains: "Interview and advice services may be the only ones a limited-service lawyer provides to a client. The attorney-client relationship begins at the start of the interview and ends when it is over." Id. at 24. Such advice can include "preventive advice" (such as advice in domestic cases "to prevent child-snatching" or "avoid giving a spouse a fault ground for divorce," or "to protect the client's financial resources"), and "litigation-focused advice" (e.g., in a divorce case, "instructing the client how to select and complete the simplified complaint form, perfect service of process, request an order of default and/or evidentiary hearing, prepare and present the required testimony ... and obtain the final order and judgment"). Id. at 24-25.

38. Id. at 25-27. Lawyer coaches "can help the client to identify options, prepare for the mediation, understand the basic legal rules and process (before the client makes tentative concessions), perform as well as possible in the mediation, and reasonably evaluate offers from the opposing party." Id. at 26. The lawyer also can prepare draft agreements and review proposed agreements. Id.

39. ABA SECTION OF LITIGATION, supra note 31, at 29-31. The task force says that many lawyers provide such limited services in real estate transactions or domestic cases. Id. at 29.

40. Id. at 31. This occurs "most commonly in domestic relations cases," but also in small business disputes (in which lawyers provide clients "with the information, legal forms, and coaching they need to collect overdue accounts"), and some Chapter 13 bankruptcy cases. Id.

41. Id. at 31-33. Lawyers who provide services like these identify cases that either are uncontested or have limited disputes and represent clients who are seeking to reasonably resolve legal problems without contentious litigation. Id. at 32-33.

42. Id. at 33-36. An example of this two-step approach is a domestic violence case followed by a divorce case. The lawyer represents a victim in the domestic violence case and often obtains a protective order that will be the basis for resolving "child custody, child support, and maintenance issues" in a subsequent divorce action in which the client appears pro se. ABA SECTION OF LITIGATION, supra note 31, at 34.

43. Id. at 37-39. In such programs, the "lawyer 'covers' the cases in a particular courtroom on a specified day. The lawyer interviews and advises litigants and represents some of them in court." Id. at 37. The task force gives, as an example of such a program, one in Washington state that represents "tenants in eviction proceedings in housing court." Id.

44. See infra Part I for discussion of the Mathews balancing test.
I. FEDERAL DECISIONS ESTABLISHING THE FLOOR: THE MINIMUM CONSTITUTIONAL RIGHT TO COUNSEL IN CIVIL CASES

*Lassiter v. Department of Social Services* is the starting point for analyzing the right to counsel in civil cases. *Lassiter*'s facts, at least the facts that the Court emphasized in its opinion, made it a bad test case. In the majority's view, even if a lawyer had represented Ms. Lassiter, the result would not have been different.

In 1975, a state court stripped Ms. Lassiter of custody for her failure to provide "her infant son William with proper medical care," and placed William in foster care. The court found that Ms. Lassiter's mother had complained that her daughter had left her three children, including William, at the children's grandmother's home for days without providing them with food or money.

In 1976, Ms. Lassiter was convicted of second-degree murder and sentenced to twenty-five to forty years imprisonment. Ms. Lassiter retrieved a butcher knife while her mother was using a broom to beat the victim (who was on the floor), and Ms. Lassiter stabbed the victim repeatedly.

In 1978, the state department of social services sought to terminate Ms. Lassiter's parental rights. At the time Ms. Lassiter received notice of the termination-of-parental-rights (TPR) hearing, she was being represented in a collateral proceeding in the criminal case, but she failed to ask that lawyer to help with the TPR proceeding. At this point, according to social services, Ms. Lassiter had not seen William since he had been placed in state custody, "except for one 'prearranged' visit and a chance meeting on the street," and she had not contacted the department to talk about William. The trial court found that Ms. Lassiter had sufficient time to obtain counsel and had not done so, and that she never contended that she was indigent. The state court granted the TPR petition, finding, in effect, that Ms. Lassiter had abandoned her child.

The sole issue before the Supreme Court was whether Ms. Lassiter was entitled to counsel "under the Due Process Clause of the Fourteenth Amendment." In answering no to this question, the Court, in a 5-4 decision: (1) announced a "presumption that an indigent litigant has a right to appointed counsel only when, if

46. Id. at 32-33. Concurring, Chief Justice Burger said: "Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a 'candidate' for dismissal as improvidently granted." Id. at 34.
47. Id. at 20 (majority opinion). "[A] social worker had taken William to a hospital" because he was having problems breathing, was malnourished, and had substantial scarring as a result of an untreated infection. Id. at 22.
48. Id. at 21.
49. Id. at 23.
50. Id. at 20.
51. Lassiter, 452 U.S. at 20-21 n.1.
52. Id. at 20-21.
53. Id. at 21.
54. Id. at 22.
55. Id.
56. Id. at 23-24.
57. Lassiter, 452 U.S. at 24.
he loses, he may be deprived of his physical liberty;"58 (2) held that the three-part balancing test in *Mathews v. Eldridge*59 applies in making the right-to-counsel determination in civil cases;60 (3) said that in deciding, on a case-by-case basis, whether there is a right to counsel in a civil case, the trial court “must balance . . . [the three *Mathews* elements against each other, and then set their net weight in the scales against the presumption;”61 and (4) held under the facts of Ms. Lassiter’s case, that she had not overcome the presumption against the right to counsel.62

In his concurring opinion, which provided the necessary fifth vote for the majority, Chief Justice Burger said: “I am content to join the narrow holding of the Court, leaving the appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.”63 The Chief Justice did not expressly endorse the presumption against appointed counsel.

Most of the Court’s reasoning would fit comfortably in an opinion announcing a right to counsel, or at least a presumptive right, in state-initiated TPR cases. Applying the three-factor *Mathews* test, the Court began by finding that a parent’s interest in the termination of his or her parental rights is “a commanding one,” and that denial of that interest constitutes “a unique kind of deprivation.”64 The Court added that parents in state-initiated TPR proceedings may also need counsel to advise them about potential criminal liability.65

Turning to the State’s interests, the Court said that because “the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision. For this reason, the State may share the indigent parent’s interest in the availability of appointed counsel.”66 The Court added that “as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests,” and therefore, “the State’s interest in the child’s welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.”67

In discussing the third *Mathews* factor, “the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel,”68 the Court said:

[T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and

58. *Id.* at 26-27.
60. *Lassier*, 452 U.S. at 27. Applying this test, a court balances “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *Id.* (citing *Mathews*, 424 U.S. at 335).
61. *Id.*
62. *Id.* at 32-33.
63. *Id.* at 34-35.
64. *Id.* at 27.
65. *Id.* at 27 n.3.
67. *Id.* at 28.
68. *Id.*
fewer still to confuse, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an unrepresented parent is evident from the findings some courts have made. Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. The respondent is able to point to no presently authoritative case, except for the North Carolina judgment now before us, holding that an indigent parent has no due process right to appointed counsel in termination proceedings.\textsuperscript{69}

\textit{Lassiter} has been subjected to widespread criticism, especially its "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."\textsuperscript{70} As the Court stated:

The dispositive question . . . is whether the three \textit{Eldridge} factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status.\textsuperscript{71}

The Court created this presumption without justifying it. It said that "we thus draw from [the physical liberty cases] the presumption that an indigent litigant has

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\item \textsuperscript{69} Id. at 30-31 (citations omitted).
\item \textsuperscript{70} Id. at 26-27. See, e.g., Simran Bindra & Pedram Ben-Cohen, \textit{Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants}, 10 GEO. J. ON POVERTY L. & POL'y 1 (2003) (arguing that there should be a right to counsel for defendants in civil cases); Boyer, supra note 20 (urging reconsideration of the \textit{Lassiter} decision); Colene Flynn, \textit{In Search of Greater Procedural Justice: Rethinking Lassiter} v. Department of Social Services, 11 WIS. WOMEN'S L.J. 327 (1996) (arguing that courts should consider impediments women face in accessing the legal system when determining procedures available to them to guarantee due process); Martin Guggenheim, \textit{The Right to be Represented But Not Heard: Reflections on Legal Representation for Children}, 59 N.Y.U. L. REV. 76 (1984) (asserting that \textit{Lassiter} was wrongly decided); David Medine, \textit{The Constitutional Right to Expert Assistance for Indigents in Civil Cases}, 41 HASTINGS L.J. 281 (1990) (arguing that the Constitution provides for expert assistance to indigent litigants in certain civil cases); Deborah L. Rhode, \textit{Access to Justice}, 69 FORDHAM L. REV. 1785, 1799 (2001) ("The rationale for subsidized representation seems particularly strong in cases like \textit{Lassiter}, where crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced. Under such circumstances, opportunities for legal assistance are crucial to the legitimacy of the justice system."); William L. Dick, Jr., Note, \textit{The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process}, 30 WM. & MARY L. REV. 627, 628 (1989) (arguing that the \textit{Lassiter} presumption ought to be reversed, and the right to counsel presumed, when the state, either actually or functionally, is the opposing party in a case and when the interests of the litigant "are fundamental and compelling"); Joan Grace Ritchey, Note, \textit{Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Cases}, 79 WASH. U. L.Q. 317, 324-26 (2001) (arguing that the Court in \textit{Lassiter} disregarded many facts creating a great risk of error); Kevin W. Shaughnessy, Note, \textit{Lassiter} v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants, 32 CATH. U. L. REV. 261, 278 n.125 (1982) (criticizing the Court in \textit{Lassiter} for, among other things, conflating the presumption against counsel and the \textit{Mathews} test).
\item \textsuperscript{71} \textit{Lassiter}, 452 U.S. at 31.
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a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”72 In the physical liberty cases, however, the Court had no occasion to decide whether or not there should be a presumption against the appointment of counsel in state-initiated TPR proceedings. To say that there is a right to counsel when physical liberty is at issue, does not establish that there should be no such categorical right when one’s fundamental interest in his or her child is threatened. Assuming arguendo one can count Chief Justice Burger’s concurrence as the fifth vote for the presumption,73 the Court in Lassiter assumed the presumption into existence, rather than creating and justifying it.74

The Court gave some cryptic clues about the showing that is necessary to overcome the presumption. It said that if a “parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak,”75 the presumption would be rebutted. It did not say this is the only case profile that will rebut the presumption.

There are two features of the Court’s opinion that suggest the presumption, as applied, should be a weak one. First, it is the risk-of-error factor that is the most important one in rebutting the Lassiter presumption, at least in cases like Lassiter in which the litigant’s interest is fundamentally important. There should be substantially more risks of error than Lassiter recognized in most contested and litigated cases when litigants are unrepresented, and thus good grounds to rebut the Lassiter presumption.

The Court’s own analysis demonstrates that the first presumption-rebutting factor, the parent’s interest (i.e., in retaining parental rights), will be both consistent and strong in TPR proceedings, at least those in which there is a real possibility the parent may lose permanent custody of the child. It follows that the vast majority of TPR cases should satisfy this first part of the presumption-rebutting test.

It is hard to determine when a state’s interests are “at their weakest,” since, like the parent’s interest, they would seem to be consistent in most TPR cases. Moreover, the Court characterizes the state’s interest in the welfare of the child as “urgent,”76 and says the state “shares the parent’s interest in an accurate and just decision.”77 The Court accepts the assumption underlying our adversary system that “accurate and just results are most likely to be obtained through the equal contest of opposed interests.”78 The Court characterizes the state’s pecuniary interest in not providing counsel as “relatively weak,”79 and says that “in some but not all cases,” the state “has a possibly stronger interest in informal procedures.”80

72. Id. at 26-27.
73. See supra note 45, and text accompanying note 63.
74. Dissenting, Justice Blackmun challenged the presumption, arguing that it disregards the “flexible approach” and sensitivity to “the particular context” that are the hallmarks of procedural due process. Lassiter, 452 U.S. at 41. Several state appellate courts have adopted major parts of Justice Blackmun’s opinion in finding that there is a right to counsel in TPR proceedings, including those that are part of “private” adoption processes. See infra Part II.
75. Lassiter, 452 U.S. at 31 (majority opinion).
76. Id. at 27.
77. Id.
78. Id. at 28.
79. Id. at 31.
80. Id.
It follows that in most cases, the state would (the Court says “may”) “share the indigent parent’s interest in the availability of appointed counsel,” 81 at least if the TPR proceeding is adversarial.  

It is the third presumption-rebutting factor — when “the risks of error [are] at their peak” 82 — that is the most dynamic one in the Court’s equation. It also is this factor on which the Lassiter decision turned. There simply was not, in the Court’s view, a substantial risk of an erroneous decision in Ms. Lassiter’s case. 84 The Court suggested this is the most important factor in TPR cases, stating: “the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high.” 85 In this light, Lassiter can be read as a maverick state-initiated TPR case, one in which there was little risk of an erroneous decision due to the absence of counsel; in most cases, there will be more risks to the indigent parent based on a lack of counsel.

The second feature of Lassiter that suggests its no-counsel presumption is weak is the Court’s reliance on Gagnon v. Scarpelli 86 to define when the risk of error will rebut the Lassiter presumption. 87 Justice Stewart cited Gagnon several times 88 and incorporated Gagnon into the Lassiter holding, saying: “We . . . adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.” 89 In Gagnon, the Court held that trial courts, acting on a case-by-case basis, should decide whether to appoint counsel for indigent probationers in revocation hearings. 90 However, the Gagnon Court added a presumption in favor of appointed counsel in some situations in which the risk of error is high. It said:

82. Id. at 28.
83. Id. at 31.
84. See supra text accompanying notes 45-62. Among other factors that reduced the risk of error in the case, were these: “the petition to terminate Ms. Lassiter’s parental rights contained no allegations of neglect or abuse upon which criminal charges could be based[,] . . . no expert witnesses testified, and the case presented no specially troublesome points of law, either procedural or substantive.” Lassiter, 452 U.S. at 32. In addition, “the weight of the evidence” indicating that Ms. Lassiter “had few sparks of . . . interest” in her son “was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference.” Id. at 32-33. Moreover, “the argument that William should live with Ms. Lassiter’s mother” was very weak given “the evidence that the elder Ms. Lassiter had said she could not handle another child, that the social worker’s investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter’s custody.” Id. at 33. This argument also was “hardly consistent” with Ms. Lassiter’s contention “in the collateral attack on her murder conviction that she was innocent because her mother was guilty.” Id. at 33 n.8.
85. Lassiter, 452 U.S. at 31 (emphasis added).
87. Lassiter, 452 U.S. at 31-32.
88. Id. at 26, 31-32.
89. Id. at 31-32 (citation omitted).
90. The Gagnon Court said: “It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements.” Gagnon, 411 U.S. at 790.
Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.  

Paraphrased, the decision in *Gagnon* means that the risk of error is unacceptable when the litigant has a colorable claim and limited self-representational capacity, and the court is dealing with a complex factual or legal issue that it has substantial discretion to resolve. This will be true in many cases.

In a post-*Lassiter* decision, *M.L.B. v. S.L.J.*, 92 the Supreme Court reinforced the importance of the risk-of-error analysis in access to justice decisions. In this 6-3 decision, written by Justice Ginsburg, the Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require a state to pay the costs of transcribing the record for appeal in an adoption proceeding involving a possible termination of parental rights when the appellant is indigent. 93 In so doing, it held for the first time that the Constitution requires waiver of an appeal fee in a civil case. 94

In justifying its decision, the Court merged the decisions requiring waivers of costs in criminal appeals and civil trial proceedings. The Court said the free-transcript right is not limited in criminal cases to instances in which incarceration is possible. 95 Applying the civil line of decisions, the Court found that “state controls or intrusions on family relationships” 96 like those in *M.L.B*. made the case closer to

91. Id. at 790-91. The Court said:
   Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.
   Id. at 786-87.


93. Id. at 106.

94. Id. In this case, the stepmother of two children sought to terminate the parental rights of the natural mother and to adopt the children, alleging that the natural mother “had not maintained reasonable visitation and was in arrears on child support payments.” Id. at 107. After a hearing, the Chancellor terminated the parental rights of the natural mother and granted the stepmother’s adoption request. Id. at 107-08.

95. Id. at 111-12 (citing *Mayer v. Chicago*, 404 U.S. 189 (1971) (determining that an indigent defendant convicted on nonfelony charges was entitled to a free transcript although no jail sentence was possible)).

96. Id. at 116.
**Boddie v. Connecticut,** in which the Court invalidated a filing fee in a divorce case, than to the post-**Boddie** cases in which the Court refused to invalidate filing fees.\(^9\) The majority said: “Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”\(^9\)

The Court fashioned due process and equal protection principles into a test that has the hallmarks of procedural due process. It said that “we inspect the character and intensity of the individual interest at stake, on the one hand, and the State’s justification for its exaction, on the other.”\(^10\) In applying the test, it was apparent that the Court also was concerned about the risk of error, saying that the lower court’s order:

simply recites statutory language; it describes no evidence, and otherwise details no reasons for finding M.L.B. ‘clear[ly] and convincing[ly]’ unfit to be a parent. Only a transcript can reveal to judicial minds other than the Chancellor’s the sufficiency, or insufficiency, of the evidence to support his stern judgment.\(^11\)

The Court cited **Lassiter**, in part, for the importance of the risk-of-error factor:

[C]ounsel at state expense, we have held, is a constitutional requirement, even in the first instance, only when the defendant faces time in confinement. When deprivation of parental status is at stake, however, counsel is sometimes part of the process that is due. It would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction — though trial counsel may be flatly denied — but hold, at the same time, that a transcript need not be prepared for

\(^9\) 401 U.S. 371 (1971) (holding that divorce filing fee could be waived based on an individual’s inability to pay because the establishment or dissolution of a marriage is a fundamental right).

\(^8\) M.L.B., 519 U.S. at 114-15 (noting the Court’s refusal to waive costs in **United States v. Kras**,
409 U.S. 434 (1973) (holding no right to waiver of fee in bankruptcy case because bankruptcy discharge entails no fundamental interest) and **Ortwein v. Shwab**, 410 U.S. 656 (1973) (holding no right to waiver of fee in seeking review of welfare benefit determination because it involved no fundamental interest or a classification attracting heightened scrutiny)).

\(^9\) Id. at 116 (citation omitted). Speaking of its prior decisions in **Lassiter**, and **Santosky v. Kramer**,
455 U.S. 745 (1982), the Court stressed that the right involved in a TPR proceeding is “fundamental,” and therefore is protected by the Due Process Clause of the Fourteenth Amendment:

Although both **Lassiter** and **Santosky** yielded divided opinions, the Court was unanimously of the view that “the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.” It was also the Court’s unanimous view that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.”

Id. at 119 (alteration in original) (quoting **Santosky**, 455 U.S. at 774, 787).

\(^10\) Id. at 120-21 (citing **Bearden v. Georgia**, 461 U.S. 660, 666-67 (1983)).

\(^11\) Id. at 121-22 (alteration in original) (citation omitted).
M.L.B. — though were her defense sufficiently complex, state-paid
counsel, as Lassiter instructs, would be designated for her.\footnote{102}

Given the malleability of the risk-of-error factor, it would be possible for a
state court in a case identical to Lassiter to accept the structure of Lassiter, but
based on its application of the risk-of-error factor, to come to the opposite
conclusion, i.e., that appointment of counsel is necessary.\footnote{103} This is so for at least
two reasons. The assessment of the risk of error is a retrospective judgment (did
the absence of counsel make a difference in a case?), and it is possible for
reasonable jurists to make different judgments based on the same facts. Second,

\footnote{102. \textit{Id.} at 123 (emphasis added) (citations omitted). Justice Kennedy, concurring in the result, cited
Lassiter and offered a procedural due process rationale for the M.L.B. decision: “Here, due process is
quite a sufficient basis for our holding . . . . The Court well describes the fundamental interests the
petitioner has in ensuring that the order which terminated all her parental ties was based upon a fair
assessment of the facts and the law.” \textit{Id.} at 129. Justice Thomas, dissenting, worried that the decision
will spawn others that extend the state’s duty to pay court costs to other civil cases and potentially open
the floodgates to right to counsel arguments in light of the flexible nature of procedural due process. He
said:

As the Court has said countless times, the requirements of due process vary considerably
with the interest involved and the action to which it is subject. It is little wonder, then, that
the specific due process requirements for one sort of action are not readily transferable to
others . . . . Under the rule announced today, I do not see how a civil litigant could
constitutionally be denied a free transcript in any case that involves an interest that is
arguably as important as the interest in Mayer . . . . What is more, it must be remembered
that Griffin did not merely invent the free transcript right for criminal appellants; it was also
the launching pad for the discovery of a host of other rights. \textit{See}, \textit{e.g.}, \textit{Bounds}, 430 U.S. at
822 (right to prison law libraries or legal assistance); \textit{Douglas}, 372 U.S. at 356 (right to free
appellate counsel). I fear that the growth of Griffin in the criminal area may be mirrored in
the civil area.
\textit{Id.} at 143-44.

103. The court could conclude, as Joan Grace Ritchey argues, that there was a very high risk of error
for a variety of reasons:

Lassiter’s incarceration rendered the Department’s allegation of “willfulness” questionable
at best. When the Department notified Lassiter of their petition to terminate her parental
rights, she strongly objected, recommending instead that William’s grandmother care for
him until Lassiter’s release. Lassiter also informed her prison guards of the petition and her
objections. However, they did nothing to assist her in obtaining counsel.

Ritchey, \textit{supra} note 70, at 324 (footnotes omitted). At the hearing, a “‘a social worker’ provided
hearsay testimony about the grandmother’s inability to care for another child. Unfamiliar with the rules
of evidence and North Carolina law, Lassiter ‘failed to uncover this weakness in the worker’s
testimony.’” \textit{Id.} at 325. During her cross-examination of the social worker, “Lassiter began to make
declarative statements, unaware that in performing a cross-examination she was limited to asking
questions of the witnesses.” \textit{Id.} This “led to noticeable impatience on the part of the judge. Moreover,
disparaging comments by opposing counsel during the course of Lassiter’s attempted cross-examination
remained unchecked by the court.” \textit{Id.} at 326 (footnotes omitted). She also could not effectively
“present testimony on direct examinations.” \textit{Id.} (internal quotations omitted). This was, according to
Ritchey,

[B]ecause, in the absence of counsel, the Judge, rather than an advocate for Lassiter,
questioned both Lassiter and her mother. An independent advocate could have elicited
information while acting in a manner consistent with Lassiter’s best interests, thus
preserving the neutrality of the judiciary and the adversarial system of justice.

\textit{Id.} (footnote omitted). The “court further compromised its neutrality — as well as Lassiter’s case — by
questioning Lassiter and her mother as if they were adverse witnesses.” \textit{Id.}
Lassiter does not predetermine the extent of the risk of error — how much error — a court must tolerate. That is a judgment each court must make for itself.

It is a short but critical next step to conclude that because the risks of error from the absence of counsel are the norm in a certain type of case — they occur in the substantial majority of such cases when litigants represent themselves — the risk-of-error analysis supports a categorical right to counsel. I turn now to state court decisions in private adoption cases that take this next step. They recognize that in the substantial majority of adoption proceedings, in which parental rights may be terminated, litigants are incapable pro se litigators and there are complex legal and factual issues. They cite this dominant case profile, combined with the other substantial problems associated with the case-by-case approach, in justifying a categorical right-to-counsel rule.

II. BUILDING ON THE CONSTITUTIONAL FLOOR: RECONSTRUCTING AND REJECTING LASSITER IN STATE COURT LITIGATION

A. State Right-to-Counsel Decisions in Private Adoption Cases

A number of state appellate courts have held that due process provisions of their state constitutions require courts to appoint counsel to represent respondents in private adoption proceedings. In these cases, the petitioner usually is a stepparent who has married a divorced natural parent. The petitioner seeks to terminate the parental rights of the other natural parent (usually the father) so the petitioner can adopt the child.

These decisions often build on prior decisions in which an appellate court in the state has held that parents in state-initiated TPR proceedings are entitled to the appointment of counsel. In these proceedings, a state agency, usually the department of social services or the department of juvenile services, alleges that a

104. There are a number of studies that demonstrate that parties represented by lawyers are substantially more successful in litigation. See, e.g., Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment, 35 LAW & SOC’Y REV. 419 (2001); Jane C. Murphy, Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women, 11 AM. U. J. GENDER SOC. POL’Y & L. 499 (2002); Nancy VerSteegh, Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence, 9 WM. & MARY J. WOMEN & L. 145, 167 (2003) (citing ELEANOR E. MACCOBY & ROBERT J. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 110 (1997)).

105. See infra Part II(A). Shaughnessy, supra note 70, at 282-83, argues that appellate courts cannot effectively review case-by-case decisions (the transcript will not reveal many omissions, e.g., in case preparation and presentation), and courts will have to develop time-consuming pretrial procedures to implement the case-by-case approach. Even then, courts will make unreliable, predictive judgments about the need (or not) for counsel. Because the qualified right to counsel is a federal, as well as a state, constitutional right, the case-by-case approach will require increased federal court review of state proceedings. Moreover, frequently, during the protracted adoption process, the natural parent and child will be separated. This undermines the natural family and makes effective reunification difficult if not impossible when an appellate court reverses a trial court’s erroneous failure to appoint counsel, counsel is appointed, and with counsel’s help, the parent prevails in a remand hearing. I agree fully with this assessment.

106. I refer to these cases as “stepparent adoption cases.”
parent has neglected, abused, or abandoned a child and that as a result, the parent’s parental rights should be terminated. Often, the child had been placed in state custody, usually foster care, prior to the state-initiated TPR proceeding.

1. Alaska

In 1991, a decade after *Lassiter*, the Alaskan Supreme Court held in *In re K.L.J.*, 107 “that the Alaska Constitution mandates that the superior court appoint an attorney when an indigent parent’s right to consent to an adoption of his or her child may be waived under [the state’s adoption law].” 108

The court identified the importance of “state involvement” in adoptions: 109

Adoption, like marriage and divorce, is wholly a creature of the state . . . . Resort to the judicial process for none of the parties in this adoption proceeding was voluntary. As with divorce, it was the only way the parties could accomplish their respective objectives.

Only a court may issue a final decree of adoption, and then only if it determines that the requisite consents have been obtained and that the adoption is in the child’s best interest. The state’s participation continues throughout the process. For example, the clerk of the court issues the new birth certificate in the name of the adopted person, the court ensures the legislatively mandated confidentiality of the proceedings, and the Bureau of Vital Statistics maintains records on adoption. Moreover, the decree is fully enforceable by the court. 110

In applying the Alaska Due Process Clause, the court applied the *Mathews* test and cited to and quoted from *Lassiter*. 111 The court found that “[t]he private interest of a parent whose parental rights may be terminated via an adoption petition is of the highest magnitude.” 112

Turning to the state’s interests, the court said that given the state’s “interest in the children . . . [it] shares the parent’s interest in an accurate and just decision; the interests of both the state and the parent in the availability of appointed counsel

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108. *Id.* at 278. The court explained that “[w]hile the provision in [the state law] eliminating the need for consent, is short of an actual adoption, it does terminate a parent’s ability to protect his or her parental rights.” *Id.* at 279 n.2. The court applied Alaska’s due process clause, contained in Article I, section 7, of the Alaska Constitution. It provides in part: “No person shall be deprived of life, liberty, or property, without due process of law.” *Id.* at 278.
109. *Id.* at 283.
110. *Id.* (footnote and citations omitted).
111. *Id.* at 279. Alaska’s Due Process Clause is contained in Article I, section 7, of the Alaska Constitution and tracks its federal counterpart. It provides in part: “No person shall be deprived of life, liberty, or property, without due process of law.” *In re K.L.J.*, 813 P.2d at 278. The Court said: “In Alaska, we have adopted the balancing test from *Mathews v. Eldridge* to determine what process is due.” *Id.* at 279 (citation omitted).
112. *Id.* (footnote omitted).
coincide here." Quoting from *In re Jay R.*, the court said: "The state has no legitimate interest in terminating a parent’s relationship with his child if he has not willfully neglected or abandoned that child." On the other hand, if the parent has abandoned or neglected a child, "[a]ppointment of counsel will make the fact-finding process more accurate, thereby furthering the state’s interest in terminating the rights of [such] parents . . . ." The court identified another state interest that remains unrecognized in many cases: the state’s "interest in the rights of the indigent parent." The court said: "The state’s interest in its citizens receiving a just determination on such a fundamental issue cannot be open to question."

The court found that "the state undoubtedly has a legitimate interest in avoiding the cost of appointed counsel and its consequent lengthening of judicial procedures." Yet, "though the State’s pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here . . . ." The court then assessed "the risk that a parent will be erroneously deprived of his or her right to the care, custody, companionship and control of his or her child if counsel is not provided." In this respect, the court’s assessment differed substantially from the Supreme Court’s in *Lassiter*. Quoting from an earlier opinion in which it had found a constitutional right to counsel in a contested custody case, the Alaska high court said:

Although the legal issues in a given case may not be complex, the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case. A parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.

The court identified many potential risks of error in uncounseled adoption cases, including those produced by a pro se litigant’s misunderstandings of legal

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113. Id. at 279-80. The Court quoted from *Lassiter* to support its point that both the parent and state had interests in provision of counsel so that the adversary system would be balanced and thereby produce "accurate and just results." Id. at 280 (quoting *Lassiter*, 452 U.S. at 28).
116. Id. (quoting *In re Jay R.*, 197 Cal. Rptr. at 681). The K.L.J. Court did not explain how appointing legal counsel for a parent that has neglected or abandoned a child would help them find the truth in such cases, although in a subsequent footnote it quoted *Lassiter*'s discussion of a survey of judges in which the substantial majority believed appointment of counsel for indigent parents increased the fairness of the proceedings and the accuracy of the fact-finding. Id. at 280 n.3 (quoting *Lassiter*, 452 U.S. at 29 n.5).
117. Id. at 280 (emphasis added).
118. Id.
119. Id.
120. Id. (quoting *Lassiter*, 452 U.S. at 28).
121. *In re K.L.J.*, 813 P.2d at 280.
122. Id. (quoting Flores v. Flores, 598 P.2d 893, 896 (1979)).
language and the burden of proof, the litigant’s inability to understand, reasonably choose, and adequately make legal arguments, and the litigant’s inability to make appropriate objections and to examine witnesses.\textsuperscript{123} The court concluded that the high risk of error would satisfy the \textit{Lassiter} case-by-case test for appointing counsel.\textsuperscript{124} The court reasoned: “Even if we were not to establish a bright line right to counsel,” the Alaska Due Process Clause would guarantee the father counsel under the facts of this case.\textsuperscript{125} “This also would be true under the federal Constitution where the presumption against appointed counsel may be overcome when ‘the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak . . . ’”\textsuperscript{126}

The court, however, “reject[ed] the case-by-case approach set out by the Supreme Court in \textit{Lassiter}.”\textsuperscript{127} Instead, it largely adopted Justice Blackmun’s dissenting opinion.\textsuperscript{128} “As Justice Blackmun explained, the due process balancing in the abstract favors a bright line rule where ‘the private interest [is] weighty, the procedure devised by the state fraught with risks of error, and the countervailing governmental interest insubstantial.’”\textsuperscript{129} The “bright line” rule the Alaska Supreme Court established in \textit{K.L.J.} was the right of an indigent respondent in an adoption proceeding to court-appointed counsel.\textsuperscript{130}

\textsuperscript{123} \textit{id.} at 280-82. The complexities of legal language pose a threshold risk. \textit{id.} at 280. Under Alaska’s adoption statute,

consent to an adoption is not required of a parent if ‘without justifiable cause’ the parent fails ‘significantly’ to communicate meaningfully or provide for the care and support of the child ‘for a period of at least one year. These terms raise issues best resolved by the skills and training of an attorney.

\textit{id.} In addition, “the need for the adopting parents to prove lack of justifiable cause by ‘clear and convincing evidence’ has a legal significance not readily ascertainable by a lay person.” \textit{id.} at 281. The \textit{K.L.J.} court also notes that an attorney would have informed the trial court that under the statute, “indigency is a justifiable cause for failure to provide care, support, or communicate with the child,” and also could have argued that “indigency and lack of legal sophistication can contribute ‘to the appearance of half-heartedness that characterized’ the attempts to contact a child.” \textit{id.} at 281 (quoting \textit{In re Adoption of B.S.L.}, 779 P.2d 1222, 1225 (Alaska 1989)). An attorney would have been able to authenticate a key document and to make meritorious objections to some of the stepfather’s evidence (neither of which the father could do). \textit{id.} An attorney also would have addressed some of the other legal complexities of adoption proceedings that the father was ill-equipped to handle, e.g., whether under the adoption statute, the father could “revive contact with his daughter by letter” after having failed to maintain contact with her for the statutorily required period of time, and whether a wage garnishment satisfied the statute’s child support requirement. \textit{id.}

\textsuperscript{124} \textit{id.} at 282.

\textsuperscript{125} \textit{id.} at 282 n.6.

\textsuperscript{126} \textit{id.} (quoting \textit{Lassiter}, 452 U.S. at 31).

\textsuperscript{127} \textit{In re K.L.J.}, 813 P.2d at 282 n.6.

\textsuperscript{128} \textit{id.}

\textsuperscript{129} \textit{id.} (alteration in original) (quoting Justice Blackmun’s dissent in \textit{Lassiter}, 452 U.S. at 48-49). The court agreed, as well, “with Justice Blackmun’s explanation of the benefits of ‘procedural norms,’” and with “his caution about reviewability of case-by-case decision making.” \textit{id.} The Court also quoted extensively from Shaughnessy’s article, supra note 70, at 282 n.6, 283.

\textsuperscript{130} \textit{id.} at 282 n.7. The Court said:

Today we extend the right to counsel to indigent parents defending against the termination of their parental rights. We are not addressing the rights of those indigent individuals seeking to adopt, but only those economically disadvantaged parties who are trying to avoid having their parental rights terminated because of adoption.
2. California

In *In re Jay R.*, the California Court of Appeals held that the respondent father in a stepparent adoption case was constitutionally entitled to counsel.\(^{131}\) In support of its decision, the appeals court cited a California Supreme Court decision ordering counsel for an indigent respondent in a state paternity action,\(^{132}\) as well as an out-of-state decision finding that a respondent had a right to counsel in a private adoption case.\(^{133}\) The court summarized *Lassiter*, but noted that although “[t]he California Supreme Court has considered similar factors [as the *Mathews* factors] in making due process determinations where parental rights are concerned,” it “does not weigh these factors against a ‘presumption’ that appointed counsel is required only if a person’s physical liberty is at stake.”\(^{134}\) Indeed, the court said, the state supreme court “specifically rejected, as a matter of California law, the contention that appointed counsel is required only when imprisonment is imposed.”\(^{135}\)

The court then applied the California Due Process Clause to the case, without the presumption “that appointed counsel is required only when physical liberty is at stake.”\(^{136}\) The state constitutional balancing test that the court applied differed somewhat from the *Mathews* test. In deciding whether there is a right to counsel, the court said that “we must examine the nature and magnitude of the interests involved, the possible consequences appellants face and the features which distinguish [this proceeding] from other civil proceedings.”\(^{137}\) Next, the panel explained, “[t]hese factors must then be balanced against the state’s interests.”\(^{138}\)

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\(^{131}\) *In re Jay R.*, 197 Cal. Rptr. at 681. The natural father, who was incarcerated, did not appear for trial. Id. at 675. The trial court found that the father had abandoned the child, and granted the adoption request pursuant to an adoption statute that made abandonment a ground for adoption. *Id.* The appellate court reversed the trial court’s order, pointing out that the stepfather petitioner had filed pursuant to a different adoption statute and had not alleged abandonment. *Id.* at 675-76.

\(^{132}\) *Id.* at 678 (citing *Salas v. Cortez*, 593 P.2d 226, 229-235 (Cal. 1979)).

\(^{133}\) *In re Jay R.*, 197 Cal. Rptr. at 678 n.7 (citing *In re Adoption of R.L.*, 312 A.2d 601 (Pa. 1973)). The court also cited a number of decisions finding a right to counsel in state state-initiated neglect proceedings. *Id.* The court identified the substantial degree of state involvement in the case:

A stepparent adoption differs from other parental termination cases in that it is not an action brought by the state and argued by state attorneys. But neither is [the stepparent] adoption proceeding a purely private dispute. The state is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child and establish a new relationship, in accordance with an extensive statutory scheme. The county welfare department must investigate and prepare a report and recommendation on each stepparent adoption and file the report with the court. The court may not order an adoption unless it considers this report and recommendation. If the consent of a parent is not required, the county adoption agency or State Department of Social Services must consent to the adoption as it did in this case. The court must decide where the child’s best interests lie.

*Id.* at 680 (citations omitted).

\(^{134}\) *Id.*

\(^{135}\) *Id.* (citations omitted). The court added: “California precedents do not give rise to such a presumption under the California Constitution and, indeed, hold just the opposite.” *Id.* (citations omitted).

\(^{136}\) *Id.*

\(^{137}\) *Id.* (alteration in original) (quoting *Salas*, 593 P.2d at 230).

\(^{138}\) *Id.*
The court then “examine[d] the nature of the proceedings to determine whether counsel is necessary to obviate the risk of erroneous and unfair results.”

Applying this test, the court emphasized that there was a great risk of error without counsel for the parent. For instance, “[a] parent who contests allegations of willful neglect may have to sustain a heavy burden of proof.” The court expressed concerns that a parent could not understand this or other important “[l]egal concepts [like] ‘willfulness’ and ‘lawful excuse.’” The parent also might not “be aware that the ‘year’ in question,” the period of time the petitioner must prove that the parent neglected the child, “is not limited to the year immediately preceding the filing of the petition, or what factors, such as imprisonment, may obviate a finding of willful neglect.”

The court balanced both “the compelling nature” of the parent’s “interest” and the risk of error against the state’s interests, and concluded that the state’s financial interest was “hardly significant enough to overcome private interests as important as those here,” and that “[t]he appointment of counsel need not delay the proceedings.” The court also aligned the interests of the state and those of the parent, saying:

The state has no legitimate interest in terminating a parent’s relationship with his child if he has not willfully neglected or abandoned that child. Appointment of counsel will make the fact-finding process more accurate, thereby furthering the state’s interest in terminating the rights of parents who do in fact neglect or abandon their children.

Balancing the factors, the court held that “due process requires appointment of counsel for indigent noncustodial parents accused of neglect in stepparent adoption

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140. Id. at 679-81.
141. Id. at 680. If a petitioner proves that “the noncustodial parent failed to provide for and communicate with the child for a year,” then the burden “shifts to the parent to prove he did not willfully fail to provide for or communicate with the child, or was unable to do so.” Id.
142. Id.
143. Id. (citation omitted).
144. Id. at 681 (quoting Lassiter, 452 U.S. at 28).
146. Id. For this proposition, the court in In re Jay R. cited Salas, 593 P.2d at 233, in which the California Supreme Court held that an indigent father who was the respondent in a paternity action was constitutionally entitled to appointed counsel. The Salas court said: “Appointment of counsel for indigent defendants will make the fact-finding process in paternity cases more accurate, thereby furthering the state’s legitimate interests in securing support for dependent children.” Id. It added that appointment of counsel “may also increase the likelihood that the man who is judicially determined to be a child’s father will provide support.” Id. at 233-34. In addition, counsel might induce fathers to enter into reasonable settlements with the state. Id. at 234. The Salas court concluded: “If the accuracy and fairness of paternity suits are improved by providing representation for indigent defendants, in the long run the state will actually further its legitimate interests in ascertaining the parentage of minor children and enforcing parental support obligations.” Id.
proceedings, if indigency is demonstrated and appointment of counsel is requested.\textsuperscript{147}

3. Florida

In \textit{O.A.H. v. R.L.A.},\textsuperscript{148} whether an indigent natural parent in a private adoption case is entitled to counsel was a question of first impression in Florida.\textsuperscript{149} In finding such a right,\textsuperscript{150} the Florida Court of Appeal for the Second District first addressed whether there was “state action” in the private adoption proceeding.\textsuperscript{151} In finding that there was “state action,”\textsuperscript{152} the Florida court cited \textit{M.L.B. v. S.L.J.},\textsuperscript{153} a private stepparent adoption case in which the United States Supreme Court found the requisite state action.\textsuperscript{154} The Florida court noted that the Supreme Court had concluded that “the challenged state action was the same” as in a state-initiated TPR proceeding.\textsuperscript{155} As in a private stepparent adoption case, in a state-initiated TPR proceeding, if the petitioner is successful, the result can be the “imposition of an official decree extinguishing, as no power other than the State can, the parent-child relationship.”\textsuperscript{156}

Turning to the merits, the Florida court applied principles developed by the Florida Supreme Court in two prior decisions: \textit{Potvin v. Keller},\textsuperscript{157} and \textit{In re D.B.},\textsuperscript{158} both of which were pre-\textit{Lassiter} juvenile dependency cases in which the state sought to terminate parental rights.\textsuperscript{159}

\textsuperscript{147} \textit{In re Jay R.}, 197 Cal. Rptr. at 678. The court in \textit{Irahetla v. Superior Court of Los Angeles County}, 83 Cal. Rptr. 2d 471, 476-77 (Cal. Ct. App. 1999), cites a number of decisions that it claims demonstrate that after \textit{In re Jay R.}, California courts adopted the \textit{Lassiter} physical liberty presumption. The court also notes that despite this alleged development, “a few courts have found a right to legal counsel in child support actions brought by a county.” \textit{Id.} at 477 (citations omitted). The California Supreme Court denied review in \textit{Irahetla}, \textit{(Irahetla v. Los Angeles County Superior Court, 1999 Cal. LEXIS 3975 (June 16, 1999))}, and to date the California Supreme Court has not said whether or not it agrees with the assessment in \textit{Irahetla} by the Second Appellate District, Division Two, of the Court of Appeal.

\textsuperscript{148} \textit{Id.} at 5. The stepfather petitioner argued the natural father had abandoned the child and asked the trial court to terminate the parental rights of O.A.H., making him the adoptive parent. O.A.H., who was incarcerated, asked the trial court to appoint counsel to represent him. \textit{Id.} at 4-5.

\textsuperscript{149} \textit{Id.} at 7.

\textsuperscript{150} \textit{Id.} at 5.

\textsuperscript{151} \textit{Id.} at 5.

\textsuperscript{152} \textit{Id.} at 6.

\textsuperscript{153} 519 U.S. 102 (1996).

\textsuperscript{154} See discussion of \textit{M.L.B.}, supra Part I.

\textsuperscript{155} \textit{O.A.H.}, 712 So. 2d at 6.

\textsuperscript{156} \textit{Id.} The court said: “Our analysis of the issue must begin with a determination whether contested adoption proceedings . . . involve state action so as to give rise to due process concerns.” \textit{Id.} at 5. It is not clear whether the court was trying to identify “state action,” in addition to the state decision to deny counsel, to determine whether constitutional provisions applied at all, or whether it assumed that constitutional provisions applied, and it was looking for an additional degree of state involvement to justify its recognition of a right to counsel. \textit{See infra} Part II(C)(1), arguing that the only “state action” that is necessary to make constitutional provisions applicable is the state’s failure to provide counsel.

\textsuperscript{157} 313 So. 2d 703 (Fla. 1975).

\textsuperscript{158} 385 So. 2d 83 (Fla. 1980).

\textsuperscript{159} \textit{O.A.H.}, 712 So. 2d at 6-7.
In *Potvin*, the Florida Supreme Court established a case-by-case test to determine when a lawyer should be appointed to represent an indigent parent. Under this test, trial judges must consider:

the relevant circumstances in each case . . . includ[ing] at least: (i) the potential length of parent-child separation, (ii) the degree of parental restrictions on visitation, (iii) the presence or absence of parental consent, (iv) the presence or absence of disputed facts, and (v) the complexity of the proceeding in terms of witnesses and documents.

While in *D.B.*, the state supreme court held there was an absolute right to counsel, "where the proceedings can result in permanent loss of parental custody." The court in *D.B.* recognized that in juvenile dependency proceedings, "there is a constitutionally protected interest in preserving the family unit and raising one's children." The court explained that, "[b]ecause the interest at stake is so important and fundamental in nature, we recognize, consistent with our holding in *Potvin*, that a right to counsel may be required in certain circumstances." The court held "that counsel is necessarily required under the due process clause of the United States and Florida Constitutions, in proceedings involving the permanent termination of parental rights to a child, or when the proceedings, because of their nature, may lead to criminal child abuse charges."

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161. *Id.* at 706. In *Potvin*, the Florida Supreme Court followed the lead of the United States Court of Appeals for the Ninth Circuit in *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974). *Cleaver* was a class action in which plaintiffs sought appointment of counsel to indigent parents in all juvenile dependency proceedings. *Id.* at 941. The Ninth Circuit held that procedural due process required state trial courts to appoint counsel on a case-by-case basis. *Id.* at 945. The court said: "The determination should be made with the understanding that due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child." *Id.* In *Potvin*, the Florida Supreme Court said: "The *Cleaver* criteria not only comport with constitutional due process requirements, they offer a sensible set of guidelines for determining the inherent unfairness of a custody proceeding." *Potvin*, 313 So. 2d at 706 (footnote omitted).
162. *In re D.B.*, 385 So. 2d at 87. The *D.B.* court reiterated that in other dependency cases, "the constitutional right to counsel is not conclusive; rather, the right to counsel will depend upon a case-by-case application of the test adopted in *Potvin v. Keller*." *Id.* (citation omitted). The court reversed the circuit court's decisions that indigent parents and children were entitled to appointment of counsel in all juvenile dependency proceedings. *Id.* The circuit court had based its decision on *Davis v. Page*, 442 F. Supp. 258 (S.D. Fla. 1977).
164. *Id.* at 90.
165. *Id.* The court said "where there is no threat of permanent termination of parental custody, the test should be applied on a case-by-case basis." *Id.* at 91. The court added cryptically, that even "[w]here the trial judge finds no constitutional right to counsel . . ., he may nonetheless use his historical authority to provide legal assistance." *Id.* The court also reversed the lower court's order that counsel be appointed to represent children in all dependency proceedings. *Id.* The court summarized its holding as follows:

*Where permanent termination or child abuse charges might result, counsel must be appointed for (1) the natural married or divorced indigent parents of the child, (2) the natural*
In _O.A.H._, the appeals court concluded that "the principles described by the _D.B._ court" were controlling within their case.\textsuperscript{166} The court found that considering "the character of the interest involved and the nature of the proceeding," there was no significant difference between a state-initiated and private TPR proceeding.\textsuperscript{167} Both the state-initiated proceeding and private TPR proceeding have the ability to deprive parents of the right to their children and both can lead to the adoption of the child by a third party.\textsuperscript{168}

The court then turned to the effect of the Supreme Court's decision in _Lassiter_, rendered after the Florida Supreme Court's _D.B._ decision. It read _Lassiter_ as establishing a "case-by-case" test, disregarded the presumption against counsel, noted that the Supreme Court had acknowledged that "informed opinion" endorsed the categorical right to counsel that Florida had recognized, and emphasized that after _Lassiter_, "Florida's Supreme Court has continued to confirm that _D.B._ stands for the proposition that a constitutional right to appointed counsel arises when the proceeding can result in a permanent loss of parental rights."\textsuperscript{169}

In a subsequent decision, Florida's Fifth District Court of Appeal agreed with _O.A.H._, holding that "an indigent mother facing involuntary termination of parental rights in an adoption proceeding has a constitutional right to appointment of trial and appellate counsel."\textsuperscript{170} The court dealt with _Lassiter_, in part, by stating:

In our federal system of jurisprudence, the United States Constitution establishes the minimum level of due process protections for all people, but state constitutions and laws may provide additional due process protections.

In the area of termination of parental rights, the Florida due process clause provides higher due process standards than the federal due process clause.\textsuperscript{171}

4. Kansas

In _S.C.R. v. C.L.C. (In re Application to Adopt H.B.S.C.)_,\textsuperscript{172} the Kansas Court of Appeals held that an indigent parent in a private adoption case was entitled to

\textsuperscript{166} Id. at 6.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 7.
\textsuperscript{171} Id. at 790 (citation omitted). In _G.C. v. W.J._, 917 So. 2d 998, 999 (Fla. Dist. Ct. App. 2005), the First District cited _D.B._ and _O.A.H._ in holding that in an adoption proceeding, an indigent parent is entitled to the appointment of counsel.
\textsuperscript{172} 12 P.3d 916 (Kan. Ct. App. 2000).
appointment of counsel on appeal. The magistrate court, which initially heard the matter, appointed counsel to represent the natural father pursuant to a state statute. Both the magistrate court and the state district court, which heard the case de novo on appeal, granted the adoption request. At the stepfather’s request, the district court prohibited appointed counsel from representing the natural father on appeal. The court based its prohibition on its reading of the statute.

The Kansas Court of Appeals reversed the district court’s decision, holding that the natural father was entitled to appointed counsel on appeal. The court relied heavily on In re Brehm, a state-initiated dependency proceeding it decided two years prior to Lassiter. The court in Brehm acknowledged that, “there is no specific legislative authority for the appointment of counsel for an indigent person on appeal from an order severing parental rights.” The court followed with:

However, there is no doubt that the relationship of natural parent and child is a fundamental right of which neither may be deprived without due process of law as guaranteed by the Constitution of the United States and the Kansas Bill of Rights. Nor can there be any doubt that, in such case, the right to counsel, either retained or appointed, is essential to due process.

The S.C.R. court then compared state-initiated TPR proceedings to private adoption proceedings, and said: “A stepparent adoption differs from other parental termination cases because it is not brought by the State; however, such proceedings are not a purely private dispute either.” Instead, the state is involved in both proceedings; “[a]doption, not recognized under the common law, is wholly a creature of statute. In order to accomplish an adoption, a legislatively created scheme must be followed regarding notice, hearing, consent, and pleadings, whether it is an independent or agency adoption in Kansas.”

It followed, in the Court’s view, that given the similarities in the two types of proceedings, there should be a right to counsel in adoption cases as there was in state-initiated TPR proceedings.

173. Id. at 921-22.
174. Id. at 919 (quoting Kan. Stat. Ann. § 59-2136(h)). The statute provided: “If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated . . . .”
175. Id.
176. Id.
177. Id.
180. Id. at 270.
181. Id. The court in Brehm also found that “there is inherent authority in courts to provide for counsel in order to provide a fair and impartial hearing of matters involved in severance of parental rights.” Id. at 271.
182. S.C.R., 12 P.3d at 921.
183. Id. (citations omitted). In holding that the father was constitutionally entitled to counsel on appeal, the court in S.C.R., which was decided in 2000, did not cite Lassiter.
184. Id. at 921-22.
B. Important Features of the Private Adoption Cases

1. Exercises in Federalism

In explaining Florida's rejection of Lassiter, the Florida Court of Appeal said simply: "[T]he Florida due process clause provides higher due process standards than the federal due process clause." The court cited the Florida Supreme Court decision in Traylor v. State in support of the Florida courts' rejection of Lassiter.

In Traylor, the Florida high court defended the right of state courts to interpret their state bills of rights more broadly than the Supreme Court does comparable federal provisions. The court began by listing the costs and weaknesses of federal judicial supremacy. Once the United States Supreme Court "settles a matter, further experimentation with potentially rewarding alternative approaches in other jurisdictions is foreclosed." This is true despite the fact that "a ruling that may be suitable in one [locality] may be inappropriate in others." Moreover, "the [Supreme] Court oftentimes is simply unfamiliar with local problems, conditions and traditions."

By comparison, "a state court's decision construing its own constitution is controlling only as to courts within that state; the ruling will not stifle the development of alternative methods of constitutional analysis in other jurisdictions." Moreover, "no court is more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state's own high court."

History, the Florida Supreme Court argued, also supports an independent role for state courts. It said: "[S]tate courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms. State constitutions were the initial and prime charters of individual rights throughout most of our nation's existence."

The independence of state courts, of course, is qualified. As a result of the Supremacy Clause, state courts are bound to comply with the minimum constitutional rights established by the United States Supreme Court. They can, however, develop more protective rights in interpreting their own constitutions.

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185. M.E.K., 921 So. 2d at 790.
186. 596 So. 2d 957 (Fla. 1992).
187. M.E.K., 921 So. 2d at 790.
188. Traylor, 596 So. 2d at 961.
189. Id.
190. Id.
191. Id. at 962.
192. Id.
193. Id. at 961. The court pointed out that prior to 1776, "most of the original thirteen colonies had adopted constitutions with provisions protecting individual rights." Id. (quoting Mary A. Crossley, Note, Miranda and the State Constitution: State Courts Take a Stand, 39 VAND. L. REV. 1693, 1696 (1986)). For many years after the adoption of the federal Bill of Rights, "state constitutions were the primary documents protecting the liberties of the people from governmental interference." Id. at 962. Today, "[s]tate courts function daily as the prime arbiters of personal rights." Id.
194. U.S. CONST. art. VI, cl. 2.
"[T]he federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling."\textsuperscript{195} This, the Florida Supreme Court argued, is a basic tenet of Federalism:

Federal and state bills of rights . . . serve distinct but complementary purposes. The [F]ederal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation.\textsuperscript{196}

The court concluded by noting the factors that might justify a state court in giving a more rights-protective interpretation to a provision in its constitution:

\[W\]hen called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state’s own general history, and finally any external influences that may have shaped state law.\textsuperscript{197}

2. Differences from \textit{Lassiter} in the Content and Application of Procedural Due Process

a. Whether to Adopt and How to Apply the \textit{Lassiter} Presumption Against a Right to Counsel

The state courts in the adoption cases exercised their Federalism-based right to go beyond \textit{Lassiter} by rejecting the \textit{Lassiter}-based presumption against the appointment of counsel or by applying state decisions that they thought were inconsistent with it.\textsuperscript{198} According to the United States Supreme Court, the \textit{Lassiter} presumption arises from its right-to-counsel decisions in criminal cases.\textsuperscript{199} The evolution of the right to counsel in the states may differ substantially from the federal experience.\textsuperscript{200} These decisions demonstrate that \textit{Lassiter} does not extinguish pre-\textit{Lassiter} right-to-counsel decisions based on state law, and a state

\textsuperscript{195} Traylor, 596 So. 2d at 962.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} See \textit{In re Jay R.}, 197 Cal. Rptr. at 679 (holding that “California precedents do not give rise to such a presumption under the California Constitution and, indeed, hold just the opposite”); \textit{O.A.H.}, 712 So. 2d at 7; \textit{S.C.R. (In re H.B.S.C.)}, 12 P.3d at 920-21.
\textsuperscript{199} \textit{Lassiter}, 452 U.S. at 26-27.
\textsuperscript{200} See, e.g., \textit{In re Jay R.}, 197 Cal. Rptr. at 679 (recognizing no such presumption under California constitutional law).
court can build on pre-existing state authority, and reason by analogy, to substantially expand the right to counsel in that state.\footnote{See Pastore, supra note 2 (noting that many courts that established a categorical right to counsel in certain civil cases prior to Lassiter maintained those rulings after Lassiter).}

In other states, the highest state courts have not decided whether to adopt a Lassiter-type presumption. They are free to choose to accept the view of the Lassiter majority or that of the dissenters, whichever they believe is more persuasive and consistent with their constitutional principles, precedent, and traditions. It is wholly consistent with the principles of Federalism to reject the presumption as a matter of state constitutional law, as the Alaska Supreme Court did in In re K.L.J.\footnote{Id. at 283-85.}

Stripped of the presumption, Lassiter largely becomes Mathews. In the Alaska,\footnote{In re Jay R., 197 Cal. Rptr. at 678-81.} California,\footnote{O.A.H., 712 So. 2d at 6-7.} and Florida\footnote{The California test is similar to Mathews, but not identical. See In re Jay R., 197 Cal. Rptr. at 679 (applying a test which examines “the nature and magnitude of the interests involved, the possible consequences . . . and the features which distinguish [the present proceeding] from other civil proceedings,” balanced against the state’s interest).} adoption cases, the central parts of the opinions were the applications of the Mathews’ test, or one like it,\footnote{See, e.g., In re K.L.J., 813 P.2d at 279-80 (holding that the state, first and foremost, has an interest in the children, and to that end, shares the parent’s interest in an accurate and just decision).} to the facts to produce not a case-by-case decision, but rather a categorical right to counsel.


In the state adoption cases, there is universal acceptance of the fundamental importance of a parent’s interests in his or her children. There are, however, important differences from Lassiter and from one another, in how the state courts defined the state interests and in whether and how they aligned them with the individual interests. These differences can affect the outcome of the Mathews’ balancing test, which the state courts in the adoption cases almost uniformly accepted and applied.

The state courts often emphasize the various ways in which the state and parents share an interest in accurate decisions (with the state’s interest deriving both from its interest in the children and in fairness to the parent)\footnote{See, e.g., In re Jay R., 197 Cal. Rptr. at 681 (holding that “appointment of counsel will make the fact-finding process more accurate, thereby furthering the state’s interest in terminating the rights of parents who do in fact neglect or abandon their children”) (emphasis in original).} and sometimes identify state interests in appointing counsel for the parents that are not identified in Lassiter, e.g., enhancing fact-finding, including facts that may establish wrong-doing by parents.\footnote{Id. at 278.}

c. Different Assessments of and Tolerance for the Risk of Error

The major differences from Lassiter in the application of the Mathews’ test were in the ways in which the state courts in the adoption cases assessed the risks
of error without counsel and in their more limited tolerance of erroneous decision-making.

In *Lassiter*, the Supreme Court makes high risks of errors ("at their peak")\(^{209}\) a factor that can rebut the presumption against counsel.\(^{210}\) Although the Court pays lip service to the risk of an erroneous decision when a litigant proceeds pro se,\(^{211}\) it either assumes the pro se norm is one of limited risk, or accepts as constitutionally tolerable a high degree of risk, or both.

By contrast, the opinions in *In re K.L.J.*\(^{212}\) and *In re Jay R.*\(^{213}\) contain much more detailed and realistic assessments of the risk of error when litigants represent themselves, and much less tolerance of erroneous decision-making when the private interest, loss of a child, is so substantial and the state interests are relatively insubstantial. These differences are the primary reasons the state courts strike the ultimate balance in favor of a categorical, rather than case-by-case, right to counsel.\(^{214}\)

State judges are in a good position to understand and identify the risks of error in a particular state proceeding. State trial judges preside in these proceedings, and state appellate judges regularly review them. In supervisory, administrative, and rule-making roles, state judges regularly review and revise the procedures and policies that shape proceedings. State judges know whether or not the state provides support systems for pro se litigants, like legal information, simplified pleading forms, self-help kiosks, limited legal advice, and lawyer-of-the-day programs. These forms of support can help to reduce the risk of error in some types of cases in which disputes are limited or claims are uncontested.

The categorical decisions of the state courts in the adoption cases are justified by the real-world limitations of the average pro se litigant in adoption cases. With the rarest exception, such a litigant is simply incapable of understanding the law and effectively marshalling the facts at an adversarial hearing. Rather than designing a presumption based on the exceptional pro se litigant, as the Supreme Court does in *Lassiter*, the state courts construct their categorical rules on the predominant characteristics of self-represented litigants in litigation.

\(^{209}\) *Lassiter*, 452 U.S. at 31.
\(^{210}\) *Id.*
\(^{211}\) *Id.* at 28-31.
\(^{212}\) *In re K.L.J.*, 813 P.2d at 278-80.
\(^{213}\) *In re Jay R.*, 197 Cal Rptr. at 680-81.
\(^{214}\) In a state-initiated dependency and neglect proceeding in *State ex rel. T.H. v. Min.*, 802 S.W.2d 625, 627 (Tenn. Ct. App. 1990), the court reversed the failure of the trial court to appoint counsel for parents. It applied the *Lassiter* test, but noted that the risk-of-error factor was the most important because "the competing interests of the parents and the state are evenly balanced." *Id.* at 626. The court identified a number of factors that guided it in its risk-of-error analysis. *Id.* at 627. In an excellent analysis of post-*Lassiter* litigation, Clare Pastore says:

Rigorous application of these factors would certainly seem to suggest that courts should grant counsel in many termination cases. Indeed, many Tennessee decisions have reversed or remanded termination decisions absent any record that the trial court considered these factors, or where the court did not advise indigent parents of their right to request counsel, even while the court described facts that made termination seem a foregone conclusion. Significantly, however, Tennessee courts have been unreceptive to the few reported claims for counsel outside of the termination-of-parental-rights context.

Pastore, *supra* note 2, at 189.
C. Refining and Adding Arguments

1. Clarifying the State Action Issue

Most of the state courts in the adoption cases properly did not require proof of "state action" for the purpose of deciding to make state constitutional provisions applicable, the traditional constitution-triggering function of the state action doctrine. Instead, they accepted, without discussing it, that the failure of the state to provide lawyers to the respondents satisfied the constitutional-triggering state action requirement. They did consider the nature and degree of state involvement in the adoption process in their substantive analysis of the right to counsel.\textsuperscript{215}

There is language in some of the above adoption cases,\textsuperscript{216} however, as well as holdings and language in other such cases,\textsuperscript{217} either suggesting or demonstrating that the courts required enhanced proof of state action in order to trigger constitutional protections; that is, more than the state’s failure to provide counsel. These courts appear to require threshold proof of pervasive state involvement in the proceeding to invoke constitutional protections.\textsuperscript{218} At best, the discussions are confusing.

In imposing a heightened burden of proof to establish state action, these decisions make two mistakes. The first is in looking beyond the failure of the state

\textsuperscript{215} See, e.g., In re K.L.J., 813 P.2d at 283 (noting that adoption is "wholly a creature of the state"); In re Jay R., 197 Cal. Rptr. at 679-80 (noting that the state is "called upon to exercise its exclusive authority to terminate the legal relationship between parent and child").

\textsuperscript{216} See, e.g., M.E.K., 921 So. 2d at 790 (reversing lower court determination that there was no state action in adoption proceeding, and holding that "judicial termination of parental rights in a privately initiated involuntary adoption proceeding is state action that is sufficient to trigger due process protection to an indigent parent"); O.A.H., 712 So. 2d at 5-6 (see discussion supra in text accompanying note 148-56).

\textsuperscript{217} See, e.g., Rosewell v. Hanrahant, 523 N.E.2d 10, 12 (Ill. App. Ct. 1988) (holding that there was no state action in the adoption proceeding and, therefore, no right to counsel); In re K.L.P., 735 N.E.2d at 1074-77 (distinguishing United States Supreme Court state action decisions from a private adoption case involving two children, and finding state action in the latter because the adoption process was "a comprehensive statutory scheme," and because several years prior to the adoption proceeding, the State "Department of Children and Family Services" had taken "protective custody of [one of the children] and then filed petitions for adjudication of wardship, alleging that she was an abused and neglected minor"). The Illinois Supreme Court affirmed the state action finding. In re K.L.P., 763 N.E.2d 741, 751 (Ill. 2002). In doing so, it cited major U.S. Supreme Court state action decisions Shelley v. Kraemer, 334 U.S. 1 (1948), and Reitman v. Mulkey, 387 U.S. 369 (1967), but did not rest its decision on them. Rather, it said: "The State filed the initial petition under the Juvenile Court Act, seeking adjudication of the minor children as neglected . . . . The girls were placed in the custody of their father and stepmother as a direct result of this state action." In re K.L.P., 763 N.E.2d at 751. The court found that the subsequent "adoption petition, although filed by private parties, essentially took the place of the petition to terminate parental rights that the State was authorized, but declined, to file." Id. Both Illinois appellate courts reached the right conclusion — that there was state action — but for the wrong reasons. The county's action in denying counsel to the mother in the adoption proceeding was the only governmental action necessary to trigger the application of constitutional provisions. See supra text accompanying notes 207-214. See infra text accompanying notes 219-30. On the merits, the Illinois Supreme Court affirmed the intermediate appellate court's holding that the failure to provide counsel in adoption proceedings, while providing it in state-terminated TPR proceedings, denied the mother equal protection under both the United States and Illinois Constitutions. In re K.L.P., 763 N.E.2d at 752-53.

\textsuperscript{218} See decisions supra notes 207 and 208.
to provide counsel. This failure, by itself, satisfies the state action requirement. In all of the adoption cases, the state has acted by failing to provide a lawyer to a litigant, or more immediately, a state court has acted by failing to do so. Further state action should not be necessary. It was never an issue in the long line of right-to-counsel decisions by the United States Supreme Court in which litigants argued that states had failed to provide them with lawyers at trial, on appeal, on discretionary review, and in the post-conviction process. To respond that these were criminal cases, not civil cases, does not distinguish them for purposes of state action. A state’s administration of its civil justice system is as much state action as is its administration of its criminal justice system. For this reason, there was no state action issue in Lassiter, a civil case. Admittedly, the State was a party in Lassiter, but that does not affect the state action issue. The issue is whether there is a “sufficiently close nexus between the State and the challenged action” to attribute the action to the state. The challenged action in Lassiter was the failure of the State to provide a lawyer to Ms. Lassiter. It was this action — more accurately, this failure to act — that triggered the application of the Constitution.

The second mistake in these cases was in applying the wrong state action rules — rules designed to identify when the State should be responsible for an ostensibly private act. The issue in those state action cases was whether that ostensibly private act should be attributed to the State because a state agent coerced or encouraged the private actor to do it, acted as a joint participant with the private actor, or because the state agent and private actor were so entwined with one another or symbiotically-related. The act of the State in denying counsel to a

219. Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment of the Constitution, providing that in all criminal prosecutions the accused shall enjoy right to assistance of counsel for his defense, is made obligatory on the states by the Fourteenth Amendment, and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him).
220. Douglas v. California, 372 U.S. 353 (1963) (holding that indigent defendants were denied equal protection of the law where their convictions were decided without benefit of counsel).
221. Ross v. Moffitt, 417 U.S. 600 (1974) (holding that the appointment of counsel requirement, for indigent state defendants on their first appeal, would not be extended to require counsel for discretionary state appeals and for application for review in the Supreme Court because such appointment is not required by the due process and equal protection clauses of the Fourteenth Amendment).
222. Murray v. Giarratano, 492 U.S. 1 (1989) (holding that there is no federal constitutional right to counsel for indigent prisoners seeking state post-conviction relief).
225. See decision supra note 205.
226. Blum v. Yaretsky, 457 U.S. 991 (1982) (holding that Medicaid recipients failed to establish “state action” in a nursing home’s decisions to discharge or transfer Medicaid patients to lower levels of care).
227. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (discussing a debtor who was deprived of his property through state action and a creditor who participated, under the color of state law, in causing that deprivation).
229. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that the exclusion of a person, based solely on account of his or her skin color, from a restaurant that was operated by a private owner, who was under a lease, in a building financed by public funds and owned by the parking
litigant is not a private act, and therefore this line of state action cases is not applicable.230

This is not to say that other forms of state involvement are irrelevant in Civil Gideon cases. On the contrary, such involvement may be relevant in the substantive right-to-counsel analysis.

For example, in Boddie v. Connecticut,231 in which the Supreme Court invalidated a fee requirement in divorce cases, the Court did emphasize that states "oversee many aspects" of the "institution" of marriage,232 and that a married couple cannot divorce "without state approval."233 This, however, was not to establish state action, which was not an issue, but rather to describe the substantial weight of the litigant's interest in filing and litigating a divorce action. The Court said: ""The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained."234

Similarly, in M.L.B. v. S.L.J.,235 in which the high court invalidated an appellate filing fee in an adoption case, the panel noted that the case "involv[ed] the State's authority to sever permanently a parent-child bond."236 This was so, even though "the termination proceeding in the case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency . . ."237 The Court's comments were directed not at a state action issue (again, there was none), but rather at the importance of the litigant's interest in her children. In sum, there should be no state action issue in Civil Gideon litigation.

2. Adding a Missing State Interest to the Mathews' Balance

In identifying the state interests as part of the Mathews test, courts usually mention cost, judicial efficiency, informality, and expedition.238 What usually is

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230. Nor is the issue analogous to that in Shelley v. Kraemer, 334 U.S. 1 (1948). In Shelley, the Court held that by enforcing restrictive racial covenants, judges were enforcing "the common-law policy" of states, and therefore providing the required state action to invoke Constitutional requirements. Id. at 19-20. The actions challenged were those of private individuals, and there was state action through the actions of the judges in enforcing the private agreements. The analogue to the Civil Gideon cases is not Shelley; rather, it would be an action by a judge alone, for example, ordering that only white people could testify in his or her court. There is no doubt that this would satisfy the state action requirement. The failure to provide counsel is analogous.

232. Id. at 376.
233. Id.
234. Id. at 381 n.8 (quoting Jeffreys v. Jeffreys, 296 N.Y.S. 2d 74, 87 (N.Y. Sup. Ct. 1968)).
236. Id. at 116.
237. Id. at n.8.
238. See, e.g., Richard B. v. State, 71 P.3d 811, 829 (Alaska 2003) (evaluating “additional fiscal or administrative burdens on the government”); in re K.L.J., 813 P.2d at 280 (stating concerns about “cost” and “lengthening of judicial procedures”); Kent K. v. Bobby M., 110 P.3d 1013, 1021 (Ariz. 2005) (noting two state interests, the best interests of the child and “reducing the cost and burden of [the proceedings]” (citation omitted); in re Jay R., 197 Cal. Rptr. at 681 (explaining that the “state’s interest is largely financial”); in re Alexander V., 613 A.2d 780, 785 (Conn. 1992) (identifying state interest in
missing in this list, however, is any mention of the state interest in enforcing the law. What is surprising about this omission, is that this law enforcement function is the raison d'ètre of government. It underlies the Social Compact and predates the Welfare State. The law enforcement function is the primary justification for government itself, and it inheres in state sovereignty.239

In criminal cases, the government directly enforces the law. In civil cases, it enforces the law by creating and administering judicial (and other) systems of justice. These largely are adversary systems that work fairly if they are balanced. They are balanced, in major part, when there is a lawyer on both sides.

So when the state provides counsel to an indigent party who opposes a represented party, it legitimates itself by helping to enforce laws that it has enacted and is duty-bound to enforce, thereby performing its basic role.

The early societies whose models of government and laws most directly influenced our own understood and accepted their obligation to make law accessible to their subjects and citizens by providing representation to them. Elsewhere, I have traced part of this history.240 It ran from Rome, where “the poor’s advisor and advocate was the patrician head of the extended Roman household,”241 through England beginning in the “early Middle Ages” when church advocates or “defensores pauperum” represented the poor “first in ecclesiastical courts and later, with lay advocates, in Rome’s secular courts.”242 In time, “[w]ith the conversion of England, Rome’s legal aid tradition gradually became part of England’s ecclesiastical court practice.”243 In these courts, advocates were duty-bound to represent the poor. “As a private bar developed, the duty to represent the poor became partly its responsibility.”244 In effect, the Crown agreed to allow private lawyers to practice if they represented the poor as part of their practice, thereby helping to discharge the Crown’s civil law enforcement duty. In this way, the King recognized that “[t]he notion of personal sovereignty carried with it a paternal, or at least a proprietary, duty to enforce fairness and right between subject and subject.”245

The centerpiece of this legal aid effort was created by Parliament, at the King’s urging, with “the enactment in 1495 of 11 Hen. 7, ch. 12.”246 This statute, among other things, required English judges, including judges of the King’s Bench, to appoint lawyers to represent indigent parties in civil actions.

The right to counsel granted by the Act was broad. It applied to “every pover persone” who “shall have [a] cause of accion” against “any persone” who may be “within the realme.” It provided for the pro bono appointment of “learned

239. See JOHN RAWLS, A THEORY OF JUSTICE 4-5 (rev. ed. 1999) (“Justice is the first virtue of social institutions.”).
241. Id. at 33.
242. Id. at 35-36.
243. Id. at 36.
244. Id. at 39 (footnote omitted).
245. Id. at 41 (alteration in original).
246. Millemann, supra note 237, at 42 (footnote omitted).
Counsell and attorneys,” both to draft and prepare writs and litigate the cases. It governed in “all such suytes to be made afore the Kingis Justices,” “Barons of his Eschequer,” “and all other Justices in Courtes of Recorde.”

Remarkably, this statute, in partnership with 23 Hen. 8, ch. 15, was the backbone of the English legal aid system for almost four hundred years.

This history illustrates the point that the state has a compelling interest in providing lawyers to the poor to help them implement its law, and thereby to perform its duty. This state interest should be at least as well-accepted today in our constitutional democracy as it was in fifteenth-century England. This interest should be, but most often is not, given weight in the procedural due process cases through the Mathews balancing process. When appointed counsel balances the adversary process, and thereby helps to implement the law, counsel is helping that state do what it is obligated to do. This ought to weigh heavily on the pro-counsel side of the Mathews scale.

CONCLUSION

In this article, I argue that it should be reasonably possible to substantially expand the right to counsel in civil cases through litigation in state courts based on the due process provisions of state constitutions. I contend that the Supreme Court’s decision in Lassiter v. Department of Social Services, while a potential obstacle, should not foreclose such litigation. Even in those jurisdictions in which the highest courts have fully accepted Lassiter, there should be room to argue that the Lassiter presumption against counsel in cases that do not threaten physical liberty is a weak one, and that it can be overcome through fact-based proof in a particular category of cases that there is a high risk of erroneous decisions without counsel. State courts that accept Lassiter still must decide for themselves how much risk of error they will tolerate, how much risk is posed by pro se litigation in particular cases, and what to do if the ultimate balance puts them in equipoise.

In Watson v. Division of Family Services the Delaware Supreme Court interpreted Lassiter in deciding that the decision to appoint counsel should be left

247. Id. at 42-43.
248. Id. (footnotes omitted). I note that 11 Hen. 7, ch. 12 may well be more than important history; there are compelling arguments that it is embodied in the law of many states today. “When the English settlers came to the New World they carried much of the English law with them. Much of that law was embodied in state constitutions and declarations of rights.” Id. at 43. This was done through constitutional provisions that incorporated into a state’s law those parts of English law, as of 1776, that had not been repealed or nullified by disuse. Id. at 43-44 (footnotes omitted). “The pro bono statute, 11 Hen. 7, ch. 12, is one law the settlers carried” with them, and there are good arguments it remains effective today. Id. at 43. In Frase, 840 A.2d at 129-31, Ms. Frase made this argument, but the court did not reach it.
250. See supra Part I.
251. Id.
to trial judges to determine on a case-by-case basis.\textsuperscript{252} The court noted that it had adopted the \textit{Lassiter} case-by-case approach for appointment of counsel in separate, state-initiated TPR proceedings.\textsuperscript{253} The court observed that with this approach “Delaware judges \textit{routinely} appoint counsel to represent indigent parents” in TPR proceedings.\textsuperscript{254} Further, the court expressed its belief that based on the case-by-case holding in \textit{Watson}, Family Court judges will decide, “\textit{probably routinely}, that the due process provisions in the United States Constitution and the Delaware Constitution require the appointment of counsel . . . [in] dependency and neglect proceedings,” as well.\textsuperscript{255}

There are several possible explanations for the broad scope of the Delaware court’s right-to-counsel rulings. First, it added a refinement to the \textit{Lassiter} equation from one of its prior decisions.\textsuperscript{256} After stating that “the presumption against the right to counsel except where personal liberty is at stake must be weighed against the \textit{Eldridge} factors,”\textsuperscript{257} it said that “should one side of the analysis not clearly outweigh the other, the [trial judge] should err on the rule of appointing counsel in order to further the due process right to fundamental fairness in judicial proceedings.”\textsuperscript{258} If trial courts are applying this “tie-goes-to-the-runner” principle, it could explain their routine appointment of counsel practice.

Second, although application in \textit{Watson} of the first two \textit{Mathews’} factors tracks that in \textit{Lassiter}, the application of the risk-of-error factor is very different.\textsuperscript{259} The Delaware Supreme Court identifies many sources of error: (1) from the outset of dependency and neglect proceedings, indigent parents are the only parties who do not have appointed legal representation;\textsuperscript{260} (2) parents in these proceedings are “often dysfunctional, usually due to . . . substance abuse”,\textsuperscript{261} (3) indigent parents are particularly ineffective litigants;\textsuperscript{262} and (4) it is unrealistic to expect these parents to “turn their lives around” and thereby prove that they should regain parental rights “without an attorney to advocate their need for the reunification

\textsuperscript{252} \textit{Watson} v. Division of Family Services, 813 A.2d 1101, 1107-09 (Del. 2002). Dependency and neglect proceedings can result in the placement of children in foster care, and are the initial step in terminating parental rights. \textit{Id.} at 1106. TPR proceedings are a separate, final stage in the process. \textit{Id.} at 1108.

\textsuperscript{253} \textit{Id.} at 1108.

\textsuperscript{254} \textit{Id.} (emphasis added).

\textsuperscript{255} \textit{Id.} at 1109 (emphasis added). Indeed, at the time of the Court’s decision in \textit{Watson}, Delaware’s Family Court had begun to “routinely” appoint “counsel to represent indigent parents in dependency and neglect proceedings.” \textit{Id.} Further, the General Assembly had “begun to provide limited funding to the Family Court” for this purpose. \textit{Id.}

\textsuperscript{256} \textit{Id.} In \textit{In re Carolyn S.S.}, 498 A.2d 1095, 1098 (Del. 1984), this court adopted the \textit{Lassiter} presumption in construing the Delaware Constitution due process clause to provide for right of appointment to be decided on a case-by-case basis instead of holding that there was a fixed rule of entitlement to counsel for indigent parents in all termination proceedings. \textit{Id.} at 1108. The court in \textit{Watson} determined that the Delaware Constitution likewise requires a trial judge to decide whether to appoint counsel for indigent parents in a dependency and neglect proceeding on a case-by-case basis. \textit{Id.} at 1109.

\textsuperscript{257} \textit{Id.} at 1110.

\textsuperscript{258} \textit{Watson}, 813 A.2d at 1110 (quoting \textit{Black v. Div. of Child Support Enforcement}, 686 A.2d 164, 169 (Del. 1996)).

\textsuperscript{259} \textit{Id.} at 1110-11.

\textsuperscript{260} \textit{Id.}

\textsuperscript{261} \textit{Id.} at 1110-11.

\textsuperscript{262} \textit{Id.} at 1111.
resources that are available through the [State agency]." The court’s risk-of-error analysis thus encompassed future decisions related to potential reunification, as well as immediate ones.

Third, there were other right-to-counsel advocates in Delaware whose work supported the court’s decision in Watson. The Delaware Legislature had provided limited funding for representation of indigent parents in dependency and neglect proceedings prior to Watson, and a Court Improvement Project sponsored by the Delaware Supreme Court had recommended that both indigent parents and children be represented "from the inception of a dependency and neglect proceeding." The Lassiter case-by-case approach, legislative and other non-litigation strategies thereby complemented each other, likely producing more in the way of court-ordered representation than any one would have by itself.

The better state court response to Lassiter, however, is to reject its no-counsel presumption and case-by-case approach as a number of state courts have done in adoption cases. These decisions rest on both procedural due process and equal protection grounds. These courts either have based their rejections of Lassiter on pre-Lassiter state decisions, or, writing on a clean slate, have decided that the dissenters in Lassiter were simply more persuasive than the Justices in the majority. Both sets of courts relied heavily on their assessments of the risks of erroneous decisions without counsel and their more limited tolerance of erroneous decisions. They concluded that the risk of error without counsel is so prevalent in adoption proceedings that a categorical right-to-counsel rule is required. In so doing, they acted in the best traditions of federalism.

The next step would be to recognize a right to counsel in child custody cases, at least in those which one parent may lose custody entirely (i.e., no shared custody) and the other party is represented. In recognizing a right to counsel in adoption cases in In re K.L.J., the Alaska Supreme Court built upon Flores v. Flores, a custody case in which the court earlier had recognized a right to counsel. In Flores, the court held that the Due Process Clause of the Alaska Constitution gave to a respondent a right to counsel in "a private child custody proceeding in which her spouse [was] represented by Alaska Legal Services Corporation." The court said that "[t]he interest at stake in this case is one of the

263. Id. The court emphasized the importance of the lawyer’s "intermediary" role with the Division of Family services, as well as the lawyer's role as an "advocate in the Family Court." Id.
264. Watson, 813 A.2d at 1109.
265. See id. at 1106.
266. Id. at 1108 (footnote omitted).
267. See supra Part II.A.
268. Id.
269. See decisions supra note 21.
270. See decisions supra notes 198.
272. See supra Parts I, II.B.2.C.
273. Id.
274. See supra Part II.B.1.
276. Flores, 598 P.2d at 893-94; see also id. at 894 n.1 for ALASKA CONST. art. I, § 7 (containing the Alaskan due process clause). This was a divorce case in which custody was the only issue and both parties were indigent. The husband removed the child from California without the wife's consent,
most basic of all civil liberties, the right to direct the upbringing of one’s child.”\textsuperscript{277} It found that “there is a strong state interest in divorce-child custody proceedings.”\textsuperscript{278}

The court said that it had “noted on previous occasions that ‘[c]hild custody determinations are among the most difficult in the law.”\textsuperscript{279} In such cases, “the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case.”\textsuperscript{280} As a result, “[a] parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.”\textsuperscript{281} The court concluded that “[t]his disadvantage is constitutionally impermissible where the other parent has an attorney supplied by a public agency.”\textsuperscript{282}

In all Civil Gideon litigation, there is a missing state interest that the courts should weigh in favor of a right to counsel.\textsuperscript{283} It is the state’s interest in enforcing the laws that it enacts.\textsuperscript{284} When a lawyer for an indigent litigant helps to enforce the law, that lawyer acts in the highest interest of the state, as well as of the legal profession.\textsuperscript{285} The right-to-counsel equation should always reflect this.

\footnotetext{277}{\textit{Id.} at 895 (footnote omitted).}
\footnotetext{278}{\textit{Id.}}
\footnotetext{279}{\textit{Id.} at 896.}
\footnotetext{280}{\textit{Id.}}
\footnotetext{281}{\textit{Id.}}
\footnotetext{282}{\textit{Flores}, 598 P.2d at 896. Three judges of Maryland’s Court of Appeals would have recognized a constitutional right to counsel in custody cases if the court had reached the merits in \textit{Fraze}, 840 A.2d at 131-139 (concurring opinion by Cathell, J., in which Bell, C.J. and Eldridge, J. joined).}
\footnotetext{283}{See supra Part II.C.2.}
\footnotetext{284}{\textit{Id.}}
\footnotetext{285}{\textit{Id.}}