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ARTICLE

The Constitution of Parenthood

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Abstract. This Article challenges the conventional assumption that the Constitution protects only biological parent-child relationships and makes an affirmative case for constitutional protection for nonbiological parents. Family law in a growing number of states legally recognizes nonbiological parents in a range of families—including nonmarital families, families headed by same-sex couples, and families formed through assisted reproduction. But in some states, nonbiological parents who have not adopted are treated as legal strangers to their children. When these parents turn to the Constitution to assert a liberty interest in their parent-child relationship, they find no relief. Courts conclude that only biological parents possess a right to parental recognition protected by the Due Process Clause. This biological understanding of constitutional parenthood often rests on a reading of Supreme Court precedents from the 1970s and 1980s involving the rights of unmarried fathers and the status of foster parents. This Article revisits those precedents—both to show that they present a more complicated approach to parenthood than conventionally assumed and to make clear the ways in which they are in tension with more recent constitutional commitments. Rather than elaborate a biological approach to parenthood, the Court's decisions on unmarried fathers and foster parents view parenthood as a social practice. Even as these precedents provide useful insights about parenthood's social dimensions, they are outdated. Decided decades ago, these decisions condone forms of inequality that now appear constitutionally suspect. Since they were decided, legal understandings of the family have shifted significantly. The Court itself has contributed to the changing legal landscape through its decisions on the constitutional rights of same-sex couples—who ordinarily include nonbiological parents.

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Today, insights, principles, and values observable in constitutional precedents on parenthood and the family point toward a liberty interest in parental recognition that reaches nonbiological parents. To show how, this Article turns to contemporary family-law developments. Modern family law takes from constitutional precedents important insights about parenthood and yet updates the meanings and implications of those precedents. Family law's functional turn has featured the vindication of nonbiological parent-child bonds based in part on interpretations of constitutional decisions on unmarried fathers, foster parents, and same-sex couples. In valuing established parent-child bonds in marital and nonmarital families, in different-sex and same-sex couples, and for men and women, family-law authorities have found support in the Court's decisions but have taken those decisions in more inclusive and egalitarian directions. Even as this functional vision of parenthood has arisen as a formal matter in family law, it reflects and extends important constitutional commitments in ways that shed light on the parent-child relationships that merit recognition as a matter of due process. Ultimately, constitutional understandings of parenthood may evolve in light of insights from family law. This Article's examination of the law of parenthood contributes to an account of the dialogic relationship between family law and constitutional law—demonstrating how family-law authorities develop approaches to the family that draw on and apply constitutional principles in ways constitutional decisionmakers may eventually adopt.

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Introduction

Parentage—the legal determination of who is a parent—arises primarily as a matter of state family law. In the past several years, family-law authorities—including courts and legislatures, as well as scholars and lawyers engaged in academic work, law reform projects, and litigation[1]—have transformed parentage. In a growing number of states, individuals parenting children to whom they are not biologically related have been treated as legal parents. Recognition of *nonbiological* parent-child bonds has occurred in a range of families, including nonmarital families, families headed by same-sex couples, and families formed through assisted reproduction.[2]

Rather than require nonbiological parents to adopt, family law has developed principles of parental recognition that turn on social criteria. Courts in some states have accommodated nonbiological parents by means of common law and equitable devices that recognize a person as a parent when she has acted as a parent to the child and the child views her as a parent.[3] Courts and legislatures also have adapted existing parentage presumptions—which conventionally were assumed to correspond to biological parentage—to nonbiological parents.[4] For example, they recognize as a parent the individual, whether a man or a woman, who is married to the woman who gives birth to the child.[5] With assisted reproduction, intentional parenthood also has emerged as an important concept; an individual who consents to assisted reproduction with the intent to be a parent is often treated as a legal parent.[6] In a growing number of jurisdictions, family law provides multiple paths for nonbiological parents to attain legal status.[7] Nonbiological parentage arises not merely when no biological parent is present; the claims of nonbiological parents can trump competing claims by those with biological ties to the child.[8]

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1. This Article recognizes that family law is developed not only by judges and legislators but also by scholars and lawyers. *Cf.* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 4 (2014) (explaining how "judges, lawmakers, lawyers, [and] scholars" influence family law's canon).

2. *See infra* Part IV.

3. *See* Courtney G. Joslin, *De Facto Parentage and the Modern Family*, FAM. ADVOC., Spring 2018, at 31, 32-33.

4. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1217-18, 1228-29, 1242 n.340, 1246-48 (2016); *infra* notes 369, 371, 476-78 and accompanying text.

5. *See infra* notes 369, 371 and accompanying text.

6. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2345-46, 2363-81 (2017).

7. *See* Joslin, *supra* note 3, at 32-34; NeJaime, *supra* note 6, at 2363-81.

8. *See infra* notes 276, 278 and accompanying text.

But not all states have followed this path. Some continue to hew to a view of parenthood tethered to biological connection. Family-law regimes in these jurisdictions fail to capture parent-child relationships that exist in fact—relationships that may develop in the absence of biological connection and without adoption.[9] When individuals are told that they are not parents as a family-law matter, they may seek protection under the Constitution. Given that the Constitution has long been read to protect parents' relationships with their children as a matter of substantive due process, these individuals claim that the state's refusal to recognize them as parents violates their constitutional rights.[10]

Yet these claimants often find no relief, as courts conclude that only *biological* parents possess a right to parental recognition protected by the Due Process Clause.[11] Consider a recent example. In *Hawkins v. Grese*, an unmarried same-sex couple decided to have a child.[12] After Grese gave birth to a child conceived with donor sperm, the two women raised their son together.[13] When they ended their relationship in 2014, the child was seven.[14] They informally shared custody for another two years, but "[e]ventually, relations between Grese and Hawkins soured and Grese terminated [the child]'s contact with Hawkins."[15]

Virginia courts refused to recognize Hawkins, the nonbiological mother, as a parent under the state's family law.[16] Without marriage to the biological mother and without a biological connection herself, Hawkins was a legal stranger with no rights to custody or visitation; Hawkins asserted that this

9. *See* NeJaime, *supra* note 6, at 2317-23.

10. While substantive due process is deeply contested, the critical question with respect to parenthood appears to be not whether the Constitution protects parent-child relationships, but rather which parent-child relationships it protects. *See* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2382 (2016); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) (explaining how in earlier cases featuring "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'" (quoting Santosky v. Kramer, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting))). *But see* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment); *id.* at 91-92 (Scalia, J., dissenting).

11. *See infra* text accompanying notes 655-56.

12. 809 S.E.2d 441, 443 (Va. Ct. App. 2018).

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.* ("The [Juvenile and Domestic Relations District Court] awarded joint legal and physical custody to Hawkins and Grese . . . , finding that [the child] considered both women to be his parents. . . . [T]he circuit court . . . determined that Hawkins could not be considered a parent based on Virginia's rejection of the de facto parent doctrine.").

treatment violated her constitutional rights.[17] In 2018, the Virginia Court of Appeals rejected this argument, concluding that Virginia's "definition of 'parent' is not inconsistent with Supreme Court jurisprudence regarding the nature of the family and parentage."[18]

Quoting a 1977 Supreme Court decision, the state court reasoned that the "'usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.'"[19] For the court, biological parenthood had a prepolitical status—"predating the bill of rights"—whereas nonbiological parenthood was "a legal construct," or "'an arrangement in which the State has been a partner from the outset.'"[20] Again quoting Supreme Court precedent, the court explained:

> There is no "serious[] dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship," but natural, biological parentage is a unique relationship predating any legal arrangement.[21]

Ultimately, the court refused to undertake "[a] judicial expansion of the term 'parent' to include someone not bound by blood or law."[22]

The appeals court reached this conclusion despite the parent-child relationship that existed in fact and the trauma inflicted on the child by ending that relationship. Indeed, the trial court had found that a "parent-child bond" had formed between Hawkins and the child and that the child "would be harmed if that bond was severed."[23] Observing that the child "was raised by Hawkins and Grese in their shared home until they ended their relationship,"[24] the appellate court conceded that the child would benefit from "a continuing relationship with Hawkins."[25] Yet the court accepted Grese's decision to cut Hawkins out of the child's life: As the biological mother, Grese possessed constitutional authority to make "child rearing decisions" and thus could exclude her former partner.[26] In the court's view, the Constitution offered no

17. *Id.* at 443-44.

18. *Id.* at 447.

19. *Id.* (quoting Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 843 (1977)).

20. *Id.* (quoting *OFFER*, 431 U.S. at 845). On this view, "the family is capable of existing in some sense apart from state activity, as a natural formation rather than only as a creation of the state." Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504 (1983).

21. *Hawkins*, 809 S.E.2d at 447 (alteration in original) (quoting *OFFER*, 431 U.S. at 844).

22. *Id.*

23. *Id.* at 451-52.

24. *Id.* at 443.

25. *Id.* at 452.

26. *Id.*

protection to the nonbiological mother; instead, due process protected the biological mother's right to exclude the child's other parent.

As the reasoning of the *Hawkins* court illustrates, the biological basis of constitutional protection for parenthood often rests on a reading of Supreme Court precedents that are now decades old. *Hawkins*, for instance, heavily quotes *Smith v. Organization of Foster Families for Equality & Reform* (*OFFER*), a 1977 decision denying the constitutional claims of foster parents.[27] Other courts similarly rely on Supreme Court decisions from the 1970s and 1980s concerning the rights of unmarried fathers.[28] Consider a Florida appellate court's 2015 decision in *Russell v. Pasik*, rejecting the claim of a nonbiological mother in an unmarried same-sex couple.[29] The court drew on *Lehr v. Robertson*,[30] a 1983 decision, in reasoning that, while "the act of assuming parental responsibilities and actively caring for a child is sufficient to develop constitutional rights in favor of the parent[,] . . . it is the *biological connection between parent and child*" that furnishes the opportunity for a constitutionally protected relationship.[31] Constitutional precedents, on this view, have both assumed and produced a model of parenthood that is at base biological.

Family life and family law have changed dramatically since the time when the Court decided *OFFER* and *Lehr*. Indeed, the Court itself has participated in

27. *Id.* at 447 (quoting Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 843-45 (1977)); *see also, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 806, 812 (11th Cir. 2004) (rejecting constitutional claims of foster parents and noting "the usual understanding of 'family' implies biological relationships" (quoting *OFFER*, 431 U.S. at 843)).

28. *See, e.g.*, D.M.T. v. T.M.H., 129 So. 3d 320, 337 (Fla. 2013) (noting "the 'significance of the biological connection' between parent and child" (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983))); Boone v. Ballinger, 228 S.W.3d 1, 6 (Ky. Ct. App. 2007) ("Under American law, a biological parent's interest in his or her child is a powerful one that will not be disturbed 'absent a powerful countervailing interest.'" (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))); *see also* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (asserting that "this Court's precedents" support the constitutionality of "a biology based birth registration regime" (citing cases including *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (plurality opinion))).

29. 178 So. 3d 55, 60-61 (Fla. Dist. Ct. App. 2015).

30. 463 U.S. 248.

31. *Russell*, 178 So. 3d at 60. The *Russell* court quoted a 2013 Florida Supreme Court decision that had declared, based on *Lehr*, that "the United States Supreme Court has pronounced . . . [that] a biological connection gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right based on the actions of the parent." *D.M.T.*, 129 So. 3d at 338. Indeed, the *D.M.T.* court asserted that "[i]n *Lehr*, the United States Supreme Court articulated the 'significance of the biological connection' between parent and child." *Id.* at 337 (quoting *Lehr*, 463 U.S. at 262). *Russell* continues to govern disputes involving unmarried nonbiological parents in Florida. *See, e.g.*, Springer v. Springer, 277 So. 3d 727, 727-28 (Fla. Dist. Ct. App. 2019) (relying on *Russell* in denying parental rights to a nonbiological parent).

those changes. Most strikingly, its decisions on the rights of same-sex couples responded to shifts in the cultural and legal status of gays and lesbians, and in turn prompted further progress in the treatment of same-sex couples' families.[32] Yet courts largely have failed to relate the recognition of same-sex couples to constitutional understandings of the parental relationships that due process protects.

Hawkins again illustrates this point. There, the nonbiological mother argued that recent Supreme Court decisions recognizing the constitutional rights of same-sex couples—including *Obergefell v. Hodges*, extending the right to marry—"implicitly redefined 'parent' or 'family.'"[33] Unlike different-sex couples, same-sex couples necessarily feature a nongenetic parent, and thus the Court's protection of same-sex couples' families entailed the protection of nonbiological parents. Yet, in the Virginia court's eyes, decisions on same-sex marriage did not alter "the definition of 'parent'" for due process purposes—a definition that remained primarily biological.[34]

In the growing number of jurisdictions in which family law treats nonbiological parents as legal parents, the assumption that the liberty interest in parental recognition flows naturally from the biological connection between parent and child may be of little consequence: The nonbiological parent can still establish parentage under state law. But in jurisdictions like Virginia, with family-law regimes that treat nonbiological parents such as Hawkins as legal strangers, a biological approach to constitutional parenthood harms parents and children. Legislatures in these jurisdictions ignore or dismiss constitutional concerns as they tether parentage to genetics, and courts in these states draw on constitutional precedents to deny protection to nonbiological parents.[35]

Jurisdictions that refuse to recognize nonbiological parents as legal parents are increasingly out of step with family-law developments across the country.[36] But courts and legislatures in these states find support for their restrictive view of parenthood in decades-old Supreme Court precedents. Ultimately, we are left with a striking disconnect between emerging conceptions of parenthood as a family-law matter and relatively static views of parenthood as a constitutional matter. As state family-law systems have

32. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003).

33. Hawkins v. Grese, 809 S.E.2d 441, 446-47 (Va. Ct. App. 2018). Denise Hawkins relied on the Court's decisions in *Obergefell* and *Pavan v. Smith*. *See id.* at 444. For discussion of those cases, see Part III below.

34. *Hawkins*, 809 S.E.2d at 447-48.

35. *See, e.g.*, *id.* at 447 (describing the approach taken in Virginia).

36. *See* NeJaime, *supra* note 6, at 2363-81 (listing the increasing number of jurisdictions that recognize nonbiological parents as legal parents).

minimized the relevance of biological connection to parenthood—even if inconsistently and incompletely—constitutional approaches evidence a starkly different understanding that presents biological connection as the longstanding and natural basis for due process protection.[37]

This Article challenges the common assumption that the Constitution protects only biological parents and makes an affirmative case for constitutional protection of the bonds that develop between nonbiological parents and their children.[38] The conventional reading of constitutional precedents from the 1970s and 1980s both misapprehends the complexity of those decisions at the time they were decided and fails to appreciate their limitations in light of more recent developments. Constitutional precedents are relevant to the claims of nonbiological parents in ways that largely have been overlooked. By focusing on family formation, parental responsibility, and parental conduct, these precedents value social over biological dimensions of parenthood—even though they do not expressly acknowledge a due process interest in parental recognition for nonbiological parents. Yet, at the same time that these constitutional precedents shed important light on the claims of nonbiological parents, they are outmoded in ways that limit their applicability

37. Strikingly, even family-law scholars who argue for and analyze the legal recognition of nonbiological parents *as a matter of state family law* have been relatively silent on the status of nonbiological parents *as a matter of constitutional law*—seemingly accepting the conventional wisdom of biological exceptionalism. The constitutional debate among scholars has focused on whether the biological parent has the constitutional authority to exclude the nonbiological parent, rather than on whether the nonbiological parent herself has a due process right to parental recognition. *See infra* notes 434-36 and accompanying text.

Some scholars would treat other bodies of law that regulate family relationships as family law. This would include constitutional law. However, I draw a distinction between regulation that rests explicitly on family-law grounds and regulation that purports to turn on constitutional determinations. Accordingly, I treat family law and constitutional law as distinct bodies of law for purposes of parental recognition. For the more capacious view of family law, see generally HASDAY, *supra* note 1. Hasday's critique of the family-law canon, as erroneously excluding bodies of law that regulate family relationships, may partly explain why family-law scholars writing on nonbiological parenthood devote scant attention to constitutional law. *See id.* at 2-3.

38. Even though equality inflects the liberty analysis, for practical and principled reasons this Article's focus remains on due process rather than equal protection. Current frameworks of equal protection may fail to see laws premised on biological connection as drawing discriminatory distinctions. More importantly, our constitutional order has valued parenthood as a liberty interest, and equality alone does not recognize the weight of the interest at stake. A biological understanding of parenthood fails to reflect the experiences of a growing number of parents and children who form attachments worthy of recognition. *See* Akhil Reed Amar, Feature, *America's Lived Constitution*, 120 YALE L.J. 1734, 1744 (2011) (connecting constitutional understandings to "the lived experiences of Americans"). For an argument that equal protection requires the recognition of nonbiological parents, see NeJaime, *supra* note 6, at 2347-57.

today. They are hampered by assumptions about the family—as a gender-differentiated, heterosexual institution primarily tied to marriage—that now appear inconsistent with contemporary constitutional principles.

To see how and why constitutional commitments *today* point toward the recognition of nonbiological parents on due process grounds, this Article turns to modern family-law developments. Family law demonstrates what the Court's precedents mean in a world in which legal and cultural understandings of parenthood increasingly include the bonds that develop between nonbiological parents and their children. By showing how the inclusion of nonbiological parents reflects and extends important constitutional commitments—including commitments observable in the very decisions cited to support a biological approach to parenthood—family law provides insights about parent-child relationships that merit recognition as a matter of due process.

Part I revisits the Court's decisions, over the course of the 1970s and 1980s, on the rights of unmarried fathers. The Court's first foray into the due process interest in parenthood came in the early twentieth century, when it addressed parental *rights*—that is, parental authority to make childrearing decisions without government intrusion.[39] Almost a half-century later, the Court expressly addressed parental *recognition*—that is, the government's obligation to treat an individual as a legal parent.[40] In a landmark 1972 decision, *Stanley v. Illinois*, the Court protected an unmarried father who had been treated by law as a legal stranger to his children.[41]

While decisions on unmarried fathers are commonly invoked to support the biological premise of constitutional parenthood,[42] a closer look reveals that the Court viewed fatherhood as a social practice.[43] The vindication of biological ties in nonmarital families emerged to challenge traditional views that linked parenthood to marriage—men became fathers through marriage to the mother, and unmarried men presumably rejected parental responsibilities. The Court accepted the claims of unmarried fathers who approximated husbands—those who formed a household with the child's mother and accepted

39. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

40. *See* Stanley v. Illinois, 405 U.S. 645, 647-49 (1972). This Article focuses on rights involving parenthood, not procreation, even though, as Glenn Cohen shows, the right to procreate implicates rights to be a (genetic, gestational, and/or legal) parent. *See* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 (2008) (discussing the rights to be, and not to be, a parent under the rubric of the right to, or not to, procreate).

41. *Stanley*, 405 U.S. at 649.

42. *See, e.g.*, D.M.T. v. T.M.H., 129 So. 3d 320, 337 (Fla. 2013).

43. *See infra* Parts I.B-.D.

responsibility for the child.[44] When the Court rejected the claims of unmarried fathers, it simultaneously cleared the path for the child's relationship with a nonbiological father (the man married to the mother) to enjoy legal status.[45] In this sense, the turn to social criteria, to support both unmarried biological fathers and married nonbiological fathers, did not necessarily point in egalitarian directions but instead at least partially propped up the two-parent, marital family—a view the Court made explicit in the last of its decisions on the constitutional rights of unmarried fathers.[46]

At the same time that the Court was deliberating over the rights of unmarried fathers, it decided other cases that involved due process protections for family relationships. Part II explores decisions from the 1970s on the constitutional status of nonparents who claimed protected relationships with children they were raising.[47] In authorizing a grandmother to continue to live with and raise her grandson despite local zoning regulations, the Court articulated a relatively pluralistic account of the family relationships that merit due process protection.[48] The same year it vindicated the bonds of grandmother and grandson, the Court resisted constitutional rights for foster parents—in part to protect the competing interests of biological parents threatened with the loss of their children at the hands of the state.[49] Even as the Court prioritized biological bonds over purely social connections, it explicitly left open the possibility that nonbiological parent-child bonds might merit protection on due process grounds in other circumstances.[50]

An examination of the Court's key precedents on unmarried fathers and nonparental caregivers reveals that some of the very decisions relied upon to support a biological understanding of constitutional parenthood in fact paint a more complicated picture of the relationship between biological ties and the Constitution. They reveal biological connection to be, at least for men, an insufficient basis on which to claim due process protections. And, by valuing established relationships between parents and children, they affirm the continuing importance of social criteria to constitutional assessments of the family relationships that deserve protection.

Even as the Court's decisions on unmarried fathers and foster parents shed light on the relationship between biological ties and constitutional protection,

44. *See infra* Part I.B.

45. *See infra* Parts I.C-.D.

46. *See* Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (plurality opinion).

47. *See, e.g.*, Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

48. *See Moore*, 431 U.S. at 495-97, 504-06 (plurality opinion).

49. *See OFFER*, 431 U.S. at 846-47.

50. *See infra* Part II.B.

their utility in deciding questions regarding contemporary family arrangements is limited. These cases were decided decades ago and rest in part on views about the family that now appear outmoded. In the ensuing years, legal and cultural understandings of the family have shifted significantly—in directions that are more inclusive and egalitarian and that value nonbiological parent-child relationships. The Court itself contributed to the changing legal landscape—most critically, as Part III explores, with its decisions on the rights of same-sex couples. In treating same-sex couples and the parent-child relationships they form as equally deserving of respect,[51] the Court embraced nonbiological parenthood.[52] Yet while these cases present a more inclusive approach to parenthood and express significant concern for protecting children's relationships with their parents, they still connect parenthood to marriage.[53]

These decisions focus not only substantively but also doctrinally on marriage—grappling with the due process interest in marriage, not parenthood. Nonetheless, they provide guidance on how to reason about the liberty interest in parental recognition. As *Obergefell* demonstrates, "new insights" about the family arrangements worthy of respect and the groups subject to exclusion can reshape understandings of the family relationships protected as a matter of due process.[54]

For "new insights" of the kind that shape understandings of the family relationships that the Constitution protects, Part IV turns to family law—the body of law most concerned with questions of parental recognition. Family law supplies guidance on how to reason about parenthood in ways that address contemporary family arrangements in light of constitutional commitments.[55] Through family law's *functional turn*, courts, legislatures, scholars, and lawyers (collectively referenced in this Article as "family-law authorities") vindicated

51. *See infra* Part III.

52. *See* NeJaime, *supra* note 4, at 1240-65 (relating marriage equality to recognition of nonbiological parents in both same-sex and different-sex couples, both inside and outside of marriage).

53. *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075, 2078-79 (2017) (per curiam) (explaining that Arkansas uses birth "certificates to give married parents a form of legal recognition that is not available to unmarried parents"); Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) (opening marriage to same-sex couples, based in part on the relationship between marriage and childrearing).

54. 135 S. Ct. at 2596, 2598-99; *see* Douglas NeJaime & Reva B. Siegel, *Concurring Opinion*, *in* WHAT *OBERGEFELL V. HODGES* SHOULD HAVE SAID (Jack Balkin ed., forthcoming 2020) (on file with author); *see also* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 827 (2014).

55. *See generally* Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413 (2017) (explaining how family-law developments shape constitutional understandings of the family).

established parental bonds in a broad range of families featuring nonbiological parents—what courts and legislatures often call "de facto parents"[56] and what scholars of child development have termed "psychological parents."[57] The functional approach acknowledges the significance of developed parent-child relationships, prioritizes children's welfare, and embraces families that break from the traditional norms of the gendered, heterosexual, marital family.[58]

Why turn to family law for purposes of analyzing how the Constitution treats parenthood? Conventionally, family law and constitutional law are imagined to occupy relatively separate spheres, with family law understood to be a matter of local concern and constitutional law viewed as a federal priority.[59] On this account, to the extent they interact, constitutional law operates in a fairly top-down way, compelling family law to reform in light of constitutional principles.[60] Family law otherwise enjoys ample room to regulate without devoting much attention to constitutional considerations.

Yet, in reality, family law and constitutional law are not so easily separated.[61] Constitutional authorities and family-law authorities learn from each other, and developments that speak in one register shape decisionmaking

56. *See infra* notes 437-72 and accompanying text.

57. For the seminal text, see generally JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (new ed. 1979) (elaborating the concept of psychological parenthood and urging decisionmakers to prioritize children's relationships with their psychological parents). While this Article does not advance an argument based on *children's* liberty interests, the argument from parental interests is guided by concern for children's relationships. On children's rights to parental relationships, see generally JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 254-79 (2006).

58. *See infra* notes 390-93 and accompanying text.

59. *See* Judith Resnik, Commentary, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2199 (1993); *see also* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298 (1998).

60. *See* Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 963 (2016) ("According to [the] standard story, constitutional law establishes boundaries or outer limits for permissible family laws, which are typically . . . state-made laws."). Courtney Cahill labels this "trickle-down" constitutionalism. *See* Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. (forthcoming 2020) (on file with author). Of course, this conventional understanding resonates with the principle of constitutional supremacy. *See* U.S. CONST. art. VI, cl. 2.

61. *See* NeJaime, *supra* note 55, at 415-16; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1036 (2002) [hereinafter Siegel, *She the People*]. As Reva Siegel shows, conventional accounts of constitutional law have failed to appreciate the extent to which conflict over the Constitution's treatment of women revolved around claims about the family. For example, Siegel shows how "[a] woman's claim to vote was . . . a claim for democratic reconstruction of the family." Reva B. Siegel, Essay, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 452 (2020).

that speaks in the other.[62] Family law has not simply been disciplined by constitutional decisions. Nor has family law, in the absence of direct constitutional oversight, simply engaged in regulation detached from constitutional principles. Rather, as the recent embrace of marriage equality illustrates, family law elaborates and advances new understandings of the relationships the Constitution protects.[63]

Family-law authorities are animated by constitutional values and see themselves as acting to vindicate constitutional principles. Yet in doing so, these authorities may move beyond what constitutional decisionmakers actually have done. Nonbiological parental recognition has not occurred merely because constitutional law does not prohibit it. Rather, nonbiological parental recognition has occurred in part based on constitutional commitments. Judges, legislators, scholars, and lawyers working in family law have drawn on constitutional understandings in crafting and revising their own account of parenthood. They have furnished interpretations of key constitutional decisions that, rather than bolstering a biological approach to parenthood, affirmatively support the recognition of nonbiological parents.[64] The Constitution, on this account, views parenthood as a social practice and protects parent-child relationships that exist in fact.

Family law's functional turn finds support in the Court's decisions while significantly remedying the inequalities and harms reflected in those decisions—valuing actual parent-child relationships not only in marital but also in nonmarital families, not only in different-sex but also in same-sex couples, and not only for men but also for women.[65] Of course, as *Hawkins* demonstrates, these developments are not consistent across family-law regimes and have not been embraced uniformly by family-law authorities.[66] But the functional turn represents a significant and growing trend observable across judicial decisions, legislative acts, law reform efforts, advocacy, research, and scholarship.[67]

While this vision of parenthood has arisen as a formal matter in family-law doctrine, it has drawn support from constitutional precedents and principles and furnishes insights that may eventually support new

62. *See* NeJaime, *supra* note 55, at 415-16. Cahill, for example, considers how understandings of maternity in family law can reshape constitutional understandings of maternity—an idea she calls "trickle-up" maternity. *See* Cahill, *supra* note 60.

63. *See* NeJaime, *supra* note 55, at 417-19; *see also* Appleton, *supra* note 60, at 922 (explaining how the author "expos[es] and theoriz[es] how family law principles, assumptions, and values have infiltrated and shaped constitutional doctrine, including doctrine disputed in *Obergefell*").

64. *See infra* Part IV.A.

65. *See infra* Part IV.

66. *See supra* notes 12-18 and accompanying text.

67. *See infra* Part IV.

understandings of parenthood in constitutional doctrine. Guided by family-law insights on the meaning of parenthood and its relationship to constitutional commitments, understandings of parenthood as a matter of due process may develop in ways that vindicate actual relationships, whether biological or nonbiological.[68] Ultimately, constitutional decisionmakers, learning from family law, may come to appreciate that parents who have formed relationships with their children, including nonbiological parents, have a liberty interest in parental recognition. Part V explores how decisionmakers would reason about the due process rights of nonbiological parents. Reasoning of this kind has consequences for a range of families—including same-sex couples' families, families formed through assisted reproduction, blended families, and families with more than two parents.

This Article takes the crucial first step of building the case for a liberty interest that includes nonbiological parent-child bonds, doing so by attending to some paradigmatic scenarios in which the issue would arise. Recognizing nonbiological parents' liberty interest in parental recognition raises a number of questions that this Article does not purport to fully resolve. Which nonbiological parents merit protection: Intended parents? De facto parents? Stepparents? Prospective adoptive and foster parents? Is there a limit to the number of parents who possess a liberty interest? What exactly does constitutional protection yield: Recognition as a legal parent under state law? Rights to maintain a relationship with the child, perhaps merely through visitation? Part V addresses some of the questions and concerns that constitutional protection raises. It identifies considerations and principles that could guide decisionmaking and suggests some preliminary answers to questions that would arise in some of these circumstances. Questions about how to operationalize the due process interest in parental recognition are difficult. But they do not provide a reason to refuse to recognize the constitutional status of nonbiological parents. And they are not unprecedented. Indeed, they are the very questions with which family-law authorities have long grappled in analyzing parentage claims.

Further, recognition of a liberty interest for nonbiological parents does not mean all claimants prevail. This Article's approach to constitutional change suggests that decisionmakers recognize protected liberty interests in ways that reflect evolving legal and societal understandings of the family relationships worthy of respect. Methods of constitutional interpretation that would lead to the recognition of nonbiological parents likely would also constrain the extension of such protections.

68. *Cf.* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 100 (2008) (drawing on changes in women's military status to show "how extrajudicial developments can undermine the plausibility of the constitutional interpretation in the Court's precedents").

Moreover, even if a court were to find a liberty interest, it need not order that the claimant be accorded parental status. The government may have sufficiently strong grounds to limit the consequences of a protected interest. For example, in seeking to vindicate children's interests, a court might withhold parental status in circumstances where a child presently has two involved legal parents. In fact, state courts already make determinations that require balancing the constitutional interests of various family members, including in situations that lead to the denial of parentage to those who possess interests of constitutional dimension.[69]

* * *

It may seem odd at this moment to argue for an expanded conception of the interest in parental recognition protected as a matter of substantive due process. Current law, best represented by the Court's marriage equality decision in *Obergefell*, views liberty as a capacious and evolving concept—an approach that hearkens back to the origins of the Court's modern due process jurisprudence.[70] Yet, in the coming years, the Court—which has grown more conservative and no longer includes *Obergefell*'s author, Justice Kennedy—may shift away from this approach and instead revert to a narrower view.[71] Still, it is impossible to predict how judicial understandings of the family relationships the Constitution protects will grow. As they did with marriage equality, developments outside the courts and developments in subconstitutional bodies of law ultimately may shape understandings of the family relationships that due process protects.[72]

Importantly, though, the Supreme Court is not the only constitutional authority, and the federal courts are not the primary actors with respect to parental recognition. The Court has decided a relatively small number of cases on parenthood—and its most significant line of cases is decades old.[73] The Court's

69. *See infra* notes 737-39 and accompanying text.

70. Obergefell v. Hodges, 135 S. Ct. 2584, 2598, 2602 (2015); *see infra* Part V.A; *see also* Kenji Yoshino, *The Supreme Court, 2014 Term—Comment: A New Birth of Freedom?* Obergefell v. Hodges, 129 HARV. L. REV. 147, 149, 163-64 (2015) (connecting *Obergefell* to Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), as well as the majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

71. For an example of a narrower view, see *Washington v. Glucksberg*, 521 U.S. 702 (1997), which narrowed substantive due process protections by, in part, focusing on the level of specificity such that the Court must engage in a "'careful description' of the asserted fundamental liberty interest." *Id.* at 721-22 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). *See also* Yoshino, *supra* note 70, at 169 (observing how *Obergefell* cast aside the constraints that *Glucksberg* placed on substantive due process).

72. *See infra* Part V.A.

73. The Court's constitutional decisions on the rights of unmarried fathers—*Stanley*, *Quilloin*, *Caban*, *Lehr*, and *Michael H.*—have been cited rarely in the Court's cases this century. These decisions are discussed further in Parts I.C-.D below. Citations to these five cases appear in Supreme Court opinions in only eleven cases since 2000. *See* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting); Sessions v.
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decisions—past, present, and future—provide guidance on how to approach questions of parental recognition, but they do not exhaust the range of constitutional understandings. Legislatures, state courts, scholars, and advocates will continue to address parentage and, in doing so, will advance contested views of constitutional principles.[74] Rather than simply treat the constitutional status of parenthood as settled, these actors will grapple with, elaborate, and contribute to constitutional meaning,[75] even when they speak in nonconstitutional registers.[76]

Morales-Santana, 137 S. Ct. 1678, 1692 & n.12 (2017); Adoptive Couple v. Baby Girl, 570 U.S. 637, 673, 687 (2013) (Sotomayor, J., dissenting); McDonald v. City of Chicago, 561 U.S. 742, 873 (2010) (Stevens, J., dissenting); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 718 (2010) (plurality opinion); *id.* at 744 nn.7-8 (Breyer, J., concurring in part and concurring in the judgment); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 462 (2006) (Stevens, J., concurring in part and dissenting in part); Vieth v. Jubelirer, 541 U.S. 267, 326 (2004) (Stevens, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003); Nguyen v. INS, 533 U.S. 53, 62-64 (2001); Troxel v. Granville, 530 U.S. 57, 77 (2000) (Souter, J., concurring in the judgment); *id.* at 87-88 (Stevens, J., dissenting); *id.* at 92 n.1 (Scalia, J., dissenting); *id.* at 98 (Kennedy, J., dissenting).

OFFER has been cited in Supreme Court opinions in only three cases since 2000. *See* Kerry v. Din, 135 S. Ct. 2128, 2138 (2015) (plurality opinion); *id.* at 2142 (Breyer, J., dissenting); *Adoptive Couple*, 570 U.S. at 686 (Sotomayor, J., dissenting); *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting); *id.* at 99 (Kennedy, J., dissenting).

74. *Cf.* Hasday, *supra* note 68, at 102 (explaining how the Court's judgment in *Rostker v. Goldberg*, 453 U.S. 57 (1981), "did not stop Congress, the executive, and the military from debating the issue, or enforcing their own evolving judgment that sex equality . . . called for granting women an increasingly large military role, including in combat").

75. A number of literatures are relevant to this concept. On how state courts contribute to shared constitutional understandings, see generally Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (defending state courts' role in conflict over American constitutionalism); Goodwin Liu, Brennan Lecture, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017) (explaining and defending the role that state courts play in elaborating the meaning of American constitutional law). On how lawmakers engage in constitutional interpretation, see generally Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) (focusing on Congress's enforcement power under Section 5 of the Fourteenth Amendment as a way to describe and defend constitutional interpretation by nonjudicial actors). On how social movements shape constitutional meaning, see generally NeJaime & Siegel, *supra* note 54 (contextualizing judicial recognition of same-sex couples' right to marry within the gay rights movement's decades-long struggle for legal rights); and Reva B. Siegel, Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006) (relating activism for and against the Equal Rights Amendment to eventual understandings of constitutional equality). *See also* Kahn, *supra*, at 1160 (explaining that "constitutional debate . . . occurs—among judges, academics, politicians, [and] ordinary citizens").

76. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 454, 473 (2007) (explaining the constitutive function of "ordinary" laws such that the

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Importantly, questions of parental recognition raise not only federal but also state constitutional issues. "American lawyers and judges," Judge Jeffrey Sutton recently urged, should "pay attention to the liberty . . . protections in the federal *and* state constitutions."[77] Indeed, as Justice Brennan famously remarked in 1977, "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[78] State constitutional decisions recognizing the status of nonbiological relationships, like family-law developments protecting such relationships, may shape evolving views of the parental relationships that the federal Constitution protects.[79] In Paul Kahn's words, "[t]he common object of state interpretive efforts is American constitutionalism."[80]

Even though this Article does not treat Supreme Court precedent as the final word on parental recognition, it recognizes that the Court's decisions will likely continue to guide judges, legislators, scholars, and lawyers. As this Article shows, the Court's precedents on unmarried fathers, nonparental caregivers, and same-sex couples have played an important yet largely unnoticed role in family law's functional turn. Accordingly, this Article's focus on Supreme Court decisions acknowledges the influence that those decisions have on evolving understandings of the legal status of family relationships—even as the meanings and implications of those precedents shift over time. State supreme courts have already interpreted constitutional decisions from the 1970s and 1980s in ways that support the recognition of nonbiological parents—as an equitable or common law matter.[81] It would be a small step to extend that logic to constitutional meaning.[82]

Constitution includes "not only the canonical document but a host of statutes, regulatory materials, federal common law rules, and established practices").

77. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2-3 (2018).

78. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). As Justice Goodwin Liu recently argued, "redundancy in interpretive authority—whereby state courts and federal courts independently construe the guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy." Liu, *supra* note 75, at 1312.

79. Worrying that Justice Brennan's position nonetheless situated state claims as mere supplements to federal claims, Judge Sutton hopes states can be a site for innovative claimsmaking, "allowing the U.S. Supreme Court, informed by these [state] experiences, to decide whether to federalize the issue." SUTTON, *supra* note 77, at 178.

80. Kahn, *supra* note 75, at 1148; *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 369 (2011) ("The more one moves away from the notion of states as separate from the nation, the more useful state courts become as expositors of federal constitutional values.").

81. *See infra* Part IV.A.

82. Indeed, as then-New York Chief Judge Judith Kaye observed, "the common law and state constitutional law often stand as alternative grounds for individual rights." Judith

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I. The Constitution of Parental Recognition and the Claims of Unmarried Fathers

Not until the early twentieth century did parenthood fully enter the constitutional lexicon. In its 1923 decision in *Meyer v. Nebraska*, the Court struck down a Nebraska law prohibiting foreign-language instruction in schools.[83] Two years later, in *Pierce v. Society of Sisters*, the Court struck down an Oregon law that mandated public education.[84] In these early decisions, the Court recognized, "within the liberty of the [Fourteenth] Amendment," a parent's "right of control" over a child's upbringing.[85] By the late 1930s, the Court repudiated the constitutional logic that had animated the *Lochner* era—the period during which *Meyer* and *Pierce* were decided.[86] Yet its decisions on parental rights survived.[87] Indeed, they came to undergird the Court's modern substantive due process jurisprudence.[88]

These *parental rights* decisions served as precedents when, a half-century later, the Court acknowledged constitutional interests in *parental recognition*.[89] That the Court pointed to parental rights to support parental recognition may account for some of the ways in which these two lines of cases often blur. But for present purposes, it is important to distinguish between them.[90] The first-order question of who is a legal parent (parental recognition) precedes the second-order question of what authority the legal parent wields (parental

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S. Kaye, Brennan Lecture, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15 (1995).

83. 262 U.S. 390, 403 (1923).

84. 268 U.S. 510, 534-35 (1925).

85. *Meyer*, 262 U.S. at 400. This Article assumes that parenthood arises as a matter of due process. For an argument that grounds fundamental rights in the Privileges or Immunities Clause, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123-24 (2000).

86. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-92 (1937).

87. *See* Moore v. City of East Cleveland, 431 U.S. 494, 501 n.8 (1977) (plurality opinion) ("*Meyer* and *Pierce* have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated . . . ."); Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944) (citing *Meyer* and *Pierce* in recognizing "the parent's claim to authority in her own household and in the rearing of her children").

88. *See* Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

89. Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential.'") (quoting *Meyer*, 262 U.S. at 399).

90. *See* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 317 [hereinafter Buss, *Adrift in the Middle*] (distinguishing between "'core' parental rights cases," in which "the identity of the parents (or the persons entitled to act as parents) is undisputed," and cases in which parental identity is in dispute); Emily Buss, Essay, *"Parental" Rights*, 88 VA. L. REV. 635, 640 (2002) (distinguishing "rights of parental authority [from] rights of parental identity").

rights).[91] As the Court explained in its first decision on parental recognition in 1972, it was not considering whether the state could interfere with parental authority but instead whether the state could define "parent" in the first instance so that "an unwed father is not a 'parent.'"[92]

As this Part shows, the acknowledgment of a constitutional interest in parental recognition came at a transitional moment when the Court was repudiating the common law regime that sharply differentiated between marital and nonmarital families and that subordinated women to men.[93] Up to that point, marriage largely defined parentage, at least for men.[94] But as the Court recognized the constitutional rights of unmarried fathers in the 1970s and 1980s, it did so only partially—ushering in a new regime while also maintaining elements of the past.[95] Biological paternity provided the starting point of the inquiry, such that only biological fathers would qualify for constitutional protection.[96] Yet, biological paternity was not sufficient to garner constitutional rights. Instead, the Court required that the man "act[] as a father"[97]—a role related as much to financial responsibility and marriage-like family formation with the child's mother as to parental care.[98] When the Court refused to protect the unmarried biological father on constitutional grounds, it usually cleared the path for a nonbiological father—the man married to the mother—to enjoy parental status under state law.

Ultimately, the Court's decisions supply support for considering social criteria in determining the constitutional meaning of parenthood. Nonetheless, they do so largely in service of the traditional family since, even as the Court sought at times to promote equality based on marital status and gender, it reproduced a framework that privileged a marital and gender-differentiated model of the family.[99]

91. *See* Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 314 (2017) ("[W]hich adults qualify as parents who possess *Meyer/Pierce/Troxel*-type rights?").

92. *Stanley*, 405 U.S. at 649-50.

93. *See infra* Part I.A.

94. *See infra* Part I.A.

95. *See infra* Part I.B.

96. *See* Lehr v. Robertson, 463 U.S. 248, 261-62 (1983).

97. *Id.* at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 389 n.7 (1979)).

98. *See* Melissa Murray, Essay, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 400-12 (2012).

99. *See* Mayeri, *supra* note 10, at 2381-82.

A. Marriage and Parentage: The Historical Centrality of Marriage to Paternity

It may be tempting to understand the Court's protection of unmarried biological fathers as natural—merely the constitutional recognition of relations that are inherently familial. But, for much of the nation's history, the Court had assumed that legal fatherhood sprung from marriage, not biology. Parenthood was a legal and social arrangement, not simply a biological fact.

When a married woman gave birth to a child, her husband was treated as the legal father.[100] Even though this presumption of legitimacy was assumed to reflect the husband's biological paternity, it did not require it. Evidentiary rules made the presumption difficult to rebut, as the couple themselves generally could not testify to the husband's "nonaccess,"[101] and the necessary showing required "facts which prove, beyond all reasonable doubt, that the husband could not have been the father."[102] Accordingly, the law operated both to recognize men as legal fathers when they were not biological fathers and to foreclose the legal recognition of some actual biological fathers.[103]

When an unmarried woman gave birth to a child, the child did not have a legal father, even if the biological father could be compelled to financially support the child.[104] Throughout the nineteenth and twentieth centuries, some states instituted reforms that furnished rights to "illegitimate" children and their parents.[105] Others continued to treat biological fathers of "illegitimate" children as nonparents. These men often had to petition courts to establish a legal relationship, which in some jurisdictions required adoption-type proceedings.[106]

Against this backdrop, it becomes clear that the lack of recognition of unmarried biological fathers was, until relatively recently, not viewed as a deprivation of constitutional rights.[107] Rather, it simply reflected a common

100. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *457 (discussing that the husband's status as the father "shall be presumed, unless the contrary can be shown").

101. Goodright v. Moss (1777) 98 Eng. Rep. 1257, 1258.

102. Phillips v. Allen, 84 Mass. (2 Allen) 453, 454 (1861), *superseded by statute*, An Act Improving the Collection of Child Support in the Commonwealth, sec. 16, § 7, 1986 Mass. Acts 596, 616 (codified as amended at MASS GEN. LAWS ch. 209C, § 7 (2019)).

103. *See In re* Findlay, 170 N.E. 471, 473 (N.Y. 1930).

104. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 197-98 (1985); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 283-84, 312 (1964).

105. *See* GROSSBERG, *supra* note 104, at 228-33.

106. *See In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom.* Stanley v. Illinois, 405 U.S. 645 (1972).

107. *See* Grossman, *supra* note 91, at 315.

law regime designed around marriage. On this view, the Court's eventual turn to biological connection as a basis for fatherhood did not reiterate settled understandings but rather justified protection for parental relationships that had been historically excluded and stigmatized.

B. Biological and Social Fathers in the Nonmarital Family

In the 1970s, the Court broke important new ground by treating the parental relationships of unmarried biological fathers as worthy of constitutional protection. Marriage, the social arrangement that had long defined parentage, furnished the norm by which the Court judged the claims of unmarried fathers. The Court protected biological fathers who formed families with the child's mother and exercised custodial and financial responsibility over the child.[108] When it rejected the claims of unmarried fathers, the Court also exhibited a preference for marriage—protecting the mother's marital family in which she was raising the child. In clearing the path for the mother's husband to attain parental status under state law, the Court did not merely configure fatherhood as a practice, rather than a biological fact; it offered relief to *nonbiological* fathers who had assumed a parental role.

The Court's decisions only partially vindicated equality based on marital status. The decisions also had a complicated relationship with emergent principles of sex equality. Even as the Court addressed the claims of unmarried fathers in ways that reflected a more egalitarian approach to parenting, it did not disturb law's gendered assumption that biological mothers are automatically treated as legal parents—and thus expected to assume parental responsibilities—while biological fathers are not.[109]

1. A break from tradition: Protecting the unmarried biological father

The Supreme Court began to recognize a constitutional interest in parental recognition in response to state laws that treated unmarried biological fathers as legal strangers. In the first such case, the Court considered an Illinois law that defined "parents" to mean "the father and mother of a legitimate child . . . or the natural mother of an illegitimate child, and . . . any adoptive parent."[110] Absent marriage to the child's mother, the biological father was "treated not as a parent but as a stranger to his child."[111] Accordingly, "[u]nder

108. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 389 (1979); *Stanley*, 405 U.S. at 650-51.

109. On the durability of this view in constitutional law, see generally Cahill, *supra* note 60.

110. *Stanley*, 405 U.S. at 650 (quoting 37 ILL. REV. STAT. § 701-14).

111. *Id.* at 647-48.

Illinois law, the children of unwed fathers become wards of the State upon the death of the mother."[112]

The unmarried father was not without recourse. Under the state's Paternity Act, "the father of a child born out of wedlock" could gain custody "pursuant to an adoption proceeding initiated by him for that purpose"[113]—a regime the Illinois Supreme Court accepted.[114] But in its 1972 decision in *Stanley*, the U.S. Supreme Court repudiated this treatment of unmarried fathers.[115]

Joan and Peter Stanley had lived together, on and off, for eighteen years.[116] They had three children, but when Joan died, the children became wards of the state under Illinois law.[117] Stanley challenged the law's failure to treat him as a legal parent.[118]

Stanley emphasized his biological connection to the children. Quoting Harry Krause, a family-law scholar who led efforts to reform "illegitimacy" laws, Stanley attempted to leverage biologically imposed financial obligations into biologically based rights.[119] Government authorities had long imposed support obligations on fathers of nonmarital children, but these obligations did not translate into affirmative recognition of a legal parent-child relationship with attendant rights.[120] Collapsing this distinction, Stanley asserted that "biological relationship is the test that has been used—since time immorial [sic]—in our and other cultures for the fixing of support and other familial obligations, and it is the biological relationship that underlies and is traced by legal relationship."[121] Stanley linked the "fundamental interest" in procreation to the interest in parental recognition, claiming that "one who has exercised the right to procreate and has gone on to establish a familial relationship with

112. *Id.* at 646.

113. Paternity Act, § 12, 1957 Ill. Laws 1035, 1040 (repealed 1985).

114. *In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom. Stanley*, 405 U.S. 645.

115. *Stanley*, 405 U.S. at 647-50.

116. *Id.* at 646.

117. *Id.* The State, however, "had the ability to choose whether to file a case to declare the children wards of the state" and did so "because of legitimate concerns about [Stanley's] ability to raise his children." *See* Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 WM. & MARY BILL RTS. J. 773, 779 (2016).

118. *Stanley*, 405 U.S. at 646.

119. Brief for the Petitioner at 20, *Stanley*, 405 U.S. 645 (No. 70-5014), 1971 WL 134140 (citing Harry D. Krause, *Legitimate and Illegitimate Offspring of* Levy v. Louisiana—*First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 345 (1969)).

120. *See* NeJaime, *supra* note 6, at 2274-75.

121. Brief for the Petitioner, *supra* note 119, at 20 (quoting Krause, *supra* note 119, at 345).

his biological progeny has a fundamental interest in maintaining that relationship."[122]

Yet in the same sentence in which he emphasized biological procreation, Stanley highlighted "familial relationship," suggesting that social dimensions were also central to fatherhood.[123] "A biological coupled with a familial relationship," he asserted, "engenders a sanctimonious relationship deservant of this Court's special recognition."[124] Stanley argued that "[m]ore than [his] biological relationship with his children is involved in this case," given that "[p]ractically all males can, in a biological sense, [have] children; but not all, within or without wedlock, can or are willing to assume the cultural role of a father in a family relationship."[125] What Stanley sought from the Court was not the *creation* of a parent-child relationship, but rather the "*maintenance* of a familial relationship with" his children.[126]

Given that Stanley challenged a regime of legal fatherhood tethered to marriage, marital parenthood featured prominently on both sides of the case. Marriage represented a social understanding of fatherhood focused on family formation and the assumption of paternal responsibility.[127] Defending its stark marital-status distinction, the State asserted that "the presence or absence of the father from the home on a day-to-day basis and the responsibility imposed upon the relationship" distinguished married and unmarried fathers.[128] The "father married to the mother of his children lives with them, creating the basic family unit upon which our society is based."[129] The unmarried father, by contrast, usually "establishes no fixed family unit, but only a transient relationship."[130]

Since Stanley had lived with his children and their mother for many years before the mother died, he could link parental conduct to parental coupling, regardless of their marital status.[131] Cohabiting but unmarried parents,

122. *Id.* at 7-8.

123. *Id.*

124. *Id.* at 20.

125. *Id.* at 21-22.

126. *Id.* at 21 (emphasis added).

127. The State asserted that "[m]othering . . . is the result of the primary sexual drives of females," while "the male's parental functions do not involve specific physiologic process" and thus marriage is needed to bind fathers to their children. Brief for Respondent at 25-27, Stanley v. Illinois, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 133736.

128. *Id.* at 23.

129. *Id.*

130. *Id.* at 24.

131. *See* Mayeri, *supra* note 10, at 2315 (noting that Stanley advanced "a functional definition of family" that "relied on marriage as a model" but eschewed "legal formality" as the sole path to recognition).

Stanley's attorneys argued, "are parents in the social and emotional as well as the biological sense," unlike "the unmarried mother and the unmarried father who establish no real or lasting relationship with each other."[132] The vertical parent-child relationship grew out of the horizontal adult relationship. As Stanley argued, "[t]he fact [he] was a voluntarily acknowledging and supporting father who had created and maintained a family is not changed by the mere presence or absence of a marriage certificate."[133] Nonetheless, making the distinction between his family and the marital family as fine as possible, Stanley referred to the children's mother as "his common-law wife."[134] As Melissa Murray observes in her analysis of the case, Stanley "had not only behaved like a father; he had behaved like a *husband*."[135]

Concluding that "Stanley's interest in retaining custody of his children is cognizable and substantial,"[136] the Court emphasized that Stanley not only "sired" but also "raised" his children.[137] As we will see, an emphasis on social factors would shape the Court's decisions *limiting* the constitutional rights of unmarried fathers.[138] But social criteria featured even in the Court's initial decision *extending* constitutional rights to unmarried fathers. Tracking Stanley's framing, the issue in the Court's view was not whether the Constitution required creation of a family, but instead whether it would permit "dismemberment of his family."[139]

While some may have read the Court's decision as broadly protecting biological fathers,[140] its holding appeared to turn on the fact that Stanley had lived in a household with his children.[141] From the very outset, the Court did not simply protect the biological father, but rather protected "a particular kind

132. Brief for the Petitioner, *supra* note 119, at 22 (quoting LEONTINE YOUNG, OUT OF WEDLOCK 147 (1954)).

133. *Id.*

134. *Id.* at 18-19.

135. Murray, *supra* note 98, at 402.

136. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

137. *Id.* at 651.

138. *See infra* Part I.C.1.

139. *See Stanley*, 405 U.S. at 658.

140. *See* Michael J. Higdon, *Biological Citizenship and the Children of Same-Sex Marriage*, 87 GEO. WASH. L. REV. 124, 149 (2019) ("[T]he Court's opinion in *Stanley* might suggest that constitutional parenthood flows directly from biological parenthood . . . ."); John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 376 (1991) ("This first elaboration of the parental rights of unmarried men conceivably could have been interpreted as a constitutional protection of the genetic relationship itself.").

141. *See Stanley*, 405 U.S. at 649 (holding that "Stanley was entitled to a hearing . . . before his children were taken from him" like "all other parents whose custody of their children is challenged"); *id.* at 652 (referring to "Stanley's interest in retaining custody").

of father[]"—one it viewed as undertaking the work of family.[142] In fact, the 1973 Uniform Parentage Act (1973 UPA), which was drafted by Krause and purported to implement *Stanley*'s requirements, warned against overreading *Stanley* and thus distinguished between unmarried fathers who merited legal recognition and "the *disinterested* unmarried father," whose rights "may be terminated."[143]

Stanley rested on equal protection and procedural due process grounds: The father was deprived of a hearing that would be provided "to all other parents whose custody of their children is challenged."[144] Nonetheless, *Stanley* came to stand for the *substantive* due process interest that an unmarried father has in the relationship with his child.[145] (Stanley had not asserted liberty claims in state court,[146] but raised fundamental rights arguments at the Supreme Court.[147])

By announcing that the unmarried biological father in Stanley's position possessed constitutional interests in legal recognition, the Court declared a new understanding of *legal* fatherhood. States could no longer assume that unmarried biological fathers were not legal parents in the absence of adoption. But precisely which unmarried biological fathers enjoyed constitutional status remained in dispute.

2. Unmarried fathers in the age of equality

Stanley's constitutional protection of unmarried fathers occurred at a time when the Court was repudiating the discriminatory common law regime that privileged marital over nonmarital families and men over women. The expansion of constitutional understandings of parenthood drew from and facilitated protection for family forms and family roles that had been marginalized and stigmatized. In this sense, the protection of unmarried men's biological relationships represents an attempt to expand constitutional protections for parental relationships in more inclusive and egalitarian directions.

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142. *See* Murray, *supra* note 98, at 405-06.

143. Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 14 (1974).

144. 405 U.S. at 649. In light of *Stanley*, the Court vacated and remanded two cases in which the lower courts had denied unmarried fathers parental rights. *See* Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972) (mem.); Rothstein v. Lutheran Soc. Servs. of Wisc. & Upper Mich., 405 U.S. 1051 (1972) (mem.).

145. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979) (citing *Stanley* while noting that a father argued "that he was denied substantive due process").

146. *See In re* Stanley, 256 N.E.2d 814, 815-16 (Ill. 1970) (dismissing Stanley's equal protection challenge and two statutory challenges to the Cook County Circuit Court's decision), *rev'd sub nom. Stanley*, 405 U.S. 645.

147. Brief for the Petitioner, *supra* note 119, at 19-23.

a. Vindicating the nonmarital family

Even as the marital family served as a normative model in *Stanley*, the Court inaugurated a new approach to the nonmarital family. The Court's extension of constitutional rights to unmarried fathers was part of its broader repudiation of the discriminatory regime of "illegitimacy," which disadvantaged nonmarital children in a variety of settings. In fact, in addressing the rights of nonmarital children, Krause described the rights of unmarried fathers as "the other side of the same coin."[148] By recognizing unmarried fathers as legal fathers, the state could secure relationships in ways that might provide a source of financial support to the child.

Stanley and its progeny grew out of—and then proceeded alongside—cases protecting "illegitimate" children on equal protection grounds.[149] In two 1968 decisions—*Levy v. Louisiana*[150] and *Glona v. American Guarantee & Liability Insurance Co.*[151]—the Court struck down Louisiana laws that discriminated against nonmarital parent-child relationships. Both cases involved mother-child, rather than father-child, relationships.[152] In *Levy*, nonmarital children sought damages based on their mother's wrongful death,[153] while in *Glona*, an unmarried mother sought damages based on her child's wrongful death.[154] Just as Illinois had defined "parent" to exclude unmarried fathers, Louisiana's statute had defined "children" to exclude "illegitimate children."[155] In finding Louisiana's treatment of nonmarital parent-child relationships unconstitutional, the Court rejected "invidious discrimination" against "illegitimate" children, "even though [such discrimination] had history and tradition on its side."[156] As with unmarried fathers, a focus on biological relationships emerged as a way to challenge traditional practices and to protect stigmatized families.

148. Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 502 (1967).

149. The same year it decided *Stanley*, the Court struck down another law that discriminated against "illegitimate" children. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972). The next year, it held that if states grant "legitimate children a judicially enforceable right to support from their natural fathers," they cannot "deny that right to illegitimate children." Gomez v. Perez, 409 U.S. 535, 535, 538 (1973) (per curiam).

150. 391 U.S. 68, 70, 72 (1968).

151. 391 U.S. 73, 74, 76 (1968).

152. *Levy*, 391 U.S. at 69-70; *Glona*, 391 U.S. at 73-74.

153. 391 U.S. at 69.

154. 391 U.S. at 73.

155. *See* Brief on Behalf of Respondents at 9, *Glona*, 391 U.S. 73 (No. 639), 1968 WL 112853 (citing LA. CIV. CODE art. 3556 (1870)).

156. *See Levy*, 391 U.S. at 71. The Court limited the reach of *Levy* in *Labine v. Vincent*, 401 U.S. 532, 535-36, 539-40 (1971) ("*Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring.").

Decisions repudiating "illegitimacy" guided the Court's approach to unmarried fathers. In *Stanley*, the Court cited *Levy* and *Glona* for the constitutional significance of nonmarital "family relationships."[157] *Levy*, the Court explained, stands for the proposition that nonmarital "children cannot be denied the right of other children because familial bonds [in nonmarital families] were often as warm, enduring, and important as those arising within a more formally organized family unit."[158] By protecting both nonmarital children and unmarried fathers on constitutional grounds, the Court treated nonmarital families, which had been stigmatized by society and excluded under law, as worthy of respect.

Like *Stanley*, the "illegitimacy" cases also stressed both biological connection and the act of parenting. The *Levy* Court emphasized that the "children, though illegitimate, were dependent on [their mother]; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."[159]

Concerns with marital status related to concerns with race and class. "Illegitimacy" penalties targeted parents and children of color.[160] More generally, poor, unmarried parents often found themselves subject to state intervention.[161] As is still the case, the government scrutinized the conduct of poor parents in ways it did not for others, threatening them with removal of their children and termination of parental rights.[162] Legal aid lawyers saw the

157. Stanley v. Illinois, 405 U.S. 645, 651-52 (1972).

158. *Id.*

159. 391 U.S. at 72.

160. *See* Serena Mayeri, Essay, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1281 (2015) ("Advocates initially framed illegitimacy penalties as centrally connected to poverty and to systemic racial oppression."). Indeed, as Anders Walker has shown, opponents of racial integration in the 1950s attempted to use the prevalence of "illegitimacy" in African-American families as a way to continue educational segregation and justify it on "moral" grounds. *See* ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 41 (2009).

161. On the historical trajectory of a system that regulated single-parent (usually mother-led) families in ways that tied government intervention to government benefits, see generally Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

162. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888-89, 889 n.7 (1975) (describing the overrepresentation of poor families in reports of child abuse in the 1960s); Leroy H. Pelton, *Not for Poverty Alone: Foster Care Population Trends in the Twentieth Century*, J. SOC. & SOC. WELFARE, June 1987, at 37, 50-51 (describing the "child abuse crusade" that targeted poor parents for investigations and child removal in the 1960s and beyond). For a current perspective, see Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), https://perma.cc/2DT7-ZBMS.

due process rights of biological parents as a potential bulwark against an overreaching child welfare system.[163] At the same time that they litigated for the rights of unmarried fathers, these lawyers challenged the procedures employed in parental rights terminations.[164]

Even though many reformers and activists worked to secure the rights of nonmarital families, the Court's repudiation of "illegitimacy" remained partial. In cases after *Levy* and *Glona*, the Court upheld laws that disadvantaged nonmarital children.[165] And, as we will see, the Court offered selective protection to unmarried fathers.

b. Sex equality and unmarried fathers

Stanley featured questions of equality based on not only marital status but also gender. In the 1970s, the Court began to repudiate the gender-hierarchical order on which legal regulation of the family had long been based,[166] issuing the first such decision in *Reed v. Reed*.[167] Oral arguments for *Reed* and *Stanley* occurred on the same day in 1971, and media commentary focused on the sex-based dimensions of the regulations in each.[168] As Serena Mayeri documents, Justice White's draft opinion in *Stanley* relied on sex equality grounds and quoted from the draft opinion in *Reed*.[169]

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163. *See* Motion for Leave to File & Brief Amicus Curiae of Community Action for Legal Services, Inc. et al. at iv-v, 19b-19c, 19e, Lehr v. Robertson, 463 U.S. 248 (1983) (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 1646, at *3-4, *24-26 ("This appeal presents a constitutional question of great importance to large numbers of indigent clients who have children out of wedlock . . . .").

164. *See* Mayeri, *supra* note 10, at 2338, 2350, 2355-56; *see also* Santosky v. Kramer, 455 U.S. 745, 753 (1982).

165. *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 349-50, 353 (1979) (plurality opinion) (upholding a law that precluded a father who had not legitimated his child from suing for the child's wrongful death). On the continuing discrimination against nonmarital children, see generally Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

166. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 270 & n.1, 283 (1979) (holding unconstitutional a state law making spousal support at divorce available to wives but not to husbands); Weinberger v. Wiesenfeld, 420 U.S. 636, 637-38, 653 (1975) (holding unconstitutional a Social Security Act provision that allowed widows, but not widowers, to claim survivor benefits); Frontiero v. Richardson, 411 U.S. 677, 678-79, 690-91 (1973) (plurality opinion) (holding unconstitutional a policy under which female servicemembers could not seek benefits for a "dependent" spouse); *see also* Siegel, *She the People*, *supra* note 61, at 1023 & n.246 (cataloguing sex equality cases that involved laws relating to family relationships).

167. 404 U.S. 71, 73, 76-77 (1971) (holding unconstitutional a state probate code provision preferring male relatives over female relatives as estate administrators).

168. *See* Mayeri, *supra* note 10, at 2311-12.

169. *See id.* at 2320-21.

The relationship between sex equality and unmarried fathers' rights, however, was complicated. As Mayeri's treatment shows, throughout the 1970s, feminists debated the extent to which such rights would advance or undermine the interests of mothers—given that women continued to bear the disproportionate burdens of parenting and that rights for unmarried fathers would compromise the authority of mothers.[170] After all, in many of the cases that arose, the unmarried father challenged the judgment of the mother, who sought to place the child for adoption or facilitate adoption by her husband.[171] Nonetheless, protecting the liberty interests of unmarried fathers could, in some cases, counter gender stereotypes and promote a view of the family in which both women and men assume parental responsibilities.[172]

While the Court did not ultimately decide *Stanley* on sex equality grounds, it turned to sex equality principles in its next decision protecting an unmarried father. In its 1979 ruling in *Caban v. Mohammed*, the Court struck down a state law that required consent to adoption from unmarried mothers but not fathers.[173] When the mother sought to have her new husband adopt her children, the biological father, Caban, objected.[174]

Many, including some of the Justices, assumed that unmarried men would not care for their children without the constraining force of marriage.[175] They assumed that mothers, in contrast, were *naturally* moved to care for children, whether married or not.[176] But Caban defied these expectations. He had formed a relationship with his children that, to the Court, appeared analogous to the relationship they had with their mother.[177] "[B]oth mother and father participated in the care and support of their children," and the children had a relationship with each parent characterized by "affection and concern."[178]

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170. *See id.* at 2299-2300, 2324, 2338.

171. *See* Lehr v. Robertson, 463 U.S. 248, 250 (1983); Caban v. Mohammed, 441 U.S. 380, 381-82 (1979); Quilloin v. Walcott, 434 U.S. 246, 247 (1978); *In re* Baby Girl M., 688 P.2d 918, 920 (Cal. 1984), *superseded by statute*, Act of Sept. 29, 1986, ch. 1370, 1986 Cal. Stat. 4901, 4904-05 (codified as amended at CAL. FAM. CODE § 7664 (West 2019)); *In re* Baby Girl S., 628 S.W.2d 261, 262 (Tex. App. 1982), *vacated sub nom.* Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074, *reinstated on remand sub nom. In re* Baby Girl S., 658 S.W.2d 794 (Tex. App. 1983).

172. *See* Mayeri, *supra* note 10, at 2330 ("[F]athers' constitutional claims dovetailed with feminists' desire to encourage paternal caregiving and to combat sex-stereotypes about maternal superiority that threatened women's status as full citizens.").

173. 441 U.S. at 385, 394.

174. *Id.* at 382-83.

175. *See* Mayeri, *supra* note 10, at 2304-05, 2317-18.

176. *See id.* at 2381.

177. *Caban*, 441 U.S. at 389.

178. *Id.*

Relying on its recent decisions rejecting laws based on "overbroad generalization[s]" about women and men,[179] the Court emphasized social acts of parenting as it ruled for Caban. Even as the Court left open the possibility of differential treatment of mothers and fathers shortly after a child's birth, it rejected the State's position that the law's "broad, gender-based distinction" could be justified by a "universal difference between maternal and paternal relations at every phase of a child's development."[180] It is on this basis that Susan Appleton characterizes *Caban* as a critical part of family law's "equality project" of the 1970s.[181]

Caban's sex-equality principle did not require lawmakers to treat biological fathers like biological mothers. Rather, they needed to treat fathers who took on the responsibilities of parenthood like mothers. At least for men, the Court did not isolate the biological connection as the basis for constitutional protection but rather required social acts *in addition to* biological connection.

Even though the Court's decision ultimately rested on equal protection grounds, substantive due process arguments featured prominently in *Caban*. Once again, marriage served as the model of family formation. Like Stanley, Caban compared himself to married fathers, claiming that he "had substantially the same fatherly relationship to his children as he would be expected to have had if they had been born in wedlock."[182] This similarity, Caban argued, "is key to the existence of a substantial constitutionally protected interest in that relationship."[183] Caban and his supporters characterized his nonmarital family as "a *de facto* family" worthy of protection.[184]

The Court echoed Caban's focus on family formation in ways that reflected the priority of marriage.[185] It observed that the mother and father had held themselves out as "husband and wife, although they never legally married."[186] In fact, they "lived together as a natural family for several years. As

179. *Id.* at 394 (citing Califano v. Goldfarb, 430 U.S. 199, 211 (1977) (plurality opinion); and Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)).

180. *Id.* at 389.

181. *See* Susan Frelich Appleton, *Gender and Parentage: Family Law's Equality Project in Our Empirical Age*, *in* WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 237, 237-38 (Linda C. McClain & Daniel Cere eds., 2013).

182. Appellant's Brief at 23-24, *Caban*, 441 U.S. 380 (No. 77-6431), 1978 WL 207155.

183. *Id.* at 24.

184. *Id.* at 9, 19-20; Brief of the American Civil Liberties Union, Amicus Curiae at 5, *Caban*, 441 U.S. 380 (No. 77-6431), 1978 WL 207160.

185. The Court noted that Caban himself had also since married. *See Caban*, 441 U.S. at 383.

186. *Id.* at 382.

members of this family, both mother and father participated in the care and support of their children."[187]

Even as it attended to Caban's family formation with the mother, the Court emphasized Caban's parent-child bonds by explaining that "the father ha[d] established a substantial relationship with the child[ren]."[188] The Court noted "the importance in cases of this kind of the relationship that in fact exists between the parent and child."[189] Like *Stanley*, *Caban*'s emphasis on social, and not merely biological, bonds would shape subsequent decisions on the liberty interest of unmarried fathers.

C. (Unmarried) Biological Fathers vs. (Married) Nonbiological Fathers

With *Stanley* and *Caban*, the Court repudiated the denigration of unmarried fathers, even as it appeared to judge such fathers by their proximity to the marital model. The Court's privileging of marriage became clearer in decisions rejecting the claims of unmarried fathers who sought to block the child's adoption by the mother's new husband. In denying such challenges, the Court ensured the child would be raised by a married mother and father.

The Court's decisions protecting parent-child relationships inside the marital family meant that the Court assigned important value to nonbiological bonds. To be sure, the parental status of the mother's husband did not receive constitutional protection. Still, the Court rejected the constitutional claims of biological fathers in ways that cleared the path for nonbiological fathers to attain parental status through adoption. In doing so, the Court affirmed an approach to fatherhood as a social practice, rather than a biological fact.

1. Unmarried fathers as legal strangers

In *Quilloin v. Walcott*, decided in 1978—the year before *Caban*—the Court considered the claim of an unmarried father, Quilloin, challenging his child's adoption by the mother's husband.[190] Family formation loomed large. Distinguishing *Stanley*, the mother and her husband argued that "in *Stanley*, the father, mother, and children had lived together as a family," whereas in "the instant case . . . [Quilloin] has never lived with the minor child on a regular basis."[191]

187. *Id.* at 389. As Janet Dolgin argues, "the important 'natural' relationship giving Caban legal rights to his children was not his biological link to the children, . . . but his link to their mother." Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 658 (1993).

188. *Caban*, 441 U.S. at 393.

189. *Id.* at 393 n.14 (citing Quilloin v. Walcott, 434 U.S. 246, 256 (1978)).

190. 434 U.S. at 247.

191. Brief of Appellees at 9, *Quilloin*, 434 U.S. 246 (No. 76-6372), 1977 WL 189167.

Quilloin had formed a relationship with the child—though he had not resided with the mother and child.[192] When he contested his son's adoption by the mother's husband, Quilloin sought only visitation, explaining that he "felt that the minor child should be with the mother the major portion of the child's time."[193] The child, for his part, was open to a relationship with both his biological father and his stepfather.[194]

The role that marriage played in the vindication of unmarried fathers, which began to emerge in *Stanley*, became clear in *Quilloin*, where the Court unanimously rejected the unmarried father's claim.[195] Finding that the government had not impermissibly discriminated against men based on marital status, the Court distinguished between Quilloin and married fathers. Quilloin "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," whereas a married father has the "full responsibility for the rearing of his children during the period of the marriage."[196]

Marriage necessarily included custody and support, and the unmarried father needed to demonstrate an analogous arrangement to merit protection as a matter of due process. The Court explained that "this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child."[197] Focusing on parental responsibilities, the Court faulted Quilloin for not taking "steps to support or legitimate the child over a period of more than 11 years."[198] The Court approached the parent-child relationship through the lens of family formation, repeating the lower court's observation that, "unlike the father in *Stanley*, [Quilloin] had never been a *de facto* member of the child's family unit."[199]

Liberal reformers seeking to vindicate unmarried fathers reconciled *Stanley* and *Quilloin* by focusing on the custodial relationship—locating fatherhood as a social and legal determination rather than merely a biological fact. "The critical distinction between *Stanley* and *Quilloin*," the ACLU asserted the following year in *Caban*, "is that in *Stanley* the father had had custody of the children for a number of years and thus the Court recognized his 'cognizable and substantial

192. *See* Mayeri, *supra* note 10, at 2336-37.

193. Brief of the Appellant at 12, 20, *Quilloin*, 434 U.S. 246 (No. 76-6372), 1977 WL 189165; *see also* Mayeri, *supra* note 10, at 2337.

194. Brief of the Appellant, *supra* note 193, at 18.

195. *Quilloin*, 434 U.S. at 247-48, 256.

196. *Id.* at 256 ("[L]egal custody of children is, of course, a central aspect of the marital relationship . . . .").

197. *Id.* at 255.

198. *Id.* at 252-56 (noting the Georgia Supreme Court's finding in this case and later echoing that finding in denying Quilloin's claim).

199. *Id.* at 253.

interest' in their 'companionship, care, custody and management.'"[200] As Caban's attorneys put it, "*Quilloin* refused to extend substantive *Stanley* rights to a father who had only 'sired' but not 'raised' or had a 'family' relationship to his child."[201]

In *Lehr v. Robertson*, a 1983 decision, the Court again considered the claim of an unmarried father who contested his child's adoption by the mother's new husband on both equal protection and due process grounds.[202] But the father, Lehr, also alleged that the mother prevented him from seeing the child and thus forming a relationship that merited constitutional protection.[203] Seeking to elide the distinction between *Stanley* and *Quilloin*, Lehr focused on biology, framing his parental "liberty interest as being founded solely upon his biological relationship with [his child]."[204] Lehr argued that the Court "has not confined the protection of the liberty interest to a 'legal' family," but instead "has couched this protected liberty interest in terms of the 'biological' relationship."[205] He claimed that *Stanley* imposed "no requirement . . . that [the unmarried father] have custody of the child or any relationship with the illegitimate child,"[206] asserting that "the liberty interest at stake is created by the biological relationship between parent and child, whether or not legitimized by marriage."[207]

Those opposing Lehr focused not on biological connection but on parental responsibility. Defending its laws, the State of New York asserted that Lehr "never supported [the mother], even while she was pregnant . . . and allegedly receiving public assistance."[208] Lehr, the State continued, "claim[ed] to have offered child support but ha[d] never actually provided support or sent . . . any gifts. Nor ha[d] he taken any of the steps he could have . . . to assure [the child]'s financial security."[209] Lehr failed to act not only as a father but also as a husband. According to the State, "he refused to marry [the mother] because he

200. Brief of the American Civil Liberties Union, *supra* note 184, at 10-11 (quoting Stanley v. Illinois, 405 U.S. 645, 651-52 (1972)).

201. Appellant's Reply Brief at 15, Caban v. Mohammed, 441 U.S. 380 (1979) (No. 77-6431), 1978 WL 207157.

202. 463 U.S. 248, 250 (1983).

203. *See id.* at 269-70 (White, J., dissenting).

204. Appellant's Reply Brief at 6-7, *Lehr*, 463 U.S. 248 (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 217, at *6-7.

205. Appellant's Brief at 45, *Lehr*, 463 U.S. 248 (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 219, at *42.

206. *Id.* at 46-47, 1982 U.S. S. Ct. Briefs LEXIS 219, at *44-45 (citing Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972)).

207. Appellant's Reply Brief, *supra* note 204, at 5, 1982 U.S. S. Ct. Briefs LEXIS 217, at *5.

208. Brief for Appellee Attorney General of the State of New York at 18, *Lehr*, 463 U.S. 248 (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 1645, at *32.

209. *Id.* at 18, 1982 U.S. S. Ct. Briefs LEXIS 1645, at *33.

'could not make such a commitment . . . , either morally or financially.'"[210] As Murray observes, Lehr "failed to live up to the expectations of fatherhood—expectations that . . . were inextricably intertwined with the marital family."[211]

Writing for the Court in a decision rejecting Lehr's claim, Justice Stevens drew on due process reasoning articulated in *Caban*'s dissenting opinions—one that he authored and the other by Justice Stewart.[212] Justice Stewart's dissent had asserted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[213] Similarly, Justice Stevens had drawn a distinction in *Caban* based on the existence of a relationship, "assum[ing] that, if and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process."[214] Developing these themes, the Court's opinion in *Lehr* drew a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility."[215] Even though Justice Stevens himself had dissented in *Caban*, this distinction harmonized the earlier decisions. The *Lehr* opinion highlighted "[t]he difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case."[216]

While the biological father, unlike others, was uniquely situated to "grasp[] the opportunity" to be a legal parent,[217] he must have done so to receive constitutional protection. In a dissenting opinion, Justice White, echoing Lehr's arguments, objected that "[t]he 'biological connection' is itself a relationship that creates a protected interest."[218] But the Court declared that the "importance of the familial relationship" does not spring from biology but "from the emotional attachments that derive from the intimacy of daily association."[219] The Court noted "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection

210. *Id.* at 18, 1982 U.S. S. Ct. Briefs LEXIS 1645, at *32 (second and third alterations in original) (quoting Joint Appendix at 29, *Lehr*, 463 U.S. 248 (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 216, at *18).

211. Murray, *supra* note 98, at 404.

212. *See Lehr*, 463 U.S. at 259-60.

213. Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

214. *Id.* at 414 (Stevens, J., dissenting) (footnote omitted).

215. 463 U.S. at 259-60.

216. *Id.* at 261.

217. *Id.* at 261-62.

218. *Id.* at 272 (White, J., dissenting).

219. *Id.* at 261 (majority opinion) (quoting Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 844 (1977)).

under the Due Process Clause."[220] Constitutional protection did not simply reflect biological facts, but instead required that the man "act[] as a father toward his children"[221]—the "plus" in what is commonly referred to as the "biology-plus" test.[222]

This was true for fathers but not mothers. Rejecting Lehr's equal protection arguments, the Court drew a distinction between men and women that pulled back from instincts exhibited in *Caban*.[223] Whereas the Court required parental conduct that went beyond biological connection for unmarried men, it assumed that the social role of parent flowed naturally from the biological fact of pregnancy for women.[224] As the Court quoted from Justice Stewart's *Caban* dissent, "The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."[225]

The Court translated biological differences between women and men into "social and legal differences between mothers and fathers"[226]—reiterating, rather than challenging, stereotypes about the roles of women and men in the family.[227] As Karen Czapanskiy famously put it, women are "draftees" and men are "volunteers."[228] This reasoning has implications for equality as well as liberty—premising due process protection for fathers on not simply biological but also social dimensions, while treating the constitutional status of motherhood as a biological inevitability.[229]

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220. *Id.* (alteration in original) (citation omitted) (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)). Mayeri shows how Justice O'Connor's concern with Justice Stevens's sex-equality reasoning led the Court toward due process reasoning that turned on the lack of a substantial relationship between Lehr and his daughter. *See* Mayeri, *supra* note 10, at 2366-67.

221. *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 389 n.7).

222. *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 361 & n.78 (2012) (collecting examples).

223. *See supra* text accompanying notes 179-80.

224. *See* Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 435-44 (2013); June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1048 (2003).

225. *Lehr*, 463 U.S. at 260 n.16 (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

226. *See* NeJaime, *supra* note 6, at 2281.

227. The Court also allowed sex-based "illegitimacy" laws to survive. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 73-74 (2003).

228. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16 (1991).

229. This gender-differentiated approach to parental recognition persisted in the Court's treatment of citizenship of children born to unmarried parents, but appeared increasingly inconsistent with the Court's gender equality jurisprudence as well as family law's gender-neutral approach to custody. *See* Antognini, *supra* note 224, at 457.

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2. Protecting nonbiological fathers in marital families

By denying protection to Quilloin and Lehr and instead protecting a mother's new marital family, the Court propped up marriage as the appropriate domain for childrearing. In vindicating the marital family, the Court also valued nonbiological parental bonds. By turning back the parental claim of the unmarried father, the Court allowed another man—the mother's husband—to attain legal status as a father. That is, rejecting the biological father's constitutional claim cleared the way for a nonbiological father to adopt the child.

The Court understood the rejection of the unmarried father's claim and adoption by the stepfather as prioritizing the child's interest.[230] It is tempting to view the rights of nonmarital children as largely consistent with the rights of unmarried fathers. Yet, in the eyes of some of the Justices—as well as other judges, lawmakers, and advocates—the interests of unmarried fathers often diverged from the interests of their children. Within a framework that prioritizes the marital family, rights for the unmarried father could prevent the child's adoption into a marital home. Cases in which the mother sought to place the child for adoption shaped contestation over unmarried fathers' rights.[231] As Mayeri explains, the "genuine concern for the welfare of illegitimate children . . . reflected the widely held assumption that adoption into a two-parent marital family was the best alternative for a child born 'out of wedlock,' assuming her parents were unable or unwilling to marry each other."[232] Even Krause worried that *Stanley* would be applied in ways that would hinder adoptions.[233]

The Court appears to have begun to appreciate this tension. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686, 1700-01 (2017) (striking down a gender-differentiated residency requirement for unmarried mothers and fathers in immigration law).

230. *See, e.g.*, *Lehr*, 463 U.S. at 264 n.22 (explaining how the adoption "gives legal permanence to [the child's] relationship with her adoptive father, a relationship they had maintained for 21 months at the time the adoption order was entered").

231. *See* Mayeri, *supra* note 10, at 2334-35.

232. *Id.* at 2335; *see also* Caban v. Mohammed, 441 U.S. 380, 395 (1979) (Stewart, J., dissenting) (expressing concern that rights for unmarried fathers would undermine children's interests by hindering adoption); Brief of the Child Care Ass'n of Illinois, Inc., Amicus Curiae at 2, Stanley v. Illinois, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 134139 ("If the so-called 'unwed father' is to be automatically accorded . . . rights tantamount to those held by [the mother], . . . then the whole legal system for the adoption of children . . . will be placed in serious jeopardy . . . .").

233. *See* Krause, *supra* note 143, at 12. For examples of cases in which unmarried fathers challenged decisions by the mothers to place children for adoption, see *In re Baby Girl M.*, 688 P.2d 918, 920 (Cal. 1984), *superseded by statute*, Act of Sept. 29, 1986, ch. 1370, 1986 Cal. Stat. 4901, 4904-05 (codified as amended at CAL. FAM. CODE § 7664 (West 2019)); *In re Baby Girl S.*, 628 S.W.2d 261, 262 (Tex. App. 1982), *vacated sub nom.*

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As Mayeri observes, if children were not placed for adoption with married couples, the next best option, "according to the conventional wisdom, was for their mother to marry another man willing to adopt them, thereby legitimating the children."[234] Doing so would also avoid dividing custody across two households—a practice which drew significant skepticism at the time.[235] By rejecting the claims in both *Quilloin* and *Lehr*, the Court made possible the child's adoption by the mother's husband.[236] Explaining that "the adoption was sought by the child's stepfather, who was part of the family unit in which the child was in fact living,"[237] the *Quilloin* Court declared that "the result of the adoption in this case is to give full recognition to a family unit already in existence."[238] The value the Court assigned to marriage—and children's interest in being raised in an intact, marital family—was clear.[239]

The vindication of marital parenting entailed not only the rejection of the parental status of biological fathers but also the acceptance of the parental status of nonbiological fathers. Importantly, though, the nonbiological father—the stepfather—was not understood to possess a due process interest in parental recognition. Rather than assert his own constitutional claim to a parental relationship, the legal status of his parental relationship hinged on the constitutional status of the biological father.

D. The Triumph of Marriage—and the Nonbiological Father

With *Lehr*, the Court clarified that the biological connection between father and child, standing alone, does not give rise to a protected liberty interest. The unmarried father needs to act as a father—by assuming responsibility for the child—to have a constitutional claim. If he fails to do so, the Court will leave him a legal stranger and clear the way for the child's adoption by the mother's husband.[240] Soon, though, the Court would question the assumption that an unmarried biological father who also forms a parental relationship with the child has a constitutionally protected right to maintain

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Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074, *reinstated on remand sub nom. In re Baby Girl S.*, 658 S.W.2d 794 (Tex. App. 1983).

234. Mayeri, *supra* note 10, at 2335.

235. *See* GOLDSTEIN ET AL., *supra* note 57, at 38 ("[T]he noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.").

236. *See* Lehr v. Robertson, 463 U.S. 248, 250 (1983); Quilloin v. Walcott, 434 U.S. 246, 247, 256 (1978).

237. *Quilloin*, 434 U.S. at 252-53 (summarizing the Georgia Supreme Court's reasoning).

238. *Id.* at 255.

239. *See* Murray, *supra* note 98, at 404-05.

240. *See Lehr*, 463 U.S. at 262.

that relationship. In doing so, the Court would cast aside any doubt that its approach to parenthood privileges the marital family.

California maintained in its evidence code a marital presumption that conclusively presumed that a woman's husband, as long as he was cohabiting with his wife and was not "impotent or sterile," was the father of a child to whom she gave birth.[241] In *Michael H. v. Gerald D.*—in which the caption itself makes clear that the biological father was pitted against the nonbiological father—the mother had an extramarital relationship that produced a child, Victoria.[242] Michael, the biological father, had formed a significant relationship with Victoria and held her out as his own child—including during periods of cohabitation with the child's mother.[243] Yet he was precluded from challenging the marital presumption and establishing his own paternity.

Michael appeared to satisfy the "biology-plus" standard presumably required of unmarried fathers to gain constitutional protection: He lived with the mother and child at various points, cared for the child, and held the child out as his own.[244] But after the mother and her husband, Gerald, reconciled, Michael's presence threatened an intact marital family, in which the husband served as father.[245] Rejecting Michael's claim that application of the state's marital presumption infringed his due process rights, Justice Scalia's plurality opinion bluntly stated that "to provide protection to an adulterous natural father is to deny protection to a marital father."[246] Tradition privileged marital, rather than biological, fatherhood.[247]

Because both Michael and Gerald had "formed a psychological or *de facto* father-child relationship with Victoria," the attorney for Victoria claimed the child was entitled to maintain relationships with both men.[248] Rejecting this claim, Justice Scalia declared that "California law, like nature itself, makes no provision for dual fatherhood."[249] Instead, it recognized the marital father, even when he is not the biological father, as the legal father.[250] On this view, marriage, not biology, constitutes "natural" relations.

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241. CAL. EVID. CODE § 621(a) (West 1989) (repealed 1994).

242. 491 U.S. 110, 113-14 (1989) (plurality opinion).

243. *See* Brief for Appellant Victoria D. at 10-11, 22 n.17, 28, *Michael H.*, 491 U.S. 110 (No. 87-746), 1987 WL 880074.

244. *See Michael H.*, 491 U.S. at 114 (plurality opinion).

245. *See id.* at 114-15, 127.

246. *Id.* at 130 (emphasis omitted).

247. *See id.* at 124 ("[O]ur traditions have protected the marital family . . . [and] the presumption of legitimacy.").

248. Brief for Appellant Victoria D., *supra* note 243, at 10-11 (quoting Joint Appendix at 15, *Michael H.*, 491 U.S. 110 (1989) (No. 87-746), 1988 U.S. S. Ct. Briefs LEXIS 1138, at *16).

249. *Michael H.*, 491 U.S. at 118 (plurality opinion).

250. CAL. EVID. CODE § 621(a) (West 1989) (repealed 1994).

To harmonize the result with its earlier decisions, the plurality declared that the "unitary family," rather than the parent-child relationship standing alone, merits constitutional protection.[251] To distinguish Michael's developed—but constitutionally unprotected—relationship with his child from the protected relationships of men like Stanley and Caban, the Court read its precedents to "rest not upon . . . isolated factors but upon the historic respect . . . traditionally accorded to the relationships that develop within the unitary family."[252] In both *Stanley* and *Caban*, the father had formed a family by residing with the mother and children.[253] In each of *Quilloin* and *Lehr*, the Court protected the relationship between the child and the stepfather who had formed a marital family with the mother.[254]

As Janet Dolgin argues, given *Michael H.*,

> the . . . requirement for effecting legal paternity—that a father effect a social relationship with his biological child—is read as code for the requirement that he effect that relationship *within the context of family*, most easily identified in cases in which the father has established a marriage or marriage-like relationship, with the child's mother.[255]

Marital families necessarily constituted "unitary" families; nonmarital families were "unitary" families when they looked and acted marriage-like. A nonmarital family could hardly seem marriage-like if the mother remained married to another man.

Even as Gerald asserted that "Victoria and I consider that I am her father,"[256] he did not advance a liberty interest in that parent-child relationship. Instead, he argued that the protection of his relationship with Victoria should be considered in assessing the state's interest in enforcing its conclusive marital presumption.[257] The Court upheld the state-law determination of parentage without suggesting that the husband had an interest of constitutional magnitude.

This approach is consistent with earlier cases. If they were parties to the litigation, stepfathers—men serving as nonbiological fathers—did not assert constitutional claims.[258] While the Court emphasized social aspects of fatherhood

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251. *Michael H.*, 491 U.S. at 123 (plurality opinion).

252. *Id.*

253. *See supra* notes 131-35, 185-87 and accompanying text.

254. *See supra* notes 236-38 and accompanying text.

255. Dolgin, *supra* note 187, at 650 (footnote omitted).

256. Joint Appendix, *supra* note 248, at 3 (capitalization altered), 1988 U.S. S. Ct. Briefs LEXIS 1138, at *5.

257. *See* Brief on the Merits for Appellee Gerald D. at 22-25, 24 n.16, *Michael H.*, 491 U.S. 110 (No. 87-746), 1988 WL 1025582.

258. *See* Lehr v. Robertson, 463 U.S. 248, 250 n.1 (1983) (noting that the primary appellee in the case was the mother, not her husband); Quilloin v. Walcott, 434 U.S. 246, 247, 254
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when it both *accepted* and *rejected* unmarried fathers' constitutional claims, it did not see the mother's husband as constitutionally entitled to parental status.[259]

E. State Responses to Constitutional Decisions

The Court's decisions on unmarried fathers shaped approaches of state courts and legislatures addressing paternity. In adopting the 1973 UPA, states sought to extend legal protection "equally to every child and to every parent, regardless of the marital status of the parents."[260] Lawmakers viewed the Court's earlier constitutional decisions as requiring pathways to parentage for unmarried fathers.[261]

Even as states sought to protect relationships between nonmarital children and their biological fathers, concerns about adoption loomed large. The Court's decisions reshaped significant aspects of adoption. Many states provided greater authority for biological fathers to veto adoptions. As June Carbone and Naomi Cahn observe, some states "staked out a strong stance that children's interests lie in a relationship with both biological parents, and . . . made it difficult for mothers . . . to place children for adoption without the father's consent."[262] Still, lawmakers in many states worried about hindering adoptions and thus limited rights for men who, in the words of the sponsor of California's version of the 1973 UPA, had "not lived with the child or actually established physical and emotional parent-child ties."[263] To protect their right to receive notice of an adoption petition, men in some states were required to register with putative father registries.[264] Indeed, heartrending cases of children's removal from adoptive homes[265] led some states to place increasingly high burdens on unmarried fathers.[266]

(1978) (noting that the argument by the mother and her husband was that the biological father's due process rights were not violated).

259. *See* Buss, *Adrift in the Middle*, *supra* note 90, at 321 ("While only the biological father pressed a constitutional claim in *Quilloin*, there were clearly two competing paternal contenders in the litigation.").

260. UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM'N 1973).

261. *See* Anthony C. Beilenson, *Archaic Injustice Eliminated*, L.A. TIMES, Oct. 19, 1975, pt. IV, at 5.

262. June Carbone & Naomi Cahn, Jane the Virgin *and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 535 (2017).

263. Beilenson, *supra* note 261.

264. *See* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1039-42 (2002) (explaining the mechanics of putative father registries).

265. *See, e.g.*, *In re* Doe, 638 N.E.2d 181, 182-83 (Ill. 1994) (holding that the biological father's rights had not been properly considered three years after the child had been born and subsequently placed with adoptive parents).

266. *See, e.g.*, *In re* Adoption of J.S., 358 P.3d 1009, 1011-12 (Utah 2014) (rejecting the biological father's constitutional challenge to Utah's requirement that, in addition to registering in the state's putative father registry, he also file an affidavit promising to

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Outside of specific concerns with adoption, states prioritized paternity establishment. Biological evidence was critical.[267] As Katharine Baker explains, "genetics still serves as the default means of determining fatherhood" for nonmarital children, and "[e]ven though not constitutionally required to, states also allow alleged genetic fathers to sue to establish paternity as the child grows."[268]

Congress shaped state policies and practices in ways that prioritized yet also minimized men's biological ties. Federal law required states to provide easy ways for unmarried fathers to establish paternity.[269] Voluntary acknowledgments of paternity, by which a man attests to his status as the biological father, became the most common way to establish parentage for nonmarital children.[270] Importantly, though, in the absence of a specific request by a party, federal law did not require states to demand that a man who signs such an acknowledgment undergo genetic testing to confirm his paternity.[271] Indeed, once a man has established his paternity in this way and the acknowledgment has taken effect, even if the man is not the biological father, the acknowledgment can only be challenged under very limited circumstances.[272]

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provide financial support to the child and assume custody); *see also* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 294-96 (2011) (explaining the relationship between "high-profile" adoption cases and legal regulation of the rights of unmarried fathers).

267. *See* UNIF. PARENTAGE ACT §§ 12, 13(c), 13 cmt. (UNIF. LAW COMM'N 1973).

268. Katharine K. Baker, *Procreation and Parenting*, OXFORD HANDBOOK CHILDREN & L. 10 (Nov. 2018), https://perma.cc/37MF-XNSV.

269. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. III, § 331, 110 Stat. 2105, 2227 (codified as amended at 42 U.S.C. § 666(a)(5) (2018)); Family Support Act of 1988, Pub. L. No. 100-485, tit. I, § 111, 102 Stat. 2343, 2348-50 (codified as amended in scattered sections of 42 U.S.C.); 45 C.F.R. §§ 302.70(a)(5)(iii), 303.5 (2019).

270. *See, e.g.*, UNIF. PARENTAGE ACT, art. 3, introductory cmt. (UNIF. LAW COMM'N 2017).

271. *See* 45 C.F.R. § 302.70(a)(5)(iii) (detailing the procedures for voluntary acknowledgment of paternity (VAP) and omitting any specific requirement for the genetic testing of the putative father); *id.* § 303.5(d) (requiring genetic testing "[u]pon request" of a party in a contested paternity case).

272. *See* 42 U.S.C. § 666(a)(5)(D)(iii) ("[A]fter the 60-day period . . . , a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of *fraud*, *duress*, or *material mistake of fact*, with the burden of proof upon the challenger . . . ." (emphasis added)); *see also, e.g.*, People *ex rel.* Dep't of Pub. Aid v. Smith, 818 N.E.2d 1204, 1205-06 (Ill. 2004) (holding that a putative father who waived his right to request DNA testing for paternity could not bring an action to declare the nonexistence of a parent-child relationship after learning through DNA testing that he was not the genetic father); Burden v. Burden, 945 A.2d 656, 668 (Md. Ct. Spec. App. 2008) (holding that a conclusive presumption of paternity arose after the husband filed a VAP, preventing him from attempting to disestablish paternity in future actions); *In re* S.R.B., 262 S.W.3d 428, 430-31 (Tex. App. 2008) (finding that the VAP could not be ruled invalid

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Courts, too, prioritized yet also minimized biological ties. In some states, courts applied key precedents in ways that furnished greater constitutional protection for biological fathers. For example, the California Supreme Court invalidated the state's parentage law to the extent it prevented an unmarried father from establishing paternity when the mother blocked him from forming a relationship with the child.[273] Even though *Lehr* featured facts suggesting that the mother had prevented the biological father from forming a relationship with the child, the California court reasoned that "*Lehr* can fairly be read to mean that a father need only make a reasonable and meaningful attempt to establish a relationship, not that he must be successful against all obstacles."[274]

At the same time, courts carried forward the emphasis on established parent-child bonds. As a California court observed in 2000, "there are times when the due process clause of the federal Constitution precludes states from applying substantive rules of paternity law which have the effect of terminating an *existing* father-child relationship."[275] Tensions between biological and social factors arose most frequently in conflicts over the marital presumption.[276] Extracting from the relevant precedents "[t]he theme of relationship (as distinct from mere biological parenthood),"[277] courts could favor nonbiological fathers married to the mother over biological fathers seeking to form a relationship with the child. Unlike the result in *Michael H.*, though, courts in many states grew increasingly hospitable to claims by biological fathers who had in fact formed parental relationships with the child, despite the mother's marriage to another man.[278] As with *Michael H.*, these cases were still framed as conflicts between marital presumptions of paternity and

based on testimony of the mother that the purported father was not the child's biological father).

273. *See* Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992).

274. *Id.* at 1228.

275. Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 296 (Ct. App. 2000).

276. *See, e.g.*, Pearson v. Pearson, 182 P.3d 353, 359 (Utah 2008) (upholding the marital presumption against a challenge by a biological father when the husband had served as father to the child).

277. *See, e.g.*, *Brian C.*, 92 Cal. Rptr. 2d at 303.

278. *See, e.g.*, Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399, 403 (Ct. App. 1998) ("There is . . . an obvious distinction between a biological father who has actually established a parent and child relationship, and a man who has not established such a relationship but would like to do so."); C.C. v. A.B., 550 N.E.2d 365, 372 (Mass. 1990) (reasoning that for constitutional purposes, "[t]he existence of a substantial parent-child relationship is . . . the controlling factor").

constitutional rights of unmarried biological fathers. The nonbiological father (the mother's husband) was not viewed as a constitutional rights holder.[279]

For its part, the Supreme Court has not revisited the constitutional rights of unmarried fathers. Still, a more recent decision suggests that the Court continues to value established relationships over biological ties. In its 2013 decision in *Adoptive Couple v. Baby Girl*, the Court ruled on statutory, not constitutional, grounds.[280] An unmarried father contested his biological child's adoptive placement, arguing that it violated his rights under the Indian Child Welfare Act (ICWA).[281] In denying his claim, the Court resisted a biologically grounded account of parenthood[282]—an account advanced by the dissents.[283] As in its earlier decisions, the Court's rejection of the biological father's claim—

279. This dichotomy between the family-law status of nonbiological fathers and the constitutional status of biological fathers is also reflected in scholarly treatments. In recent years, scholars have brought renewed attention to the unmarried fathers cases, focusing on the rights of *biological* fathers and the gender-differentiated regulation of *biological* mothers and fathers. *See, e.g.*, Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 647 (2014) (arguing that the shift toward a system in which parental rights are earned by performing caretaking labor creates an unequal hurdle for men who intend to be fathers). *See generally* Mayeri, *supra* note 10 (documenting and exploring the history of unmarried fathers' ultimately unsuccessful constitutional claims and the relationship of those claims to feminist debates over sex equality). But, with the notable exception of Michael Higdon's argument that constitutional understandings of parenthood should include intended parents, scant attention has been given to whether due process protects nonbiological parents' interest in parental recognition. *See* Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1491 (2018) (advocating for "a definition of constitutional parenthood that accounts not only for those who share a biological connection to the child, but also those who were the intended parents of the resulting child, regardless of biology"). Higdon would not extend constitutional protection to functional parents who are not intended parents. *See id.* at 1525. For related work, see Peter Nicolas, Essay, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1298-1307 (2014) (arguing for a fundamental right to establish parentage arising out of gestational surrogacy arrangements).

280. 570 U.S. 637, 641-42 (2013).

281. *Id.* at 645-46; *see also* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C.).

282. The Court reasoned that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]' . . . by the termination of the Indian parent's rights." *Adoptive Couple*, 570 U.S. at 651-52.

283. In contending that "[t]he Court's opinion . . . needlessly demeans the rights of parenthood," Justice Scalia referred to "the entitlement of those who bring a child into the world to raise that child." *Id.* at 668 (Scalia, J., dissenting). Justice Sotomayor connected ICWA's definition of "parent" as including "'any biological parent'" to "the principle, recognized in our cases, that the biological bond between parent and child is meaningful." *Id.* at 673 (Sotomayor, J., dissenting) (quoting 25 U.S.C. § 1903(9)).

though on statutory grounds—facilitated the child's adoption.[284] In doing so, the Court preserved the child's relationship with "the only parents she had ever known," which had been jeopardized when, based on the lower court's ruling, she was taken from the adoptive parents at the age of twenty-seven months.[285]

As we have seen, the Court's decisions on unmarried fathers have much to say to contemporary assessments of the status of nonbiological parents. Nonetheless, it is necessary to turn to other decisions by the Court to gain a deeper understanding of constitutional parenthood. The next Part addresses the status of nonparental caregivers.

II. Nonparental Caregivers and the Constitution

The Court's early parental rights precedents—decisions on the scope of parental authority, rather than questions of parental recognition—were not limited to biological parents. These precedents instead included nonparents exercising custody over the child. In its 1925 decision in *Pierce v. Society of Sisters*, the Court held that a compulsory public education law "unreasonably interferes with the liberty of parents *and guardians* to direct the upbringing and education of children under their control."[286] *Prince v. Massachusetts*, decided in 1944, featured an aunt asserting parental authority with respect to her niece.[287] The State did not argue that Prince could not assert parental rights,[288] and the Court, even as it rejected her claim, simply assumed that she could claim parental authority because she had "legal custody."[289]

The Court's later parental rights opinions, in contrast, spoke in expressly biological registers. In *Santosky v. Kramer*, a 1982 case involving termination of parental rights, the Court protected the "fundamental liberty interest of *natural*

284. *See id.* at 655-56 (majority opinion).

285. *Id.* at 641. For persuasive criticism of the Court's treatment of ICWA's protections, see generally Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295 (2015).

286. 268 U.S. 510, 529-30, 534-35 (1925) (emphasis added).

287. *See* Appellant's Brief at 5, Prince v. Massachusetts, 321 U.S. 158 (1944) (No. 98), 1943 WL 54417.

288. *See* Brief on Behalf of the Appellee the Commonwealth of Massachusetts, *Prince*, 321 U.S. 158 (No. 98), 1943 WL 54418.

289. *See Prince*, 321 U.S. at 159, 161; *see also* JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 103 (2014) (arguing that "it was not natural parenthood that gave both custodial and educational rights; it was custodial power—whether resulting from biology, positive law, or otherwise—that gave educational rights" (quoting David R. Upham, *Pierce v. Society of Sisters*, Natural Law, and the Pope's Extraordinary—But Undeserved—Praise of the American Republic 12 (Mar. 17, 2012) (unpublished manuscript), https://perma.cc/7H2G-N9YN)).

parents in the care, custody, and management of their child."[290] In *Parham v. J.R.*, a 1979 case involving the civil commitment of minors, the Court offered a biological explanation for the historical protection of parental rights, reasoning that "*natural* bonds of affection lead parents to act in the best interests of their children."[291]

The constitutional status of those who are not biological parents but take on parental roles remains unclear. To better understand this issue, this Part addresses due process decisions outside the area of parental recognition that assess the claims of those who are not the child's biological parents but nonetheless are parenting the child. Like the Court's decisions on unmarried fathers, these precedents are decades old and yet retain influence in contemporary cases on parenthood. Courts, as *Hawkins* demonstrates, cite them to support a biological approach to constitutional parenthood.[292] As this Part shows, even as these constitutional precedents privilege biological connection, they do not resolve the constitutional status of nonbiological parents and, in fact, gesture toward a social approach to parenthood that would credit the claims of some nonbiological parents on due process grounds.

A. The Constitutional Status of Blood Relatives

At the same time that the Court protected nonmarital parent-child relationships in its decisions on "illegitimacy" and unmarried fathers, it also extended constitutional protection to a grandmother raising her grandson. In its 1977 decision in *Moore v. City of East Cleveland*, the Court held that a zoning ordinance that prevented Moore from living with her grandson in the absence of the grandson's parent violated Moore's substantive due process rights.[293]

To defend its law, East Cleveland framed *Meyer* and *Pierce*—the Court's original parental rights decisions—as inapposite, asserting that they do not "'give[] grandmothers any fundamental rights with respect to grandsons,' and . . . that any constitutional right to live together as a family extends only to the nuclear family—essentially a couple and their dependent children."[294] In contrast, Moore, who was raising her grandson because his mother had died,[295] relied on the Court's parental rights cases to argue that "[t]he right to privacy in family decisions concerning the nurturing of children applies to [her]" because

290. 455 U.S. 745, 753-54 (1982) (emphasis added).

291. 442 U.S. 584, 602 (1979) (emphasis added).

292. *See supra* notes 27-28 and accompanying text.

293. 431 U.S. 494, 495-97, 506 (1977) (plurality opinion).

294. *Id.* at 500 (citation omitted) (quoting Brief for the Appellee at 18, *Moore*, 431 U.S. 494 (No. 75-6289), 1976 WL 178723).

295. *Id.* at 496-97.

she "stands as if she were the child's natural mother."[296] In other words, she argued that her relationship should be protected because she was a de facto parent.

The plurality opinion conceded that *Meyer* and *Pierce* "did not expressly consider the family relationship presented here."[297] Yet it reasoned that "[d]ecisions concerning child rearing, which . . . *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children."[298] Focusing on the act of raising children, the plurality cited *Prince*, describing it as a decision that "spoke broadly of family authority as against the State, in a case where the child was being reared by her aunt, not her natural parents."[299] Of course, *Moore* did not involve parental recognition, but merely the ability of a grandmother and grandson to live together without criminal sanction. Nonetheless, the Court refused to limit protected relationships to those between biological parents and children and instead adopted "a larger conception of the family" that included nonparental caregivers.[300]

Even as the plurality took a capacious view of the relationships protected as a matter of due process, it seemed to privilege biological relations. Moore herself had pressed this view, drawing on *Prince* to argue that, "[w]hile most of the [Court's] decisions . . . focus on the right of biological parents to raise their children, it is clear that the concept of 'parent' extends equally to blood-related persons occupying the role of parent."[301] Mirroring arguments pressed by unmarried fathers, she claimed that "[t]hese relatives have a constitutional right . . . to build upon their blood relationship."[302] Biological relatedness appeared salient to the Court. The *Moore* plurality opinion distinguished *Village of Belle Terre v. Boraas*, a 1974 decision upholding a zoning ordinance that prevented groups of unrelated individuals from living together.[303] Whereas "[t]he ordinance there affected only *unrelated* individuals," the East Cleveland

296. Brief for the Appellant at 23-25, *Moore*, 431 U.S. 494 (No. 75-6289), 1976 WL 181334.

297. *Moore*, 431 U.S. at 500 (plurality opinion); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

298. *Moore*, 431 U.S. at 505 (plurality opinion).

299. *Id.* at 505 n.15 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

300. *Id.* at 505.

301. Brief for the Appellant, *supra* note 296, at 23-24.

302. *Id.* at 26.

303. *Moore*, 431 U.S. at 498-99 (plurality opinion); Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 7-10 (1974) (upholding the constitutionality of a zoning ordinance that limited the occupancy of one-family dwellings to biological, adoptive, or marital families, or not more than two unrelated persons).

ordinance "slic[es] deeply into the family itself."[304] On this view, related—but not unrelated—individuals constitute families for federal due process purposes. Of course, relatedness could describe a biological or legal status—and the claimants in *Village of Belle Terre* were not only biologically but also legally unrelated.[305]

B. The Constitutional Status of Foster Parents

The same year it decided *Moore*, the Court also considered the constitutional status of caregivers without biological ties. In *OFFER*, a case that has received relatively little academic attention,[306] foster parents challenged procedures the government used to remove children from their foster homes.[307] Even though the state pays foster parents to provide for children, the foster parents argued that they formed parent-child bonds worthy of some protection.[308] They did not seek recognition as legal parents, but claimed that the relationships they formed with their foster children rose to the level of a liberty interest entitled to certain safeguards before the state could sever it.[309]

The organization representing the interests of foster parents framed the Court's precedents as embracing social understandings of the family rather than focusing on legal status.[310] Drawing on the concept of psychological parenthood—popularized by Joseph Goldstein, Anna Freud, and Albert Solnit in their seminal 1973 book[311]—it asserted that "the existence of a biological

304. *Moore*, 431 U.S. at 498 (plurality opinion).

305. 416 U.S. at 2-3.

306. For a notable exception, see David L. Chambers & Michael S. Wald, Smith v. OFFER, *in* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 67 (1985).

307. Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 818-20 (1977).

308. *Id.* at 826, 835-36.

309. *Id.* at 839. As Chambers and Wald recount, "[t]he original complaint alluded to a fundamental constitutional right of Mrs. Smith and other foster parents 'to establish a home, bring up children, and enjoy those privileges long recognized as essential to the pursuit of happiness.'" Chambers & Wald, *supra* note 306, at 81 (quoting from the complaint). While the attorney representing the foster parents sought a preremoval hearing in the complaint, it "was ambiguous whether [she] was seeking more—whether she was claiming that at the hearing the foster parents were entitled to the benefit of substantive standards protecting their 'fundamental right to establish a home.'" *Id.* (quoting from the complaint).

310. *See* Brief for Appellees Organization of Foster Families for Equality & Reform et al. at 46, *OFFER*, 431 U.S. 816 (Nos. 76-180 et al.), 1977 WL 189092.

311. *See generally* GOLDSTEIN ET AL., *supra* note 57.

relationship was not the key determinant" in a child's attachment.[312] In fact, the attorney for the foster parents relied on Goldstein and Solnit as experts in the case.[313] Emphasizing arrangements in which bonds had developed, the foster parents urged protection for placements of at least a year in duration.[314] They asserted a "liberty interest" in the survival of this "psychological family."[315]

Nonetheless, the interests of biological parents—those who sought their children's return—complicated the issue. The Court could scarcely find that foster parents possessed a liberty interest "without derogating from the substantive liberty" of the biological parents.[316] As with unmarried fathers, vindication of biological ties would protect parents who had been marginalized by the state and society. Prioritizing the rights of biological parents would safeguard the parental status of poor women and women of color subject to overreaching child welfare authorities[317] and threats by foster parents seeking to supplant them.[318] In this sense, the recognition of nonbiological parental ties would undermine, rather than promote, important interests in equality.[319]

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312. Brief for Appellees Organization of Foster Families for Equality & Reform et al., *supra* note 310, at 39, 42.

313. *See* Chambers & Wald, *supra* note 306, at 101-02. At the Supreme Court, a group that included Goldstein, Freud, and Solnit filed an amicus brief in support of the plaintiffs. *See* Brief of a Group of Concerned Persons for Children as Amici Curiae, *OFFER*, 431 U.S. 816 (Nos. 76-180 et al.), 1977 WL 189097.

314. *OFFER*, 431 U.S. at 839, 853-54.

315. *Id.* at 839.

316. *See id.* at 846.

317. *See* Dorothy E. Roberts, David C. Baum Memorial Lecture, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172-73.

318. Some feared that foster parents would form attachments with the children that would undermine reunification efforts. *See OFFER*, 431 U.S. at 818 n.1 (explaining how, regarding one of the couples in *OFFER*, "[t]he agency apparently felt that [they] were too emotionally involved with the girls and were damaging the agency's efforts to prepare [the children] to return to their mother"). Indeed, this concern about the child's attachment provided a justification to terminate a foster placement. *See In re* Jewish Child Care Ass'n of N.Y., 172 N.Y.S.2d 630, 631 (Sup. Ct. 1957) (finding "that the welfare of the child will be best served by her removal from the [foster] home before further damage is done" in denying the claim of foster parents when "the child's mother expected eventually to assume [the child's] care and nurture" and would not "consent to an adoption"); *see also* Chambers & Wald, *supra* note 306, at 72 ("[S]ome agencies may remove a child from a foster home if the agency detects that the foster parents want the child permanently.").

319. As Chambers and Wald detail, Louise Gans, who represented the biological parents who intervened in the case, "saw foster-care issues as related to issues of class. All too often, she felt, foster care was a way for middle-class social workers to transfer children of the poor to middle-class homes." Chambers & Wald, *supra* note 306, at 87-88.

Intervening to assert their own constitutional interests, biological parents whose children were in the foster care system framed the "biological parent-child relationship" as the central feature of constitutional parenthood.[320] Groups backing the biological parents also characterized constitutional precedents on parental rights as reflecting "[t]he primacy of the natural parent-child relationship."[321] The government, too, defended its regime by denying that constitutional protection extended to the foster parent relationship and by instead framing itself as vindicating the interest of "children and *natural* parents."[322]

Even amici arguing in favor of the due process interests of foster parents and children conceded that the initial removal infringed the due process rights of biological parents.[323] Moreover, the competing rights of biological parents led some to draw a distinction based on whether the foster child was being returned to her biological parents or was instead moving to a new temporary placement. In the former situation, legal aid lawyers claimed a hearing would infringe upon the liberty interest that inheres in the "natural family unit."[324]

The district court had avoided the foster parents' substantive due process claims, instead holding that *foster children* had a liberty interest that entitled them to procedural due process in the form of a hearing before removal.[325] The Supreme Court reversed without deciding the critical constitutional issue. Acknowledging that the "claim to a constitutionally protected liberty interest raises complex and novel questions," the Court determined that it was "unnecessary . . . to resolve those questions definitively in this case."[326] Instead, "even on the assumption that [the foster parents] have a protected 'liberty interest,'" the Court concluded that the state's preremoval procedures were constitutionally sufficient.[327]

320. Reply Brief of Appellants Naomi Rodriguez et al. at 5, *OFFER*, 431 U.S. 816 (Nos. 76-180 et al.), 1977 WL 189093.

321. Motion of the Puerto Rican Family Institute, Inc. & the Puerto Rican Ass'n for Community Affairs for Leave to File Brief Amici Curiae & Brief Amici Curiae at 7-8, *OFFER*, 431 U.S. 816 (Nos. 76-180 et al.), 1976 WL 181142.

322. Brief for State Appellants at 11-12, *OFFER*, 431 U.S. 816 (Nos. 76-180 et al.), 1976 WL 181139 (emphasis added).

323. *See* Brief of a Group of Concerned Persons for Children as Amici Curiae, *supra* note 313, at 5, 26.

324. *See* Brief for The Legal Aid Society of the City of New York, Juvenile Rights Division as Amicus Curiae at 19, 23, *OFFER*, 431 U.S. 816 (Nos. 76-180 et al.), 1976 WL 181145.

325. *See* Org. of Foster Families for Equal. & Reform v. Dumpson, 418 F. Supp. 277, 282 (S.D.N.Y. 1976), *rev'd sub nom. OFFER*, 431 U.S. 816.

326. *OFFER*, 431 U.S. at 847.

327. *Id.* Even though the plaintiff, Smith, did not prevail on her constitutional claim, she retained custody of the foster children who had been placed with her and ultimately adopted them. *See* Chambers & Wald, *supra* note 306, at 114.

The Court did not close the door to constitutional protection for nonbiological parental bonds.[328] Acknowledging that "the usual understanding of 'family' implies biological relationships," the Court nonetheless observed that "biological relationships" do not provide the "exclusive determination of the existence of a family."[329] Indeed, it affirmed the privileged status of marriage to support the significance of nonbiological family relations, explaining that "[t]he basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation."[330] Marriage illustrated that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."[331]

Turning to the parent-child relationship, the Court explained that "a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."[332] Whereas in *Moore*, decided the same year, the Court distinguished between related and unrelated individuals,[333] here the Court made clear that "we cannot dismiss the foster family as a mere collection of unrelated individuals."[334] It rejected a categorical distinction based on blood: Some unrelated individuals constitute a family and some do not. Indeed, *Village of Belle Terre*, the earlier decision that the Court distinguished in *Moore*, involved a group of college students wanting to live together, not the kinds of parent-child relationships imagined in *OFFER*.[335]

While the Court did not protect the nonbiological relationships at issue, it supplied guidance to future decisionmakers. First, the Court stressed the State's role in the creation of the foster family. The Court reasoned that "whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the

328. The attorney for the foster parents described the decision as "as helpful a loss as she could hope for." Chambers & Wald, *supra* note 306, at 113. She believed that Justice Brennan "could not forge a majority" to uphold at least part of the lower court's decision and thus "he salvaged what he could by leaving open the possibility that a 'liberty' interest could be found and procedural protections required in some later cases when a state provided no review for transfers at all." *Id.* at 113-14. Further, "he also left open for lower courts the further development of constitutionally protected nonbiological and state-created parenting relationships." *Id.* at 114.

329. *OFFER*, 431 U.S. at 843.

330. *Id.*

331. *See id.* at 844.

332. *Id.*

333. *See supra* notes 300-04 and accompanying text.

334. *OFFER*, 431 U.S. at 844-45 (distinguishing from *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

335. *Village of Belle Terre*, 416 U.S. at 2, 7-10.

outset."[336] On this view, foster parents may be distinguished from other individuals who form families in which they parent children to whom they are not biologically connected.

Second, the Court emphasized the liberty interests of biological parents. Again, the Court distinguished between fostering and other settings in which individuals form nonbiological parent-child bonds:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest . . . .[337]

Because the child welfare system threatened parent-child bonds in poor families and families of color, the protection of biological parents intersected with concerns about race and class.[338] Even as the Court implicitly acknowledged the problems with authorizing state intervention in vulnerable families, it left room for the constitutional recognition of nonbiological parent-child relationships.

Balancing concern for the rights of biological parents with attention to the interests of children led the Court to distinguish not only between foster parents and other nonbiological parents but also among foster parents. Envisioning circumstances in which the biological parents' lack of presence may strengthen the foster parents' claims, the Court drew distinctions based on the age of the child at the time of placement as well as the duration of the placement:

> At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.[339]

The Court anticipated situations in which the foster parent had long functioned as the child's parent in the absence of biological parents with competing interests.

Commentary in the wake of *OFFER* appreciated what the Court did not resolve. As the *New York Times* reported, "[t]he [C]ourt left open the possibility that the foster family . . . has a type of liberty interest in the family relationship

336. *OFFER*, 431 U.S. at 845.

337. *Id.* at 846.

338. *See generally* Roberts, *supra* note 317 (discussing the economic and racial inequalities in the child welfare system).

339. *OFFER*, 431 U.S. at 844.

that is protected by the due process promise somewhat akin to the interest of a traditional biological family."[340] The grounds on which such a liberty interest might be recognized related to the social dimensions of parenting. Commentary in the *Harvard Law Review* explained that the Court "articulated a more functional conception of the protected family which left open the possibility of protection for some unconventional interests."[341] Zeroing in on the precise conditions suggested by the Court, a piece in the *Columbia Law Review* argued that a liberty interest should be seen to exist "where foster parents have become the child's 'psychological parents' and where the rights of the natural parents have been terminated."[342]

Despite the fact that the Court reserved the constitutional question, lower courts, invoking *OFFER*, have repeatedly rejected constitutional claims of foster parents.[343] As the Seventh Circuit concluded, a "long-term foster relationship with [a child] does not create an interest within the Fourteenth Amendment's protection of liberty."[344] Courts distinguish the foster relationship—"a temporary arrangement created by state and contractual agreements"—from "the natural family."[345]

III. The Constitution of Same-Sex Couples' Families

The Court's decisions on the rights of unmarried fathers and the constitutional status of foster parents are decades old. Yet, as the *Hawkins* and

340. *Court Backs New York's Policy on the Removal of Foster Children*, N.Y. TIMES (June 14, 1977), https://perma.cc/6JT5-2KLA.

341. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 136 (1977). Conservative scholar Bruce Hafen, however, argued that "[t]hese interpretations are seriously flawed" and claimed that *OFFER* "does not suggest a 'functional' analysis of human relationships." Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 503 (1983).

342. Mendel Shapiro, Note, *Constitutional Protection of Long-Term Foster Families*, 79 COLUM. L. REV. 1191, 1204-05 (1979).

343. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 813-15 (11th Cir. 2004) (drawing on *OFFER* in concluding that "[t]here is no precedent for appellants' novel proposition that long-term foster care arrangements and guardianships are entitled to constitutional protection akin to that accorded to natural and adoptive families"); Wildauer v. Frederick County, 993 F.2d 369, 373 (4th Cir. 1993) (per curiam) (rejecting a foster parent's constitutional claim). *But see* Elwell v. Byers, 699 F.3d 1208, 1216 (10th Cir. 2012) (reading *OFFER* to support the recognition of a liberty interest for foster parents in some circumstances).

344. Procopio v. Johnson, 994 F.2d 325, 333 (7th Cir. 1993).

345. *E.g.*, Ballard v. Johnson, No. 15-11039, 2017 WL 1151166, at *6 (E.D. Mich. Mar. 28, 2017) (quoting Renfro v. Cuyahoga Cty. Dep't of Human Servs., 884 F.2d 943, 944 (6th Cir. 1989)).

Russell cases with which this Article opened illustrate, courts invoke them to deny constitutional protection to nonbiological parent-child bonds today.[346] They do so even though these precedents were decided at a time when many of the family arrangements at issue today were not even in view. Legal as well as cultural understandings of the family have shifted significantly in recent decades.[347] As this Part shows, the Court itself is responsible for some of this shift.

By opening marriage to same-sex couples and protecting same-sex couples on both liberty and equality grounds, recent constitutional decisions treat same-sex couples' families as worthy of respect and recognition. In doing so, they demonstrate that constitutional understandings of family have evolved. The Constitution protects same-sex couples' parental relationships, and therefore protects nonbiological parents. Still, these constitutional decisions speak to the liberty interest in marriage, not parental recognition.

A. Marriage and the Constitutional Status of Same-Sex Couples

In recent years, the Supreme Court and lower federal and state courts have protected the families of same-sex couples on constitutional grounds. In 2013, the Court found in *United States v. Windsor* that the Defense of Marriage Act violated equal protection principles.[348] The federal government's refusal to recognize same-sex couples' marriages, the Court concluded, "demean[ed]" gays and lesbians and "impose[d] inequality" on them.[349] Two years later, in *Obergefell v. Hodges*, the Court struck down state laws that excluded same-sex couples from marriage.[350] Noting that "[s]ame-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives," the Court, as a matter of due process, ruled that same-sex couples are entitled to recognition through marriage.[351] Holding that the bans also

346. *See supra* notes 19, 21, 31 and accompanying text.

347. *See, e.g.*, *Attitudes on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), https://perma.cc/7CJS-GXAL (showing that 61% of Americans support same-sex marriage in 2019, compared to only 31% in 2004); *Single Parents Can Raise Kids as Well as Two Parents (Agree/Disagree)*, GSS DATA EXPLORER, https://perma.cc/E537-FH5U (archived Dec. 23, 2019) (reporting that, in 2012, 48% of adults agreed or strongly agreed that single parents can raise children as well as two parents can, compared to only 35% in 1994); *see also* Kim Parker et al., *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RES. CTR. (Jan. 17, 2019), https://www.perma.cc/BAB9-VRHJ (finding that about 20% of Generation Z and Millennials believe cohabitation is a good thing for society, compared to only 5% of the Silent Generation).

348. 570 U.S. 744, 774 (2013).

349. *Id.* at 772.

350. 135 S. Ct. 2584, 2607-08 (2015).

351. *Id.* at 2598-99, 2601-03.

violated related principles of equal protection,[352] the Court emphasized that, while same-sex couples have been subjected to "a long history of disapproval of their relationships," society has come to appreciate that they form families worthy of respect.[353] It had become clear, in a way it was not in earlier eras, that the "denial to same-sex couples of the right to marry works a grave and continuing harm" and impermissibly "disrespect[s] and subordinate[s]" them.[354]

In the Court's view, the constitutional significance of marriage—"a two-person union unlike any other in its importance to the committed individuals"[355]—entailed respect not only for adult relationships but also for parent-child relationships—"safeguard[ing] children and families."[356] In fact, citing its precedents on parental rights, the Court explained that "the right to marry . . . draws meaning from related rights of childrearing."[357] Recognizing that same-sex couples "create loving, supportive families," the Court asserted that the "laws at issue . . . harm and humiliate the children of same-sex couples."[358] Children also featured prominently in *Windsor*, where the Court declared that without legal recognition, children of same-sex couples struggle to "understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[359] With its marriage equality decisions, the Court made clear that the constitutional status of marriage is related to parenting, and that this emphasis on parenting applies to same-sex couples.[360]

Windsor and *Obergefell* have been criticized for privileging marriage and sharply distinguishing between marital and nonmarital families.[361] The decisions suggest that nonmarital arrangements harm children; without the "stability" and "predictability" marriage affords, same-sex couples' children "suffer the stigma of knowing their families are somehow lesser."[362] This reasoning, as some scholars and courts have observed, may be read to affirm

352. *Id.* at 2602-03.

353. *Id.* at 2602-04.

354. *Id.* at 2604.

355. *Id.* at 2599.

356. *Id.* at 2600.

357. *Id.* (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

358. *Id.* at 2600-01.

359. United States v. Windsor, 570 U.S. 744, 772 (2013).

360. *See Obergefell*, 135 S. Ct. at 2600-01; *Windsor*, 570 U.S. at 772; *see also* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 231 (2013) (discussing the role of parenting in *Windsor*).

361. *See* Melissa Murray, Essay, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1210 (2016).

362. *Obergefell*, 135 S. Ct. at 2600.

the superiority of the marital family with respect to parenthood.[363] Indeed, Melissa Murray has connected her analysis of the constitutional treatment of unmarried fathers to the constitutional treatment of same-sex marriage—arguing that both affirm a view of parenthood that privileges marital childrearing.[364]

B. Parenthood and the Constitutional Status of Same-Sex Parents

The Court's embrace of marriage equality has implications for questions of parental recognition. Same-sex couples are not similarly situated to different-sex couples with respect to sexual procreation and biological parenthood; they necessarily include parents without gestational or genetic ties. In endorsing the liberty and equality interests of same-sex couples' families, the Court effectively embraced a model of parenthood that focuses on social, rather than biological, connections.

In *Obergefell*, the Court clearly understood same-sex couples as including both biological and nonbiological parent-child relationships.[365] Yet, in declaring that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted,"[366] the opinion could be read to suggest that nonbiological parents are appropriately channeled through adoption. At the same time, though, the Court treated birth certificates and child custody as "aspects of marital status" to which same-sex couples are entitled.[367] In fact, one of the consolidated cases in *Obergefell* involved Ohio's obligation to place the names of nonbiological parents in married same-sex couples on birth certificates.[368] In the wake of *Obergefell*, lower courts have read the decision to demand nonbiological parental recognition through statutory means, rather than only through adoption.[369] The Court itself removed any doubt two years later.

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363. *See* Sheardown v. Guastella, 920 N.W.2d 172, 176-77 (Mich. Ct. App. 2018); Murray, *supra* note 361, at 1214-15.

364. *See* Murray, *supra* note 98, at 389-90.

365. *See* 135 S. Ct. at 2600.

366. *Id.*

367. *Id.* at 2601.

368. *See* Henry v. Himes, 14 F. Supp. 3d 1036, 1040, 1062 (S.D. Ohio) (ordering the State to "issue birth certificates to Plaintiffs for their children listing *both* same-sex *parents*"), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

369. *See* Roe v. Patton, No. 2:15-cv-00253, 2015 WL 4476734, at *2-3 (D. Utah July 22, 2015); McLaughlin v. Jones, 382 P.3d 118, 120-22 (Ariz. Ct. App. 2016), *vacated*, 401 P.3d 492 (Ariz. 2017), *cert. denied sub nom.* McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018).

In a per curiam order in *Pavan v. Smith*, the Court reversed an Arkansas Supreme Court decision which had concluded that *Obergefell* did not necessarily require the State to issue birth certificates listing the nonbiological mother as a parent when her same-sex spouse gives birth.[370] (If the nonbiological mother in a same-sex couple had adopted the child, the State would have issued an amended birth certificate listing both parents.[371]) Arkansas defended its actions by asserting that "a birth certificate is simply a device for recording biological parentage—regardless of whether the child's parents are married."[372] But Arkansas law generally required that a birth mother's husband be listed on the birth certificate, even if he was not the biological father of the child—for instance, if the couple had used donor sperm.[373] Accordingly, as the Court observed, "Arkansas law makes birth certificates about more than just genetics."[374] The Court concluded that the State could not treat same-sex couples differently, even if the nonbiological father represented unusual circumstances for different-sex couples while the nonbiological mother represented the norm for same-sex couples. *Obergefell*, the Court held, "proscribes such disparate treatment."[375]

In a dissenting opinion, Justice Gorsuch drew a distinction between *Obergefell*—which "addressed the question whether a State must recognize same-sex marriages"—and the issue of parental recognition, to which "nothing in *Obergefell* spoke."[376] Justice Gorsuch credited the State's argument that "rational reasons exist for a biology based birth registration system, reasons that in no way offend *Obergefell*."[377] But the Court rejected this position—in part based on the fact that the State itself had not adhered to a biology-based system—and instead made clear that *Obergefell* reaches questions of nonbiological parental recognition, at least within marriage.[378]

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370. 137 S. Ct. 2075, 2076-77 (2017) (per curiam). Birth certificates do not establish parentage but are evidence of parentage.

371. *See id.* at 2078 n.*; *id.* at 2080 (Gorsuch, J., dissenting). In a similar case in Iowa, state officials claimed "that the only way a married lesbian couple . . . can list the nonbirthing spouse as the parent on the birth certificate is to go through an adoption proceeding." *See* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 352-53 (Iowa 2013). In *Gartner*, the Iowa Supreme Court concluded that the State's approach violated the equal protection guarantee of the Iowa Constitution. *Id.* at 350-54.

372. *Pavan*, 137 S. Ct. at 2078 (majority opinion).

373. *Id.* at 2077.

374. *Id.* at 2078.

375. *Id.*

376. *Id.* at 2079 (Gorsuch, J., dissenting).

377. *Id.*

378. *See id.* at 2078-79 (majority opinion).

In the wake of *Obergefell* and *Pavan*, federal and state courts have found that the failure to apply marital parentage rules to married same-sex couples violates constitutional guarantees.[379] Immediately after *Obergefell*, a federal district court granted an injunction requiring the State of Utah to treat a married same-sex couple who has a child through donor insemination as it does a married different-sex couple who has a child the same way.[380] Recognizing the nonbiological mother as a legal parent is consistent with "allow[ing] same-sex couples to marry 'on the same terms and conditions as opposite-sex couples.'"[381] After *Pavan*, the Arizona Supreme Court concluded that "[b]ecause the marital paternity presumption does more than just identify biological fathers, Arizona cannot deny same-sex spouses the benefit the presumption affords."[382] More recently, the Utah Supreme Court extended this logic to male same-sex couples, ruling that the State must allow married same-sex couples to enter gestational surrogacy arrangements just as married different-sex couples can.[383]

Yet these decisions, like *Pavan* itself, have not focused on due process protections for parenthood. The same-sex couples in *Pavan* did not assert a parental liberty interest.[384] Nonetheless, Arkansas officials characterized the plaintiffs as claiming a due process right for nonbiological parents.[385] The State connected constitutional protection to biological connection, arguing that "while biological parents have a well-recognized due process right to direct the care, custody, and control of their children, an individual who is not a biological parent has no such interest."[386] Rather than refute the State's biologically grounded view of the liberty interest, the plaintiffs rejected the characterization of their claims and redirected attention to the due process interest in *marriage*.[387]

379. *See, e.g.*, Henderson v. Box, No. 17-1141, slip op. at 7-8 (7th Cir. Jan. 17, 2020); McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017), *cert. denied sub nom.* McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018).

380. Roe v. Patton, No. 2:15-cv-00253, 2015 WL 4476734, at *4 (D. Utah July 22, 2015).

381. *Id.* at *3 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015)).

382. *McLaughlin*, 401 P.3d at 498 (citing *Pavan*, 137 S. Ct. at 2078 (majority opinion)).

383. *See In re* Gestational Agreement, 449 P.3d 69, 72, 80 (Utah 2019) (striking down the requirement in the state's surrogacy law that "medical evidence" be presented to "'show[] that the intended mother is unable to bear a child'" because it "violates *Obergefell* in that it deprives married same-sex male couples of the ability to obtain a valid gestational agreement" (quoting UTAH CODE § 78B-15-803(2))).

384. *See* Petition for a Writ of Certiorari, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 587527.

385. *See* Brief for the Respondent in Opposition at 13-14, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 1397395.

386. *See id.* at 14.

387. *See* Reply Brief of Petitioners at 3-4, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 1629334 ("[P]etitioners are not claiming an independent due process right to be named

footnote continued on next page

The plaintiffs' emphasis on marriage was unsurprising. The earlier cases decided by the Court involved marriage for same-sex couples, and *Pavan*'s extension of *Obergefell* to parenthood arose in the context of the marital family. The same-sex couple's marriage supplied the claim to nonbiological parental recognition, putting them on an equal footing with different-sex couples, who could access nonbiological parentage through marriage. Even as the Court's decisions embrace same-sex couples' families on constitutional grounds and gesture toward the relationship between nonbiological parenthood and sexual orientation equality, they also focus on marital parenthood.[388]

* * *

What do constitutional precedents on unmarried fathers, foster parents, and same-sex couples mean for understandings of parent-child relationships today? The next Part turns to family law for guidance about how legal conceptions of parenthood have evolved to include the relationships that develop between nonbiological parents and their children, and how this evolution reflects and extends constitutional commitments. Family law has not developed approaches to parenthood simply in light of the space provided by constitutional law. Rather, family law has been developing approaches to parenthood that are guided in significant part by constitutional commitments and yet move beyond what constitutional precedents formally require. As the next Part shows, family-law developments relating to the treatment of de facto parents, same-sex parenting, and conflicts over the marital presumption illustrate how family-law authorities have reacted to, elaborated, and extended constitutional commitments in important directions.

IV. Family Law's Functional Turn, Evolving Understandings of Parenthood, and the Constitution

This Part identifies the *functional turn* in family law and relates it to constitutional values. Responding to the realities of family life, family-law authorities—including not only judges and legislators but also scholars and lawyers—have developed frameworks in which the law tracks actual family relationships, rather than excluding relationships that fail to satisfy criteria such as marriage or blood relation.[389] With respect to parent-child relationships,

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on a marital child's birth certificate. Rather, petitioners are seeking to vindicate their right to the full 'constellation of benefits' conferred on married couples under Arkansas law." (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2600-01 (2015))).

388. *See, e.g.*, Sheardown v. Guastella, 920 N.W.2d 172, 176 (Mich. Ct. App. 2018) ("[A]s *Pavan* recognized, the overarching principle from *Obergefell* requires states to afford the same *marriage-related* benefits to same-sex married couples that are afforded to heterosexual married couples." (citation omitted)).

389. *See* GROSSMAN & FRIEDMAN, *supra* note 266, at 2 ("Family law follows family life.").

a functional approach values what courts and legislatures commonly term de facto parenthood and what scholars of child development have termed psychological parenthood[390]—that is, the individual who is the parent from the child's perspective.[391]

The functional approach observable in family law prioritizes the act of raising a child and forming a parental bond with that child,[392] but it does not hinge solely on developed parental bonds. Rather, family-law authorities have devised multiple ways to identify, at the moment of a child's birth, those who will function as the child's parents. This identification has occurred by updating existing parentage devices such as the marital presumption, as well as by adding intent-based paths to parentage for those engaging in assisted reproduction. Accordingly, a range of criteria might be invoked to vindicate functional parenthood.[393]

Although focused primarily on family-law doctrine, the functional turn has been animated by and has extended constitutional commitments. Family-law authorities have not merely implemented constitutional mandates. Nor have they ignored or defied constitutional precedents, or regulated simply in the absence of constitutional considerations. Rather, family-law authorities have acted on values observable in constitutional precedents, have reimagined and repurposed constitutional decisions, and have extended constitutional principles to address new and increasingly common forms of parenting. In constructing a more inclusive and egalitarian vision of parenthood that promotes the interests of children living in a range of family arrangements, family-law authorities have rethought how the Court's precedents and the constitutional commitments they serve matter for families today. Ultimately, family-law authorities provide insights about how constitutional accounts of parenthood may develop as understandings of the family evolve.

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390. *See, e.g.*, Susan Frelich Appleton, Lecture, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1486-87 (2014) ("Exemplifying family law's functional turn, concepts such as de facto parents, parents by estoppel, psychological parents, intent-based parenthood, and *in loco parentis* status can establish legal *parentage* based on *parenting conduct*." (footnotes omitted)).

391. "Whether a person becomes the psychological parent of a child is based on day-to-day interaction, companionship, and shared experiences." JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 12 (1996). It does not depend on a "biological or legal relationship to the child." *Id.* at 12-13. For a discussion of subsequent research, see Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 65 (2017).

392. *See* Appleton, *supra* note 181, at 240.

393. *See* Appleton, *supra* note 390, at 1486-87 (including "intent-based parenthood" as part of "family law's functional turn").

Of course, family-law authorities have not spoken with one voice. Family law in some jurisdictions retains an attachment to biological status, and some scholars and lawyers seek to strengthen the position of biological parenthood.[394] Yet the functional turn in family law is, undoubtedly, a longstanding, far-reaching, and growing trend observable across many judicial decisions, statutory acts, law reform projects, advocacy efforts, and scholarly approaches.[395] Illustrating this trend and relating it to constitutional values, this Part first addresses the status of de facto parents in nonmarital families. Next, it examines the relationship between nonbiological parentage and equality commitments. Finally, it considers families with more than two parents.

A. De Facto Parentage and Nonmarital Families

In its decisions on unmarried fathers, the Court protected nonbiological fathers, but only inside marriage—either stepfathers seeking to adopt or husbands claiming the marital presumption. It did not protect, or even contemplate, nonbiological fathers *outside marriage*. Nor did it protect nonbiological *mothers*; in fact, the Court viewed legal motherhood as a biological fact.[396]

In the last few decades, family-law authorities have moved in more egalitarian directions by pressing a functional approach to parental recognition that reaches nonbiological fathers *and mothers* in marital *and nonmarital* families.[397] As they have done so, constitutional values—including values gleaned from the Court's key precedents on unmarried fathers and nonparental caregivers—have played a role.

Family-law authorities include not only courts and legislatures but also scholars and lawyers.[398] Participating in constructing and refining the law,

394. *See* NeJaime, *supra* note 6, at 2324-25.

395. *See, e.g.*, Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1988-89 (2015) (identifying and documenting family law's "recent shift toward a more functional understanding of the family").

396. *See* Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983).

397. *See, e.g.*, Appellant's Opening Brief on the Merits at 44-45, K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (No. S125643), 2004 WL 2997742; Brief of Amicus Curiae Northern California Ass'n of Counsel for Children in Support of the Minor Nicholas H. at 7-14, *In re* Nicholas H., 46 P.3d 932 (Cal. 2002) (No. S100490).

398. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 829-30 (2004) ("The academic community's scholarship helps to create, promulgate, and reinforce the widely shared ways of thinking about family law, and legal scholarship can influence legislatures and courts. Legal scholars also . . . structure the content and focus of many family law courses. How family law is taught . . . helps determine how the next generation of lawyers . . . will understand family law and its guiding principles." (footnote omitted)).

scholars engage in what George Fletcher called "committed argument"—making "first-order substantive legal argument about the law" that puts them "in a dialogue with their colleagues, with judges of their time, and with the legal tradition."[399] In the late twentieth century, leading family-law scholars made arguments about appropriate ways to regulate family relationships, drawing on resources in existing law to imagine a more inclusive regime. Criticizing courts' and legislatures' attachment to narrow criteria that defined family relations through formal status (marriage) and "natural" relations (blood), scholars developed frameworks that prioritized other criteria, inquiring whether the family relationships at issue functioned in ways the law should capture. While some work focused on adult relationships, a substantial literature developed on parent-child relationships.

Consider a few leading examples. Katharine Bartlett questioned the conventional view of parenthood as "an exclusive status" and considered how the law might accommodate a range of new family arrangements.[400] Martha Minow urged the law to track familial conduct in order to protect the interests of children.[401] Nancy Polikoff attended specifically to lesbian couples and advocated equitable devices to safeguard children's relationships with their nonbiological parents.[402]

Constitutional precedents played a role—but a relatively minor one—in the scholarly case for functional family law, as scholars could point to the Court's focus on existing relationships. As Bartlett argued in a seminal article, the Court's impulse to view "the prior development of a family relationship as a substitute for the usual guaranty of responsible parenthood—marriage—demonstrates both the desire to protect the child's actual relationships and the belief that parenthood is not based solely on a biological connection."[403] Moreover, when the Court denied the claims of unmarried fathers, it acted to protect nonbiological relationships between a child and stepfather. For

399. *See* George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 984 (1981).

400. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879-83 (1984).

401. *See* Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 287 (1992-93); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 284 (1991) [hereinafter Minow, *Redefining Families*]. Functional arguments emerged in the context of both adult and parent-child relationships. *See* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1648-50 (1991).

402. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990).

403. Bartlett, *supra* note 400, at 924.

instance, Bartlett observed that "[t]he Court in *Lehr* protected 'developed' relationships, not biological connections."[404]

Still, family-law scholars building a functional account appreciated the significant limitations of constitutional precedents—the ways in which those decisions constrained more pluralistic visions of the family. In making the case for nonexclusive parenthood, Bartlett, writing before the Court firmly rejected dual fatherhood in *Michael H.*, saw the cases on unmarried fathers as obstacles: The unmarried father's status was "exclusive, for no substitute father can acquire any rights until those of the unwed father are extinguished."[405] On this view, a child cannot have more than one father. Accordingly, Bartlett characterized the result in *Quilloin* and *Caban* as "inadequate, for the Court extends legal recognition to only one father, while the children understood themselves to have two."[406] Bartlett's functional family-law approach had the capacity to alter the outcomes in disputes involving unmarried fathers, providing greater protection to nonmarital relations since "the unwed father's full or partial parenthood would no longer depend upon his ability to defeat all other competing claims."[407]

Scholars did not simply produce academic writing on functional family recognition; they sought to change the law through litigation and law reform. In the early 1990s, both Minow and Polikoff urged courts to extend legal recognition to nonbiological mothers in same-sex couples.[408] Academic work also formed the foundation for arguments lawyers pressed in court.[409]

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404. *Id.* at 924 n.215 (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)).

405. *Id.* at 924-25.

406. *Id.* at 927.

407. *Id.* at 955-56.

408. *See, e.g.*, Brief for Amici Curiae Eleven Concerned Academics at 6-7, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (No. 61) (arguing on behalf of eleven academics led by David Chambers and Martha Minow that a "functional approach" to define parent under New York's custody statute "is necessary if the Courts are to perform their traditional role as protectors of the interests of the children who come before them"); Brief Amicus Curiae of the National Center for Lesbian Rights et al. in Support of Respondent-Appellee, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) (No. P3884/91), *reprinted in* 22 N.Y.U. REV. L. & SOC. CHANGE 213, 245-47 (1996) (arguing, by Polikoff on behalf of amici, for a functional conception of parenthood that would legally recognize nonbiological lesbian and gay parents); *see also* Nancy D. Polikoff, Essay, *How Does a Radical Lesbian Feminist Who Just Knows How to Holler Somehow Become a Noted Legal Scholar?*, 66 J. LEGAL EDUC. 493, 495-96 (2017) (describing Polikoff's academic and litigation-based efforts to support functional understandings of family in the law).

409. *See, e.g.*, Appellant's Opening Brief at 32, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463) (proposing that the court adopt Polikoff's "definition of parenthood" and explaining that "at least one court has adopted a formulation similar to that proposed by Polikoff").

By 2002, leading family-law scholars, including Bartlett, Grace Ganz Blumberg, and Ira Ellman, operationalized a functional approach to family law in the American Law Institute's (ALI) Principles of the Law of Family Dissolution.[410] The ALI's approach to parenthood reflected the importance of parental conduct and the formation of a parent-child relationship, focusing on "parenting functions," including "caretaking functions."[411] The drafters included the status of parent by estoppel, extending this parental designation to an individual who "lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent . . . , when the court finds that recognition of the individual as a parent is in the child's best interests."[412] The drafters also included "the status of a de facto parent . . . based on an individual's functioning as a parent."[413] Reflecting Bartlett's scholarly argument, the ALI made space for multiple parents[414] and authorized a partial, rather than full, parental status.[415] While legislatures did not adopt the ALI's Principles regarding parentage, the ALI's approach influenced scholarly debate and judicial decisions.[416]

Even as Bartlett invoked constitutional precedents in her academic work, scholars did not argue in law journals or law reform efforts that a functional approach to parental recognition was constitutionally required. In fact, when constitutional issues arose in scholarly debate and in litigation, they usually did so in ways that threatened, rather than aided, functional family-law efforts. In the paradigmatic case, a biological parent wielded constitutionally protected parental authority as a way to block the claims of the child's co-parent who was not a biological parent, was not married to the biological parent, and had

410. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at vii (AM. LAW INST. 2002).

411. *Id.* § 2.03(5)-(6).

412. *Id.* § 2.03(1)(b)(iv).

413. *See id.* § 2.03 cmt. c.

414. *See id.* § 2.03(1)(b)(iv) (requiring a parent by estoppel to show "an agreement with the child's parent (or, if there are two legal parents, both parents)").

415. *See id.* § 2.18(1) (giving superior custody rights to legal parents and parents by estoppel over de facto parents).

416. Scholars have written numerous law review articles and a book in response to the ALI's Principles. *See* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006). In addition, courts have drawn upon the ALI's Principles in making decisions about de facto parenthood. *See, e.g.*, Young v. King, 208 A.3d 762, 766 (Me. 2019) (referencing the ALI's Principles in a case involving determination of de facto parentage); Conover v. Conover, 146 A.3d 433, 451 (Md. 2016) (citing the ALI's Principles in recognizing de facto parenthood for the first time in Maryland); A.H. v. M.P., 857 N.E.2d 1061, 1070-74 (Mass. 2006) (using the ALI's Principles to evaluate claims of de facto parenthood and parent by estoppel).

not adopted the child.[417] The constitutional question concerned whether the state could extend, as a matter of family-law doctrine, parental recognition to another individual (the nonbiological co-parent) over the objection of the biological parent.

In the twenty-first century, scholarly and legal debate on the constitutional stakes has been structured by the Court's 2000 decision in *Troxel v. Granville*—a decision on parental rights, not parental recognition.[418] In *Troxel*, grandparents sought court-ordered visitation with their grandchildren—pursuant to a Washington statute authorizing third-party visitation in the child's best interest—over the wishes of the children's mother.[419] The grandparents attempted to draw support from *Moore* by focusing on biological relatedness as the basis on which to protect bonds between grandparents and their grandchildren.[420] But, unlike Moore, they were not de facto parents: They had not served in a primary caregiver role and were merely seeking additional visitation.[421] Accordingly, the mother responded by drawing a line based not on biology but on parental role. She distinguished *Moore* as a case involving "the functional equivalent of parent and child" and urged the Court to reject a constitutional rule that extends to "grandparents and other collateral relatives who do not act as custodial or psychological parent."[422]

Holding that the mother possessed constitutional authority to limit the grandparents' access to the children, the Court ruled that, as applied, Washington's third-party visitation statute violated the mother's due process rights.[423] The Court did not find the statute facially unconstitutional. Importantly, it refused to "define . . . the precise scope of the parental due process right in the visitation context."[424]

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417. *See* Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS., no. 1, 2014, at 195, 208-09.

418. 530 U.S. 57 (2000) (plurality opinion). For an assessment of developments since *Troxel* was decided, see Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 COLO. L. REV. 941, 986-1011 (2019).

419. 530 U.S. at 60-61 (plurality opinion).

420. *See* Brief for Petitioners at 41-42, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1079965 (citing Moore v. East Cleveland, 431 U.S. 494, 500-05 (1977) (plurality opinion)).

421. *See id.* at 2 (explaining how they "met regularly with their granddaughters" but not claiming to have engaged in regular caretaking); Brief for Respondents at 8-9, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1146868 (making clear that the grandparents did not engage in regular caretaking of the children).

422. Brief for Respondents, *supra* note 421, at 41-42.

423. *Troxel*, 530 U.S. at 72-73 (plurality opinion).

424. *Id.* at 73.

The *Troxel* decision made it more difficult for those lacking parental status under state law to maintain a relationship with the child over the objection of the legal parent. Justice O'Connor's plurality opinion reasoned in ways that turned on a distinction between *legal* parents and nonparents (or third parties).[425] Armed with *Troxel*, a biological parent seeking to shut out a de facto parent would argue that she possessed constitutional authority to exclude nonparents. In this sense, the reach of *Troxel* and the constitutional rights it protected were critical to family-law efforts aimed at functional parental recognition.

The consequences for de facto parents did not escape the notice of some of the Justices in *Troxel* who worried specifically about children's relationships with those who served in a parental role but without a legal or biological tie. Dissenting, Justice Kennedy observed that "a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another."[426] Expressing concern about cases involving "a once-custodial caregiver," Justice Stevens's dissent focused on the interests of children in light of "[t]he almost infinite variety of family relationships that pervade our ever-changing society."[427]

These concerns had been raised in amicus curiae briefs. A brief filed by LGBT legal organizations in *Troxel* urged the Court to leave space for de facto parentage: States should have authority to compel visitation against a biological parent's wishes when the claimant can demonstrate "the existence of a significant relationship of caretaking" and that the biological parent "permit[ted] or encourage[d] the child to form an exceptionally strong bond with the [claimant]."[428] The brief linked this standard to the Court's decisions on unmarried fathers, relying on *Lehr* in asserting that a showing "keyed to the nature and depth of the actual relationship[] is consistent with the Court's focus on demonstrated bonds rather than ties assumed from blood."[429]

The brief, like the dissents of Justices Kennedy and Stevens, accepted the framing of the issue as centered on the constitutional authority of the biological parent. This line of reasoning did not imply that the Constitution offers due process protection to a de facto parent. Rather, it suggested that the Constitution *permits* states to recognize de facto parents, even over the objection of the biological parent—who remained the parent vested with constitutional rights.

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425. *See id.* at 67-68.

426. *Id.* at 100-01 (Kennedy, J., dissenting).

427. *Id.* at 85, 90 (Stevens, J., dissenting).

428. Brief of Lambda Legal Defense & Education Fund and Gay & Lesbian Advocates & Defenders as Amici Curiae in Support of Respondent at 19-21, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1186733.

429. *Id.* at 19 (citing Lehr v. Robertson, 463 U.S. 248, 261-62 (1983)).

While the conventional framing pitted the biological parent's constitutional rights against the state's authority to recognize a de facto parent, another amicus curiae brief submitted by LGBT and women's rights organizations drew on the Court's precedents to suggest that a de facto parent herself merited at least some constitutional protection.[430] The brief argued not only that the state may provide rights to a de facto parent over the biological parent's objection, but also that doing so "advances important constitutional rights of the de facto parent and the child."[431] To support this argument, the brief invoked *Moore*, characterizing the grandmother as a "de facto parent" who had a protected relationship under the Constitution.[432] *Troxel*, of course, did not engage this argument and instead simply bolstered the constitutional authority of biological parents.[433]

In *Troxel*'s wake, family-law scholars continued to argue for functional parental recognition on family-law, rather than constitutional, grounds—contending that constitutional law should yield to family-law efforts to expand the category of "parent."[434] These scholars asserted that, after consenting to formation of a *parent-child* relationship by the other person, the biological parent could not later invoke constitutional rights protected by *Troxel* to exclude that other person.[435] Relatedly, they emphasized distinctions between true third parties and those who serve as parents, viewing *Troxel* as inapplicable because it rejected the claims of nonparents, not de facto parents.[436] Given this way of reasoning, it is unsurprising that scholars have

430. *See* Brief of Northwest Women's Law Center et al. as Amici Curiae in Support of Respondent at 9-10, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1186734.

431. *Id.* at 9-10 (emphasis omitted).

432. *Id.* at 9 (emphasis omitted) (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)).

433. *See supra* text accompanying note 423.

434. There is a voluminous family-law literature arguing in favor of functional parental recognition. *See, e.g.*, David D. Meyer, *What Constitutional Law Can Learn from the ALI* Principles of Family Dissolution, 2001 BYU L. REV. 1075, 1082-88, 1103-04. A few scholars have argued against de facto parenthood, contending that a court would infringe a biological parent's constitutional rights by recognizing an individual as a de facto parent over the biological parent's objection. *See* John Dewitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 185 (2002); Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 912-13 (2019). For an account of different positions in this debate, see David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY, *supra* note 416, at 47, 53-55.

435. *See, e.g.*, Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 632-33 (2012); Grossman, *supra* note 91, at 336-39.

436. *See, e.g.*, Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 834 (2001).

been relatively silent on the question of whether de facto parents themselves are entitled to recognition on due process grounds.

After *Troxel*, courts in a growing number of states confronted the claims of de facto parents and increasingly ruled in ways that reflected the scholarly consensus.[437] These courts concluded that the states could, consistent with constitutional requirements, recognize de facto parents over the biological parent's objection.[438]

Developments from Washington are especially illuminating. *Troxel* involved a Washington third-party visitation statute that the Washington Supreme Court had found unconstitutional on its face.[439] The U.S. Supreme Court, in contrast, ruled only that the statute was unconstitutional as applied to the mother in the case; it did not "consider the primary constitutional question passed on by the Washington Supreme Court."[440] After *Troxel*, in another case involving grandparent visitation, the Washington Supreme Court again struck down the entire statute as unconstitutional.[441]

That same year, in *In re Parentage of L.B.*, the Washington Supreme Court announced the common law recognition of de facto parents.[442] That is, the court extended the logic of *Troxel* with respect to third parties at the same time that it protected de facto parents. In *In re Parentage of L.B.*, the court accepted the claim of a nonbiological mother in a same-sex couple who had parented the child for six years but whose partner kept her from the child after they separated.[443] In doing so, the court rejected the biological mother's argument that recognizing her partner as a parent would violate the biological mother's constitutional parental rights.[444] The court viewed its test for de facto parenthood as giving adequate consideration to the biological parent's rights since the de facto parent needed to show that the "natural or legal parent

437. *See* Joslin, *supra* note 3, at 34-35 (cataloguing post-*Troxel* cases on functional parents). A majority of jurisdictions now furnish some form of recognition to functional parents. *See id.* at 32.

438. *See* Polikoff, *supra* note 417, at 207-08. Opponents of nonbiological parental recognition continue to argue that biological parents maintain constitutional authority to exclude nonbiological parents who have not adopted. *See, e.g.*, Petition for a Writ of Certiorari at 14, Frank G. v. Joseph P., 140 S. Ct. 307 (2019) (No. 18-1431), 2019 WL 2140498 (arguing that "lower courts . . . flouted this Court's decisions in *Troxel* and *Pierce*, which limit the category of 'parents' for due process purposes to biological and adoptive parents").

439. *See In re* Custody of Smith, 969 P.2d 21, 23 (Wash. 1998), *aff'd on other grounds sub nom.* Troxel v. Granville, 530 U.S. 57 (2000).

440. *Troxel*, 530 U.S. at 73 (plurality opinion).

441. *See In re* Parentage of C.A.M.A., 109 P.3d 405, 407 (Wash. 2005).

442. 122 P.3d 161, 175-77 (Wash. 2005).

443. *Id.* at 164, 176.

444. *Id.* at 177-78.

consented to and fostered the parent-like relationship"[445]—and thus could not later assert a constitutional right to exclude the other parent from the child's life.

More importantly, the court found *Troxel* inapposite based on the distinction between parent and nonparent. The nonbiological mother was not a third party infringing on the rights of a parent. Instead, because the court held that its "common law recognizes the status of *de facto* parents and places them in parity with biological and adoptive parents[,] . . . *both* [women] have a 'fundamental liberty interest[]' in the 'care, custody, and control' of [the child]."[446]

But the court did not hold that the nonbiological mother possesses a constitutional right to be recognized as a de facto parent; rather, it merely reasoned that once she receives state law recognition, she possesses the same constitutionally protected parental rights as any other legal parent.[447] Critically, though, the court appeared to question the biological premise of constitutional parenthood. While the court's de facto parent conclusion made it unnecessary to reach the constitutional question, it remarked in a footnote that the nonbiological mother "persuasively argue[d]" that she has "constitutionally protected rights to maintain the[] parent-child relationship."[448]

The Washington court was not alone in its protection of de facto parents. In the early twenty-first century, courts in a growing number of jurisdictions protected de facto parents on common law or equitable grounds.[449] These courts did not contemplate a constitutional basis for de facto parentage; that is, they did not, as the Washington court did, suggest that de facto parents may be constitutionally entitled to protection. Nonetheless, even as they decided only family-law questions, some courts viewed constitutional precedents as not simply allowing de facto parentage (overcoming the *Troxel* objection), but rather affirmatively supporting it. In reasoning in this way, courts breathed new life into critical yet dated constitutional decisions—taking the very precedents commonly invoked to support a biological approach to parenthood and reconfiguring them to support a nonbiological approach in family law.

Consider the reasoning of the New Jersey Supreme Court in *V.C. v. M.J.B.*, a landmark decision in 2000.[450] As it adopted a "psychological parent" standard for purposes of state family law, the court drew on constitutional precedents—

445. *Id.* at 176-77.

446. *Id.* at 178 (second alteration in original) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion)).

447. *Id.* at 177-78.

448. *Id.* at 177 n.27.

449. *See* Joslin, *supra* note 3, at 32-33.

450. 748 A.2d 539 (N.J. 2000).

linking *OFFER*, the foster parent case, to decisions on unmarried fathers.[451] Citing *OFFER*, it explained that "for constitutional as well as social purposes," children's interest in parental relationships "lies in the emotional bonds that develop between family members as a result of shared daily life."[452] "That point," the court continued, "was emphasized in *Lehr v. Robertson*, where the Supreme Court held that a stepfather's actual relationship with a child was the determining factor when considering the degree of protection that the parent-child link must be afforded."[453]

In other words, the New Jersey Supreme Court read *Lehr* as denying the unmarried father's claim in order to secure the stepfather's status—a result it saw as consistent with *OFFER*'s reasoning about the bonds that result from living together as a family. Whereas *Hawkins* and *Russell*, cases with which this Article opened, drew on *OFFER* and *Lehr*, respectively, to support the biological premise of parenthood,[454] the New Jersey court relied on the very same cases to support a social account of parenthood that reached nonbiological relationships. In the New Jersey court's view, the recognition of psychological parents as a family-law matter furthered commitments of constitutional magnitude.

Other state supreme courts followed New Jersey's lead. Consider *Rubano v. DiCenzo*, a Rhode Island Supreme Court decision issued just months after the New Jersey ruling, recognizing that a nonbiological mother in a same-sex couple could qualify as a de facto parent.[455] The court viewed precedents on unmarried fathers as relevant to family-law reasoning about the legal status of parents who lack biological ties and are not married to the child's mother. *Lehr*, the court explained, rejected the efforts of the biological father, who lacked "an actual relationship of parental responsibility," to "block a nonbiological parent's adoption."[456]

Going further, the court read constitutional dimensions into *Quilloin*'s protection of the stepfather. The court reasoned:

> [T]he biological parent "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," [so] . . . *his constitutional rights were of less weight than those of a married but nonbiological father* who had "borne full responsibility for the rearing of his children during the period of the marriage."[457]

451. *Id.* at 549-50.

452. *Id.* at 550.

453. *Id.* (emphasis omitted) (citation omitted).

454. *See supra* notes 11-34 and accompanying text.

455. 759 A.2d 959, 971 (R.I. 2000).

456. *Id.* at 973 (quoting Lehr v. Robertson, 463 U.S. 248, 259-60 (1983)).

457. *Id.* at 973-74 (emphasis added) (quoting Quilloin v. Walcott, 434 U.S. 246, 256 (1978)). This move aligns with the positions of some scholars. For instance, Nancy Dowd argues that "[t]he constitutional norm of fatherhood should be nurture." Nancy E.

footnote continued on next page

Although the *Quilloin* opinion itself never approached the stepfather as a constitutional rightsholder, the Rhode Island court implied that both men seeking parental status in that case possessed interests of constitutional magnitude.[458] Further, it suggested that the nonbiological father's constitutional interest in *Quilloin* was more significant than that of the biological father.[459] The court essentially constitutionalized the interest of the nonbiological parent in a way that the constitutional decision itself had not. Nonetheless, the court did not hold that the nonbiological mother in the case before it had a constitutional right to parental recognition, but rather that she merited de facto parent recognition under state family law.[460] In the court's view, de facto parentage in family law vindicated constitutional commitments observable in precedents on unmarried fathers.

In the years since the New Jersey and Rhode Island courts ruled, state supreme courts have continued to see the recognition of de facto parents as consistent with constitutional values and to find support for that recognition in the U.S. Supreme Court's constitutional precedents. For example, the Minnesota Supreme Court quoted *Lehr* in 2007 to bolster its view that a nonbiological mother in an unmarried same-sex couple was part of a "recognized family unit" entitled to protection.[461] These cases have reached not only unmarried nonbiological mothers but also unmarried nonbiological fathers. In 2016, the Hawaii Supreme Court found that a man could qualify as a de facto parent even though he had not adopted his partner's child.[462] The court relied on *Lehr* and *OFFER* in support of the view that "[t]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."[463]

Even *Michael H.*, the Court's most pointed expression of marital supremacy, became a basis on which to protect nonbiological parents in *nonmarital* families. *Michael H.*, the Rhode Island Supreme Court explained in *Rubano*, "held that a developed relationship within a family unit between a nonbiological parent and a child can, under certain circumstances, warrant more legal protection by a state than the equally developed relationship

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Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1271 (2005).

458. *See Rubano*, 759 A.2d at 973-75.

459. *See id.* at 973 (citing *Lehr*, 463 U.S. at 259-60; and *Quilloin*, 434 U.S. at 256).

460. *See id.* at 976.

461. SooHoo v. Johnson, 731 N.W.2d 815, 822 (Minn. 2007) (quoting *Lehr*, 463 U.S. at 258).

462. *See* A.A. v. B.B., 384 P.3d 878, 892 (Haw. 2016).

463. *Id.* at 888 (first alteration in original) (quoting *Lehr*, 463 U.S. at 261).

between the child and the biological parent outside the family unit."[464] On this view, a decision that rejected the claim of an *unmarried* biological father in ways that cleared the path for legal recognition of a married *nonbiological* father also lent support to the legal status of an *unmarried nonbiological* mother.[465]

From this perspective, the shift toward functional parenthood has been premised not only on the egalitarian dimensions of the unmarried fathers cases—the vindication of nonmarital families—but also on the traditional dimensions: the valorization of the two-parent marital family.[466] As I have shown elsewhere, those arguing on behalf of unmarried nonbiological parents framed their clients' families as analogous to married couples featuring a nonbiological parent.[467] In this way, advocates—and courts that ruled in their favor—leveraged traditionalist aspects of earlier decisions for emancipatory ends.

After accepting de facto parentage, state courts—and later state legislatures—had to devise standards to identify de facto parents. These standards echoed some of the themes of constitutional precedents. Courts stressed family formation and co-residence—requiring that the de facto parent "lived with the child"—in ways that resonated with decisions on unmarried fathers.[468] But judicial standards also offered a more child-centered and egalitarian approach than constitutional precedents supplied. Reflecting the influence of the "psychological parent" concept elaborated by Goldstein, Freud, and Solnit,[469] courts adopted equitable and common law standards that

464. *Rubano*, 759 A.2d at 974 (citing Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (plurality opinion)).

465. *See id.* at 977.

466. *See* Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 629 (2013) (arguing that "to gain legal recognition, nontraditional families must closely follow a prescribed script of how families are *supposed* to act"); Serena Mayeri, Response, *The Functions of Family Law*, 163 U. PA. L. REV. ONLINE 331, 334 (2015) (responding to Murray, *supra* note 395) (arguing that "functional definitions of family . . . reward a particular kind of family life—one that looks as much like the dominant nuclear family ideal as possible"); Murray, *supra* note 395, at 1990 ("[E]ven as courts credited departures from the traditional marital family configuration in their interpretations of the [1973] UPA, they nonetheless emphasized the degree to which these families comported with the basic structure and functions of the marital family.").

467. *See* NeJaime, *supra* note 4, at 1192-93, 1196-1230.

468. *See* V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000); *see also In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

469. GOLDSTEIN ET AL., *supra* note 57. For literature discussing the influence of the "psychological parent" concept, see CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 106 (2014) (explaining how the "highly influential books by [Goldstein, Freud, and Solnit] . . . introduced the idea that the law should respect a child's psychological relationship with a caregiver, and the law generally tries to do so" (footnotes omitted)); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 28 (2008); and Feinberg, *supra* note 391, at 64 (observing that "the theories developed in *Beyond the Best Interests of the Child* have had a

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emphasized caretaking over financial support and inquired whether the claimant "forged" a "parent-child bond."[470] De facto parent statutes enacted in recent years echo foundational family-law rulings on de facto parents, demanding that the claimant have "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."[471] Some now explicitly require that "continuing the relationship between the [purported de facto parent] and the child [be] in the best interests of the child."[472]

Even statutes that were designed to recognize unmarried biological fathers in *Stanley*'s wake moved in more functional directions in the absence of legislative reform—essentially providing for the recognition of de facto parents by another means.[473] In 1975, California adopted the 1973 UPA's presumption treating a man as a legal father if "[h]e receives the child into his home and openly holds out the child as his *natural* child."[474] California lawmakers understood their enactment of the 1973 UPA as animated by the Court's protection of unmarried biological fathers and nonmarital children.[475] Yet in 2002, the California Supreme Court applied this "holding out" presumption to an unmarried *nonbiological* father.[476] Three years later, the California court rendered the presumption gender-neutral, applying it to unmarried nonbiological mothers[477]—as did courts in other states.[478] The New Mexico Supreme Court explained that, "[b]ecause the presumption is based on a person's conduct, not a biological connection," a nonbiological mother in a same-sex couple could establish parentage by "holding out a child as her natural child."[479] "Natural" had come to mean "legal."

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significant and enduring influence on the law's approach to resolving issues relating to the placement of children").

470. *V.C.*, 748 A.2d at 551; *see also* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. (forthcoming 2020) (on file with author) ("From the child's perspective, the adult who has been acting as a parent *is* a parent. Allowing a legal parent to exclude a de facto parent would disrupt one of a child's central relationships, which robust research shows would create a risk of serious harm to the child." (footnotes omitted)).

471. *E.g.*, DEL. CODE ANN. tit. 13, § 8-201(c)(3) (2019).

472. *E.g.*, VT. STAT. ANN. tit. 15C, § 501(a)(1)(G) (2019).

473. *See* Joslin, *supra* note 3, at 33.

474. Act of Oct. 1, 1975, ch. 1244, § 11, 1975 Cal. Stat. 3194, 3196-97 (codified as amended at CAL. FAM. CODE § 7611(d) (West 2019)) (emphasis added).

475. *See* Beilenson, *supra* note 261.

476. *See In re* Nicholas H., 46 P.3d 932, 933, 937 (Cal. 2002).

477. *See* Elisa B. v. Superior Court of El Dorado Cty., 117 P.3d 660, 673 (Cal. 2005).

478. *See, e.g.*, *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014); Chatterjee v. King, 280 P.3d 283, 285 (N.M. 2012).

479. *See Chatterjee*, 280 P.3d at 288.

In pressing arguments that older parentage presumptions, like the "holding out" presumption, should apply to unmarried nonbiological parents, lawyers appealed to the interests the Court's precedents were seen to vindicate.[480] The 1973 UPA grew out of cases on "illegitimacy" and unmarried fathers and so could be seen to support the protection of parent-child relationships in nonmarital families.[481] Over time, it became clear that bonds in nonmarital families could be protected by applying the "holding out" presumption to nonbiological parents. Moreover, LGBT rights and women's rights organizations argued that sex equality principles mandated application of the "holding out" presumption not only to nonbiological fathers but also to nonbiological mothers.[482] In other words, constitutional values of sex equality required that family-law approaches to parentage include nonbiological mothers in nonmarital families—and thus include mothers in same-sex couples.[483]

Ultimately, the functional turn in family law is more connected to the Court's constitutional precedents than most scholars have appreciated. Constitutional decisions did not merely set parameters for regulation. Nor did they simply leave space for family-law regulation detached from constitutional considerations. Rather, constitutional precedents provided tools and logic for more expansive approaches to parental recognition. Family-law authorities moved beyond constitutional precedents, advancing interests that the Court's decisions only partially vindicated, or worse, ignored or undermined. In doing so, family-law authorities reworked constitutional precedents—repurposing them in ways that gave greater weight to actual parent-child bonds for biological as well as nonbiological parents, in marital as well as nonmarital families, and for men as well as women. Through this lens, the recognition of de facto parents as a family-law matter advanced important constitutional commitments and values.

B. Nonbiological Parental Recognition in the Age of LGBT Equality

Many of the cases on de facto parents feature nonmarital families formed by same-sex couples.[484] Courts and legislatures have increasingly recognized

480. *See, e.g.*, Opening Brief of Real Party in Interest Emily B. at 11-13, 36-37, *Elisa B.*, 117 P.3d 660 (No. S125912), 2004 WL 2981959.

481. *See id.* at 11-12.

482. *See id.* at 37. The brief on behalf of the real party in interest was written by attorneys at the National Center for Lesbian Rights.

483. *See id.* at 38; *see also* Application for Leave to File and Brief of Amici Curiae California NOW, Inc. and California Women's Law Center at 5-11, *Elisa B.*, 117 P.3d 660 (No. S125912), 2005 WL 1304015.

484. *See* NeJaime, *supra* note 4, at 1196-1229.

nonbiological LGBT parents, and marriage equality has only accelerated the pace of change. Constitutional values articulated in marriage equality decisions have animated shifts in parentage law. While these constitutional precedents concern marriage, family-law authorities have begun to understand these precedents, and the values they espouse, in ways that lead to nonbiological parental recognition in nonmarital families. In litigation and legislation, decisionmakers are appreciating how nonbiological parental recognition is connected to sexual orientation equality.

Consider the shift in New York family law from 1991 (a year in which sodomy prohibitions remained constitutional under Supreme Court precedent) to 2016 (the year after the Supreme Court ruled in favor of marriage equality in *Obergefell*). In its 1991 decision in *Alison D. v. Virginia M.*, the New York high court interpreted "parent" narrowly—as biological or adoptive—and thus denied parental recognition to a nonbiological mother who had been raising a child with her same-sex partner.[485] Viewing biological connection as an inevitable marker of parenthood, the court saw no problem depriving both same-sex and different-sex couples of parental recognition in the absence of a biological connection or adoption.[486]

The New York high court overturned *Alison D.* twenty-five years later.[487] Even though *Brooke S.B. v. Elizabeth A.C.C.* is a family-law decision, the court's reasoning connects constitutional shifts relating to same-sex couples to questions of parental recognition.[488] *Obergefell*, the *Brooke S.B.* court observed, did not simply furnish marriage rights to same-sex couples but did so on grounds that credited the parental relationships formed by same-sex couples.[489] Marriage equality, and *Obergefell* specifically, rendered *"Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples . . . unsustainable."[490] The definition of "parent" under New York law had to adapt to the newfound status of same-sex couples' families.

485. 572 N.E.2d 27, 28-29 (N.Y. 1991) (per curiam), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016). In this case, two women had a child with donor sperm and raised the child together for two years until they separated, at which point they continued to co-parent until the biological mother cut off contact between the child and the nonbiological mother. *Id.* at 28.

486. *See id.* at 29. Same-sex couples were not then eligible for second-parent adoption, which New York approved in 1995. *See In re* Jacob, 660 N.E.2d 397, 398-99, 405 (N.Y. 1995).

487. *Brooke S.B.*, 61 N.E.3d at 490.

488. *See* Douglas NeJaime, *The Story of* Brooke S.B. v. Elizabeth A.C.C.*: Parental Recognition in the Age of LGBT Equality*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 245, 254-55 (Melissa Murray et al. eds., 2019).

489. *See Brooke S.B.*, 61 N.E.3d at 498.

490. *Id.*

Of course, *Obergefell* involved marriage, and the Court's subsequent decision in *Pavan* clarified that *Obergefell* required the recognition of nonbiological parents in *married* same-sex couples.[491] While these constitutional decisions involved only marriage, they supply reasoning that resonates beyond marriage. The "premise of heterosexual parenting" is biological. An approach to parentage rooted in biological connection—an approach more prominent in the regulation of nonmarital families—treats same-sex couples as outsiders.[492] As the *Brooke S.B.* court reasoned:

> Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing [as a legal parent], as only one can be biologically related to the child. By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption.[493]

On this view, equality for same-sex couples is connected to nonbiological parentage in nonmarital families.[494]

The court's reasoning reveals biological connection for what it is: a *legal* basis on which to claim parental status. That is, the law does not simply reflect a set of facts that can be taken for granted; instead, the law makes a decision to convert a biological fact into a legally salient criterion.[495] Given that the paradigmatic different-sex couple could access the biological basis for legal parenthood (regardless of any formal step such as marriage or adoption), but the paradigmatic same-sex couple could not, an approach that turned on biological connection valued the parental bonds in different-sex couples' families over the parental bonds in same-sex couples' families. After *Obergefell*, this treatment appeared impermissible.

As Part I above observed, when the Supreme Court first approached questions of parental recognition, the protection of biological ties could vindicate important equality interests—based on marital status and gender. At that time, the protection of nonbiological ties affirmed the superiority of the marital, two-parent family by clearing the way for the mother's husband to be the legal father.[496] Today, in contrast, an emphasis on biological connection

491. *See supra* notes 370-78 and accompanying text.

492. *See Brooke S.B.*, 61 N.E.3d at 498.

493. *Id.* (citation omitted).

494. The *Brooke S.B.* court articulated an intent-based standard and left open the possibility for a functional standard. *Id.* at 490, 500-01.

495. *Cf.* Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1362 (1992) ("[A] biological parent's custody over his offspring is not merely 'natural' and prepolitical. Rather, . . . custody is a *legal* concept, shaped and enforced by the state.").

496. *See supra* Parts I.C.2, .D.

can undermine commitments to equality based on sexual orientation, gender, and marital status. Nonbiological parental recognition is necessary to protect lesbian and gay parents, especially those who have not married.

Equality interests also point in the same direction as children's interests.[497] Child welfare occupied a complicated and contingent position in the Court's decisions on unmarried fathers and foster parents.[498] In cases involving same-sex couples, the biological parent invokes her constitutional rights in ways that would sever the child's relationship with one of the parents. Unlike in *OFFER*, the recognition of nonbiological parents does not intervene in a vulnerable family by taking the child from her biological parent. Instead, parental recognition credits the family that the partners jointly and freely formed by leaving the child with both her biological and nonbiological parents.[499]

In its 2016 *Brooke S.B.* decision, the New York Court of Appeals lamented how "lower courts applying *Alison D.* were 'forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships.'"[500] In its 1991 *Alison D.* decision, the court reasoned that, despite the nonbiological mother's "close and loving relationship with the child," as "a biological stranger to [the] child," she was "not a parent within the meaning of [the law]."[501] In a prescient dissent, Judge Kaye focused on children raised by same-sex couples, warning that "the impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development."[502] Recognizing how nonbiological parentage, sexual orientation equality, and child welfare are connected, the *Brooke S.B.* court explained that its approach "ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents."[503]

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497. *See* Huntington & Scott, *supra* note 470 ("[T]he recognition of de facto parents is particularly important for children in families that do not fall into the traditional norm of two married parents.").

498. *See supra* Part I.C.2; *supra* notes 310-22, 332-39 and accompanying text.

499. *See* Ramey v. Sutton, 362 P.3d 217, 221 (Okla. 2015) ("Ramey [the nonbiological mother] does not seek custody in lieu of Sutton, the biological mother. Rather, she seeks to be recognized as a parent . . . . The couple, in a committed and long term relationship, collectively decided to have a family and then to raise the child together. . . . This couple and *more importantly*, their child, is entitled to the love, protection and support from the only parents the child has known.").

500. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016) (alteration in original) (quoting Debra H. v. Janice R., 930 N.E.2d 184, 201 (N.Y. 2010) (Ciparick, J., concurring), *abrogated by Brooke S.B.*, 61 N.E.3d 488).

501. Alison D. v. Virginia M., 572 N.E.2d 27, 28-29 (N.Y. 1991) (per curiam), *overruled by Brooke S.B.*, 61 N.E.3d 488.

502. *Id.* at 30 (Kaye, J., dissenting).

503. *Brooke S.B.*, 61 N.E.3d at 498-99.

Brooke S.B. was decided on family-law grounds but expressly acted on and reflected evolving constitutional norms.[504] It illustrates how family law has internalized constitutional developments and has extended constitutional insights to urgent questions of parental recognition that constitutional decisions have yet to fully and meaningfully address. Through the lens of *Brooke S.B.*, the recognition of nonbiological parents in nonmarital families furthers constitutional principles of liberty and equality. Reasoning of this kind suggests how constitutional understandings of parenthood may evolve in light of the newfound status of same-sex couples' families.

It is not only courts that articulate new understandings of parenthood in light of constitutional developments. Emergent constitutional commitments also guide law reform projects and legislation. In the wake of *Obergefell*, the Uniform Law Commission created a committee to draft a new Uniform Parentage Act in light of the Court's decision.[505] Jamie Pedersen, a state legislator who had long advocated for LGBT families, chaired the committee, and Courtney Joslin, a leading family-law scholar, served as the official reporter.[506] The committee's members, as well as observers to the committee, included judges, lawyers, and scholars with expertise in parentage law.[507]

The final product, the Uniform Parentage Act of 2017 (2017 UPA), draws on the Court's decisions in *Obergefell* and *Pavan*, suggesting how they guide parentage reform.[508] As the drafters explained, earlier versions of the UPA were "written in gendered terms, and . . . presumed that couples consist of one man and one woman," but the 2017 UPA "seeks to ensure the equal treatment of children born to same-sex couples."[509] Recognizing that "[a]fter *Obergefell* and *Pavan*, [some] parentage laws . . . may be unconstitutional," the 2017 UPA "helps state legislatures address this potential constitutional infirmity by amending provisions throughout the act so that they address and apply equally to same-sex couples."[510]

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504. *See* NeJaime, *supra* note 488, at 254-55.

505. *See* Memorandum from Jamie Pedersen, Chair, Study Comm. on Possible Amendments to the Uniform Parentage Act in Light of the Supreme Court Decisions Concerning Same-Sex Marriage to the Comm. on Scope & Program (Oct. 5, 2015), https://www.perma.cc/KU52-YNJ4.

506. *See* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

507. In addition to Pedersen and Joslin, the committee included state lawmakers Lesley Cohen, Bart Davis, Melissa Hortman, and David McBride, judges Gail Hagerty and Debra Lehrmann, lawyers Mary Ackerly, Claire Levy, and Harry Tindall, and scholars Barbara Atwood and Kay Kindred. *Id.* I served as an observer to the committee.

508. *Id.* at 1-2.

509. *Id.* at 1.

510. *Id.* at 1-2.

Even though *Obergefell* and *Pavan* involved only marriage, the 2017 UPA drafters appreciated, as the *Brooke S.B.* court did, that the relevant constitutional values have implications beyond marriage, given the relationship between sexual orientation equality and nonbiological parenthood. The commitment to nonmarital families also carries forward the legacy of the original 1973 UPA, which itself reflected principles announced in constitutional precedents on "illegitimacy" and unmarried fathers.[511] Whereas the 1973 UPA employed biological criteria to protect nonmarital families, the 2017 UPA recognizes that, today, nonbiological criteria are necessary to fully vindicate unmarried parents.[512]

To protect nonbiological parent-child bonds, the 2017 UPA codifies de facto parenthood.[513] It also incorporates a functional approach in other ways. The "holding out" presumption covers an "individual [who] resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual's child."[514] The new UPA explicitly adopts a nonbiological and gender-neutral "holding out" presumption—aligning with an interpretation that some courts recently had given the "holding out" presumption in the 1973 UPA, which was adopted in *Stanley*'s wake and assumed to capture only biological fathers.[515]

While the functional turn in family law primarily credits parental conduct, a range of criteria can be relevant to parentage determinations in ways that serve a functional approach and reach nonbiological parents. At-birth determinations of parentage seek to identify who will become a child's psychological parent, furnishing certainty and stability to parents and children rather than waiting for a period of parental conduct to pass.[516] Marriage provides one such at-birth mechanism. The 2017 UPA continues to treat

511. *See* UNIF. PARENTAGE ACT § 2 cmt. (UNIF. LAW COMM'N 1973) ("Sections 1 and 2, the major substantive sections of the Act, establish the principle that regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other. . . . [R]ecent U.S. Supreme Court decisions . . . require equality of treatment in most areas of substantive law.").

512. *See* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 612 (2018) (explaining that "[c]onsistent with one of the core principles of the original UPA," the new UPA's provision for nonbiological parentage "seeks to ensure the equal treatment of nonmarital children").

513. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

514. *Id.* § 204(a)(2).

515. *See* Joslin, *supra* note 512, at 600-01.

516. *See* Anne Alstott et al., Developing Families: Science-Based Innovations to Support and Promote Early Relationships (Sept. 25, 2019) (unpublished manuscript) (on file with author). On the overlap between intentional and functional parenthood, see Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 674-75 (2002).

marriage as a pathway to parentage, but does so through a gender-neutral presumption that expressly includes nonbiological parents in different-sex and same-sex couples.[517]

With the rise of assisted reproduction, intent-based paths to parentage also have become an important way to identify both biological and nonbiological parents. The 2017 UPA treats as a legal parent an individual who consents to "assisted reproduction by a woman with the intent" of being a parent of the resulting child.[518] That individual is a legal parent whether or not the individual's gametes were used in the assisted reproduction. Further, the 2017 UPA adapts the voluntary acknowledgment of *paternity* (VAP)[519]—the most common way that unmarried biological fathers establish parentage[520]—to nonbiological mothers and fathers by allowing "intended parent[s]" to sign a voluntary acknowledgment of *parentage*.[521] The 2017 UPA also regulates surrogacy in ways that treat "intended parents" as legal parents, whether or not they are genetically related to the child.[522]

The 2017 UPA, as the drafters acknowledged, reflects steps that some states had already taken.[523] Yet it also drives reform, supplying state legislatures a model act that draws on the expertise of judges, lawmakers, scholars, and lawyers. States have begun to enact it,[524] reforming their parentage laws in some ways that appear constitutionally required and in other ways that are guided by constitutional commitments.

C. The Functional Turn Continues: Multiple Parents

Family law continues to grow in functional directions. The developing treatment of multiple parents furnishes a striking example of how family-law authorities are revisiting issues contemplated in constitutional precedents and resolving them in new ways that still take cues from constitutional decisions.

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517. UNIF. PARENTAGE ACT § 204(a) (2017).

518. *Id.* § 703.

519. *Id.* § 301.

520. *See* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 469 (2012).

521. UNIF. PARENTAGE ACT § 301 (2017).

522. *Id.* §§ 809, 815; *see also* NeJaime, *supra* note 6, at 2346-47, 2346 n.432.

523. *See* UNIF. PARENTAGE ACT, prefatory note (2017).

524. For examples of states enacting the 2017 UPA, see An Act Relating to Parentage Proceedings, No. 162, 2018 Vt. Acts & Resolves 472 (codified at VT. STAT. ANN. tit. 15C, §§ 101-809; and VT. STAT. ANN. tit. 33, §§ 4921(e)(1), 6911 (2019)); and Uniform Parentage Act, ch. 6, 2018 Wash. Sess. Laws. 158 (codified at WASH. REV. CODE §§ 19.380.010, 26.26A.005-.903 (2019)).

The Court confronted the possibility of more than two parents when it decided the fate of unmarried fathers. Even in the 1978 *Quilloin* case, the child expressed a preference to maintain a relationship with both his biological father and his stepfather.[525] A decade later in *Michael H.*, the child expressly argued that she had a constitutional right to a parental relationship with both her biological father and her mother's husband—both men she viewed as fathers.[526] Yet the Court dismissed the possibility of dual fatherhood as inconsistent with both law and "nature."[527]

Since that time, family-law authorities have begun to credit multiparent arrangements—often in response to de facto parenthood, assisted reproduction, and LGBT family formation.[528] Family law's move toward multiparent recognition has occurred through adjudication,[529] legislation,[530] and law reform projects (such as the 2017 UPA).[531] A growing number of states—though still in the single digits—authorize courts to recognize more than two parents if doing so is "in the best interests of the child"[532] or is necessary to avoid "detriment" to the child.[533]

The recognition of more than two parents carries forward the Court's focus on established relationships, but does so in ways that depart from the results sanctioned by the Court. Consider a recent California case—one like *Michael H.*—in which a court previously would have chosen between competing claimants. In *C.A. v. C.P.*, the mother had a child through an extramarital relationship with a coworker.[534] She and her husband remained together and parented the child, but the biological father also formed a parental bond with the child.[535] When the child was three, the mother and her husband cut off the biological father's contact.[536]

525. *See* Brief of the Appellant, *supra* note 193, at 18 (stating that the child "did not oppose the adoption" and also "would like to see [his biological father] sometimes").

526. Brief for Appellant Victoria D., *supra* note 243, at 10-12, 14.

527. Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion).

528. *See* NeJaime, *supra* note 4, at 1263-64.

529. *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (finding that parental rights or obligations could extend to the biological mother, nonbiological mother, and sperm donor (biological father)).

530. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 206(b) (2019).

531. *See* UNIF. PARENTAGE ACT § 613 (UNIF. LAW COMM'N 2017).

532. VT. STAT. ANN. tit. 15C, § 206(b).

533. CAL. FAM. CODE § 7612(c) (West 2019); WASH. REV. CODE § 26.26A.460(3) (2019). For other statutes allowing more than two parents, see D.C. CODE § 16-831.01(1)(A)(iii) (2019); and ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (2019).

534. 240 Cal. Rptr. 3d 38, 40 (Ct. App. 2018), *cert denied*, No. 18-1354, 2019 WL 4921306 (U.S. Oct. 7, 2019).

535. *Id.*

536. *Id.*

As the record demonstrated, both the biological father and the marital father had "a strong bond" with the child, such that the child had "two devoted [f]athers."[537] Such a situation arguably existed in *Michael H.* as well. Yet at the time of that case, California law did not provide for dual fatherhood.[538] The Court in *Michael H.* rejected the biological father's constitutional claim, even though he had formed a relationship with the child and thus seemingly satisfied *Lehr*'s "biology-plus" standard, in order to preserve the relationship between the child and the mother's husband.[539]

But by the time of *C.A.*, California's parentage code authorized courts to recognize more than two parents for a child.[540] Affirming the trial court's judgment of dual fatherhood, the appellate court concluded that "where a child truly has three parents, . . . depriving her of one of them would be detrimental to her."[541] The *Michael H.* scenario now produced a different result—one that affirmed the established relationship of the biological father at the same time that it affirmed the importance of the nonbiological father in a marital family.[542] And whereas the Supreme Court in *Michael H.* expressly rejected the child's position, the California court in *C.A.* vindicated the child's interest in maintaining relationships with both of her fathers.[543]

California's multiparent law provided space for the court to recognize the constitutional status of the biological father—something that *Michael H.* resisted—and also respect the nonbiological father's parental bond. Strikingly, the mother and her husband—the child's nonbiological father—had argued that parental recognition of the biological father would infringe their "joint parental rights."[544] The court agreed that parents have "a fundamental liberty interest protected by the federal Constitution," but observed that "the biological father of the child, who has consistently supported her both financially and otherwise," "is a parent" as well.[545] For the court, both the married couple and the biological father appeared to possess interests of constitutional magnitude.

Michael H. in important ways represented a retreat from the Court's earlier position, as articulated in *Lehr*, that a biological father who forms a relationship with the child has a constitutionally protected liberty interest.

537. *Id.* at 47.

538. *See* Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion).

539. *Id.* at 129-30.

540. CAL. FAM. CODE § 7612(c) (West 2018).

541. *C.A.*, 240 Cal. Rptr. 3d at 47.

542. *Id.* at 50.

543. *Id.*; *see also* notes 248-50 and accompanying text.

544. *C.A.*, 240 Cal. Rptr. 3d at 50.

545. *Id.*

The California court in *C.A.* was able to credit the constitutional interest of such a man (consistent with *Lehr*) while also preserving the parental status of the mother's husband (consistent with *Michael H.*). Indeed, *C.A.* appears to take cues from *Lehr*—protecting the biological father who has "grasp[ed the] opportunity" to a be a parent[546]—as well as *Michael H.*—protecting the nonbiological father married to the child's mother. The recognition of multiple parents followed logically from the cases on unmarried fathers, yet required a deviation from the result ultimately sanctioned by that line of cases. That deviation was necessary to vindicate not only the interests of the two men who served as fathers but also the child's interest in maintaining parental attachments.

* * *

As this Part has shown, by valuing actual parent-child relationships, family law in many states has protected the bonds of nonbiological parents in a range of families. This functional turn has been guided by constitutional values, leveraging principles evident in constitutional precedents and yet adapting those principles to contemporary family arrangements. As the next Part shows, family law's functional turn has much to teach constitutional authorities as they reason about parenthood.

V. The Constitutional Liberty Interests of Nonbiological Parents

Just as family law shifts in light of constitutional developments, constitutional understandings shift with the benefit of family-law insights.[547] Guided by family-law developments on the status of nonbiological parent-child relationships, including how recognizing such relationships furthers constitutional commitments, constitutional understandings of parenthood may evolve in ways that reach nonbiological parents.

This Part first considers how decisionmakers might reason about the liberty interest in parental recognition. It draws on recent developments regarding marriage equality to illustrate how insights from family law can guide approaches to the family relationships that due process protects. It then shows that, today, family law demonstrates how constitutional principles point toward due process protections for established parent-child relationships that include nonbiological parents. This Part then explores the consequences of a liberty interest in parental recognition that reaches nonbiological parents by examining a few concrete settings. Finally, this Part responds to concerns raised by the recognition of nonbiological parents' due process interests.

546. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

547. *See* NeJaime, *supra* note 55, at 415-16.

A. Reasoning About Family Relationships and the Constitution

This Subpart returns to *Obergefell*. The Court's decision supplies a methodological approach to due process that makes clear how shifts in legal and societal views of the family influence understandings of the family relationships the Constitution protects. Staying with *Obergefell*, the discussion then shows how new approaches to relationship recognition and parentage—approaches that emerged primarily in the space of family law—contributed to changing views of the marital relationship protected as a matter of due process. Courts, including the Supreme Court, adopted a view of marriage for constitutional purposes that reflected contemporary views—both about marriage and the status of same-sex couples—that had been articulated by family-law authorities. As courts reasoned about the right to marry protected by the Constitution, they assimilated right-to-marry precedents, which had not contemplated same-sex couples' families, to a modern understanding capable of including same-sex couples. Importantly, not only family-law developments but also intervening constitutional developments regarding same-sex relationships compelled decisionmakers to reassess the right to marry.

Finally, and most critically, this Subpart applies the lessons of marriage equality to the law of parental recognition. *Obergefell*'s treatment of marriage and due process models an approach to reasoning about parenthood and due process. As with marriage, insights from family law can guide assessments of the parental relationships protected as a matter of due process. Family law's treatment of nonbiological parents demonstrates how a biological approach to constitutional parenthood fails to protect parent-child bonds that law and society increasingly view as worthy of respect. But family-law authorities do not simply provoke new understandings of the parental bonds that merit recognition; they show concretely how those new understandings resonate with constitutional principles and relate to constitutional precedents. In connecting nonbiological parentage to constitutional commitments, family-law authorities have integrated constitutional precedents into a functional approach to parenthood that reaches a range of family arrangements. Further, family-law authorities have viewed more recent constitutional developments on the status of same-sex couples' families as requiring a reassessment of the parental relationships that law protects. As family law shows, constitutional principles, and the precedents that elaborate them, today point toward the recognition of established parent-child relationships, including those formed by nonbiological parents, on due process grounds.

1. Reasoning about due process and the family

We have already seen that *Obergefell* has implications for the due process interest in parenthood. By treating same-sex couples' families as worthy of

respect and by attending explicitly to children raised by same-sex couples, *Obergefell* invests nonbiological parenthood with constitutional status.[548] But it is not only *Obergefell*'s substantive result that has consequences for parenthood. It is also its methodological approach. *Obergefell* models an approach to due process that is shaped by changing understandings of both the institution at stake and the group making claims on that institution.

In *Obergefell*, the Court made clear that rights protected as fundamental—such as the right to marry—retain their importance even as the meaning of those rights shifts. "The history of marriage," the Court observed, "is one of both continuity and change."[549] While marriage maintains its "centrality, . . . it has not stood in isolation from developments in law and society."[550]

Marriage's form and meaning had changed in part because of changes in the social and legal position of women. The Court explained how commitments to sex equality—commitments that emerged from "new insights" about "the role and status of women"—had "worked deep transformations in [marriage's] structure, affecting aspects of marriage long viewed by many as essential."[551] "[N]ew insights and societal understandings," the Court reasoned, "can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[552]

In this sense, "new insights" about the group making claims on the institution can alter understandings of that institution. Just as insights about the status of women had reshaped the contours of marriage, insights about the status of gays and lesbians influenced constitutional understandings of marriage. As the Court concluded, "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[553]

On this view, emergent commitments to equality can reshape understandings of liberty.[554] With new appreciation for the equal status of gays and lesbians, the heterosexual character of marriage came to be seen not as inevitable or

548. *See supra* notes 350-60 and accompanying text.

549. Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).

550. *Id.*

551. *Id.* at 2595-96.

552. *Id.* at 2603.

553. *Id.* at 2602.

554. *See id.* at 2602-03; *see also* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 432 (2017) (noting that leading "gay rights cases" demonstrate "the importance of equal liberty, particularly as it relates to families and children"); Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (arguing that *Lawrence v. Texas*, 539 U.S. 558 (2003), "both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty").

benign but instead as a demeaning exclusion that "impose[d] stigma and injury."[555]

But how exactly did decisionmakers come to understand the denial of the right to marry to same-sex couples as a constitutional problem? From where did "new insights and societal understandings" emerge? Family law provides some answers.

2. Marriage equality and changing understandings of the family

The path to marriage equality demonstrates how family-law developments shape evolving views of the relationships that merit constitutional protection. Before courts and legislatures recognized same-sex couples' constitutional right to marry, LGBT advocates engaged in a decades-long struggle to protect same-sex couples as a family-law matter. These efforts were aimed at both adult and parent-child relationships.[556]

As I have shown in other work, LGBT advocates sought *nonmarital* forms of relationship recognition by mapping same-sex couples onto *marital* norms.[557] New relationship statuses, such as domestic partnership, were constructed in ways that reflected modern views of marriage. Minimizing traditional norms of heterosexuality, gender differentiation, and sexual procreation, those advocating domestic partnership policies instead "emphasized marital norms—such as adult romantic affiliation, mutual emotional commitment, and economic interdependence—capable of including same-sex couples."[558] Not only were these new family-law statuses modeled on a more inclusive and egalitarian account of marriage, but the couples eligible for these statuses—including primarily same-sex couples—were framed as similar to married couples.[559]

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555. *Obergefell*, 135 S. Ct. at 2602.

556. *See* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 112-54 (2014) [hereinafter NeJaime, *Before Marriage*] (documenting domestic partnership work in California from the 1980s to the 2000s); NeJaime, *supra* note 4, at 1200-29 (documenting efforts in California in the 1990s and 2000s seeking parental recognition for LGBT parents); *see also* William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 285-86 (2013) (explaining how advocates obtained parental rights for same-sex couples before pursuing a right to marriage in Vermont); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1935-41 (2012) (discussing state-level efforts aimed at nonmarital rights and recognition).

557. *See* NeJaime, *Before Marriage*, *supra* note 556, at 113.

558. *Id.*

559. *See id.* at 165.

Efforts also focused on parental recognition. Elsewhere, I have shown how lawyers made claims on behalf of nonbiological parents in nonmarital families by analogizing them to nonbiological parents in marital families.[560] While family law had increasingly recognized men as fathers when their wives gave birth to children conceived with donor sperm, nonbiological parents outside marriage were compelled to adopt—if that option were even available.[561] To leverage the parental status extended to married nonbiological fathers for the benefit of unmarried nonbiological parents, lawyers drew attention away from "traditional norms" associated with marital childrearing, such as sexual procreation and dual-gender parenting, and toward modern concepts focused on intent-based and conduct-based parenthood.[562] As with the comparison of unmarried same-sex couples to married different-sex couples, unmarried nonbiological parents seeking parental recognition were understood to approximate married nonbiological fathers already recognized under state family law.[563] Courts and legislatures increasingly adopted intentional and functional standards of parental recognition and applied them to unmarried nonbiological parents.[564]

By appealing to marital norms to gain recognition for nonmarital adult and parent-child relationships, LGBT advocates "both shaped the meaning of marriage—which had been shifting dramatically in the second half of the twentieth century—and located same-sex couples within that shifting meaning."[565] The extension of rights to same-sex couples as a family-law matter—including both relationship recognition and parental status—influenced constitutional understandings of marriage as well as the constitutional status of same-sex couples.

The California Supreme Court, finding that same-sex couples enjoy a fundamental right to marry protected by the state constitution, remarked that "gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children."[566] The view of marriage protected by the state constitution appeared consistent with the state's

560. *See* NeJaime, *supra* note 4, at 1188.

561. *See* NeJaime, *supra* note 6, at 2291-97.

562. *See* NeJaime, *supra* note 4, at 1188-89, 1188 n.12.

563. *See id.* at 1188.

564. *See id.* at 1212-19, 1226-29.

565. NeJaime, *Before Marriage*, *supra* note 556, at 91.

566. *In re* Marriage Cases, 183 P.3d 384, 428 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *appeal vacated sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

domestic-partnership status and the recognition of lesbian and gay parents. Indeed, the court explained that the "nature and breadth of the rights afforded same-sex couples under the Domestic Partner Act . . . [are] directly relevant to the question of the constitutional validity" of the limitation on marriage.[567] The court felt compelled to judge the exclusion of same-sex couples from marriage "against the background of other legislative, administrative and judicial directives which govern the legal rights of similarly situated persons."[568] The California Supreme Court was not alone. The Connecticut Supreme Court, in its marriage ruling later that same year, found it "highly significant . . . that it is the public policy of this state that sexual orientation bears no relation to an individual's ability to raise children" or "to an individual's capacity to enter into relationships analogous to marriage."[569]

The vision of marriage forged in earlier family-law conflict over the legal status of same-sex relationships is also evident in the view of marriage articulated in federal rulings.[570] Courts conceptualized marriage in terms of "adult romantic affiliation" and mutual economic and emotional support.[571] For example, the federal district court that struck down California's ban on same-sex marriage declared:

> Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.[572]

The marital relation protected by the Due Process Clause largely replicated domestic partnership[573]—a far cry from a traditional view grounded in gender-differentiated roles, procreation, and childrearing.

A similar view of marriage prevailed at the Supreme Court, which found that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[574] The view of marriage that courts, including the Supreme Court, assimilated to the constitutional protection of the right to marry was not obvious but rather was deeply contested. Justice Alito criticized

567. *Id.* at 418.

568. *Id.* For a legislative example, see ME. LEGIS. REC., 124th Legis., 1st Reg. Sess. H-401 (2009) (statement of Rep. Cleary) ("Laws in Maine exist now that extend marriage-like rights and benefits to same sex couples and families. But separate and unequal is not equal.").

569. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 435 (Conn. 2008).

570. *See* NeJaime, *Before Marriage*, *supra* note 556, at 165-69.

571. NeJaime, *supra* note 360, at 238.

572. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *appeal vacated sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

573. *See* NeJaime, *Before Marriage*, *supra* note 556, at 165-66.

574. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

the *Obergefell* majority for adopting an "understanding of marriage" that, while "shared by many people today," "focuses almost entirely on the happiness of persons who choose to marry."[575] He contrasted this understanding with "the traditional one" that views marriage as "inextricably linked to the one thing that only an opposite-sex couple can do: procreate."[576] In *Windsor*, Justice Alito had charged the majority with "endors[ing] the consent-based view of marriage and [rejecting] the traditional view," even though "[t]he Constitution does not codify either of these views."[577]

Justice Alito's criticism suggests that the Court had imported changes in the legal and societal understanding of marriage into the constitutional meaning of marriage. In other words, his objection supports the descriptive claim here about the relationship between shifts in family life and family law, on one hand, and constitutional change, on the other hand. The majority's view was not "traditional" but was consistent with modern family law's approach to marriage and resonant with the views of "many people today."[578]

As a substantive matter, Justice Alito's characterization of the view of marriage that vindicated same-sex couples—as "focuse[d] almost entirely on the happiness of person who choose to marry"[579]—obscures critical dimensions of the understanding of marriage that supported same-sex couples' inclusion. Courts, including the *Obergefell* Court, emphasized adult commitment as well as parent-child relationships.[580]

When federal courts connected marriage to childrearing, they hewed to a view of parenthood forged in family-law conflict over the legal status of unmarried nonbiological parents.[581] For example, in affirming the federal district court's decision striking down California's marriage ban, the Ninth Circuit drew on developments in parentage law, explaining that California's "parentage statutes place a premium on the 'social relationship,' not the 'biological relationship,' between a parent and a child."[582] If childrearing and marriage were connected, that connection could not rest on biological relationships but must instead emphasize social relationships. Family-law work that shifted state-law understandings of parenthood and the status of

575. *Id.* at 2641 (Alito, J., dissenting).

576. *Id.*

577. United States v. Windsor, 570 U.S. 744, 815 (2013) (Alito, J., dissenting).

578. *Obergefell*, 135 S. Ct. at 2641 (Alito, J., dissenting).

579. *Id.*

580. *See id.* at 2607 (majority opinion).

581. *See* NeJaime, *supra* note 4, at 1238-40.

582. Perry v. Brown, 671 F.3d 1052, 1087 (9th Cir. 2012) (quoting Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 124 (Ct. App. 1994)), *appeal vacated sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

same-sex parents shaped judicial assessments of marriage for constitutional purposes.[583]

The path to marriage equality demonstrates how changing legal and societal views, including views primarily elaborated in family law, can contribute to new understandings of the family relationships protected by the Constitution. The path to marriage equality also offers something more specific: It demonstrates how these changing views can shape due process reasoning in concrete ways. Decades-old Supreme Court rulings protecting the right to marry came to be seen as consistent with—and in fact, supportive of—same-sex couples' claims to marriage.

Those who rejected same-sex couples' marriage claims understood the procreative, gender-differentiated view of marriage that justified same-sex couples' exclusion as consistent with constitutional precedents on the right to marry.[584] Key precedents could be read to support this view.[585] In *Loving v. Virginia*, the 1967 decision striking down bans on interracial marriage, the Court characterized marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[586] The *Loving* Court quoted the 1942 *Skinner v. Oklahoma* decision, which struck down a forced sterilization law on equal protection grounds.[587] That case implicated procreative rights rather than marital rights, and yet the Court linked them, declaring that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[588] Marriage appeared to cabin sex and procreation.[589]

This understanding endured when, in its 1978 decision in *Zablocki v. Redhail*, the Court struck down a Wisconsin law that required noncustodial parents with outstanding child support obligations to obtain court approval to marry.[590]

583. *See* NeJaime, *supra* note 4, at 1238-40.

584. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) ("This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. . . . More recent cases have directly connected the right to marry with the 'right to procreate.'" (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978))).

585. *See* NeJaime, *supra* note 360, at 224-26 (documenting the procreative understanding of marriage seen in *Zablocki*, *Loving v. Virginia*, 388 U.S. 1 (1967), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

586. 388 U.S. at 12 (quoting *Skinner*, 316 U.S. at 541).

587. 316 U.S. at 536, 538, 541.

588. *Id.* at 541.

589. *See* Ariela R. Dubler, Essay, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1367 (2010) (suggesting that the *Skinner* "Court insisted [that] procreation went hand in hand with marriage" in ways that tapped into anxieties about sterilization's "potential to uncouple sex from the traditional, procreative family"); *see also* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1268-69 (2009) (explaining how criminal prohibitions on nonmarital sex made marriage the only appropriate site for sexual activity).

590. 434 U.S. 374, 375-77 (1978).

The Court once again described marriage as "fundamental to the very existence and survival of the race."[591] Linking marriage to procreation, the Court observed that "if [one]'s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."[592]

But the meaning of constitutional right-to-marry precedents was deeply contested. Those sympathetic to same-sex couples' claims interpreted decades-old constitutional precedents on the right to marry—precedents decided at a time when same-sex couples' families were heavily stigmatized—to support a contemporary, more inclusive understanding of marriage. By stressing "'civil rights'" and "freedom of choice," the Court's right-to-marry decisions contained resources for articulating a less procreative view of marriage.[593] And subsequent right-to-marry cases contributed to new understandings of these precedents. In its 1987 decision in *Turner v. Safley*, striking down Missouri prison regulations requiring inmates to seek permission to marry, the Court emphasized marriage's material consequences—"receipt of government benefits" and "property rights"—and dignitary dimensions—"expressions of emotional support and public commitment."[594]

In early same-sex marriage cases, constitutional precedents were cited to support a gender-differentiated view of marriage that justified the exclusion of same-sex couples.[595] But eventually, after years of social and legal shifts in understandings of same-sex relationships, courts invoked right-to-marry precedents to support a more contemporary view of marriage capable of including same-sex couples. This dynamic is observable in the Supreme Court's *Obergefell* decision,[596] as well as in lower federal court decisions.[597]

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591. *Id.* at 384 (quoting *Skinner*, 316 U.S. at 541).

592. *Id.* at 386. The Court articulated a procreative view of marriage even as the connection between sex, procreation, and marriage had been loosening—including in the Court's own treatment of the subject. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 440-43 (1972) (holding unconstitutional a prohibition on contraceptive use by unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding unconstitutional a prohibition on contraceptive use by married couples).

593. Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting *Skinner*, 316 U.S. at 541).

594. 482 U.S. 78, 82, 95-96 (1987).

595. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) (finding a same-sex couple's analogy to *Loving* inapposite because "[t]he operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman"), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

596. 135 S. Ct. at 2598-2600.

597. *See, e.g.*, Bostic v. Rainey, 970 F. Supp. 2d 456, 484 & n.19 (E.D. Va.) (characterizing *Loving* as a decision "protecting an individual's choice to marry the person he or she loves"), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

Even as the *Obergefell* Court acknowledged that the "Court's cases describing the right to marry presumed a relationship involving opposite-sex partners," it cast these cases as "identif[ying] essential attributes" of the right to marry that "apply with equal force to same-sex couples."[598] The Court described marriage in adult-centered terms that focused on both personal freedom and mutual commitment. Citing *Loving* and *Zablocki*, it declared that the "first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[599] The Court viewed this principle as applicable to different-sex as well as same-sex couples. Again citing *Loving*, the Court observed that "there is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[600] Speaking in gender-neutral terms, the Court declared that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[601]

Articulating another "basis for protecting the right to marry" observable in constitutional precedents, the Court explained that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[602] Here, the Court cited its *Lochner*-era parental rights precedents—*Meyer* and *Pierce*.[603] Even though constitutional precedents had not contemplated families formed by same-sex couples, they now were deemed to express commitments consistent with same-sex couples' families. Indeed, the Court even quoted *Zablocki*, the right-to-marry decision that turned in part on the link between sexual procreation and marriage, to connect same-sex couples to "[t]he right to 'marry, establish a home and bring up children.'"[604] While references to procreation traditionally contemplated only heterosexual sex, the majority's allusion to procreation and childrearing applies to much more. As Courtney Cahill has argued, in linking marriage to procreation in a way that included same-sex couples, the Court implied that

598. *Obergefell*, 135 S. Ct. at 2598-99.

599. *Id.* at 2599 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978); and Loving v. Virginia, 388 U.S. 1, 12 (1967)).

600. *Id.* (citing *Loving*, 388 U.S. at 12).

601. *Id.*

602. *Id.* at 2600. Strikingly, the Court did not frame marriage as necessarily linked to procreation. Instead, it made clear that it was in no way suggesting that "the right to marry is less meaningful for those who do not or cannot have children." *Id.* at 2601.

603. *Id.* at 2600 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

604. *Id.* (quoting *Zablocki*, 434 U.S. at 384).

procreation includes assisted reproduction.[605] Regardless of how children are brought into a family, "marriage offers" them "recognition, stability, and predictability"; accordingly, "[e]xcluding same-sex couples from marriage . . . conflicts with a central premise of the right to marry."[606]

Changing views of marriage shaped the Court's assessment of same-sex couples' claims as well as the constitutional precedents that protected the right to marry. Changing views of same-sex relationships also shaped the Court's assessment of same-sex couples' claims and the right-to-marry precedents on which they relied. In this sense, two lines of constitutional cases are relevant: those addressing the institution due process protects (marriage), and those addressing the group making claims on that institution (same-sex couples). The latter set of cases required a reassessment of the former.

At the time of the Court's earlier right-to-marry decisions, the criminalization of same-sex sex was seen by the Court as constitutionally permissible. But the Court's decision in *Lawrence v. Texas*, striking down on due process grounds laws prohibiting same-sex sex, shifted the legal status of same-sex relationships.[607] The *Obergefell* Court observed that as it "held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association."[608] This shift had consequences for understandings of the family arrangements due process protects. By the time of *Obergefell*, the constitutional protection of same-sex relationships against criminal sanction pointed toward the affirmative constitutional protection of same-sex relationships through marriage. "Outlaw to outcast may be a step forward," the Court explained, "but it does not achieve the full promise of liberty."[609] Armed with the principles on which *Lawrence* rested, understandings of marriage shifted to accommodate same-sex couples.[610]

The *Obergefell* Court adapted constitutional precedents on marriage to same-sex couples and connected developments on same-sex relationships to

605. *See* Courtney Megan Cahill, Essay, Obergefell *and the "New" Reproduction*, 100 MINN. L. REV.: HEADNOTES 1, 11 (2016) ("*Obergefell* lays the foundation for establishing *complete* constitutional parity between (traditional) sexual reproduction and (non-traditional) alternative reproduction—parity, that is, with respect not just to marriage but to procreation also.").

606. *Obergefell*, 135 S. Ct. at 2600.

607. *See* 539 U.S. 558, 578-79 (2003).

608. 135 S. Ct. at 2600.

609. *Id.*

610. In 1972, the Court had dismissed, "for want of a substantial federal question," an appeal from a state supreme court ruling rejecting a same-sex couple's federal constitutional claims to marriage. *See* Baker v. Nelson, 409 U.S. 810 (1972) (mem.), *overruled by Obergefell*, 135 S. Ct. 2584. Intervening constitutional developments—what the *Obergefell* Court termed "other, more instructive precedents"—made it appropriate to revisit, and ultimately overrule, that earlier decision. *Obergefell*, 135 S. Ct. at 2598-2600.

constitutional understandings of marriage—ultimately concluding that "same-sex couples may exercise the right to marry."[611] Clearly, this is often how constitutional change happens; precedents conventionally understood in a particular way are reworked and repurposed—frequently in light of intervening constitutional decisions—to support a view that reflects contemporary perspectives. The central point here is not that this process is novel. The point is that constitutional precedents were interpreted in ways that aligned them with ascendant views of marriage and family that had been elaborated in *family-law* conflicts that played out in state and local venues in the preceding decades.

3. The parental relationships due process protects

Like understandings of marriage, constitutional understandings of parenthood have shifted in light of "new insights and societal understandings" about the family. For much of the nation's history, attaching parenthood exclusively to marriage seemed "natural and just"[612] to many. But, as the Court's decisions on "illegitimacy" and unmarried fathers show, this approach eventually came to be seen as harmful and discriminatory.

While constitutional decisions on the rights of unmarried fathers and nonmarital children clearly pushed family law in new directions, reformers were engaged in state-level legislative efforts well before the Court intervened. A "liberalization" process that began in the early twentieth century continued through the 1960s.[613] As Harry Krause, the architect of these reform efforts, observed two years before the Court's first decisions rejecting discrimination based on "illegitimacy," state approaches to "illegitimacy" "range[d] from highly progressive to very traditional."[614] "Concentrat[ing] on *legislative* efforts," Krause proposed a uniform act on "[l]egitimacy."[615] It included paternity presumptions that would appear in the 1973 UPA,[616] on which Krause served as the reporter-draftsman.[617] In other words, before the Court's decisions on "illegitimacy" and unmarried fathers, Krause had drafted a model act to change state family law in precisely some of the ways that the model act promulgated in the wake of the Court's decisions did.

611. *Obergefell*, 135 S. Ct. at 2599.

612. *See id.* at 2602.

613. *See* Davis, *supra* note 227, at 81-82.

614. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 830 (1966).

615. *Id.* at 831. For the proposed model act, see *id.* at 832-41.

616. *See id.* at 831 n.10, 832-33 (including a "holding out" presumption and "voluntary legitimation"); *see also* UNIF. PARENTAGE ACT § 4(a) (UNIF. LAW COMM'N 1973).

617. Krause, *supra* note 143, at 1.

Seen in this light, the Court's constitutional protection of nonmarital parents and children followed on family-law efforts. Informed by new understandings of the parental bonds worthy of recognition, the Court articulated a constitutional approach that included nonmarital parent-child relationships. Today, constitutional decisionmakers may learn from family-law developments in ways that lead to the recognition of nonbiological parent-child bonds.

Obergefell's approach to due process suggests how constitutional decisionmakers might reason about parental recognition. Legal parenthood, even more so than marriage, is an institution that retains its central role in society even as it evolves. "[N]ew insights and societal understandings" about the parental relationships worthy of respect and the individuals marginalized by conventional views of parenthood—including LGBT individuals, unmarried individuals, and individuals using assisted reproductive technologies—can reshape understandings of the parental interests the Constitution protects.[618] Family law furnishes the kinds of "new insights and societal understandings" that can guide an approach to due process. Limiting parenthood to biological connection may seem natural and benign to some. But, as family-law authorities increasingly have acknowledged, the exclusionary and harmful meaning and effects of a biological limitation are clear.[619]

The protection of nonbiological parents standing alone says little about the basis on which such protection occurs. What exactly is the Constitution protecting when it approaches parenthood in light of insights from family law? As we have seen, the functional turn in family law prioritized actual parent-child relationships.[620] Recognizing that limiting parentage by marriage or blood would exclude relationships that exist in fact, courts and legislatures acted to protect the developed relationships between parents and children.

Such protection serves many important ends. It recognizes the difficult work of parenting that individuals undertake in a range of family configurations. It values care work and parental responsibility. Protection of actual parent-child relationships also promotes children's interests by safeguarding their relationships with their psychological parents. Internalizing insights about child development, family-law authorities endeavored to protect children from the trauma that severing a parental bond would inflict.

Protection of actual parent-child relationships also serves important equality interests. Traditional rules designed around marital and biological parentage systematically excluded individuals who formed parental bonds worthy of respect. As we have seen, the law treated fatherhood as a social

618. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

619. *See* NeJaime, *supra* note 6, at 2317-23.

620. *See supra* Part IV.

determination but treated motherhood as a biological fact.[621] Yet many women parent children to whom they are not biologically related. Outside marriage, the law tethered parentage to biological ties. Yet many unmarried individuals parent children to whom they are not genetically connected. The traditional approach to parentage was designed around the heterosexual family—presuming a biological mother and father. Yet same-sex couples necessarily include a nongenetic parent. With the functional turn, family law acted to protect nonbiological parent-child bonds without regard to gender, marital status, or sexual orientation. In doing so, family law accommodated—and valued—the growing diversity of family arrangements that American society featured. The functional turn aligned with families' lived experiences, producing a legal framework that captured relationships individuals themselves understood as parental in nature.

Guided by insights emerging from family law's functional turn, decisionmakers would reason about the parental relationships the Constitution protects in ways that value actual relationships regardless of biological ties, marital status, gender, or sexual orientation.[622] It is the work of parenting that deserves respect. It is the parental relationship forged through care and responsibility that merits recognition.

But family law does not simply provide constitutional decisionmakers with "new insights" about the parental relationships worthy of protection. Family law provides "new insights" about how recognition of actual parental relationships furthers constitutional values. Family-law authorities did not protect nonbiological parents simply on policy grounds. They did so based in part on constitutional values. In this sense, family law provides guidance to decisionmakers charged with constitutional determinations, showing how the protection of nonbiological parent-child bonds vindicates constitutional principles.

These constitutional principles are observable in the Court's precedents on the family. In fact, family-law authorities drew directly on these precedents—some of which are conventionally assumed to stand for a biological approach to parenthood—to support an approach that emphasizes actual parent-child bonds and that includes nonbiological parents. Rather than ignore constitutional precedents on parenthood or merely see such decisions as providing ample space for family law to regulate as it pleased, family-law authorities reoriented constitutional precedents.

As decisions from Hawaii, Minnesota, New Jersey, and Rhode Island demonstrate, state supreme courts that protected de facto parents invoked the Court's decisions on unmarried fathers and foster parents to support a focus on

621. *See supra* notes 224-29 and accompanying text.

622. *See supra* Part IV.

developed parent-child bonds.[623] They viewed these decisions as protecting developed relationships regardless of biological connection. By reaching nonbiological mothers and fathers in unmarried same-sex and different-sex couples, they interpreted decades-old constitutional precedents in ways that served more egalitarian and inclusive ends.

Of course, these decisions protecting de facto parents cited constitutional precedents and identified constitutional values *to support family-law reasoning*. That is, they did not resolve constitutional issues. Yet these decisions demonstrate how constitutional precedents—and the principles they articulate—can form the foundation for an approach to constitutional parenthood that focuses on actual parent-child relationships and includes nonbiological parents.[624] In other words, they model a form of reasoning that is relevant to due process analysis, showing how constitutional principles and precedents reflect the importance of the bonds formed by nonbiological parents.

Not only decades-old constitutional precedents but also more recent constitutional decisions are relevant to questions of parental recognition. Just as *Lawrence* influenced assessments of the constitutional reach of marriage,[625] intervening constitutional developments point toward new understandings of the liberty interest in parental recognition.

Obergefell and other marriage equality decisions valued parent-child relationships formed in families headed by same-sex couples and therefore valued nonbiological parent-child bonds.[626] Rather than tying parenthood to biological connection, marriage equality rulings embraced an approach to parenthood focused on family formation and parental conduct. This view reflected developments in family law, where concepts of intentional and functional parenthood grew in ways that reached nonbiological parents in a range of families. It is easy to imagine that the understandings of parenthood articulated in marriage equality decisions might also appear in decisions on parental recognition.

An approach to due process that includes nonbiological parents is necessary to treat lesbian and gay parents with the respect that decisions like *Obergefell* require. Indeed, *Pavan* appears to recognize the need to protect

623. *See supra* notes 450-65 and accompanying text.

624. Indeed, common law analysis like that in the family-law cases on de facto parenthood may have much in common with constitutional analysis on the due process interest in parenthood. *See* Kaye, *supra* note 82, at 15 (explaining that "state courts move seamlessly between the common law and state constitutional law, the shifting ground at times barely perceptible").

625. *See supra* notes 607-10 and accompanying text.

626. *See supra* Part III.A.

nonbiological parents in same-sex couples on constitutional grounds.[627] Even though the decision relies on the right to marry safeguarded in *Obergefell*, it relates nonbiological parenthood to commitments to equality and liberty. It is a small step from *Pavan* to an acknowledgment that the due process interest in parental recognition reaches nonbiological parents in same-sex couples.

Family law again demonstrates how an approach to parenthood that reaches nonbiological parents furthers important constitutional commitments, including those that emerged from the Court's decisions on same-sex couples. Courts have interpreted *Obergefell* to require parental recognition for nonbiological parents in *married* same-sex couples on constitutional grounds.[628] But, as we have seen, the *Brooke S.B.* court acknowledged that the respect now accorded to same-sex couples as a constitutional matter points toward parental recognition for nonbiological parents more generally.[629] Given that same-sex couples are not similarly situated to different-sex couples with respect to biological parenthood and given that *Obergefell* affirms the dignity of same-sex couples' families, *Brooke S.B.* recognizes the need for nonbiological parental recognition in marital as well as nonmarital families.

Guided by family-law insights, constitutional decisionmakers would appreciate how the protection of same-sex couples' families leads logically to the protection of nonbiological parent-child bonds. While the *Brooke S.B.* court reached this conclusion in the doctrinal space of family law, some judges have begun to engage in this type of reasoning *as a constitutional matter*. Consider *Sheardown v. Guastella*, a 2018 decision in which the Michigan Court of Appeals denied the parental claims of a nonbiological mother in an unmarried same-sex couple.[630] The court concluded that the state's parentage law did not violate the nonbiological mother's constitutional rights.[631]

The nonbiological mother argued that the Court's recent decisions on same-sex marriage should be seen to alter understandings of the parental interests protected by the Constitution.[632] While the court rejected this argument, a forceful dissenting opinion by Judge Fort Hood reasoned that the state's "limitation of the definition of 'parent' . . . to a natural or adoptive parent" infringed the nonbiological mother's "fundamental liberty interest in

627. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (per curiam).

628. *See, e.g.*, Roe v. Patton, No. 2:15-cv-00253, 2015 WL 4476734, at *3 (D. Utah July 22, 2015); McLaughlin v. Jones, 382 P.3d 118, 120-22 (Ariz. Ct. App. 2016), *vacated*, 401 P.3d 492 (Ariz. 2017), *cert. denied sub nom.* McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018).

629. *See supra* notes 488-94 and accompanying text.

630. 920 N.W.2d 172, 173-74 (Mich. Ct. App. 2018).

631. *Id.* at 175-79.

632. *Id.* at 174.

parenting."[633] The dissent viewed intervening constitutional developments as relevant to understandings of parenthood for constitutional purposes. It explained:

> While the cases protecting parent's [sic] fundamental liberty interests in the care and management of their own children have traditionally done so when the rights of natural parents are at issue, in *Obergefell* and *Pavan*, the United States Supreme Court expressly held that same-sex married couples should not be denied . . . the right to marry, as well as concomitant benefits, including adoption, custody, and parenting time.[634]

The dissenting opinion appreciated that constitutional understandings, which may "traditionally" have assumed "natural parents,"[635] must evolve in light of subsequent developments protecting the families of same-sex couples—families that necessarily include a nongenetic parent.[636]

The constitutional reasoning envisioned here is relevant to parent-child relationships in a variety of families—marital and nonmarital, formed by different-sex and same-sex couples, and featuring biological and nonbiological ties. Consider the Ninth Circuit's decision in *Wheeler v. City of Santa Clara*, which demonstrates how a focus on actual bonds can furnish constitutional protection to parents and children in "non-traditional family arrangements."[637] The court held that a man adopted as an infant did not possess a liberty interest in the relationship with his biological mother, with whom he had maintained some contact.[638] Accordingly, he could not sue for loss of companionship after his biological mother was shot and killed by officers.[639]

In reaching this conclusion, the court grounded the due process interest in "a true parent-child relationship."[640] As Judge Wardlaw reiterated in a

633. *Id.* at 185 (Fort Hood, J., dissenting).

634. *Id.*

635. *Id.*

636. *See id.* Given that the same-sex couple in *Sheardown* broke up before they could legally marry in Michigan, the dissent found a violation of the nonbiological mother's parental liberty interest "[u]nder these circumstances." *Id.* Accordingly, it is unclear the extent to which the reasoning would apply to an unmarried nonbiological parent after a breakup today. *Compare* Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722 (2012) (expressing concern that focusing on the connection between marriage and parentage in work on behalf of same-sex couples undermines unmarried same-sex parents), *with* NeJaime, *supra* note 4, at 1250 (suggesting that marriage equality may further erode legal distinctions between married and unmarried parents).

637. 894 F.3d 1046, 1058 (9th Cir. 2018).

638. *See id.* at 1057-58.

639. *Id.* at 1049-50.

640. *Id.* at 1058.

concurring opinion, "it is the actual relationship that society recognizes as worthy of respect and protection, that animates the constitutional claim."[641] On this view, both biological and nonbiological parent-child bonds might qualify for constitutional protection.

The court found support for its approach in constitutional precedents. Constitutional protections, the court explained by quoting *Lehr*, "require enduring relationships reflecting an assumption of parental responsibility and 'stem[] from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children.'"[642] Through this lens, constitutional protection rests on an approach that, as Judge Wardlaw put it, understands parenthood as "a practice, dependent on intimacy and association over time."[643]

Wheeler featured the possibilities presented by open adoption, an important development in adoption law over the past several decades. Claims of this kind—seeking protection for biological relationships that do not enjoy legal status—are likely to recur in light of the frequency of postplacement contact between birth parents and adopted children.[644] A ruling in favor of the claimant in *Wheeler* would have yielded two mother-child relationships protected by the Constitution—the biological and adoptive relationships.

The prospect of two mothers is not new. Noting that "[w]e no longer live in a world of conventional families with two heterosexual parents and only one mother," Judge Wardlaw observed that "[s]ome children have two mothers in a same-sex marriage."[645] And "some children have two mothers because their heterosexual parents got divorced and remarried."[646] As Judge Wardlaw remarked, "[t]he intimate relationship between a parent and child is not limited by number."[647]

Ultimately, *Wheeler* illustrates how a court might reason about parenthood and the Constitution in ways that relate constitutional principles and precedents to contemporary, "non-traditional family arrangements." *Wheeler* roots constitutional protection in established parent-child relationships,

641. *Id.* at 1060 (Wardlaw, J., concurring in opinion).

642. *Id.* at 1058 (majority opinion) (alteration in original) (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)).

643. *Id.* at 1060 (Wardlaw, J., concurring in opinion).

644. In many states, postplacement contact agreements are valid and enforceable. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-308 (LexisNexis 2019); N.Y. DOM. REL. LAW § 112-b (McKinney 2019).

645. *Wheeler*, 894 F.3d at 1060 (Wardlaw, J., concurring in opinion).

646. *Id.*

647. *Id.*

breathing new life into Supreme Court precedents conventionally associated with more restrictive (and biological) approaches to parenthood.

* * *

In recent years, the Supreme Court has been reluctant to address questions of parentage and has done so rarely.[648] But constitutional claims will continue to confront other actors, including state and federal courts. As with marriage, the Court might eventually address the due process rights of nonbiological parents. Some Justices may take a restrictive view, while others may adopt a more inclusive approach. Whatever the case, the Court will not settle debates over the meaning of parenthood. Instead, understandings of parenthood will develop in ways similar to understandings of marriage—across multiple venues (courts, legislatures, academic debate, and public dialogue); with contributions from various actors (judges, lawmakers, scholars, advocates, and social movements); and through overlapping bodies of law (primarily family law and constitutional law).

B. Consequences of Nonbiological Parents' Liberty Interest

This Subpart considers how a constitutional understanding of the due process interest in parental recognition that includes nonbiological parents would apply in concrete and familiar scenarios. First, it addresses perhaps the most compelling case for constitutional coverage—nonbiological parents in families formed by same-sex couples. Next, it focuses on nonbiological fathers in marital families—those like Gerald in *Michael H.* Finally, it considers nonbiological parent-child relationships in other arrangements, including stepparent families and families formed through assisted reproduction.

1. Nonbiological parents in same-sex couples

When courts and legislatures treat nonbiological parents as legal parents under family law, they need not reach constitutional questions. But courts that have denied relief under family law have also denied constitutional relief. Consider *Russell v. Pasik* and *Hawkins v. Grese*, the cases with which this Article began.[649] The courts in those cases found that nonbiological mothers in same-sex couples—even though they had parented their children for years—could

648. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993); Amy G. v. M.W., 47 Cal. Rptr. 3d 297 (Ct. App. 2006), *cert. denied*, 550 U.S. 934 (2007), *superseded by statute*, Act of Sept. 28, 2008, ch. 534, § 1, 2008 Cal. Stat. 3838, 3838 (codified as amended at CAL. FAM. CODE § 7612(b) (West 2019)); V.C. v. M.J.B., 748 A.2d 539 (N.J.), *cert. denied*, 531 U.S. 926 (2000); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005), *cert. denied sub nom.* Britain v. Carvin, 547 U.S. 1143 (2006).

649. Russell v. Pasik, 178 So. 3d 55 (Fla. Dist. Ct. App. 2015); Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

not claim parental status as a family-law matter because the state lacked a de facto parent doctrine.[650] The nonbiological mothers in both cases argued that the failure to recognize their parental status—and thus allow them to pursue custody or visitation with respect to children to whom they were not biologically related—infringed their due process rights.[651] In rejecting these claims, the courts articulated a biological understanding of the parental bonds due process protects.[652]

These cases relied on decades-old Supreme Court precedents. The Florida court in *Russell* drew on *Lehr*, as well as on state court decisions extending *Lehr*, to support its reasoning.[653] For its part, the Virginia court in *Hawkins* quoted *OFFER*.[654]

The *Russell* and *Hawkins* courts are not alone. In a 2001 decision, a federal district court observed the lack of "reported decisions holding that the relationship between an adult and the unrelated, non-adopted child of that adult's partner is one contemplated by [the] substantive due process right."[655] Accordingly, it concluded that "[u]nder the current state of the law, . . . an intimate and committed relationship is insufficient to trigger the protection afforded families under the Fourteenth Amendment."[656] Much has changed since 2001 with respect to the status of same-sex couples' families.[657] Yet, as *Russell* and *Hawkins* demonstrate, courts addressing the due process claims of nonbiological parents have continued to reason in this way.

A parentage regime that premises parental recognition on biological connection does not treat gays and lesbians as full and equal parents, even if it treats same-sex and different-sex couples alike.[658] Because same-sex couples necessarily feature a nongenetic parent, unlike different-sex couples, an approach that turns on biological ties treats lesbian and gay parents as something less than real parents—a view the Court has rejected in *Windsor*,

650. *See Russell*, 178 So. 3d at 57, 59 ("[T]he law is clear: those who claim parentage on some basis other than biology or legal status do not have the same rights, including the right to visitation, as the biological or legal parents."); *Hawkins*, 809 S.E.2d at 443, 446 (observing "the Commonwealth's refusal to adopt wider parental definitions through other legal constructions such as the de facto or psychological parent doctrines").

651. *See Russell*, 178 So. 3d at 60; *Hawkins*, 809 S.E.2d at 445-47.

652. *See Russell*, 178 So. 3d at 60; *Hawkins*, 809 S.E.2d at 446-47.

653. *Russell*, 178 So. 3d at 60 (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983); and D.M.T. v. T.M.H., 129 So. 3d 320, 338 (Fla. 2013)).

654. *Hawkins*, 809 S.E.2d at 447 (quoting Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 843 (1977)).

655. Zavatsky v. Anderson, 130 F. Supp. 2d 349, 354 (D. Conn. 2001).

656. *Id.* at 355.

657. *See supra* Part III.

658. *See* NeJaime, *supra* note 6, at 2333.

Obergefell, and *Pavan*.[659] To borrow language from the Court in *Obergefell*: Given "the significance [the state] attaches to" parenthood, a system that turns on biological connection "has the effect of teaching that gays and lesbians are unequal in important respects."[660]

This reasoning has consequences for conflicts over same-sex parents in marital and nonmarital families. Consider first the marital presumption.[661] Some states continue to resist the presumption's application to nonbiological mothers in same-sex couples[662]—even though *Pavan* suggests this is unconstitutional.[663] While *Pavan* does not reach the due process interest in parenthood—indeed, the plaintiffs did not raise a claim based on this interest[664]—some same-sex couples in ongoing disputes have raised due process claims to parental recognition.[665] State officials, such as those in Indiana, have responded by arguing that "[t]o the extent the Constitution protects a fundamental right to *be* a parent, it protects only the rights of biological parents."[666] This assertion not only misapprehends the Court's decisions, but also fails to acknowledge how more recent developments—including the

659. For a discussion on these three cases, see Part III above. *See also* Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 681-82 (2016) ("[M]arriage equality jurisprudence stands not just for the relatively narrow proposition that the Constitution protects a fundamental right to marry that includes same-sex marriage, but also for the broader principle that the Constitution prohibits the state from establishing a particular vision of kinship to which its citizens must conform."); Franklin, *supra* note 54, at 827 (arguing that marriage equality decisions suggest "state action that enforces [a] single, heterosexual model of the family violates gays' and lesbians' equality interests *and their liberty interests*").

660. *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2601-02 (2015) (discussing the harmful effects of excluding same-sex couples from the institution of marriage).

661. *See* Henderson v. Adams, 209 F. Supp. 3d 1059, 1078 (S.D. Ind. 2016) (holding that Indiana's refusal to apply the marital presumption to same-sex couples violates both equal protection and due process and noting that same-sex couples ask that their "families . . . be respected in their dignity and treated with consideration"), *amended by* No. 1:15-cv-00220, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016), *aff'd in part, vacated in part, and remanded sub nom.* Henderson v. Box, No. 17-1141 (7th Cir. Jan. 17, 2020).

662. *See, e.g.*, *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *8 (Tex. App. Apr. 27, 2017).

663. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (per curiam); *see also* McLaughlin v. Jones, 401 P.3d 492, 496-97 (Ariz. 2017) (relying on *Pavan* in holding that Arizona must apply its marital presumption to same-sex couples), *cert. denied sub nom.* McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018).

664. *See* Petition for a Writ of Certiorari, *supra* note 384.

665. *See, e.g.*, Plaintiffs' Brief in Support of Their Motion for Summary Judgment at 30-32, *Henderson*, 209 F. Supp. 3d 1059 (No. 1:15-cv-220), 2015 WL 13091759, ECF No. 80.

666. Memorandum of State Defendant et al. in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 16, *Henderson*, 209 F. Supp. 3d 1059 (No. 1:15-cv-220), 2016 WL 8346640, ECF No. 85.

respect now accorded the very families at issue—promote new understandings of the parental relationships protected by the Constitution.[667]

The only court to expressly accept same-sex couples' due process claims to parenthood in a dispute over the marital presumption did so with little analysis. In *Henderson v. Adams*, a federal district court ruled in 2016 that Indiana's refusal to apply the marital presumption to same-sex couples "significantly interferes with . . . the right to be a parent by denying them any opportunity for a presumption of parenthood which is offered to heterosexual couples."[668] The court rightly credited the plaintiffs' "fundamental right to parenthood," but it did not explain how exactly equality concerns affect the due process analysis or what precisely "the right to be a parent" entails.[669] Future courts confronted with these claims might elaborate the due process interest in parental recognition in ways that make clear how and why it applies to a nonbiological mother in a married same-sex couple.

Although implications for disputes over the marital presumption are important, recognizing the liberty interests of nonbiological parents would matter more outside marriage, where many states continue to disrespect nonbiological bonds.[670] The difference between the reasoning of the *Russell* and *Hawkins* courts, which resolved constitutional questions, and the *Brooke S.B.* court, which ruled on family-law grounds, is one of constitutional magnitude. *Russell* and *Hawkins* interpret decades-old constitutional decisions as limiting protection to biological parents, whereas *Brooke S.B.* interprets more recent constitutional developments as requiring protection for nonbiological parents in married as well as unmarried couples.[671]

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667. A due process interest in parental recognition that extends to nonbiological parents could affect married same-sex couples outside the context of family law as well. For example, married binational same-sex couples are challenging the government's refusal to extend U.S. citizenship to the couple's child when the child is born outside the U.S. and the citizen parent is not biologically connected to the child. *See, e.g.*, Dvash-Banks v. U.S. Dep't of State, No. 2:18-cv-00523, 2019 WL 911799, at *1-2 (C.D. Cal. Feb. 21, 2019), *appeal docketed*, No. 19-55517 (9th Cir. May 7, 2019); Complaint at 1, 18-19, Blixt v. U.S. Dep't of State, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018), 2018 WL 500137, ECF No. 1. For an argument in favor of nonbiological parents in this setting, see Higdon, *supra* note 140, at 161-66.

668. *Henderson*, 209 F. Supp. 3d at 1078.

669. *See id.* The Seventh Circuit affirmed the district court's judgment that failure to apply the marital presumption to female same-sex couples violates the Constitution, but it did not analyze the due process interest in parental recognition. Henderson v. Box, No. 17-1141, slip op. at 7-8 (7th Cir. Jan. 17, 2020).

670. *See* NeJaime, *supra* note 6, at 2370-72 (cataloguing states' treatment of unmarried nonbiological parents).

671. *Compare* Russell v. Pasik, 178 So. 3d 55, 60 (Fla. Dist. Ct. App. 2015), *and* Hawkins v. Grese, 809 S.E.2d 441, 447 (Va. Ct. App. 2018), *with* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016).

Due process protections for nonbiological parents are relevant not only to nonbiological mothers but also to nonbiological fathers in same-sex couples. These men struggle for parental recognition, regardless of whether they are married. The marital presumption generally does not apply to male same-sex couples, since the presumption arises based on marriage to the *biological mother*.[672] Unless other provisions such as those regulating surrogacy apply, the nonbiological father ordinarily must adopt. If he does not, he risks being treated as a legal stranger. For example, before New Jersey enacted a law regulating gestational surrogacy,[673] a court ruled that the woman who served as a gestational surrogate and the biological father were the child's legal parents, thus excluding the man married to the biological father.[674] That decision had the effect of rendering the child's primary caretaker a legal stranger.[675] Understandings of liberty that include nonbiological parents would reach the nonbiological father in that case.

State and federal courts are adjudicating matters involving the recognition of nonbiological parents in same-sex couples and thus clearly have a role to play in analyzing constitutional claims. But legislatures are also critical actors. If lawmakers were to appreciate the constitutional interests of nonbiological parents, they might reform parentage law in a variety of ways—as illustrated by the 2017 UPA. They might not only codify de facto parentage, but also adopt intent-based parentage.[676] Reluctant to leave nonbiological parental recognition to post hoc determinations that turn on facts about particular parent-child relationships, lawmakers might favor mechanisms that establish parentage at birth. For example, even though cases on the marital presumption feature nonbiological mothers who are already parenting the child, the general remedy—a gender-neutral marital presumption—requires applying a rule governing parentage at birth to a person who intends to parent the child but lacks a biological connection.

Of course, lawmakers in some states may not act on their own. They may resist nonbiological parental recognition—especially to the extent such recognition is viewed as a pro-LGBT step. Accordingly, just as with marriage equality, reform will likely require judicially imposed mandates.

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672. *See* NeJaime, *supra* note 6, at 2290-91.

673. Gestational Carrier Agreement Act, ch. 18, § 15, at 9, 9-10, 2018 N.J. Laws (codified at N.J. STAT. ANN. § 26:8-28 (West 2019)).

674. *See* A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at *1, *11-13 (Ch. Div. Dec. 23, 2009).

675. *See* Letter Opinion at 2, 13, A.G.R. v. D.R.H., No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 13, 2011) (ruling on custody).

676. For an argument in favor of intent-based parentage, see Higdon, *supra* note 279, at 1526.

Even if developments regarding same-sex couples make the constitutional stakes especially clear, the liberty interest in parental recognition has implications for parents in a range of families. The remainder of this Subpart considers some of those families.

2. Unmarried biological fathers and married nonbiological fathers

An approach to due process that includes nonbiological parents may lead decisionmakers to approach now-familiar situations in new ways. *Michael H.* presents a scenario that has recurred across a number of cases.[677] States have taken different approaches to disputes between two men with claims to fatherhood—the biological father and the mother's husband at the time of birth.[678] Appreciating the constitutional interests of nonbiological parents would reshape the analysis.

Rather than view neither Michael (the biological father) nor Gerald (the mother's husband) as worthy of constitutional protection, decisionmakers could see liberty interests at stake in both parental relationships.[679] This approach would credit the parental bonds that both men had formed and, in doing so, would offer a more constitutionally coherent perspective. Indeed, this approach would afford more protection to some biological fathers.[680] The Court in *Michael H.* determined that Michael did not possess a constitutional interest in his relationship with Victoria, even though he had in fact formed a parental relationship with her. Rejecting Michael's assertion of a liberty interest seemed necessary to preserve the parental status of Gerald.[681] If nonbiological fathers possessed constitutional interests in their parental relationships, a court need not view biological fathers as lacking constitutional rights. Accordingly, protecting the children's relationships with nonbiological fathers would not require denying compelling claims of biological fathers who, like Michael, have in fact established relationships with their children.[682]

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677. *See* sources cited *supra* notes 275-78 (citing cases featuring conflicts between the marital presumption and biological paternity).

678. *See* June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 387, 388 (Bill Atkin ed., 2013).

679. *See* Albertina Antognini, Michael H. v. Gerald D.*, Rewritten*, *in* FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN (forthcoming 2020), https://perma.cc/RS8Q-LETM.

680. This approach is consistent with Bartlett's argument for nonexclusive parenthood. *See* Bartlett, *supra* note 400, at 925-27.

681. *See* Michael H. v. Gerald D., 491 U.S. 110, 114-15, 127, 130 (1989) (plurality opinion).

682. *Cf., e.g.*, S.S.S. v. C.V.S., 529 S.W.3d 811, 813-14 (Mo. 2017) (upholding the stepparent adoption and termination of the biological father's rights because the circuit court found that the biological father had abandoned and neglected the child); Merkel v. Doe, 635 N.E.2d 70, 72 (Ohio Ct. Com. Pl. 1993) (holding that a statute permitting any man

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Of course, seeing both fathers as having constitutional interests may lead to the recognition of multiple parents. A court might decide, as Victoria's lawyers argued in *Michael H.*, that both men should be able to maintain a relationship with the child.[683] Legislatures might authorize courts to adjudicate more than two legal parents if doing so serves the interests of the child.[684] Still, as explained below, it is not clear that the approach to due process taken here necessarily obligates a state to permit more than two parents. Even if both the biological and nonbiological fathers possessed constitutional interests in their parental relationships, a court might make a parentage determination based on the child's best interests. And this compelling consideration may lead to the legal recognition of only one father.

3. Parents in "non-traditional family arrangements"

Appreciating the constitutional interests of nonbiological parents has implications for a variety of families—not only the traditional, two-parent, marital family protected in *Michael H.* but also what the Ninth Circuit in *Wheeler* called "non-traditional family arrangements."[685] American society features a wide variety of family forms, some of which include intended parents and de facto parents who are not biologically connected to their children.

As blended and stepparent families have become more common, more children have formed relationships with individuals other than their biological or legal parents.[686] Many stepparents function as parents to their stepchildren

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who claims to be a child's biological father to bring a paternity action unconstitutionally interferes with the integrity of the marital family).

683. *See supra* note 248 and accompanying text.

684. *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2019); D.C. CODE § 16-831.01(1)(A)(iii) (2019); ME. STAT. tit. 19-a, § 1853(2) (2019); WASH. REV. CODE § 26.26A.460(3) (2019).

685. Wheeler v. City of Santa Clara, 894 F.3d 1046, 1058 (9th Cir. 2018). Consider an especially urgent context. The U.S. government's separation of parents and children at the U.S.-Mexico border raises questions of parental rights and family integrity. But such questions are not limited to biological parent-child relationships. In determining parentage, the government relied heavily on genetic screening through cheek-swab DNA testing. *See* Respondents' Notice Regarding Compliance and Request for Clarification and/or Relief at 4, Ms. L v. U.S. Immigration & Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 3:18-cv-00428), ECF No. 86. In some cases, the parent is revealed not to be the child's biological parent. Some adults thought they were biological parents before taking the test. *See* Nathaniel Weixel, *HHS: 5 Adults Claiming to Be Parents of Detained Children Ruled Out by DNA Tests*, HILL (July 10, 2018, 5:21 PM EDT), https://perma.cc/4PAK-P3MH. These relationships may merit protection regardless of biological connection.

686. *See Wheeler*, 894 F.3d at 1060 (Wardlaw, J., concurring in opinion) ("Some children have two mothers in a same-sex marriage; some children have two mothers because their heterosexual parents got divorced and remarried . . . .").

and hold their stepchildren out as their own children. While stepparents must adopt their stepchildren to become legal parents, often such adoption is impossible because of the existence of a noncustodial parent who retains legal status.[687] Motivated by constitutional interests in established relationships—and cognizant of the protection of stepfathers in the Court's decisions on unmarried fathers—legislatures might preserve the relationship in various ways. Some might permit the stepparent to adopt without requiring the noncustodial parent to relinquish rights—essentially allowing three parents.[688] Even if not recognizing the stepparent as a legal parent, others might furnish a statutory basis on which stepparents can seek custody or visitation upon divorce from the legal parent.[689] For their part, courts might recognize some stepparents—those who formed a parent-child relationship and held the child out as their own child—as de facto parents.[690]

Consider also intended parents in families formed through assisted reproduction—a category that includes not only same-sex couples but also many different-sex couples. Some states continue to treat nonbiological parents in these families as legal strangers to their children in the absence of adoption.[691] Guided by constitutional understandings that reach nonbiological parents, courts and legislatures might construct and expand intent-based paths to parentage.[692] They might, like the 2017 UPA, treat an individual "who consents . . . to assisted reproduction by a woman with the intent to be a parent" as a legal parent of the resulting child.[693]

687. *See* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 88-97 (2006) (explaining how stepparents who serve in a parental role have their status constrained by the rights of the noncustodial parent).

688. *See* Bartlett, *supra* note 400, at 951-52.

689. *See, e.g.*, CAL. FAM. CODE § 3101.

690. *See* Bodwell v. Brooks, 686 A.2d 1179, 1183 (N.H. 1996) (finding that the stepfather who stood in loco parentis to the child had standing to seek custody); *see also* GROSSMAN & FRIEDMAN, *supra* note 266, at 278-79 (exploring whether stepparents may qualify as de facto parents); Mahoney, *supra* note 687, at 86 (arguing that stepparents who serve in a parental role should not be treated as third parties but instead as having "a significant legal status").

691. *See* NeJaime, *supra* note 6, at 2264-65.

692. While little attention has been devoted to the constitutional parental rights of nonbiological parents, scholars have focused on the constitutional right to procreate for parents using assisted reproduction. *See generally* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) (arguing that the constitutional right to procreate reaches those using assisted reproductive technologies); Radhiko Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473 (1995) (reviewing ROBERTSON, *supra*) (rejecting a right to procreate that reaches assisted reproduction). *But see* Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22 (2015) (analyzing the regulation of assisted reproduction on constitutional grounds that include both procreative and parental rights).

693. UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017).

Strikingly, as revisiting *Michael H.* demonstrated, those with biological ties may also benefit from this approach.[694] Some using assisted reproduction arrange for the child to have more than two parents—including both biological and nonbiological parents.[695] A gamete donor may be divested of parental status by statute,[696] but may over time and with the legal parent's consent develop an actual parental relationship with the child.[697] Such a relationship may rise to the level of a protected liberty interest.

On this view, biological relationships retain their place in constitutional understandings of parenthood, but biological connection itself does little work. Instead, it is, as one judge on the Ninth Circuit put it, the "actual relationship" that has constitutional significance.[698] Both those who pair biological ties with parental bonds, and those who form parental bonds in the absence of biological ties, can be treated as parents worthy of recognition as a matter of due process.

C. Concerns, Consequences, and Questions

Nonbiological parents in same-sex couples and other families formed through assisted reproduction appear as some of the strongest candidates for constitutional recognition. Indeed, efforts to reform parentage law at the state level have emphasized these parents.[699] But clearly other nonbiological parents might have compelling claims to constitutional protection—men like Gerald who have been raising children in a marital family,[700] stepparents who have raised a child for several years and held the child out as their own child but have been unable to adopt, and unmarried individuals who have become a child's psychological parent.

The dizzying array of scenarios one could imagine may lead some to resist a liberty interest in parental recognition that reaches nonbiological parents. But the complexities and challenges presented by constitutional protection for nonbiological parents do not provide sufficient reasons to reject such

694. *See supra* notes 680-82 and accompanying text.

695. *See* A.A. v. B.B. (2007), 83 O.R. 3d 561, 563 (Can. Ont. C.A.); All Families Are Equal Act, S.O. 2016, c 23 (Can.) (permitting agreements that recognize up to four parents).

696. *See, e.g.*, CAL. FAM. CODE § 7613(b)(1) (West 2020) (providing that a sperm donor who is not married to the mother "is treated in law as if he were not the natural parent").

697. *Cf.* Jason P. v. Danielle S., 215 Cal. Rptr. 3d 542, 561 (Ct. App. 2017) (affirming the judgment conferring parentage upon a sperm donor who acted as the child's parent and thus satisfied the "holding out" presumption of parentage even if his biological connection to the child was not taken into account).

698. *See* Wheeler v. City of Santa Clara, 894 F.3d 1046, 1060 (9th Cir. 2018) (Wardlaw, J., concurring in opinion).

699. *See, e.g.*, NeJaime, *supra* note 488, at 260-61 (documenting the relevance of assisted reproduction in efforts to change parentage law in New York).

700. *See* Michael H. v. Gerald D., 491 U.S. 110, 113-14 (1989) (plurality opinion).

protection. This Subpart addresses important questions raised by this Article's constitutional argument. It does not resolve all of these questions but suggests considerations that may guide their resolution.

1. Indeterminacy and intervention

Biological connection as a basis for constitutional protection may be attractive on practical, rather than principled, grounds. Biological connection limits the number of claimants (though, with reproductive technologies, that number is not always two). It is also provable with relative ease, thus reducing the likelihood of judicial intervention in family life and leaving courts with little discretion. Accordingly, some will resist constitutional protection for nonbiological parents based on a desire for clarity and certainty and to promote the privacy and integrity of families.

These are important concerns. But they are not new with respect to the legal regulation of parenthood. They also arise in contemporary family law.[701] Arguing for "bright-line rule[s] that promote[] certainty" and predictability and limit government intervention, critics of the functional turn in family law have long worried that courts are ill-equipped to administer functional standards and will inevitably recognize nonparents—including relatives, cohabiting partners, and caregivers—as de facto parents.[702] Nonetheless, courts and legislatures have repeatedly rejected line-drawing concerns as a reason to deny parental recognition.[703]

Courts have devised standards, and more recently a few state legislatures have codified such standards, to identify de facto parents while also limiting

701. *See* Ball, *supra* note 435, at 626 (explaining that "certainty concerns . . . are superficially appealing because it is generally more difficult to establish, as a factual matter, whether someone has attained the status of a functional parent under equitable parenthood principles than it is to determine whether someone is the child's biological or adoptive parent"); Minow, *Redefining Families*, *supra* note 401, at 276 ("[A] functional approach can be messy.").

702. *See, e.g.*, Debra H. v. Janice R., 930 N.E.2d 184, 191 (N.Y. 2010) (rejecting functional parenthood and instead endorsing "a bright-line rule that promotes certainty in the wake of domestic breakups"), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Strauss, *supra* note 434, at 951-54 (arguing against de facto parenthood based in part on concerns about relatives and cohabitants).

703. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005) (rejecting "fears that 'teachers, nannies, parents of best friends, . . . adult siblings, aunts, [] grandparents,' and every 'third-party . . . caregiver' will now become *de facto* parents" (alterations in original) (quoting from the petition for review)); *see also* Ball, *supra* note 435, at 656 (arguing that concerns with uncertainty are overblown and showing how in Wisconsin and New Jersey, states with functional parenthood, "courts seem to have had little difficulty in applying the test").

unnecessary intrusion into the family.[704] Judges have shown themselves capable of making these determinations, distinguishing between those who serve as a child's parent and those who do not.[705] Concerns about indeterminacy and intervention are important—just as in other settings—but they have not prevented courts and legislatures from effectively protecting existing parent-child relationships.

Line-drawing concerns common in family law would also arise in constitutional analysis. But here, too, these concerns are not new. They arose when the Court considered the rights of unmarried fathers and have continued to arise in state court adjudication of conflicts involving unmarried biological fathers.[706] Given that only some biological fathers merit protection, courts have distinguished based on social criteria rather than adhering to bright-line rules.[707] In this sense, courts have already been deciding constitutional cases in fact-specific ways while also providing guidance that shapes family-law approaches.

Legislative responses can also mitigate concerns about both indeterminacy and intervention. With ample space for regulation left by judicial decisions on unmarried fathers, state lawmakers reacted by devising relatively straightforward approaches that aimed to protect constitutional interests—though different states struck the balance between biological and social factors differently. Legislatures enacted presumptions to identify men as legal fathers and devised statutory frameworks to determine paternity.[708] Many states went

704. *See* UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017); *supra* note 524 (noting states that have adopted de facto parentage based on the UPA).

705. *See* Ball, *supra* note 435, at 653-56.

706. Justice Powell's clerk worried that "the Court will be forced to assess the psychological benefit and worth of certain types of relationships," but conceded that, "[h]aving entered this area, lines have to be drawn." *See* Memorandum from D. Rives Kistler, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 2 (May 12, 1983), https://www.perma.cc/LL5H-H23G (beginning on page 60). Some at the Court worried that the liberty interest would turn on "the substantiality of the relationship." *See* Preliminary Memorandum on *Caban v. Mohammed* from Nancy J. Bregstein, Clerk, U.S. Supreme Court, to Justice Lewis F. Powell, Jr. 7 (1978), https://www.perma.cc/DQA2-DTJ5 (beginning on page 1).

707. An exchange between Justice Powell and Justice Stevens as the Court considered *Lehr v. Robertson* illustrates this distinction. *See* Letter from Justice Lewis F. Powell, Jr. to Justice John Paul Stevens (May 17, 1983), https://www.perma.cc/LL5H-H23G (appearing on page 64); Letter from Justice John Paul Stevens to Justice Lewis F. Powell, Jr. (May 17, 1983), https://www.perma.cc/LL5H-H23G (appearing on page 63).

708. *See, e.g.*, CAL. CIV. CODE § 7004(a)(4) (West 1984) (enacting the paternity presumptions of section 4 of the 1973 UPA) (repealed 1993); N.D. CENT. CODE, § 14-17-04 (1977) (same) (repealed 2005); Diane C. Wilson, Note, *The Uniform Parentage Act: What It Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191, 192 n.6, 206-07 (1976).

beyond constitutional mandates by extending more expansive protections to unmarried biological fathers.[709]

The same could occur with respect to constitutional protection for nonbiological parents. States could enact clear rules that protect nonbiological relationships at the outset. Just as they did with the original UPA, legislatures might adopt the new UPA to reform parentage law in line with constitutional principles. Lawmakers could codify gender-neutral and nonbiological presumptions of parentage—not only a marital presumption but also a nonmarital "holding out" presumption. Lawmakers could implement intent-based rules that allow those who will parent the child to be identified as the child's legal parent at the moment of birth.[710]

Of course, states could also protect actual parent-child bonds by adopting de facto parent standards. Lawmakers can mitigate concerns not only with line drawing but also with intervention. When, as with de facto parentage, adjudication is required, the relevant legislation might place rigorous requirements on an individual claiming parentage.[711] Further, legislation may authorize courts to deny relief quickly in situations where the individual does not have a strong claim to parentage.[712] Nonetheless, questions about line-drawing in constitutional analysis will remain—requiring analysis of who merits protection and what follows from such protection.

2. Who is protected?

This Article's constitutional argument is rooted in respect for established parent-child relationships formed in a wide range of families. In this sense, it aligns most closely with a functional approach to parenthood—one that primarily values parental conduct and aims to promote children's wellbeing by

709. *See, e.g.*, N.C. GEN. STAT. § 48-2-206(a) (2019) (requiring that the "biological father shall be served with notice of the intent of the biological mother to place the child for adoption, allowing the biological father 30 days after service to assert a claim that his consent is required"); Adoption of Kelsey S., 823 P.2d 1216, 1227-28 (Cal. 1992) (reading *Lehr* to protect an unmarried father whose attempts to establish a relationship with the child were frustrated by the mother (citing Lehr v. Robertson, 463 U.S. 248, 262 (1983))); *In re* Sky D., 643 A.2d 529, 531 (N.H. 1994) (holding that the "natural father" was entitled to notice of pending adoption proceeding and the right to request a hearing to prove his paternity, which would trigger adoption consent requirements, even though he had not filed notice of claim of paternity at the time of the adoption proceeding).

710. *See* NeJaime, *supra* note 6, at 2337-47.

711. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 501(a)(1) (2019) (setting out a number of demonstrations that must be made by clear and convincing evidence for a person claiming de facto parentage to have standing).

712. *See, e.g.*, UNIF. PARENTAGE ACT § 609(c)(3) (UNIF. LAW COMM'N 2017) (authorizing a court to determine standing of a person claiming de facto parentage based on the pleadings and requiring that any hearing be conducted on an expedited basis).

maintaining their attachments to their psychological parents. But certainly not every individual who engages in what some might consider parental conduct merits constitutional (or family law) protection.[713] The discussion that follows considers how decisionmakers might approach various kinds of claimants.

Before proceeding, it is important to appreciate how evolving understandings of the family relationships worthy of recognition discipline constitutional decisionmaking. If, as this Article suggests, courts and legislatures reason about the Constitution in ways that reflect contemporary views of the family, they will also resist constitutional protection for relationships that have not garnered significant legal protection or societal recognition. With that in mind, this Subpart first addresses the question of which claimants possess a liberty interest in a nonbiological parent-child relationship. The next Subpart asks what follows from such an interest—including whether the government has sufficiently strong interests to deny relief to a claimant who in fact possesses a protected liberty interest.

In assessing whether a particular claimant possesses a due process interest, factors that go beyond actual childrearing may be relevant. In decisions on unmarried fathers, the Court paired parental conduct with biological connection.[714] And in assessing the strength of the unmarried father's constitutional claim, state courts have looked to other factors, including prebirth conduct. They ask whether the man seeking parental recognition prepared for the child, paid medical expenses related to the pregnancy, and made affirmative plans to assume the role of a parent.[715] Some state statutes, too, look to prebirth conduct, asking whether the man supported the mother

713. *Cf.* Strauss, *supra* note 434, at 913 ("Accepting caregiving assistance is not the same as agreeing to full parental status . . . .").

714. *See supra* Part I.

715. *See, e.g.*, *In re* Adoption of S.J.B., 745 S.W.2d 606, 607, 609 (Ark. 1988) (weighing failure "to even inquire concerning the possibility of [his partner's] pregnancy" as evidence that there was not a "substantial relationship" that would warrant constitutional protection), *superseded by* Act 657, 1989 Ark. Acts 1553 (codified as amended at ARK. CODE ANN. § 16-43-901 (2019)); *In re* Adoption of Doe, 543 So. 2d 741, 747, 749 (Fla. 1989) (finding the unmarried biological father's "failure . . . to provide prebirth assistance to the pregnant mother, when he was able and assistance was needed" and failure to prepare for the child deprived him of constitutional rights to notice and consent to adoption); T.R.F. v. Felan, 760 P.2d 906, 907, 914 (Utah Ct. App. 1988) (noting prebirth activities such as "discuss[ing] . . . having a child before the child was conceived" and "purchas[ing] baby furniture" as evidence that the unwed father had established the "requisite 'substantial relationship'" to trigger constitutional due process protections); *see also* Purvis, *supra* note 279, at 680-81 (arguing that "[p]rebirth parental labor performed by unwed biological fathers should be understood as fulfilling the extant 'substantial relationship' requirement" for constitutional protections, and providing examples of prebirth labor activities including "[r]equesting paternity leave," "[p]lanning childcare arrangements," "[b]uying parenting supplies," and signing the child up for insurance).

during her pregnancy. For example, Florida law provides that "[a]n unmarried biological father . . . acquires constitutional protection," such that he can block the child's adoption, "only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during the pregnancy and after the child's birth."[716] The state requires the father "to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity rights in accordance with [the statute]."[717] Requirements of this kind may be too stringent, but the point here is simply that factors that go beyond childrearing itself may be relevant to constitutional determinations of parental status.

Similarly, courts assessing the claims of those lacking biological ties might ask whether the individual planned to have a child with the biological parent—that is, whether the individual is an intended parent. Intended nonbiological parents who subsequently engaged in childrearing may be the most compelling candidates for constitutional protection. As Michael Higdon argues, preconception intent might function as biological connection does, providing a basis on which to "grasp[] the opportunity" to become a parent.[718]

Nonetheless, de facto parents may enjoy constitutional status even if they enter the scene during the mother's pregnancy or after the child's birth. Consider a case like *In re Nicholas H.*[719] Thomas began a relationship with Nicholas's mother while she was pregnant, and he committed himself to being the child's father.[720] He then served in a parental role, and Nicholas viewed Thomas as his father.[721] The California Supreme Court undertook a novel application of the parentage code's "holding out" presumption, which at the time required the man to hold the child out as his "natural" child. The court applied the presumption to Thomas—a man who held the child out as his own child but admitted he was not the biological father.[722] Had the court not ruled in this way, Thomas might have a claim to parental recognition as a constitutional matter. He prepared for the child's arrival, parented the child, and took responsibility for the child—while the biological father was nowhere to be found.[723] Extending constitutional protection to Thomas would credit the parent-child bond he formed with Nicholas and would protect Nicholas's relationship with his psychological parent.

716. *See* FLA. STAT. § 63.022(1)(e) (2019).

717. *See id.*

718. *See* Higdon, *supra* note 279, at 1525, 1530 n.322 (quoting *In re* Raquel Marie X., 559 N.E.2d 418, 424-25 (N.Y. 1990)).

719. 46 P.3d 932 (Cal. 2002).

720. *Id.* at 934.

721. *Id.* at 935.

722. *Id.* at 933-34.

723. *See id.* at 935.

Other scenarios present more difficult questions. Consider foster parents and preadoptive parents. Are they protected, and if so, in what circumstances?[724] Are kinship foster placements more likely to feature compelling claims since the foster parent and child are biologically related? How would the race and class dimensions of the child welfare system affect an assessment of foster parents' constitutional status? Rather than simply exclude all claimants in this context, judges might distinguish between preadoptive parents and foster parents, with the latter enjoying little expectation in a permanent relationship—given the state-created arrangement and the explicit prospect of the placement being terminated.[725] Judges might also distinguish between claimants based on the circumstances of the placement, including the duration and the child's age. Those who have been raising the child for a long period of time may have a greater interest in the relationship continuing. Parents raising a child since birth may also have a greater expectation in permanence, given the lack of others who have formed parental bonds with the child. Those raising a child whose biological parents' rights have been terminated may also have a more compelling constitutional claim.

While courts have largely rejected the constitutional claims of foster parents—based in part on an overreading of *OFFER*—a 2012 Tenth Circuit decision offers an example of how to reason about the liberty interests of preadoptive foster parents. As the court explained in *Elwell v. Byers*, the *OFFER* "Court indicated that the liberty interest in family association may extend to foster parents in certain circumstances."[726] While "a biological relationship bears some import," "'familial relationship'" is the touchstone of the liberty interest.[727] Although "the typical foster care arrangement generally does not create a liberty interest in familial association," the court determined that the foster parents at issue could claim a protected liberty interest because they "had cared for [the child] for an extended period of time; they were essentially the only parents [the child] had ever known."[728] Indeed, they "were very close to becoming adoptive parents."[729] As importantly, "the parental rights of [the child's] biological parents had been terminated."[730] Still, the liberty interest the court acknowledged would not yield parental recognition; the foster parents

724. *See supra* note 339 and accompanying text.

725. *See, e.g.*, Rodriguez v. McLoughlin, 214 F.3d 328, 337 (2d Cir. 2000) (emphasizing the state-created nature of the foster care arrangement).

726. Elwell v. Byers, 699 F.3d 1208, 1216 (10th Cir. 2012) (citing Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 844 (1977)).

727. *Id.* at 1215 (quoting *OFFER*, 431 U.S. at 844).

728. *Id.* at 1216-17.

729. *Id.* at 1217.

730. *Id.* at 1216.

were not now entitled to adopt. Rather, they were entitled, at a minimum, to "advanced notice" before the child was removed from their home.[731]

As *Elwell* illustrates, courts can engage in the type of analysis that leads to constitutional protection for some claimants but not others. Indeed, this kind of analysis resembles the decades of judicial oversight of the due process rights of unmarried fathers.

3. What follows from a protected liberty interest?

Merely because a constitutional right exists does not mean the claimant necessarily receives the relief she demands. Even if an individual possesses a liberty interest in a parent-child relationship, sufficiently strong interests might exist to allow the government to withhold legal protections and thus limit the consequences of such a liberty interest.

The foster care context again illustrates. A child whose placement occurred later in life might have preexisting attachments with biological parents that merit protection. If the biological parent's rights remain intact, reunification may be possible[732]—and may be in the child's best interests. As Anne Dailey and Laura Rosenbury suggest, it may be feasible to preserve a child's relationship with a biological parent and also protect the relationship that has developed between the child and the foster parent.[733] Nonetheless, the state may be justified in refusing to preserve the relationship between the foster parent and the child to protect the relationship between the child and the biological parents. Group-based equality considerations might also lead away from constitutional protection.[734] Given the race and class inequalities reflected in the child welfare system, constitutional protection for foster parents could further harm poor parents of color and denigrate their parental

731. *Id.* at 1218. In the end, however, the court ruled in favor of state officials on qualified immunity grounds, given that at the time of the conduct in question, "no court had answered whether preadoptive parents in the Elwells' position possessed a liberty interest in familial association." *Id.* at 1219.

732. *See* Spielman v. Hildebrand, 873 F.2d 1377, 1384 (10th Cir. 1989) ("Foster care relationships also often present the problem of tension between any liberty interests of foster parents and competing interests of natural parents who may have temporarily surrendered custody of the child to the state with the express understanding that the child would be returned to them.").

733. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1514 (2017) (arguing that, based on children's interests, in some situations "efforts can and should be made to maintain a child's primary attachment [with a foster parent], while at the same time recognizing the child's interest in maintaining ties to his or her biological parents").

734. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 801 (2011) (observing that "equality concerns can lead the Court to *deny* as well as to *recognize* the ostensible liberty").

status.[735] Ultimately, countervailing interests might justify the refusal to protect the relationships of many foster and preadoptive parents.

The government's interest in children's welfare may also justify limiting the consequences of a nonbiological parent's liberty interest in other contexts. Some de facto parentage statutes, for example, require that the de facto parent show that "continuing the relationship between the [de facto parent] and the child is in the best interests of the child."[736] This approach is not inconsistent with a constitutional order in which de facto parents possess liberty interests but legal parentage yields to children's interests.

Child-centered concerns might also limit the number of parents that the state recognizes. As we have seen, in a limited set of situations, more than two individuals may have viable claims to constitutional protection. Even if some situations lend themselves to multiple parenthood, decisionmakers might exercise caution. Parental conflict is already problematic when two parents share decisionmaking authority and residential placement is split across two households; adding a third parent to the mix may only lead to additional conflict and may be detrimental to the child. Accordingly, states may have latitude to resist a regime that extends full parental status, with the corresponding rights of decisionmaking and custody, to a third individual.

States already have mechanisms designed to address parentage disputes between competing claimants—that is, situations in which the child has a legal parent and two individuals have valid statutory claims to be the child's second legal parent.[737] Child-centered concerns guide the analysis,[738] as courts are instructed "to adjudicate competing claims of . . . parentage of a child . . . in the best interest of the child."[739] This child-centered approach—including when it results in the denial of legal parentage to the biological father—has been understood as constitutionally compliant.[740] In vindicating the child's best

735. *See* Roberts, *supra* note 317, at 172, 181-82 (arguing that, given the rates at which black children are removed from their parents and placed in foster care, the child welfare system should be viewed as a civil rights problem that imposes group-based racial harm). Similar considerations arise in the context of Indian children. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 668-69 (2013) (Sotomayor, J., dissenting) (explaining the aims of the Indian Child Welfare Act).

736. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 501(a)(1)(G) (2019).

737. *See* N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000) ("Colorado's UPA specifies that in the face of conflicting presumptions, courts should look to the weight of policy and logic in settling the conflict and adjudicating paternity."); *see also In re* Jesusa V., 85 P.3d 2, 14 (Cal. 2004) (same under California law).

738. *See, e.g., N.A.H.*, 9 P.3d at 366 (holding that "when presumptions of paternity arise in more than one potential father, trial courts must take the best interests of the child into account as part of policy and logic in resolving competing presumptions").

739. UNIF. PARENTAGE ACT § 613(a) (UNIF. LAW COMM'N 2017).

740. *See, e.g.*, Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399, 402-03 (Ct. App. 1998).

interests, the State may be free, as the Iowa Supreme Court put it, to make "a substantive choice that infringes on a liberty interest."[741]

Even in the multiparent context, assessments of the kind envisioned here are not new. States have adopted statutes that authorize the recognition of more than two parents only if not doing so is "detrimental to the child,"[742] meaning that the court is authorized to deny parental recognition to an individual who otherwise qualifies as a legal parent and would receive recognition if the child had only one legal parent.

Courts handling family conflicts are accustomed to balancing constitutional interests of various parties.[743] In some settings, rather than simply deny relief to one of the parties, courts may be able to devise solutions that accommodate each party's constitutional interests to varying degrees.[744] In the multiparent context, the state could explore options between recognizing the claimant as a full parent or leaving her as a legal stranger—for example, limiting the consequences of recognition by extending visitation without decisionmaking authority.[745]

This proposal, too, is not unprecedented. In some states, de facto parents enjoy only a limited right to visitation.[746] Courts in these states have unfortunately adopted the more limited status in situations in which full parental status is clearly appropriate—such as where a nonbiological mother in a same-sex couple seeks recognition as the child's second parent.[747] But a more limited status that affords only visitation may be appropriate in other circumstances—for instance, for a stepparent or other family member who has served in a parent-like role for a period of time.[748]

741. *See* Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999).

742. *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2019).

743. *See, e.g.*, Sagar v. Sagar, 781 N.E.2d 54, 56-57 (Mass. App. Ct. 2003) (holding that the trial court did not violate father's right to free exercise of religion in ordering that, without the mother's consent, a religious ritual should not be performed until the child was old enough to choose it for herself); Kirkpatrick v. Eighth Judicial Dist. Court, 64 P.3d 1056, 1063 (Nev. 2003) (holding that a statute permitting a minor to marry with the consent of only one parent does not violate the due process rights of the second parent).

744. *See, e.g.*, *Sagar*, 781 N.E.2d at 57 (affirming the trial court decision "because it intrudes least upon both parents' fundamental rights while remaining compatible with the child's [interests]").

745. *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18 & cmt. b (AM. LAW INST. 2002).

746. *See* Joslin, *supra* note 3, at 33-34.

747. *See, e.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (allowing the nonbiological mother in a same-sex couple to seek visitation if she can prove a "parent-like relationship with the child").

748. *Cf.* HUNTINGTON, *supra* note 469, at 169 (advancing an approach "focused on determining which individuals have the requisite strong, stable, positive relationship with the child" that "the law should protect").

Recognition of a liberty interest for those who form nonbiological parent-child bonds would lead to different outcomes in different circumstances. Some parents—like the same-sex parents, intended parents, and nonbiological marital fathers at the center of this Article—could reasonably expect parentage. Others—such as prospective adoptive parents, foster parents, and family members who have served in parent-like roles for a limited time—might obtain a more limited set of entitlements that allow them to maintain a relationship but without parental status. For example, Dailey and Rosenbury argue from a child-centered perspective that "courts might take into account children's interests in continued access to former caregivers when making custody and visitation decisions."[749] Similarly, they envision judicial determinations of custody and visitation as an opportunity to promote "children's interests in their relationships with foster parents."[750] Constitutional understandings of the family relationships that merit protection may play a role in determinations of whether and how to adopt an approach of this kind.

This Article does not purport to resolve all of the issues raised by the constitutional interests of nonbiological parents. Difficult questions exist—just as they do in other areas of constitutional law. But they are not a sufficient reason to reject a constitutional understanding that reaches parent-child relationships formed in families that deserve respect.

Conclusion

This Article shows how family-law authorities drew on, reoriented, and extended constitutional principles and precedents to support a more inclusive, egalitarian, and functional approach to parental recognition. Family law, through this lens, is not simply disciplined by constitutional decisionmakers in a top-down way. Nor is family law operating in a space free from constitutional considerations when it offers more expansive protections than constitutional precedents expressly contemplate. Instead, family-law authorities move beyond constitutional decisions in ways guided by those decisions and the insights they supply. Family-law authorities exert a critical and independent role in interpreting and applying constitutional precedents—appreciating their limitations and adapting their principles in light of more recent developments. In doing so, family-law authorities supply guidance to constitutional decisionmakers. They show how a court or legislature would

749. Dailey & Rosenbury, *supra* note 733, at 1514; *see also* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 399-400 (2008).

750. Dailey & Rosenbury, *supra* note 733, at 1513-14.

reason about the parental relationships due process protects in ways that are faithful to our constitutional tradition and yet consistent with commitments that have emerged more recently.