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Essentially a Mother

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ABSTRACT

This article connects the constitutional jurisprudence of the family to debates over reproductive technology and surrogacy. Despite the outpouring of literature on reproductive technologies, courts and scholars have paid little attention to the constitutional foundation of parental rights. Focusing on the structural/political function of parental rights, this article argues that a gestational mother has a constitutional claim to be recognized as a legal parent.

The article first discusses the "unwed father cases." Despite believing that natural sex differences justified distinctions in parental rights, the Supreme Court crafted a test giving men parental rights if they established relationships with their biological children. The article argues that the Court modeled this test on its view of the essential attributes of motherhood. The article also shows how this theoretical approach supports feminist claims for equal treatment despite biological difference, such as accommodation of pregnancy.

Turning to current debates, the article focuses on divided motherhood: usually surrogacy contracts, but also embryo mix-ups at fertility clinics. Rather than following existing precedent on parental rights, the law of high-tech parenthood is tending sharply in the direction of denigrating gestation, defining parenthood exclusively in terms of genes or contracts. Conferring parental rights on gestational mothers would produce better outcomes and be more consistent with the best aspects of existing constitutional precedents.

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This article connects the Supreme Court's jurisprudence of sex equality to debates over reproductive technology and surrogacy contracts. Reproductive biology is the "real difference" most often invoked to justify sex classifications in the law.[1] The Court has held, for example, that a state employer has no constitutional duty to accommodate the burden that pregnancy puts on women's participation in a workplace designed for "non-pregnant persons."[2] In contrast, the Court has required the state to accommodate men's biological disadvantage in the area of parental rights.[3] The Court's test for defining men's parental rights shows how the Equal Protection Clause can be used to accommodate sex differences and attain meaningful rather than superficial equality. The test is also a useful starting point for assigning parental rights in modern disputes arising out of reproductive technology.

In a series of cases in the 1970s, the Supreme Court held that unwed fathers can, in some circumstances, be entitled to parental rights, and so struck down state laws that deemed only the mother a legal parent of a non-marital child.[4] The Court reached this outcome as a matter of sex equality. The Court's theory of equality, however, was more nuanced than in other sex discrimination cases. Acknowledging

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1. *See infra* Part I.C.

2. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

3. *Cf.* Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (1990) (noting "the biological disadvantage men experience in accessing child-nurturing opportunities").

4. *See infra* Part I.

that biological fatherhood entailed less inherent connection to a child than biological motherhood, the Court created a standard by which fathers could be recognized as equal to mothers, despite men's biological disadvantage. Although the Court's rulings elevated the rights of men, they did so by defining parenthood in terms of motherhood and making fatherhood fit a female model. These cases stand alone in the Court's jurisprudence of sex discrimination in taking the female experience rather than the male as the baseline. They also stand alone in demanding accommodation for the disadvantaged sex.[5]

The Court's more recent treatment of fathers retreats from the accommodation approach, as do lower court decisions involving unwed fathers and, more recently, disputes over motherhood. The unwed father cases took the identity of the mother as given, but science has since split biological motherhood into two parts: begetting by the "genetic mother" and bearing by the "gestational mother."[6] The free market has splintered off a third role: expecting. Formerly a euphemism for pregnancy, it now applies to an "intended mother," who can achieve this state by contracting out the begetting and bearing.[7] Law has lagged behind, trying to decide which mother (genetic mother, gestational mother, or intended mother) is the true mother. Courts making that decision have largely failed to apply the unwed father cases, which offer a definition of parentage grounded in constitutional requirements. Instead, new proposals for determining parentage range from the purely genetic to the purely contractual. Many of these proposals minimize or eliminate the parental rights of the gestational mother, especially, but not only, if she has signed a surrogacy contract purporting to relinquish her parental rights.

Such proposals change the definition of parenthood from a woman-centered one to a man-centered one and in the process denigrate the non-genetic aspects of biological reproduction. Proposals that favor enforcement of surrogacy contracts also commodify gestation and create perverse incentives to use riskier rather than safer reproductive technology.[8] Recognizing parental rights in the gestational mother would be more consistent with the best aspects of existing constitutional precedents and, for the most part, would produce better outcomes.[9]

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5. *See infra* Part I.C.

6. *See* 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, 354 (1991).

7. *See* Schultz, *supra* note 3, at 311.

8. *See infra* Part III.

9. Legal scholarship on the question of surrogacy contracts runs the gamut from those who argue that such contracts should be enforced, on either constitutional or policy grounds, to those who argue surrogacy arrangements should be treated no differently from other adoptions. Those in favor of enforcement include JOHN A. ROBERTSON,

I use the word *essentially* in the title of this article with tongue somewhat in cheek. This article does not argue that women (or gestational mothers) are essentially "maternal" in the sense of being inherently more nurturing or loving toward children than are men (or other women). Instead it adopts the view reflected by precedent that women and men both have the capacity to love a child deeply and that active engagement in caring for a child brings out this capacity. Existing precedent also correctly recognizes gestational mothering as the baseline for judging who is a parent for purposes of the Fourteenth Amendment: when the Supreme Court decided when and how a man acquires parental rights, it based its standard on mothering.[10] That standard should be the starting point for constitutional assignment of parental rights, and it raises troubling questions about current approaches to resolving cases of disputed motherhood. That the Court created this standard for the benefit of men is all the more reason why feminists should be suspicious of the ongoing search for a different set of rules to apply to the claims of women.[11]

CHILDREN OF CHOICE 125-26 (1994) (focusing on procreative liberty rights of contracting couple); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 913-17 (2000) (focusing on lack of established relationships at birth, gender-neutrality, and stereotypes about mother-child bond); Hill, *supra* note 6, at 414-16 (1991) (focusing on certainty, contract principles, and but-for causation); Schultz, *supra* note 3 (focusing on intended parents' commitment, gender-neutrality, and concern for stereotyping women). Writers opposed to enforcement by specific performance include MARTHA A. FIELD, SURROGATE MOTHERHOOD 75-96 (1988) (arguing that surrogacy should be treated like other adoptions); Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 SIGNS 618, 625-33 (1993) (analyzing surrogacy as alienated labor). A third position, which is gaining popularity, would enforce the contract only when the gestational mother is not also the genetic mother. *See, e.g.*, E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 136-41 (2006); *see also* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1121 (1998) (arguing that the state may choose policy when parties to a surrogacy contract are in conflict over the agreement). I generally agree with those who would class surrogacy contracts with other adoptions, making them voidable by the gestational mother regardless of her genetic relationship with the child. This article sets out the constitutional underpinnings of parental rights as they pertain to the gestational mother's claim.

10. Stanley v. Illinois, 405 U.S. 645, 651 (1971) (considering the father's nurturing of the children, nurturing being a stereotypically maternal function); *see also infra* Part I.C.

11. Surrogacy is sometimes portrayed as a service one woman provides to another, and the resulting dispute as between two women contending for the role of "mother." In the more common "traditional surrogacy" arrangement, however, the contract is between the husband/genetic father and the woman who is the genetic as well as the gestational mother. The wife who anticipates adopting her husband's genetic offspring has no biological role in the creation of the child. In "gestational surrogacy," the child is conceived through *in vitro* fertilization, using gametes from either the intended parents or donors but not from the gestational mother. This article refers to the surrogates' claims to parental

Part I of this article describes how the Supreme Court used its idea of the essential traits of motherhood to create a test for when a man qualifies as a father. Part II examines what a person gains as a matter of constitutional law by being recognized as a parent and what values this protection of parental rights is supposed to serve. Part III argues that the Court's test for parenthood supports those values and shows that, as applied to women, the Court's test supports the gestational mother's claim. Without delving into every aspect of the debate over surrogacy contracts, this part also suggests that constitutional values support the gestational mother's claim even when such a contract exists.

I. WHAT MAKES A MAN A FATHER? MEASURING UP TO MOTHER

The Supreme Court has long counted parental rights among the rights protected by the Liberty Clause of the Fourteenth Amendment.[12] A person deemed by the law to be the parent of a particular child[13] must receive great deference regarding how that child will be reared and with whom the child will spend her time.[14] To enforce constitutional rights for parents is to beg the question of who is a parent: the rights of parenthood would erode if states could deny them merely by changing the legal definition of *parents*.[15] The problem of definition first came to the Court in cases involving unwed fathers. In a series of cases, the Court created a "biology-plus-relationship" test for fathers' rights that was modeled on the then-unquestioned rights of mothers.

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rights as the claims of women because they are always so. A person of either sex could theoretically raise the opposing claim to enforce the surrogacy contract.

12. "No state shall . . . deprive any person of . . . liberty . . . without due process of law." U.S. CONST. amend. XIV, § 1; *see* Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972); Prince v. Massachusetts, 321 U.S. 158, 164-66 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 533-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). For a discussion of the relationship between family privacy, the historical context of the Fourteenth Amendment, and the denial of family rights under slavery, see Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348 (1994). For a discussion of the content of and reasons for parental rights, see *infra* Part II.

13. This legal parent may or may not be a biological or adoptive parent. In *Prince*, the "parent" who claimed the right to have a child accompany her in distributing religious literature on the street was the child's aunt and legal guardian. *Prince*, 321 U.S. at 159.

14. *See infra* Part II.A.

15. *But see* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635 (2002) (arguing that the Constitution should afford strong protection to parental authority but allow states leeway in deciding who is parent); Katharine B. Silbaugh, Miller v. Albright*: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999) (cautioning against excessive constitutionalization of family law).

A. Biological Fathers' Rights Against the State: Stanley v. Illinois

In the early 1970s, Illinois law defined *parents* as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child."[16] This definition excluded the biological father of a non-marital child. Peter Stanley, an unwed father who had lived with and participated in rearing his children, argued that he was entitled to custody of them after his partner's death, unless and until the state could prove him an unfit parent.[17] The state responded that it need do no such thing. In the state's view, he was not a "parent" at all but a legal stranger to the children; thus, the state need not prove him unfit before placing the children elsewhere.[18] Stanley raised an equal protection challenge: the statute discriminated on the basis of sex, unfairly treating him, as an unwed father, differently from an unwed mother.[19]

The Court refused to resolve the case on straight equal protection grounds,[20] grounds that would have required the Court to say that mothers and fathers were similarly situated parents who happened to be male or female. The Court had not yet settled on the "intermediate scrutiny" standard for sex classifications.[21] The only sex classification it had yet struck down was the preference for male rather than female relatives as estate administrators in *Reed v. Reed*,[22] decided the year before *Stanley*. *Reed* struck down the preference as arbitrary,[23] and no one on the Court had yet proposed a heightened standard.[24] To hold that a distinction between mothers and fathers was similarly arbitrary would have been a difficult next step for the Court.

Instead the Court took a *sua sponte* detour into both substantive and procedural due process.[25] The Court framed the question before it as whether Stanley had a procedural due process right to a fitness hearing before being deprived of custody of the children.[26] It therefore balanced Stanley's private interest in his relationship with his

16. Stanley v. Illinois, 405 U.S. 645, 650 (1972) (quoting ILL. REV. STAT., ch. 37, §§ 701-14).

17. *Id.* at 646.

18. *Id.* at 649-50.

19. *Id.* at 664-65 (Burger, C.J., dissenting).

20. *Id.* at 650 (majority opinion).

21. The intermediate scrutiny standard would come four years later in *Craig v. Boren*, 429 U.S. 190 (1976).

22. 404 U.S. 71 (1971).

23. *Id.* at 74.

24. Heightened scrutiny first appeared in a plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

25. Stanley v. Illinois, 405 U.S. 645, 650 (1972).

26. *Id.* at 649.

children against the state's interest in avoiding a hearing.[27] It found Stanley's liberty interest in the "companionship, care, custody, and management" of the "children he has sired and raised" to be weighty.[28] In contrast, the state's interest in avoiding a fitness hearing was minimal and inconsistent with its stated goal of protecting the welfare of children.[29]

That much of the Court's ruling, as a matter of procedural due process, would have entitled Stanley to a hearing with substantial procedural trappings.[30] That much, however, the state was already willing to provide.[31] Stanley could have petitioned for custody of his children and received a hearing governed by the "best interest of the child" standard.[32] In the course of assessing Stanley's private interest, however, the Court created a different substantive standard: Stanley not only would receive a hearing but would *prevail* at the hearing if the court found him to be a fit parent,[33] the standard that governs terminations of parental rights.[34] The core of *Stanley* is thus the Court's recognition that Stanley was, constitutionally, a parent, whose claim to his children could be overcome only by a compelling state interest, such as his unfitness.[35] After holding that Stanley was entitled to a fitness hearing as a matter of due process, the Court noted that giving such a hearing to other parents (married parents and single mothers) but not to him was a violation of the Equal Protection Clause, thereby technically disposing of the case on the theory Stanley had argued.[36]

Why the detour into due process instead of a clean equal protection analysis? The dissent argued, and the majority did not dispute, that equal protection would not suffice because it was eminently

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27. *Id.* at 651-58.

28. *Id.* at 651.

29. *Id.* at 657-58.

30. The balancing test that weighs the state's interest against the private interest is concerned only with the procedural trappings that must attend the state's decision, not with the decision-making criteria themselves. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

31. *Stanley*, 405 U.S. at 648.

32. *Id.* at 648-49.

33. *Id.* at 649.

34. Santosky v. Kramer, 455 U.S. 745, 760 (1982); *see also* Hill, *supra* note 6, at 365.

35. This reading of *Stanley* suggests that the unfitness standard may be constitutionally required for termination of parental rights. *Cf.* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 782-92 (1999) (discussing constitutional limits on termination of parental rights).

36. *Stanley*, 405 U.S. at 658. Justice Douglas, the fifth vote for a majority that only needed four (Justices Powell and Rehnquist did not participate), joined the due process analysis but rejected the last portion of the opinion, which linked the outcome to Stanley's equal protection argument. *Id.* at 659. Much of the Court's analysis treated the statutory definition of *parents* as an irrebuttable presumption that unwed fathers were unfit. Soon thereafter the Court lost interest in irrebuttable presumptions, and this characterization did not survive in *Stanley*'s progeny.

reasonable to distinguish between unwed mothers and unwed fathers.[37] The dissent offered three reasons, all related to the mother's role in gestation. First, "[i]n almost all cases, the unwed mother is readily identifiable, generally from hospital records."[38] Second, as the state argued,

> "[I]t is necessary to impose upon at least one of the parties legal responsibility for the welfare of [the child], and since necessarily the female is present at the birth of the child and identifiable as the mother," the State has selected the unwed mother, rather than the unwed father, as the biological parent with that legal responsibility.[39]

Third,

> [O]n the basis of common human experience, . . . the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. . . . Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.[40]

The majority did not dispute the dissent's characterizations of mothers and unwed fathers. However, foreshadowing the Court's reasoning in *Craig v. Boren*,[41] the majority argued that even if unwed fathers were typically irresponsible toward their children, this stereotype should not control an individual case.[42] Even Stanley based his claim on his status as "a somewhat unusual unwed father" in that he had "loved, cared for, and supported these children from the time of their birth until the death of their mother."[43]

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37. *Id.* at 659-68 (Burger, C.J., dissenting).

38. *Id.* at 664.

39. *Id.* at 661 n. 1 (quoting Illinois's brief, alteration in original). Modern feminist family lawyers seem to agree that this statement remains an accurate generalization, although unwed fathers are more involved with their children today than the Court assumed in 1972. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 111-12 (2003) (giving statistics on paternal contact with children); Silbaugh, *supra* note 15, at 1152-53.

40. *Stanley*, 405 U.S. at 665-66 (Burger, C.J., dissenting).

41. 429 U.S. 190, 202 & n. 13 (1976) (rejecting as irrelevant state's evidence that stereotype was statistically accurate).

42. *Stanley*, 405 U.S. at 654-55. The Court noted that the justification for relying on generalizations was particularly inadequate in this situation because the state would be holding a hearing on the children's fate in any event. *Id.* at 657 n. 9.

43. *Id.* at 666 (Burger, C.J., dissenting).

In retrospect,[44] the surprising point about *Stanley* is that a father's biological relationship with a child is not sufficient for him to be deemed a parent, even though biological motherhood is sufficient for a woman to be deemed a parent. Biology was important for determining a father's status, but the Court also required a relationship with the children and a history of caring for them. Only the "unusual" father who had been deeply involved in parenting became the equal of a mother, at least when the state tried to remove the child. Later cases, discussed below, confirmed that a man was constitutionally entitled to parental rights only if he had actively helped rear his genetic offspring.

B. Biological Fathers' Rights Against Mothers

The cases that followed *Stanley* confirmed that the Court was not prepared to equate fatherhood with motherhood, even after it had declared sex classifications to be inherently suspect.[45] In *Stanley* the contest had been between the father and the state after the mother's death, but in the next case, *Quilloin v. Walcott*, the contest was between the father and mother.[46] In *Quilloin*, a unanimous Court rebuffed the claim of an unwed father of an eleven-year-old child.[47] The mother had married another man, and the father, Leon Quilloin, sought to block the adoption of the child by the mother's husband.[48] Under Georgia's adoption laws, the unwed mother had the sole power to consent to adoption of her child.[49] At the adoption hearing, the court asked not whether Quilloin was unfit but whether adoption by the step-father was in the child's best interests.[50] Unlike in *Stanley*, both Quilloin and the Court focused on substantive due process as the doctrinal basis for his claim.[51]

Two strands of reasoning are evident in the sparse, unanimous opinion rejecting Quilloin's claim. One strand found Quilloin's claim lacking because his contacts with his child were sporadic.[52] He had "never been a *de facto* member of the child's family" and thus had not "shouldered any significant responsibility with respect to the daily

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44. That is, from the perspective of a time of fathers' rights organizations and increased state efforts to assign at least financial responsibility to biological fathers.

45. Or at least "quasi-suspect." Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J. dissenting) (describing women as a quasi-suspect class).

46. 434 U.S. 246 (1978).

47. *Id.* at 247.

48. *Id.*

49. *Id.* at 248 (citing GA. CODE § 74-403(3) (1975)).

50. *Id.* at 247.

51. *Id.* at 254-55.

52. *Quilloin*, 434 U.S. at 256.

supervision, education, protection, or care of the child."[53] Although he had met the biology part of the biology-plus-relationship test, Quilloin's relationship with the child did not meet the high standard set by *Stanley*.

The other strand of the Court's reasoning focused on the alternative to recognizing Quilloin as the father: Quilloin was competing for custody not with the state and its foster care system, as Stanley had been, but with the more compelling option of the mother and her husband.[54] The Court said that *Stanley* had left the rights of unwed fathers "unresolved" in situations where "the countervailing interests are more substantial."[55] Thus, the Court implied that even if Quilloin had established a relationship with his child, the state's interest in the child's welfare could overcome his parental claim.

Had Quilloin preserved a claim of sex discrimination, he could have pointed out that even if he had been deeply involved in rearing his children, state law would not have let him terminate the mother's rights in favor of his new wife. Quilloin, however, did not preserve a sex discrimination claim, and the Court did not consider the issue.[56]

The issue of sex discrimination was preserved and was decisive in *Caban v. Mohammed*,[57] decided the year after *Quilloin*. *Caban*, like *Quilloin*, involved a father trying to block adoption of his children by the mother's new husband.[58] In this case, however, the father and his new wife also sought to adopt the child.[59] The father, Abdiel Caban was more like Peter Stanley than Leon Quilloin in his involvement with his children, and the Court sided with him.[60] Moreover, applying intermediate scrutiny,[61] the Court rejected the second rationale on which it had relied in *Quilloin*, holding that the State's desire to legitimate a child born out of wedlock was "not in itself sufficient to justify the gender-based distinction."[62] The Court suggested that a

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53. *Id.* at 253, 256.

54. *Id.* at 251-53.

55. *Id.* at 248. This phrase appears to refer to the fact that the state's interest in *Quilloin* was to establish the child in the mother's new family, as opposed to removing the child to the foster system as in *Stanley*.

56. *Id.* at 253 n. 13.

57. 441 U.S. 380 (1979).

58. *Id.*

59. *Id.* at 383.

60. *Id.* at 389.

61. Intermediate scrutiny, adopted in *Craig v. Boren*, 429 U.S. 190 (1976) (after *Stanley* but before *Caban*), requires the government to show that the suspect classification is "substantially related" to the accomplishment of an "important" governmental interest. *Id.* at 197. It contrasts with strict scrutiny, requiring that the classification be "narrowly tailored" to the accomplishment of a "compelling" governmental interest, and rational basis review, requiring the classification to be "rationally related" to a "legitimate" governmental interest.

62. *Caban*, 441 U.S. at 391. This argument may remain available to block an unwed

distinction between mothers and fathers might be appropriate in adoptions of newborn infants but not in adoptions of older children "where the father has established a substantial relationship with the child and has admitted his paternity."[63]

A few years later the Court applied the relationship requirement, almost with a vengeance, in *Lehr v. Robertson*.[64] Jonathan Lehr was the biological father of a baby whose mother disappeared with the child shortly after the birth.[65] She married another man, and when the child was just over two years old, the mother and stepfather petitioned for an adoption.[66] In the meantime, Lehr had been searching for the child. He hired private investigators and filed a petition to obtain a declaration of paternity and visitation rights.[67] Despite

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father's belated challenge to a third-party adoption. In *Quilloin*, *Lehr*, *Caban*, and *Michael H.*, the unwed fathers sought to be recognized as fathers and presumably wanted visitation, but they did not seek to remove the children from primary custody with their mothers. The father in *Caban* would not necessarily have prevailed if he had sought to undo an adoption and remove the children from the adopted home. *Cf.* Garrison, *supra* note 9, at 896 (asserting that "although an unmarried mother alone cannot block her child's father from asserting his parental status even if he has long failed to 'act as a father' to his child, adoptive parents may deprive the father of parental rights if they can make the same showing"). Nonetheless, many states seem to give unwed fathers *more* power to undo third-party adoptions than *Caban* gave them to block step-parent adoptions. *See infra* Part I.D.

Courts may be inclined to apply a more lenient standard for fatherhood if the mother tries to deny the biological father access to the child without providing a replacement father to adopt the child. *See id.* at 896. To constitutionalize that reduced burden would be wrong. By allowing the mother effectively to prevent the father from meeting the biology-plus-relationship test, the Court would leave space for mothers and states to honor different family forms, ranging from families headed by lesbian couples to the families preferred in avuncular societies, where the primary male figure in a child's life is the mother's brother.

63. *Caban*, 441 U.S. at 393. On the same day the Court handed down *Caban*, it decided against the unwed father in *Parham v. Hughes*, 441 U.S. 347 (1979), without pausing to consider the extent of his relationship with the child. In *Parham*, the child and mother had died in a car accident. *Id.* at 349. Georgia law precluded an unwed father from suing for wrongful death unless he had formally acknowledged the child. *Id.* A plurality consisting of the *Caban* dissenters rejected application of intermediate scrutiny, arguing that a lower standard applied when women and men were not similarly situated as a matter of biology. *Id.* at 355. The deciding vote, however, came from Justice Powell, who wrote the opinion of the Court in *Caban* and wrote separately in *Parham*. *Id.* at 359 (Powell, J., concurring). Justice Powell applied intermediate scrutiny in both cases. *Id.* at 359 (Powell, J., concurring); *Caban*, 441 U.S. at 382. In *Parham*, he found an "important" state interest in correctly identifying the father after the child's death, particularly in light of the facts of that case, in which the mother had also been killed and thus was not available to testify. 441 U.S. at 359-60 (Powell, J., concurring). The relatively minor burden to the father of formally asserting paternity seemed to Justice Powell reasonable in light of the difficulties of proving paternity. *Id.* at 360 (Powell, J., concurring).

64. 463 U.S. 248 (1983).

65. *Id.* at 250.

66. *Id.*

67. *Id.* at 268-69 (White, J., dissenting). Some commentators have implied that the

knowing of that petition, the mother, her husband, and the judge finalized the adoption without giving Lehr notice of the proceeding.[68]

Notwithstanding his efforts to obtain both the rights and the responsibilities of parenthood, Lehr lost his case in the Supreme Court because he had never established an *actual*, day-to-day family relationship with his child.[69] The *Lehr* Court endorsed portions the dissents in *Caban*, which drew a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility."[70] Justice Stewart's dissent in *Caban* had argued that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[71] *Lehr* also noted Justice Stewart's observation in *Caban* that traditionally, in the context of marriage, a father's rights derive from his relationship with the mother.[72] The *Caban* dissenters had been willing to let the mother "place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children."[73] They would have drawn a line between a father's rights against the state and his rights against the mother, giving only the former full-blown protection. The majority's decision in *Caban* denied mothers this legal veto once a relationship was established, but *Lehr* gave unwed mothers at least the chance, immediately after birth, to exercise a practical, *de facto* veto over the father's ability to establish parental rights.[74]

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majority denied these facts. *See, e.g.*, C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Changes in the U.S.*, 13 CORNELL J. L. & PUB. POL'Y. 431, 457 nn. 114-15 (2004). Although the majority did speak dismissively of Lehr's efforts to establish a relationship with the child, it did not deny Lehr's factual claims (which would have been improper, given the procedural posture of the case) but ignored those claims as irrelevant given the lack of an actual relationship with the child. *Cf.* Spitko, *supra* note 9, at 124 n. 119.

68. 463 U.S. at 250; *id.* at 268-69 (White, J., dissenting). Lehr would have been entitled to notice of the adoption proceeding if he had listed himself on the state's putative father registry. *Id.* at 250-51. However, "[t]he sole purpose of notice [was] to enable the person served . . . to present evidence to the court relevant to the best interests of the child." *Id.* at 252 n. 5 (quoting N.Y. DOM. REL. LAW § 111-a (McKinney 1977)). Thus Lehr would not have been able to block the adoption if the judge determined it to be in the child's best interests, and his parental rights, if any, would have been terminated without any showing that he was unfit. The presence of a putative father in the proceeding thus required the court to listen to an argument against the adoption, but it did not alter the substantive legal standard allowing the adoption to be granted, even over the father's objection. Nonetheless, many states seem to have taken *Lehr* as entitling unwed fathers to block adoptions. *See infra* Part I.D.

69. *Lehr*, 463 U.S. at 260-62.

70. *Id.* at 259-60.

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

72. *Lehr*, 463 U.S. at 260 n.16.

73. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

74. *Lehr* left unclear whether a biological father is entitled to some form of notice and,

All of the fatherhood cases assumed that the birth of a child establishes the mother's rights.[75] The Court held that the father is differently situated at the time of birth and that he remains differently situated unless and until he establishes a caretaking relationship with the child.[76] Once he establishes that relationship, the core right — to be recognized as a parent to the exclusion of others and to the exclusion of the state's ability to remove the child — is protected *as a matter of sex equality*. Setting aside the rightness or wrongness of the Court's premise that mothers' rights are automatic, the next section examines how the Court used that premise to confer rights on fathers.

C. Accommodating Fathers

1. Reproductive Biology as a "Real Difference"

The unwed father cases fall into a larger category of sex discrimination cases in which the Court invokes biological differences to justify treating the sexes differently: the "real differences" cases.[77] From *Stanley* to *Lehr* and continuing through *Nguyen v. INS*,[78] the Court

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if so, what form. Following Justice Stevens's lead, some feminists have objected to an absolute notice requirement as an invasion of the mother's privacy. *See, e.g.*, Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN'S L.J. 1 (2005) (describing the possibility of a woman being required to serve notice by publication to an unknown father, with the published notice including extensive detail about the woman and the sexual encounter(s) believed to have resulted in pregnancy). For a pragmatic response to this objection, see Jeffrey A. Parness, *Adoption Notices to Genetic Fathers: No to Scarlet Letters, Yes to Good-Faith Cooperation*, 36 CUMB. L. REV. 63 (2006). Other commentators have directly confronted the assumption that a genetic father has any right to notice if he fails to follow up on the possibility of pregnancy after sex, or even that he has a right to an opportunity to form a relationship if he does follow up. *See* Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Defining Parentage*, 34 MCGEORGE L. REV. 637 (2003) (describing genetic parents' rights in child-rearing). After *Lehr*, the Supreme Court refused to hear a case more directly raising the question of a father's rights when the mother had prevented him from forming a relationship with the child. *In re* Doe (Baby Boy Janikova), 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 513 U.S. 994 (1994), *cited in* Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 74-75, 77-85 (1995) (arguing that fathers should not have such rights).

75. For readers familiar with the unwed father cases and waiting for the other shoe to drop, Part I.C discusses *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and Part III.A addresses *Nguyen v. INS*, 533 U.S. 53 (2001).

76. Even after that point, the state may make some distinctions on the basis of sex, as in *Parham v. Hughes*, 441 U.S. 347 (1979), discussed *supra* note 63.

77. *See generally* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L. J. 913 (1983); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

78. See *Nguyen v. INS*, 533 U.S. 53 (2001), discussed *infra* Part III.A, in which the

has accepted the premise of a sex difference in parents' bonds with their children at the time of birth. During the same period, the Court decided several other "real differences" cases of sex discrimination, most of which involved female plaintiffs challenging classifications that favored men.[79] The Court's model of equality in the unwed father cases was quite different from, and more flexible than, the superficial model of equality it used in the female-plaintiff cases.

In the classic case of *Geduldig v. Aiello*,[80] the plaintiff and the dissenting Justices argued that excluding pregnancy from a disability insurance plan for state employees constituted sex discrimination.[81] They noted that the employee's need for disability benefits and the impact on the state of giving those benefits were the same regardless of whether the disability was caused by pregnancy or by other medical conditions or procedures, such as "prostatectomies, circumcision, hemophilia, and gout," conditions that were covered for men.[82] Because men received comprehensive income protection for disability, the dissent argued that true equality required comparable protection for women, including coverage of pregnancy-related disability.[83]

The majority, however, saw nothing wrong with this state of affairs. It concluded that the statute was not discriminatory because men as well as women were denied benefits for pregnancy-related disabilities.[84] As the Court said, the classification was between "pregnant . . . and non-pregnant persons,"[85] as if each were a permanent category. The Justices did acknowledge that this classification entailed some sex-specificity but threw up their hands in the face of inequitable biology.[86] Women, said the Court, were saddled by nature with the disproportionate burden of reproduction. This burden

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Court explicitly reaffirmed that the biological differences between men and women sometimes justify different legal rules.

79. *See* Michael M. v. Superior Ct., 450 U.S. 464 (1981); Dothard v. Rawlinson, 433 U.S. 321 (1977); GE v. Gilbert, 429 U.S. 125 (1976); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Geduldig v. Aiello, 417 U.S. 484 (1974); *see also* Rostker v. Goldberg, 453 U.S. 57 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975).

80. 417 U.S. 484 (1974).

81. *Id.* at 497-505 (Brennan, J., dissenting). Originally, the plan denied coverage for any pregnancy-related disability. *Id.* at 490-91. In the course of litigation, California agreed to extend benefits to disabilities due to complications of pregnancy, leaving at issue only the denial of benefits for the period of disability associated with normal pregnancy and delivery. *Id.*

82. *Id.* at 501-02 (Brennan, J., dissenting).

83. *Id.* at 501 (Brennan, J., dissenting) (noting the EEOC's agreement with this conclusion). Like the majority, the dissent accepted a male baseline, arguing that the plan should also cover pregnancy because of the coverage it provided to men, rather than because of its role in many women's lives.

84. *Id.* at 496-97.

85. *Geduldig*, 417 U.S. at 496 n.20.

86. *Id.* at 494-96 & n.20.

inherently inhibited their participation in the workforce on equal terms, as those terms have been set by men. The state had no duty to make up the difference. The Court's opinion in *Geduldig* fairly reeks of Anatole France's paean to "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges."[87] Women, the analogous poor in the Court's eyes, are burdened by a biological destiny that hinders their participation in the paid workforce.

The Court's opinions on parental rights are just the reverse: women who can bear children are rich by virtue of their biology, and biological mothers, by virtue of having produced their children, have a facially stronger claim to parental rights.[88] In *Geduldig*, the Court let the state define rights by taking men's biology (i.e., men's inability to become pregnant) as the norm.[89] If the Court had used this accommodation-denying approach in *Stanley* and *Caban*, it would have let the state to define parenthood in a way that only women could fulfill.[90] The Court would have said to the father,

> You may be the biological father of these children, but that does not make you similarly situated to their mother, who grew them in her body at risk to life and health. The Equal Protection Clause does not require the state to give equal rights to those who are not similarly situated. Affirmed.

Of course the unwed father cases did not end that way. The Court did not end its analysis (as it did in *Geduldig*) with the observation that women and men are not similarly situated and therefore need not be treated similarly. Instead, having identified a relevant biological difference between the sexes, the Court took another step: it used motherhood as the model for crafting the biology-plus-relationship test to accommodate fathers' physical disadvantage. As the Court later explained, it makes sense to allow a man to acquire parental rights comparable to a mother's by creating a test "in terms the male can fulfill."[91]

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87. ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., 1910).

88. *See* MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 56 (1995).

89. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

90. *Cf.* Silbaugh, *supra* note 15, at 1153 (analogizing *Geduldig* to unequal treatment of mothers and fathers at the time of birth).

91. Nguyen v. INS, 533 U.S. 53, 67 (2001) (describing Congress's effort to give male citizens means to obtain citizenship for foreign-born children); *see* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 690-96 (2001) (arguing that "parenthood, as protected by the Constitution, is understood in relation to the mother" and that gestation and birth are the "paradigm for parenthood"); *see also* Shanley, *supra* note 74, at 88-90 (stating that the model parent is a pregnant woman

Although *Lehr* demonstrates that this test is rigorous, the standard is not as high as it might have been. The Court did not require the father to show that he had put his physical health at risk for the child in a manner comparable to the mother's risk; he need not have rescued the child from a burning house or donated a kidney. Instead, the test is satisfied by parental behavior that is fairly basic, yet appropriate to the facts of men's biology.[92]

The Court's accommodation approach acknowledges that men and women are not similarly situated but asks whether equality requires similar treatment of men and women who have *comparable* relationships with their children.[93] Furthermore, the accommodation approach defines what is comparable by using criteria appropriate to the biology and life experience of both sexes. A woman acquires initial parental rights[94] by having biological offspring whom she gestates and to whom she gives birth; a man acquires similar rights by caring for his offspring after they are born.[95] Thus parental rights, the one area of law in which men's biology rather than women's is a disadvantage, is also the one area in which the Supreme Court has adopted a flexible, accommodating theory of sex equality.[96]

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but "different biological roles of men and women in human reproduction make it imperative that law and public policy 'recognize that a father and mother must be permitted to demonstrate commitment to their child in different ways'") (quoting *Recent Developments: Family Law — Unwed Fathers' Rights — New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility*, 104 HARV. L. REV. 800, 805 (1991)).

92. Lehr v. Robertson, 463 U.S. 248, 262-63 (1983).

93. This approach is analogous to the theory of "comparable worth" in employment law, which argues that the Equal Pay Act should require employers to pay equal wages to women and men not only for the *same* work but also for *comparable* work; that is, work that requires comparable levels of effort, skill, and training, even if it is otherwise quite different. *See generally* PAULA ENGLAND, COMPARABLE WORTH: THEORIES AND EVIDENCE (1992). The theory is that the pay disparity between, for example, teenage babysitters and teenage lawn mowers is due to pervasive sex bias that undervalues the traditional work of women. Federal courts have generally rejected comparable worth as a theory of equality under the Equal Pay Act or Title VII, and proposed federal legislation has failed.

94. The word *acquires* here refers to how adults acquire parental rights at the birth of the child, what Gary Spitko calls being an "initial constitutional parent" (a term he applies primarily to the biological mother). Spitko, *supra* note 9. One can also acquire parental rights through adoption, but even when adoption is planned, initial parental rights are understood to vest in the birth mother (and father in some cases) and are transferred to the adoptive parents.

95. Had the Court taken this approach in *Geduldig*, it could have held not just that pregnancy should be accommodated on the same terms as other disabilities but that pregnancy should be accommodated, period. Pregnancy, after all, is not a disease and is more aptly described as an ability, not a disability. "Pregnancy is part of women's lives and should be accommodated for that reason, not because it finds a persuasive analogue in male experience." Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus Envy?*, 72 B.U. L. REV. 101, 127 (1992).

96. The Court's foray into this more flexible approach to sex equality was a limited

2. The Role of Marriage

The foregoing analysis of the unwed father cases takes the Court in *Caban* at its word that the problem was one of sex equality. The Court fashioned a definition of parental rights for unwed fathers that accommodated men's biological disadvantage by allowing them to prove they had made a commitment to parenthood comparable to the commitment biological motherhood entails. Admittedly, the Court indulged some of the same stereotypes on which the challenged laws were based. In the end, however, the Court claimed to decide *Caban* as a matter of sex discrimination law. If we take the Court at its word, then its holding is a remarkably flexible and accommodating theory of equality.

Conservatives and feminists alike have proposed an alternative reading of the unwed father cases: that these cases are about protecting the traditional/nuclear/patriarchal family, not promoting sex equality (cause for praise from conservatives and condemnation from feminists).[97] This reading gives short shrift to the Court's own claim to be acting in the name of sex equality and leaves feminists without much doctrine to stand on when arguing for more feminist legal treatment of families.

As a purely doctrinal matter, preference for nuclear families alone does not explain the unwed father cases.[98] The Court grounded *Caban*

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one. *Parham v. Hughes*, 441 U.S. 347 (1979) (discussed *supra* note 63), shows that the biology-plus-relationship test does not give fathers full-fledged rights equal to those of mothers. Yet *Parham* does not deny the father equal rights; it merely permits the state to impose a different, more burdensome test when the father seeks monetary compensation for the child's death than when he claims the right to prevent the child's adoption by another. *Id.* As the plurality explained in *Parham*, "It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." *Id.* at 358 n.12. The requirement that paternity be legally acknowledged is more burdensome in that it requires formal legal action as opposed to every-day participation in child-rearing. The latter is of course a more significant undertaking, and a father could, in theory, merely acknowledge paternity without participating in the child's care. That a father would go to the trouble and expense of initiating formal legal proceedings in the absence of some meaningful relationship with the child seem unlikely.

97. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion by Justice Scalia); FINEMAN, *supra* note 88, at 85; Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650 (1993); Katheryn D. Katz, Lawrence v. Texas: *A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN'S RTS. L. REP. 249, 252 (2004); Schultz, *supra* note 3, at 318; Shanley, *supra* note 74; Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527 (2001).

98. Some of the opinions display near horror at the prospect of illegitimacy, which seems to motivate at least part of the Court's approach. This attitude makes it all the more significant that the Court was willing to recognize paternal rights even where the father had not formally acknowledged the child and even where the father was not competing merely with the mother but with a nuclear family that included the mother and her new

in equal protection; the Court's own claim to be promoting equality ought to count for something. Moreover, the majority that made this claim in *Caban* included Justices Brennan and Marshall, who had dissented from *Geduldig*, while all three *Caban* dissenters who had been on the Court five years earlier had joined the majority opinion in *Geduldig*.[99] It is more plausible that the swing Justices were sympathetic to the accommodation approach only when men's rights were at stake than that Brennan and Marshall, after siding with women workers in *Geduldig*, retreated in *Caban* to defend the patriarchal family against the likes of Burger, Stewart, Rehnquist, and Stevens.[100]

One need not *agree* with Justices Brennan and Marshall that their approach was best for sex equality and/or for women,[101] but if the Court claims to be talking about sex equality and the cases will bear that reading, then equality should be understood as the core constitutional concern. The unwed father cases do support the equality reading, and their approach to equality as accommodation of difference, rather than equality as sameness, could make them valuable to feminists.

Some of the Court's reasoning in *Caban* and *Stanley* may appear to be based on a nuclear family preference because the Court compared the actions of the unwed fathers to the actions of married fathers.[102] Indeed, the Court said married fathers were presumed to

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husband. Indeed, to the extent that the increase in the rights of unwed fathers accomplished a decrease in the rights of unwed mothers, unwed mothers are fortunate that the cases arose on those facts: if a still-single mother had been seeking to cut off the rights of the father based on his lack of relationship with the child, it is easy to imagine the Court constructing a much lower hurdle.

The Court's horror of illegitimacy is ironic in light of its later holdings that classifications based on legitimacy are themselves quasi-suspect. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985). The Court appears not to have considered that its own enshrinement of the importance of legitimacy could perpetuate the stigma against the children themselves.

99. The *Caban* dissenters were Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens. Justice Stewart wrote the majority opinion in *Geduldig*, which the Chief Justice and Justice Rehnquist joined. Justice Stevens had not yet replaced Justice Douglas, who dissented in *Geduldig*. Justices Brennan's and Marshall's votes were consistent in the two cases, as were the opposing votes of Justices Burger, Stewart, and Rehnquist. The three votes that made the difference were those of Justices Powell, Blackmun, and White, who rejected the female plaintiffs' claims in *Geduldig* but nonetheless used the Equal Protection Clause to protect the father's rights in *Caban*.

100. Inclusion on this list may not be entirely fair to Justice Stevens, whose opinion in *Michael H.* was driven in part by deference to the mother, similar to the approach of some feminists. *See infra* notes 126-31.

101. For example, Part III argues that one important aspect of the approach taken by Justice O'Connor in her dissent in *Nguyen v. INS* (joined by Justice Ginsburg and others) is bad for women because it embraces the narrow conception of equality that produced *Geduldig*.

102. Caban v. Mohammed, 441 U.S. 380, 382 (1979); Stanley v. Illinois, 405 U.S. 645,

have satisfied the relationship prong of the biology-plus-relationship test.[103] The Court, however, rejected the equal protection claim in *Quilloin*, which compared married and unmarried fathers, but accepted the equal protection claim in *Caban*, which compared mothers and fathers.[104] The Court's discussion of married fathers served not as a model for creating the biology-plus-relationship test but as a justification for the distinction between married and unmarried fathers.[105] As a matter of doctrine, the Court did *not* hold that unwed fathers were protected when and because they were similar to married fathers; they were protected when and because they were similar to biological mothers.

Nor did the Court's criteria for fatherhood endorse traditional gender roles: the Court did not define fatherhood in terms of financial support. Instead it focused on "the daily supervision, education, protection, [and] care of the child,"[106] activities that are stereotypically maternal. The Court's description of what counts as a parental relationship fit remarkably well with those of feminist and child-centered scholars who argue for re-conceiving family law under a model that promotes and rewards "fathering" in the sense of caretaking, not merely begetting.[107]

In addition to rewarding unwed fathers based on non-traditional criteria, the *Caban* Court applied those criteria to protect the biological father at the expense of a nuclear family.[108] Some commentators have suggested that the Court's decision turned on the fact that the father had previously lived with the mother and children.[109] Though unwed, perhaps the couple still qualified as a nuclear family entitled to protection under a patriarchal view of men's rights. According to the Court, however, the main factor was the father's connection to the children.[110] Most involved and connected fathers are likely to look somewhat "traditional" by virtue of having had physical custody of the child at some point; isolated visits are not likely to involve a parent

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654-55 (1972).

103. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

104. *Id.*; *Caban*, 441 U.S. at 382 (1979).

105. *Quilloin*, 434 U.S. at 256.

106. *Id.*

107. *See, e.g.*, Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1330 (2005); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1757 (1993) (advocating a theory of gestational fathering as part of an overall "generist" perspective on parenting).

108. *See Caban*, 441 U.S. at 389.

109. Laura Oren, *Honor Thy Mother?: The Supreme Court's Jurisprudence of Motherhood*, 17 HASTINGS WOMEN'S L.J. 187, 194 (2006).

110. *See Caban*, 441 U.S. at 393.

deeply in the child's care.[111] The fact that in *Caban* and *Stanley* the father's prior custody had been shared with the mother does not mean that these fathers were protected only because they had lived with the mother. One could not cite *Caban* and *Stanley* as authority for denying the claim of a father who had lived with and cared for the children separately from the mother rather than as a nuclear family. If anything, restricting parental rights to those fathers who have lived "as a family" with the children allows the mother to retain more control over the father's ability to establish parental rights at all.[112] The Court's emphasis on cohabitation between father and child seems driven more by its interest in daily caretaking than by loyalty to the nuclear family.

When Justice Scalia sought to enshrine a clear nuclear family preference in an opinion of the Court in *Michael H. v. Gerald D.*,[113] he marshaled only four votes. His plurality opinion proposed that an unwed father's claim should not disrupt an already-established nuclear family.[114] Justice Stevens, however, cast the deciding fifth vote on a theory that recognized at least some rights in the unwed father that would disrupt the mother's pre-existing nuclear family.[115]

The case arose out of Michael's affair with Carole, who was married to Gerald.[116] Carole's daughter, Victoria, was born from the affair but was initially treated as a child of the marriage.[117] When Carole left Gerald to live with Michael, blood tests showed that Victoria was Michael's child.[118] Carole took a few years to choose between the two men, going back and forth in the meantime.[119] During a reunion with Gerald, Michael sued for the right to visit Victoria.[120] He challenged

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111. *Cf.* Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1564 (1998) ("Parents transmit values not so much by what they say, but by what they do, how they live, and how they interact with others.").

112. *See generally* FINEMAN, *supra* note 88. These decisions do enforce the "sexual family" by treating fathers, and only fathers, as eligible for parental rights to the child of an unwed mother. The Court has never come close to questioning marriage as a central organizing principle of society. To the extent the unwed mother retains control of the child, she remains at least somewhat free to honor other traditions, such as giving a more prominent role to grandparents or treating one of her brothers as the important male figure in the child's life. Recognizing an unwed father's rights does reduce the mother's ability to make these other choices and further entrenches the sexual relationship between the two adults as the core of a family.

113. 491 U.S. 110 (1989).

114. *Id.* at 130.

115. *Id.* at 132-36 (Stevens, J., concurring).

116. *Id.* at 113 (plurality opinion).

117. *Id.* at 113-14.

118. *Id.* at 114.

119. *Michael H.*, 491 U.S. at 114.

120. *Id.*

California's "presumption of legitimacy," which barred him from being recognized as Victoria's father unless either Gerald or Carole joined him in seeking acknowledgement of his paternity.[121] As in *Quilloin*, Michael argued both due process and equal protection claims, but the Court refused to consider equal protection because he had not raised it in the lower courts.[122]

The Court's resolution of the case sidestepped the question of fatherhood in two ways. First, the Court refused to consider that question directly. The Court's task, it said, was not to issue an abstract declaration of paternity but to determine the standard, if any, under which Michael could demand visitation.[123]

Second, Justice Stevens's concurrence in the judgment dramatically limited the import of the Court's ruling for Gerald. Justice Scalia's plurality would have enforced the California law with no caveats, flatly denying Michael's relevance to Victoria's family. Justice Stevens voted with the plurality only because the state let Michael petition for visitation under the best interests of the child standard.[124] Moreover, Michael's right to bring such a petition was not limited in time.[125] Thus, even though the plurality favored California's presumption of legitimacy, Justice Stevens's rationale left Michael with the right to petition for visitation, regardless of whether he could be declared "the father."[126] Justice Scalia's effort to solidify the husband's

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121. *Id.* at 115. The law thus accomplished what was, in effect, an automatic adoption by the mother's husband, as long as he and the mother did not object.

122. *Id.* at 116-17 (plurality opinion). An equal protection approach would have required the Court to confront the reality that it is much easier to maintain the legal fiction that a woman's husband is always the father of her child than to maintain a legal fiction that a man's wife is always the mother of his. Eliminating the sex classification from this statute would require the Court to recognize the possibility of a child's having more than one parent of each sex. *See generally* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 272-73 (2003) (noting that calling California's rule a "presumption of legitimacy" masks the fact that the law is substituting a social father for a biological one).

123. *Michael H.*, 491 U.S. at 126 (plurality opinion); *id.* at 132-33 (Stevens, J., concurring).

124. *Id.* at 133-34 (Stevens, J., concurring); *see* Appell, *supra* note 91, at 693 ("A majority of the Court [Justice Stevens plus the dissenters] . . . would have recognized at least a right of the biological father to visit the child.").

125. *Id.* at 133.

126. The other unwed father cases do not specifically address whether an unwed father who satisfied the "biology-plus-relationship" test merely had the right to maintain that relationship through some sort of visitation, or whether they must be allowed to seek custody on the same terms as unwed mothers and divorced parents. In practice, unwed fathers have received the benefit of the same sex-neutral custody standards that apply to divorced parents. The California statute on which Justice Stevens based his resolution of the case allowed any person to petition for visitation in the child's best interest and

rights and the primacy of the nuclear family thus fell one vote short because of Justice Stevens's desire to defer to the mother and to preserve some protection for the adulterous genetic father.[127]

Even in *Michael H.*, then, the unwed father had a right to maintain some sort of relationship with his child, as long as doing so was in the child's best interest.[128] But in *Michael H.*, as in all the unwed father cases, that right depended on the father having established a meaningful relationship with the child *before* seeking help from the courts. The mother was thus implicitly recognized as the "initial 'constitutional parent,'"[129] and the biological father's ability to attain parental rights depended on her cooperation.

3. A Fork in the Road

The Court's starting point in the unwed father cases was the premise of a real difference between biological motherhood and biological fatherhood, a premise that is intuitively justified even if sometimes exaggerated. Because of that real difference, the Court could have flatly rejected the equal protection claims of unwed fathers and refused to give men a way to acquire parental rights.[130] Or it could

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was thus similar to the third-party visitation statute struck down as applied in *Troxel v. Granville*, 530 U.S. 57, 63 (2000), discussed *infra* Part II.A. Although *Troxel* suggested that broad third-party visitation statutes are invalid, some form of third-party visitation statute may be permissible and indeed may be required in situations like *Michael H.* *See infra* text accompanying notes 166-70.

127. *See* Silbaugh, *supra* note 15, at 1157 n. 96 (giving references to literature on Justice Stevens's jurisprudence of parental sex differences). Justice Stevens was apparently willing to let stand the trial court's ruling that visitation was not in Victoria's best interest, based on a preference for the mother and the nuclear family. Barbara Bennett Woodhouse argues that the better question to ask in *Michael H.* was whether having "two daddies" was good or bad and points to evidence that Michael did not, in fact, have an established parenting relationship with Victoria. Woodhouse, *supra* note 107, at 1857, 1864-65 (quoting Victoria's description of Michael as "the crazy man from California who thinks he's my father"). In fact that *is* the question the trial court asked, and, like Justice Scalia, it found categorically that having two daddies would be bad. *Michael H.*, 491 U.S. at 115-16, 120. Telling a court to ask that question may not be all that different from telling it to decide whether it is good or bad for a white child in a racist society to have a black step-father, a question that courts have no business asking after *Palmore v. Sidoti*, 466 U.S. 429 (1984). The question of whether Michael had established a true parenting relationship with Victoria is a more objective question and is the factual question on which the case would have turned on remand if the dissent had prevailed. For that reason, Woodhouse's critique of the dissent as exalting genetics over functional parenting seems unfair. One should also note that the *Michael H.* dissenters (Brennan, Marshall, and Blackmun) all joined the Court's opinion denying the genetic father's claim in *Quilloin*. *Michael H.*, 491 U.S. at 112; Quilloin v. Walcott, 434 U.S. 246, 247 (1978).

128. *See Michael H.*, 491 U.S. at 135-36.

129. Spitko, *supra* note 9, at 99.

130. Although the fathers still could have argued a due process liberty claim, the trigger for men's liberty right is defined by the accommodating equal protection approach of *Caban*. Caban v. Mohammed, 441 U.S. 380, 382 (1979). The rights of unwed fathers thus

have insisted on a sameness-oriented model of equality that ignored any uniquely female experience and defined parenthood as genetic contribution, giving biological fathers equal rights with biological mothers. The Court's accommodation approach to equality is preferable to either of these extremes.[131]

The first extreme, denying any rights to unwed biological fathers, would have left unwed mothers with more control over their children: by avoiding marriage, they could keep exclusive parental rights to the point of being able to cut off even established relationships between children and fathers.[132] Courts would deem women not merely the archetypal but the sole holders of constitutionally grounded parental rights.[133] That approach is tempting in light of how some men use parental rights to control women.[134] In the long run, however, women lose more than they gain if men are cut off from parental rights by a sterile and "surface-hugging"[135] theory of equality.[136] To the contrary, the hypocrisy of using a generous vision of equality to protect men's rights in *Stanley* and *Caban* but a stingy vision of equality to reject women's claims in *Geduldig* is yet another reason to re-visit *Geduldig* and other cases of the Court's willful blindness to inequality rooted in difference.

Worse than cutting back fathers' rights to protect mothers' prerogatives would be what we are seeing now: reversion to the other extreme, a sameness model of equality that strengthens fathers' rights by defining their experience, rather than mothers' experiences, as the baseline.[137] State law responses to Lehr have reverted to that model, which also appears in the Supreme Court's decision in *Nguyen v. INS* and in some approaches to problems involving reproductive technology.

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follow a familiar pattern in which "traditional" rights are recognized under the Liberty Clause and then expanded through the lever of Equal Protection. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (using the Equal Protection Clause to extend to unmarried couples the right to use contraception recognized for married couples in *Griswold v. Connecticut*, 381 U.S. 479 (1965)); *but see* Lawrence v. Texas, 539 U.S. 558 (2003) (relying directly on the Liberty Clause to extend sexual privacy rights).

131. For a review of the pros and cons of these two extremes, see Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 978-1000 (1994).

132. *Id.* at 981-82.

133. *Id.*

134. *See* Baker, *supra* note 111, at 1568; Davis, *supra* note 39, at 101 (discussing feminists' reluctance to challenge the notion that women have a special connection to children).

135. Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 294 (2001) (characterizing the Rehnquist Court's approach to the Equal Protection Clause).

136. *See* Katharine K. Baker, *Taking Care of Our Daughters: The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies by Martha Albertson Fineman*, 18 CARDOZO L. REV. 1495, 1514-19 (1997) (book review).

137. *See* Helms & Spence, *supra* note 74, at 6.

On first reading, *Lehr* appears to be a defeat for fathers' rights: Lehr was a sympathetic father trying to connect to his child, and the Court harshly rejected his claim, largely due to alleged deception by the mother.[138] In the course of dismissing Lehr's efforts, however, the Court spoke favorably of the state's "putative father registry," through which Lehr could have received notice of the adoption proceeding.[139] New York's registry did not actually promise parental rights, only an opportunity to appear at the adoption hearing.[140] Nonetheless, whether from an over-reading of the Court's endorsement of the registry or out of sympathy for men in Lehr's position, states have largely treated *Lehr* as establishing an unwed father's right to notice of adoption proceedings.[141] The right to notice has in turn become conflated with the right to block the adoption if the father wishes to claim parental rights, regardless of whether he has an existing relationship with the child.[142]

In addition to being an unnecessary over-reading of *Lehr*, this solicitude for the rights of biological fathers has had tragic results. In two high-profile cases in the 1990s, "Baby Jessica" and "Baby Richard" were taken from their adoptive homes and returned to their biological parents at the ages of two and four, respectively, based on lack of proper notice to biological fathers who did not know the children before initiating litigation.[143] Such outcomes reinforce the notion that

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138. Lehr v. Robertson, 463 U.S. 248, 250-52 (1983). Mary Shanley notes that mothers may have good reasons for hiding pregnancy from, for example, an abusive father. She argues that to the extent the unwed father has a right to block an adoption, the mother should at least be heard on why she does not want the father to have custody, "recognizing that her decision not to retain her custodial rights is not an abandonment of her interest in the child, but an extension of her efforts to care for her offspring." Shanley, *supra* note 74, at 77-78.

139. *Lehr*, 463 U.S. at 264-65.

140. *Id.* at 251; *see supra* note 68; Helms & Spence, *supra* note 74, at 22-23; Parness, *supra* note 74, at 64-67; *see also* Spitko, *supra* note 9, at 110 (arguing that father must make a substantial showing before acquiring rights, usually impossible before birth).

141. Rebecca Aizpuru, *Protecting the Unwed Father's Opportunity to Parents: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 715 (1999).

142. *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1322 (2005) ("[M]any states now confer parental status on the basis of biology alone."); *see also* Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 468 ("[U]nder the statutes and case law of many states, custodial claims of unwed fathers are protected to a far greater extent than the Supreme Court has said is constitutionally necessary, even when this protection comes at the price of disrupting functional, but not biologically related, families.").

143. *In re* Kirchner, 649 N.E.2d 324 (Ill. 1995) (Richard); *In re* B.G.C., 496 N.W.2d 239 (Iowa 1992) (Jessica). David Meyer narrates a heart-wrenching account of the ultimate transfer of custody from Richard's point of view. Meyer, *supra* note 35, at 753. In both cases, the litigation was in fact initiated by the mother, who regretted the adoption decision. *In re* Kirchner, 649 N.E.2d at 327; *In re* B.G.C., 496 N.W.2d at 241. Both cases may have been avoided if the waiting periods for adoption in this country were similar

biological fathers "own" their offspring regardless of whether they have functioned as parents and regardless of the reality of the child's life. They also lead in the direction of equating parenthood with genetics, with gestation and other nurturance dismissed as fungible child care services.

While the states have strengthened the rights of unwed biological fathers, the Supreme Court has shifted toward a genetically oriented definition of parenthood less from a desire to embrace fathers' rights than from fear of being accused of stereotyping women as mothers. The Court's shift, discussed in Part III, contributes to a climate that favors enforcing surrogacy contracts. Evaluating this trend in light of the Court's existing jurisprudence of parenthood requires examination of the principles that guide existing law: that is, why parental rights are protected by the Fourteenth Amendment in the first place.

Because the Court created the biology-plus-relationship test to accommodate fathers by comparing them to mothers, the relationship requirement shows that the Court saw mothers as inherently having relationships with their children. The relationship requirement also suggests that, in the unwed father cases, the Court saw itself as protecting the emotional bond between parent and child. Part II examines the Court's protection of this bond and identifies the interests that the Court tries to serve by protecting parental rights.

II. WHY PROTECT PARENTHOOD? THE RIGHT AND ITS JUSTIFICATIONS

If parenthood were determined by a simple, mechanical formula like genetics or contractual intent, it would be easy to apply the same formula to new situations made possible by reproductive technology. The Court's definition of parenthood is not so mechanical. It contains implicit assumptions about motherhood but is flexible enough to accommodate parents, like fathers, with a different biological relationship to the child. Extending that definition to new biological possibilities requires us to examine why the Court has chosen this definition of parenthood and what values the definition serves.[144]

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to those in Europe and Australia. *See* Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 516-18, 541-48 (2005) (reporting that U.S. laws make consent to adoption irrevocable in a few days to two weeks, while most European countries and Australian states allow approximately six weeks).

144. To continue the analogy suggested in note 92, courts rejected the comparable worth theory of equality in employment law partly because of the practical difficulty of deciding when two very different jobs were "comparable" in terms of skill, effort, and other relevant factors. In the reproductive context, Marjorie Schultz argues that accommodation of men

As a starting point, the result in *Michael H.* raises the question of what it means to be a parent as a matter of constitutional law. After the *Michael H.* decision, Gerald and Carole remained Victoria's parents under California law, but Michael had the right to petition for visitation based solely on a judge's assessment of Victoria's best interests. Does that mean Michael is a parent, too?

Second, what is the Court protecting when it protects parental rights? In the unwed father cases, the Court held that, as far as the Fourteenth Amendment is concerned, a man has little, if any, presumptive bond with his newborn genetic offspring. Some recent opinions suggest (contrary to the implicit premise of the unwed father cases) that the same is true of women.[145] If the bond between parent and child were the only reason for protecting parental rights, and if no bond existed with either mother or father at the child's birth, no constitutional bar would prevent the state from seizing newborns and distributing them to parents by some administrative scheme.[146]

The bond between parent and child is not the only reason for protecting parental rights as a matter of constitutional law. The rights of biological parents are also protected precisely to prevent the state from distributing babies according to its own standards. Constitutional protection of parental rights serves the structural need to minimize the state's discretion in distributing children, and with them the power to control the education and socialization of the next generation. Fourteenth Amendment parental rights aim at both these concerns: the emotional bond between parent and child and the parent's right to control the upbringing of the child.[147] The biology-plus-relationship test accords with these justifications for protecting parental rights as a matter of constitutional law.

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via reproductive technology is a necessary complement to feminist demands for accommodation of pregnancy in the workplace. Schultz, *supra* note 3, at 303, 385. I agree with Schultz that courts should accommodate men's reproductive disadvantage, but the biology-plus-relationship test is sufficient. In light of the role parental rights play in constitutional law and in children's lives, it is neither necessary nor appropriate to minimize the importance of gestation for the sake of a "gender neutral" criterion such as genetics or intent.

A few voices have called for accommodation in the form of a "male right to abortion" (meaning a biological father's right not to pay child support if the mother refuses to have an abortion). *See* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 47-48 (2004); *see also* Dubay v. Wells, No. 06-11016-BC, 2006 WL 1983210, at *1 (E.D. Mich. July 17, 2006). To the extent that these arguments are based on analogy to a woman's right to abortion, they misapprehend the nature of the abortion right.

145. *See infra* Part III.A (discussing *Nguyen v. INS*, 533 U.S. 53 (2001)). On the issue of the nature and quality of the mother-child bond, see Lucy Jane Lang, *To Love the Babe That Milks Me: Infanticide and Reconceiving the Mother*, 14 COLUM. J. GENDER & L. 114 (2005).

146. *See* Appell, *supra* note 91, at 709-10 (speculating about possible administrative schemes).

147. *See* Denise A. Skinner & Julie K. Kohler, *Parental Rights in Diverse Family Contexts: Current Legal Developments*, 51 FAM. REL. 293, 293-94 (2002).

A. The Constitutional Meaning of Parenthood

What did Peter Stanley and Abdiel Caban gain by winning their cases and being recognized as parents? The rights of parents have been described as including the "right to the care, custody and companionship of [the] child as well as the right to make decisions affecting the welfare of the child free from government interference, except in compelling circumstances."[148] The Supreme Court's early parental rights cases protected a motley assortment of rights, mostly related to control over the child's education.[149] More comprehensive, but in the end surprisingly narrow, was the Court's affirmation of parental rights in *Troxel v. Granville*.[150] Despite the narrowness of the holding, *Troxel* runs counter to the protection for unwed fathers carved out by Justice Stevens's opinion in *Michael H.*[151]

Troxel struck down a Washington trial court's application of a third-party visitation statute. Under the authority of that statute, the court had ordered more frequent visits with the children's grandparents than the mother preferred.[152] The substantive standard governing the trial court's decision was the best interests of the children, the same standard that applied to Michael's petition for visitation in *Michael H.*[153] The Court's six opinions left a great deal of uncertainty for states that want to allow non-parental visitation orders.[154] They also revealed that the Court holds to a surprisingly weak theory of parental rights.

Despite commonly being called a "grandparent" visitation law, the third-party visitation statute at issue in *Troxel* actually allowed *anyone* to petition a court for a visitation order.[155] The order could issue based solely on a finding that visitation would be in the best interests of the child.[156] The statute thus authorized sweeping intrusions on parental rights. The plurality opinion condemned the breadth of the statute, but the Court declared it unconstitutional only as applied

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148. Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 406 (1988); *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (describing "the interest of the parent in the companionship, care, custody, and management of his or her children").

149. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 164-66 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 533-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

150. 530 U.S. 57 (2000).

151. *Compare id. with* Michael H. V. Gerald D., 491 U.S. 110 (1989).

152. *Troxel*, 530 U.S. at 60-61.

153. *Id.* at 61; *Michael H.*, 491 U.S. at 134-36 (Stevens, J., concurring).

154. *See generally* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279 (2000); Janet Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 394 (2002).

155. *Troxel*, 530 U.S. at 57.

156. *Id.* at 63.

in *Troxel* itself.[157] Although the micromanaging of the mother in *Troxel* was particularly egregious, the third parties seeking visitation were sympathetic. They were, after all, the children's biological grandparents. Their son, the father, had died, and they sought the visitation order after finding their contacts with his children reduced as the mother moved on with her life.[158] It is hard to imagine a better case for third-party visitation than the claims of these particular grandparents.[159] One can thus safely assume that whatever right the mother had against these grandparents, she has the same right against the rest of the world.

That right appears to be mainly the right to have one's views about what is in the child's best interests consulted first and presumptively last, hardly a robust presumption. *Troxel* holds that the state cannot override the parent's decisions based *solely* on a difference of opinion between judge and parent about the child's best interests.[160] At the same time, *Troxel* leaves open doors for state intervention that make parental rights appear surprisingly weak. The Court refused to declare the third-party visitation statute unconstitutional on its face, and the plurality opinion suggested that a similar statute would be acceptable if it merely gave some "special weight" to the parent's wishes.[161] The mother in *Troxel* appears only to have had contingent authority over her children's daily affairs. Were she, for example, to cut off all contact with the grandparents, the grandparents could still win a visitation order if they could convince a trial court that the mother's decision hurt the children. The grandparents would not need to prove her unfit.[162]

The narrow parental rights recognized in *Troxel* are of course the same rights the unwed fathers gained by being recognized as fathers in *Stanley* and *Caban*. In *Stanley*, as in *Troxel*, the other parent's death meant that recognition as a parent conferred exclusive parental rights, but in *Caban* the father gained only the right

157. *Id.* at 73.

158. *Id.* at 60-61.

159. Except perhaps for Michael H., discussed in Part I.C.

160. *Troxel*, 530 U.S. at 63.

161. *Id.* at 69.

162. *See generally* David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1140 (noting that the mother in *Troxel* won narrowly). Perhaps after *Troxel* the standard for intervention ultimately will become something akin to "arbitrary and capricious," the standard applied in other contexts where courts review decisions committed to the discretion of a unit of government. Finding a home for children's rights against their parents through analogy from the family to administrative agencies would recognize the family as the unofficial third level of governance in our system, a fitting approach for the current Court. *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 159-60 (1999).

to be and to remain a more or less equal contender with the mother on questions of the child's best interests.[163]

These are also the same rights that Carole and Gerald retained when the Supreme Court let stand California's presumption of Gerald's paternity.[164] In their case however, parental rights were expressly conditioned, by Justice Stevens's concurrence, on Michael's ability to seek visitation based on Victoria's best interests.[165] That resolution is precisely what *Troxel* forbids: a judge overriding the wishes of the legal parents based solely on the judge's assessment of the child's best interests. *Troxel* thus either modifies or contains an exception for *Michael H.*[166]

One could modify *Michael H.* to be consistent with *Troxel* without jettisoning Justice Stevens's opinion in favor of the plurality opinion. The simplest modification would be to raise the standard Michael would have to meet to obtain visitation. Instead of "Michael is entitled to any visitation that is in Victoria's best interests," the standard would be "Michael is entitled to visitation if the lack of visitation would harm Victoria." Michael would thus stand in the same position as the *Troxel* grandparents and all other third parties, with the important caveat that states would be required, not merely permitted, to allow for visitation by non-legal fathers who satisfy the biology-plus-relationship test.[167]

Alternatively, one could leave the resolution of *Michael H.* intact and treat it as an exception to *Troxel.* The rule would be that on questions of custody and visitation, judges cannot override legal parents without a showing of harm to the child, except that they may apply a best interests standard when a man who would otherwise have rights as the child's father is excluded from that status by a marital presumption of paternity.[168]

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163. The ongoing right to make such decisions is the difference between *Caban* and *Quilloin.* Quilloin was given the opportunity to be heard on whether the *adoption* by the mother's husband was in the child's best interest. If it were, Quilloin would be cut off from all future decisions and any right to visitation. 434 U.S. 246, 250-51 (1977). Although *Caban* raised the specific issue of the unwed father's right to block adoption of the child by a step-father, the opinion condemns the gender-based scheme and makes clear that the unwed mother and father should be treated as equal parents for purposes of custody decisions.

164. Michael H. v. Gerald D., 491 U.S. 110 (1988).

165. *Id.* at 133-34 (Stevens, J., concurring).

166. In *Troxel,* Justice Stevens recognized this tension when he relied on the unwed father cases to support the proposition that states can mandate visitation with a non-parent. Troxel v. Granville, 530 U.S. 57, 87-90 (2000).

167. This discussion assumes that Michael could have satisfied the relationship prong of the biology-plus-relationship test, an issue that would have been addressed on remand if Michael had prevailed. *See* Woodhouse, *supra* note 107, at 1864-65.

168. This approach would not preclude the possibility that courts could accord a similar

Either way, *Troxel* highlights the fact that *Michael H.* created a constitutional status that can only be described as that of a quasi-parent: a person not a legal parent who nonetheless has greater rights in a contest with the legal parent than does any other third party. Michael attained that status by being a biological father who (allegedly) established a parenting relationship with his offspring. Whether one thinks the law should preserve or eliminate Michael's quasi-parental status depends in part on what interests one thinks the Court is protecting when it protects parental rights, and what it means to protect those interests equally for men and women.

B. Constitutional Justifications for Parental Rights

Why are parental rights protected as a matter of constitutional law? The biology-plus-relationship test explicitly defines the rights of unwed fathers and implicitly recognizes those of mothers (and, to a lesser extent, those of married fathers). This test accords with the justifications given in earlier cases for protecting parental rights in the first place: protecting emotional bonds between parents and children and ensuring the non-state-controlled distribution of children. In particular, the relationship prong protects emotional bonds while the biology prong serves the political purpose.[169]

1. The Concrete Connection Between Parent and Child

The unwed father cases focused on the caretaking relationship between the father and the child. The Court's concern was the most intuitive reason for protecting parental rights: the concrete, particularized emotional bond between each parent and child, as individuals. The prospect of a child being torn from her parent is the sort of "heart-crushing blow to the pursuit of happiness"[170] that can send even the most conservative judge looking for a constitutional text on which to

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status to other contenders for quasi-parental status, such as birth parents in cases of botched adoptions (*see* Meyer, *supra* note 35, at 813-14 (proposing that the law let the adoption stand but allow for visitation by the birth parents)), and partners of legal parents who become functional parents in the absence of a biological tie. *See* Spitko, *supra* note 9, at 132 (proposing that a caretaker who assumes an explicitly parental role, with the consent of the existing legal parent(s), should be deemed a legal parent).

169. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

170. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 105 (1997) (proposing the quoted language as a test for violation of the Privileges or Immunities Clause); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing parental rights as "long recognized at common law as essential to the orderly pursuit of happiness by free men").

hang reversal.[171] The interest in this emotional bond was poignantly illustrated by the desire of the child in *Quilloin* to be adopted by his stepfather *and* to continue visitation with his biological father.[172] Before the unwed father cases, states operated on the assumption that only women formed such bonds with children. The Court rejected this stereotype and said that men too can form emotional bonds with their children.[173]

The protection of parental rights in *Caban*, however, was triggered by a history of day-to-day caretaking, *not* by a showing of actual emotional attachment.[174] In other words, the biology-plus-relationship test analogized to what, in the Court's eyes, mothers *do*, not what mothers *feel*.[175] The Court did not ask whether Caban changed diapers resentfully or joyfully, only whether he changed them.[176] Parental rights attach because the parent assumes responsibility, not purely as a balm for the heart.[177] This justification for parental rights is thus a *concrete connection* rather than, say, *love*. The Court's decisions in the unwed father cases did not turn on subjective inquiries into the father's (or child's) emotions, but the relationship prong of the test embodies Court's solicitude for their existing bond.[178] Parental rights

171. In *Troxel*, Justice Scalia voiced his objection to the enterprise of substantive due process yet indicated his willingness to find protection for parent-child relationships in the First Amendment's (non-textual) freedom of association. *Troxel*, 530 U.S. 57, 93 n.2 (2000) (Scalia, J., dissenting).

172. Quilloin v. Walcott, 434 U.S. 246, 251 & n.11 (1977).

173. *See* Lehr v. Robertson, 463 U.S. 248, 261 (1983).

174. 441 U.S. 380, 389 (1979).

175. As noted above, the Court has not clarified what would pass as the "bare minimum" for claiming parental rights under the biology-plus-relationship test, but its decisions emphasize daily caretaking responsibilities over more stereotypically male parenting such as giving gifts or providing financial support. Although the absence of financial support was counted against the father in *Quilloin*, money went unmentioned in *Caban*, and the Court was unconcerned by the financial motive for custody in *Stanley*. *Caban*, 441 U.S. 380; *Quilloin*, 434 U.S. 246; Stanley v. Illinois, 405 U.S. 645 (1972).

176. The reference to diapers is illustrative. The children in *Caban* were old enough that diapers did not enter into the discussion. On nurturing as the essence of legal fatherhood, see generally Dowd, *supra* note 107, at 1275. The emphasis on presence rather than on the performance of specified tasks also leaves room for recognizing families with diverse views of gender roles. *See infra* note 183.

177. Protection of this emotional bond can also be explained instrumentally, on the theory that an adult who knows the child well is likely to make good decisions on the child's behalf. *See* Emily Buss, *Allocating Developmental Control Among Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27, 31 (comparing the relative expertise of parents and states with respect to the unique needs of a particular child).

178. The Court's emphasis on the caretaking bond was so strong that it encouraged a flowering of arguments (to date unsuccessful) for recognizing parental rights in non-biologically related caregivers, from foster parents to the romantic partners of biological parents. Although *Troxel* reaffirmed the primacy of the biological parent, it left a wide opening for states to recognize "social parents" when necessary to prevent harm to the child. Troxel v. Granville, 530 U.S. 57, 64 (2000). The Supreme Court is unlikely either to require or to forbid recognition of such parents as a matter of constitutional law.

were earned by conduct that is reasonably assumed to give rise to an emotional bond.[179]

Interests other than emotions may also be protected by honoring a caretaking bond. The best interests of the child may be served by committing her future care to a person with a track record of willingness to provide that care.[180] In the unwed father cases, however, the Court evinced concern primarily for the emotional connection presumed to arise from caretaking. *Caban*, after all, involved no shortage of parents willing and demonstrably able to care for the child.[181] Alternatively, the fact that the parent has labored to rear the child may intensify the sense that the child is the property of the parent. Although notions of property rights may contribute to an adult's sense of entitlement to a child, and thus to the emotional harm of removing the child, a property right in a child seems an unlikely candidate as a *constitutional justification* for parental rights.[182] Moreover, the most traditional conception of the child as property was the father's authority over both his wife and her children, regardless of whether the children were "his" biologically or whether he had assisted in their care.[183] By requiring caretaking, the biology-plus-relationship test

179. The care-based relationship requirement thus serves as a decision rule, or reasonable proxy, for implementing an underlying principle that is much more difficult to measure. Although expert witnesses will always be available to testify about whether a child has "bonded" with a particular adult, it seems preferable to rely on data that are not filtered through the biases of such experts.

180. For cases in which this is not so, *Stanley* made clear that the standard for removing the child is the unfitness of the parent. Stanley v. Illinois, 405 U.S. 645, 649-50 (1972). Initial identification of the legal parent is a distinct question from the termination of parental rights. Avoiding the latter requires only fitness.

181. Caban v. Mohammed, 441 U.S. 380, 384 (1979).

182. In considering what the justifications for parental rights tell us about how to apply existing doctrine to new facts, we should focus on the openly admitted reasons for protecting those rights. Although a critic may point out that the Court's decisions serve other interests, that is an argument either for confessing a different goal than previously stated or for changing the law, not for continuing to develop it in a direction that serves an unacknowledged and illegitimate goal.

183. This model arguably survives in the fact that only unwed fathers have to satisfy the biology-plus-relationship requirement to establish their parental rights. In *Quilloin*, the Court justified this distinction by arguing that it was reasonable to assume that a married father who lived in the same household as the children was involved in their day-to-day care. Quilloin v. Walcott, 434 U.S. 246, 248 (1978). Gary Spitko has reconciled the differing treatment of married and unmarried fathers by theorizing marriage as clear consent by the mother to share parenting with her husband. Spitko, *supra* note 9, at 114. The political theory of parental rights discussed below would offer another justification for this distinction. Suppose for example that a traditionally minded couple marries and has children. The mother does virtually all of the day-to-day caretaking, and the father provides financial support. If he were sufficiently uninvolved with the children, he might arguably fail to meet the biology-plus-relationship test, yet to deny him parental status would amount to declaring that this family form, and its gender-based assignment of roles, was invalid. *Cf.* Appell, *supra* note 91, at 788 ("Stripped to its core components, the parental rights doctrine, with its mixture of biological and social connections, is remarkably

replaces older notions of property in children with a model in which parental rights, even if sometimes experienced as akin to property rights, are defined and justified according to day-to-day caretaking relationships.

The concrete connection protected by the biology-plus-relationship test is also distinct from a related but weaker emotional consideration: a person's abstract desire to be the parent of a child. Some commentators have argued that the right of privacy includes a "right to procreate" that protects this abstract desire.[184] *Skinner v. Oklahoma*, which struck down a statute employing sterilization as a criminal penalty,[185] provides some support for this argument, as does *Eisenstadt v. Baird*, which characterized the right to privacy as including "the decision whether to bear or beget a child."[186]

Claims of a "right to procreate," however, ignore that the privacy cases turned on the nature of the state's interference in procreation, not on an affirmative right to generate offspring. In the contraception and abortion cases, as in *Skinner*, the Court's concern was largely for the violation of physical integrity and private space.[187] In contrast, the "right to procreate" and its reciprocal "right not to procreate" have been invoked to support claims of a right to clone oneself, a right to use genetic material and frozen embryos in a particular fashion, and a right to make an enforceable surrogacy contract.[188] Such claims go well beyond the concerns about involuntary sterilization in *Skinner*.[189] As *Lehr* demonstrates, the Court has not deemed the abstract desire to be a parent, unconnected to a caretaking relationship with a particular child, worthy of constitutional protection.[190]

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flexible and responsive to diverse family formations that both honor and support the role and place of the family in our constitutional system.").

184. *See, e.g.*, ROBERTSON, *supra* note 9, at 24, 178.

185. 316 U.S. 535, 541-42 (1942).

186. 405 U.S. 438, 453 (1972).

187. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973).

188. *See* ROBERTSON, *supra* note 9, at 32-34; Justyn Lezin, Note, *(Mis)conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 203-04 (2003) (discussing the contested status of the "right to procreate" and preconception contractual agreements); *see also* Appell, *supra* note 91, at 742 ("A rather extreme manifestation of an intent-based parent conception is the theory that there is a constitutional right to procreate that requires that the state . . . enforce preconception agreements, over the claims of donors and surrogates.").

189. *See* Rao, *supra* note 9, at 1117 ("There is . . . no constitutional right to buy or sell sperm, eggs, embryos, or gestational services . . . ."); *see also* John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004); Lezin, *supra* note 188 (discussing the contested status of the "right to procreate"). *But see* Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1588-91 (1979) (arguing that the physical burdens of pregnancy are the most important for analyzing a constitutional right to abortion and criticizing *Roe* for emphasizing the "family planning" interest).

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

2. The Political Role of the Family

Although *Skinner* suggests the possibility of some protection for the "right to procreate," the Court decided that case as a matter of equal protection, not liberty; doctrinally, the problem was arbitrary sterilization, not sterilization itself.[191] *Skinner*'s equal protection focus fits comfortably with the second rationale for protecting parental rights: society's interest in using the family as a decentralized, non-state-controlled form of political organization. This less intuitive justification for parental rights featured prominently in *Meyer v. Nebraska*[192] and *Pierce v. Society of Sisters*,[193] which argued that protection of parental rights is linked to the preservation of a democratic, pluralist form of government.

This rationale speaks directly to the requirement that substantive due process rights must be "implicit in the concept of ordered liberty."[194] The first rationale focuses on the privacy of family relationships; the second puts the family in a political context and claims that protection of parental rights is necessary for democracy. In *Meyer* the Court explained the connection:

> In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius [including Plato, whom the Court quotes] their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest.[195]

In *Pierce* the Court summarized, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children."[196] In both cases, the Court treated the family as a micro-culture that must be permitted a say in raising "its own" children to survive and reproduce itself.

The prospect of Spartan boarding schools in this country may seem an idle threat, but an irony of the Court's pronouncements in

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191. Skinner v. Oklahoma, 316 U.S. 535, 538-42 (1972). By deciding *Skinner* on equal protection grounds, the Court avoided direct conflict with *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough."). Although *Buck* is usually treated as if it were no longer good law, *Roe v. Wade*, 410 U.S. 113, 154 (1973), cited *Buck* with approval, to support the proposition that the state has an interest in determining the course of a woman's pregnancy.

192. 262 U.S. 390, 400-01 (1923).

193. 268 U.S. 510, 534-35 (1925).

194. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

195. *Meyer*, 262 U.S. at 402.

196. *Pierce*, 268 U.S. at 535.

Meyer and *Pierce* is that they were written at a time when the United States government was sending American Indians to just such Spartan schools. Continuing until well after World War II, tens of thousands of Native children were removed from their homes and sent to government-controlled boarding schools for the stated purpose of eliminating their culture.[197] The overwhelming, if unfinished, success of this effort demonstrates the importance of the Court's argument, which it deployed to protect the disfavored subcultures in *Meyer* and *Pierce* (Germans and Catholics, respectively).[198] That history has also given us the Indian Child Welfare Act,[199] which requires preference for placing an Indian child for adoption within his or her tribe, the only federal codification of the pluralist justification for parental rights.[200] To a much lesser degree, the specter of Spartan standardization of children hung over the third-party visitation statute in *Troxel*, which transferred authority to decide a child's best interests from the parent to the state.[201]

This political rationale for parental rights starts with the understanding that when a child is born into the world, someone must be given the responsibility and privilege of raising her. This article focuses on the privilege more than the responsibility. Parental rights also serve state interests by imposing responsibility for financial support of the child. Although courts proclaim that custody and visitation are separate matters from financial support and cajole former spouses not to withhold one to obtain the other, they are in truth a legal package. If Jonathan Lehr had been sued for child support, he would not have been able to plead his lack of a caretaking relationship with

197. *See* STEVE HENDRICKS, THE UNQUIET GRAVE: THE FBI AND THE STRUGGLE FOR THE SOUL OF INDIAN COUNTRY (2006) (describing Native American children forced to cut their hair and burn traditional clothes and punished for practicing their religions or speaking their languages). Protection of parental rights is also consistent with the historical origins and purposes of the Fourteenth Amendment. *See* Davis, *supra* note 12, at 1362 (discussing deprivation of parental rights under slavery).

198. For a skeptical investigation of the moral foundation of *Meyer* and *Pierce*, as well as a powerful warning about the dangers of treating a child as "a conduit for the parents' religious expression, cultural identity, and class aspirations," see Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1114 (1992), and *id.* at 1000-01 ("*Meyer* announced a dangerous form of liberty, the right to control another human being."). Woodhouse acknowledges that parents are usually presumed to speak for children but argues that "constitutionalizing this presumption as the parents' 'right' to speak, choose, and live through the child has led to its being too often invoked in situations in which it is, at best, unnecessary or, at worse, oppressive." *Id.* at 1115. Treating the question of cultural transmission not as a right of the parents to express themselves but as society's need for parents to transmit diverse cultures avoids some of those dangers.

199. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, § 105 (1978).

200. Efforts to promote race-matching or religion-matching in adoptions arguably reflect the same concern.

201. Troxel v. Granville, 530 U.S. 57, 63 (2000).

the child as a defense, but once his paternity was adjudicated for support purposes he would have been entitled to seek visitation or custody. Parental rights are thus part of a system that privatizes dependence, placing responsibility for caretaking on the family rather than the state.

This aspect of parental status should not play an important role in the doctrine of parental rights under the Fourteenth Amendment. First, the question of parental rights arises when the state tries to *deny* parental rights to a willing aspirant. Such parents presumably know that the rights they seek come with responsibilities. In light of the state's interest in private support of children, to deny parental rights is perverse. For example, in *Stanley*, the state asserted that its interests were served by denying rights to unwed fathers in part because "'it is necessary to impose upon at least one of the parties legal responsibility for the welfare of [the child], and since necessarily the female is present at the birth of the child and identifiable as the mother,' the State has selected [her]."[202] Regardless of whether assigning responsibility to the mother at birth is "necessary," it makes no sense to refuse the offer of support implicit in the father's bid for recognition as a parent of a child who would otherwise be an orphan.[203] Although the desire to privatize dependence may be an important *reason* why states wish to recognize parental rights, it does not make sense as a *justification* for overriding the state's decision in the name of the Fourteenth Amendment.

Second, feminists generally consider the privatization of dependency a bad thing, and many feminists argue that the state should see itself as substantially more responsible for children.[204] That critique, however, does not call for the elimination of parental rights. Professor Fineman, for example, calls for state support of caretaking units (e.g., parent and child), not the state's assumption of the entire caretaking role.[205] The success of this critical project thus depends on establishing greater separation between parental rights and responsibilities.[206]

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202. Stanley v. Illinois, 405 U.S. 645, 661 n. 1 (1972) (Burger, C.J., dissenting) (quoting Illinois's brief, alteration in original).

203. The facts of *Stanley* present a somewhat poor case for this point: as the dissent pointed out, Stanley may not have intended to take actual physical custody of the children, had previously been adjudicated an unfit parent (of another child), and may have been more interested in control over the welfare money that went with the children. *Id.* Those facts were properly ignored by a Court asked to decide not whether Stanley was a fit parent but whether the state could declare him not to be a parent by fiat and thus remove the children without regard to his fitness. *Id.*

204. *See, e.g.*, Maxine Eichner, *Children, Parents, and the State: Rethinking Relationships in the Child Welfare System*, 12 VA. J. SOC. POL'Y & L. 448 (2004).

205. Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207 (1999).

206. Just as divorced parents link visitation and child support despite judicial

Some separation already exists under Fourteenth Amendment doctrine, which, to date, requires parents to "earn" their parental rights (by gestation and birth, marriage, or biology-plus-relationship) but does not seem to limit the state's ability to impose parenthood on a much lesser showing (often biology *or* relationship).[207]

Because the Fourteenth Amendment is primarily understood as imposing constraints on state action, the polices underlying parental rights doctrine are those policies likely to be threatened by the state. Although the rules of parental responsibility may serve the state's desire to avoid public responsibility (and the child's interest in support, given a stingy state), rules of parental rights serve a different political purpose: protecting the socialization of children from undue state control.

If only the best interests of the child were considered at the time of birth, the state could choose a child's parents from millions of Americans. Doing so would allow the state to standardize its children through legislative and judicial biases: to assign children to parents deemed deserving under criteria chosen by the ruling class. By instead entrusting the child to his or her family of birth, the doctrine that parental rights are rooted in biology reduces the state's role in selecting parents.[208] It also parallels the Fourteenth Amendment's method for assigning national citizenship: if you are born here, you are ours.[209] Under this rationale, constitutional protection of parental rights harnesses the family as a unit of decentralized social organization, serving a political purpose wholly separate from the best interests of either the child or the parent.

How does the biology-plus-relationship test accord with the political justification for parental rights? Of the unwed father cases, only *Stanley* involved the state claiming the right to take charge of the child itself.[210] In that situation, the relationship hurdle may seem unduly high: given a choice between the state and even an uninvolved

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admonishment, see Greg Geisman, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. REV. 568 (1993), the public has usually seen overt support of dependence as licensing greater public control over the parent (including but not limited to her decisions about how to rear the child).

207. *See* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. OF WOMEN & L. 47 (2004).

208. *See* Appell, *supra* note 91, at 710 (noting that biological relationship "is perhaps the clearest, simplest standard that also minimizes the state's role in making individualized decisions" and "promotes diversity by minimizing discriminatory choice that could result in homogenization").

209. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

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

father, the political rationale would favor the father. Perhaps in cases like *Stanley*, the bar should be lowered, but a high relationship bar may serve the political rationale when the father is competing with the mother and with alternative arrangements made by her. If a child establishes relationships within an alternative family form, which may lack a clear analogue to a father, the political perspective would see not the absence of a father but a different kind of family.[211] The biology-plus-relationship test thus serves the political goal first by assuming that the child is automatically attached to a mother chosen by nature and happenstance, not by the state; second by conditioning the father's rights on both parents' decision to parent together;[212] and third by providing the child of an involved father with an alternative to the state in the event the mother is unavailable.

This model of parental rights as a means of political organization depends on the Court's premise that the biological mother automatically accrues parental rights at birth, a premise based entirely on the fact that gestation and birth are the mother's acts. As science loosens biology's control over the site of reproduction, the question arises whether the same underlying constitutional concerns will continue to drive assignment of parental rights or be replaced by other principles, such as those of the market.

Part III evaluates the premise of mothers' rights that was the basis for the biology-plus-relationship test and defends that premise against the accusation that it improperly stereotypes women as loving mothers. It also considers the law's choice among three contending mothers (genetic, gestational, and intended) in light of the policies justifying constitutional protection of parental rights. It concludes that those policies favor recognizing the gestational mother as a parent of the child she bears.

III. WHAT MAKES A WOMAN A MOTHER? ESSENTIALISM AND BIOLOGY

The unwed father cases arose from changing social patterns and the breakdown of the sharp division between men's and women's roles; the legal dilemma over the definition of a mother has arisen from changing technology. Advances in reproductive technology, and

211. The political rationale for parental rights thus supports, or at least does not oppose, the position that "social parents" should receive parental rights when an existing legal parent has voluntarily initiated a parenting relationship between the social parent and the child. *See, e.g.*, Spitko, *supra* note 9.

212. Again, states may be reluctant to allow mothers to defeat the claims of fathers by denying access to the child, but the Supreme Court should not constitutionalize an automatic right of biological fathers to establish their parental rights.

the marketplace that has grown beside them, have led inevitably to litigation over who is the "true mother."[213] Disputes over motherhood arise not only when the gestational mother tries to keep the child despite a surrogacy contract[214] but also when the intended parents renege or a fertility clinic makes a mistake, such as implanting an *in vitro* embryo in the wrong woman.[215] Although the Supreme Court has not yet accepted a case raising the issue of disputed motherhood, for years lower courts have grappled with reproductive technology that no longer allows them to take the identity of the mother as a given.

The emergence of new technology does not mean that courts must reinvent the law of parental status from scratch.[216] The Court's biology-plus-relationship test tracked the first of the two reasons why parental rights are protected.[217] The answer to who is a mother should also be guided by precedent and by the reasons parental rights are protected. Unfortunately, both lower courts and legal commentators

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213. *See* Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who is the Mother*, 16 LAW & INEQ. 289 (1998).

214. *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

215. *See, e.g.*, Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000). *See generally* Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, and Law*, 12 COLUM. J. GENDER & L. 1 (2003); Snyder, *supra* note 213.

In most surrogacy cases, the gestational mother has purported to sign away her parental rights to the intended parents through a surrogacy contract. To avoid characterizing such a contract as baby-selling, which would be illegal, proponents of enforcing the surrogacy contract must define the gestational mother as "not the mother" (a strategy that recalls the state's argument in *Stanley* that it did not have to hold a hearing on Stanley's fitness because he simply was not a parent under state law). Stanley v. Illinois, 405 U.S. 645, 650 (1972). Once that re-definition is accomplished, it becomes the legal definition of maternity and will apply even in cases in which no surrogacy contract exists, since the whole theory of the surrogacy cases is that the gestational "host" *is not* the mother, and the money exchanged pursuant to the contract merely compensates her for services akin to those of babysitter.

Richard Posner's strategy for avoiding the "baby-selling" label is to insist that what is being sold is not the baby but the parent's rights. Since the parent does not "own" the baby, he insists, the baby is not "sold." RICHARD A. POSNER, SEX AND REASON 410, 423 (reprint ed., Harvard University Press 1994) (1992). This distinction fails because any sale of an interest in property is merely a transfer of the rights held by the seller, not a means of conferring absolute dominion. Lesser interests than a fee simple can be bought and sold; animals are considered property, but a person who buys a dog does not thereby acquire the right to abuse it.

216. *See* Garrison, *supra* note 9 (arguing for adaptation of existing precedent rather than starting from scratch in the face of new technology); *see also* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1070 (discussing the non-uniqueness of "law of billboards").

217. The cases overtly protect the father's concrete connection with the child. The father's abstract interest in his offspring is protected incidentally in the course of protecting his concrete relationship and may itself receive some minimal protection under *Lehr*. Lehr v. Robinson, 463 U.S. 248 (1983). *See also* Helms & Spence, *supra* note 74 (suggesting that minimal notice provisions and best interests hearing are required). The interest in protecting child-rearing from state control is relevant only in cases like *Stanley*, where the mother is absent. *Stanley*, 405 U.S. 645.

addressing issues of reproductive technology, especially surrogacy contracts, have largely ignored the doctrinal roots of parental rights.[218] This Part considers how the unwed father cases apply to women and defends the Court's premise in those cases that a mother's parental rights are established by pregnancy and birth. It also argues that this premise is a necessary part of the Court's idea that the family serves a public, political purpose as well as private ends. To reject the Court's premise would undermine the original reasons for giving constitutional protection to parental rights.

A. The Problem of Essentialism

In *Stanley* and *Caban*, the Supreme Court adopted the premise that gestation and birth establish the same kind of relationship between a woman and a child that the Court demanded of the unwed fathers who claimed parental rights. A substantial body of feminist criticism calls that premise essentialist and accuses the Court of stereotyping women as mothers and nurturing caregivers. The opinions in the unwed father cases do reflect gender stereotypes, and the Court at times casts women, post-birth, as inherently nurturing and loving toward their children. Rejecting these stereotypes, however, does not require that we also reject any meaningful difference between biological motherhood and biological fatherhood. Nonetheless, judges and commentators have exhibited a growing belief that recognizing any difference between a mother's and a father's relationship to newborn offspring is inappropriately essentialist.

The fear of stereotyping dominated the opinions in *Nguyen v. INS* and drove the Court to minimize the relevance of biological difference.[219] Tuan Anh Nguyen was the child of an American man and a Vietnamese woman.[220] He was born in Vietnam but raised almost entirely by his father, with whom he lived in the United States from the time he was five years old.[221] At the age of twenty-two, Nguyen pleaded guilty to a felony, and the INS tried to deport him.[222] Nguyen claimed he was entitled to United States citizenship.[223] By federal law, any child of a female citizen can claim citizenship no matter where born, but a child born abroad to an unwed American father

218. This failure is not surprising, as courts typically decide questions of parental rights in family law settings that involve many additional considerations, and courts in that setting are probably most accustomed to deciding cases according to the best interests of the child.

219. 533 U.S. 53 (2001).

220. *Id.* at 57.

221. *Id.*

222. *Id.*

223. *Id.*

can become a United States citizen only if formally acknowledged.[224] Nguyen's problem was that the acknowledgement must occur before the child turns eighteen; he and his father had missed their chance.[225] In their suit, they claimed the law discriminated against male citizens by imposing requirements beyond those required for female citizens to transmit citizenship to their foreign-born children.[226]

The INS argued that this distinction between mothers and fathers served the government's interest in ensuring a meaningful relationship between the child and the citizen parent, and by extension between the child and the United States.[227] A mother, said the INS, has a relationship with her child by the fact of gestation and birth; a father might not even know his child exists.[228] Based on the unwed father cases, which made the same presumption, the INS probably thought it was on solid ground, but the Court, led by Justice Kennedy, was wary of stereotyping women as mothers and declined to endorse the INS's argument. Instead, it upheld the law on the basis of a different governmental interest than the one asserted by the INS: the law ensured an "opportunity" for a meaningful relationship, which the mother satisfied by her necessary "presence at the birth," as opposed to the certainty of her relationship with the child through gestation and birth.[229]

Defending itself against the dissent's accusations of stereotyping, the majority claimed that by not assuming an automatic relationship between mother and child — by holding that the mother was merely present in the same place at the same time as the child and thus *could* have a relationship — it had avoided stereotyping women as caregivers.[230] The additional requirement for a father (that he must acknowledge the child) was needed because he was not necessarily present at birth.[231] Thus was the process of growing a fetus, laboring, and delivering a child reduced to being "present" at the child's arrival, as if children were dropped in their mothers' laps by storks.[232]

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224. *Id.* at 59 (citing 8 U.S.C. § 1409(a)).

225. *Nguyen*, 533 U.S. at 59.

226. *Id.* at 58. The Court had previously granted *certiorari* to resolve this issue in *Miller v. Albright*, 523 U.S. 420 (1998), but concluded in that case that the child lacked standing to assert what the Court perceived to be the right of the citizen parent to pass on citizenship free of discrimination on the basis of his sex.

227. *Nguyen*, 533 U.S. at 65.

228. *Id.* at 79-80.

229. *Id.* at 64-68.

230. *Id.* at 55.

231. *Id.* at 62.

232. *See* DUMBO (Walt Disney Co. 1941) (opening sequence, in which Mrs. Jumbo establishes her relationship with Jumbo Jr., later dubbed Dumbo, after delivery by stork; at no point does the film reference a Mr. Jumbo).

Justice O'Connor's dissent (joined by Justices Souter, Ginsburg, and Breyer) correctly lambasted the majority's new "opportunity" rationale.[233] There was no evidence that this rationale described Congress's actual purpose when it passed the law,[234] and the dissent exposed the law as having arisen out of a "history of sex discrimination in laws governing the transmission of citizenship and with respect to parental responsibilities for children."[235] The dissent also questioned whether the "opportunity" rationale qualified as an "important" governmental interest, as required for intermediate scrutiny.[236]

The dissent also refused to acknowledge any difference between motherhood and fatherhood, even at the time of birth, which is troubling.[237] The dissent's approach suggests that a new mother, like a

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233. Nguyen v. INS, 533 U.S. 53, 85-87 (2001). Largely for the reasons mentioned in this paragraph, my criticism of the *Nguyen* dissent does not necessarily imply that *Nguyen* was correctly decided, only that it is a harder case for feminists than the dissent suggests. Because a parent-child relationship clearly existed, the citizen-father and his child should have been deemed similarly situated to citizen-mothers and their children, triggering intermediate scrutiny. *See* United States v. Virginia, 518 U.S. 515 (1996) (reaffirming heightened scrutiny for sex-based classification). *Nguyen* would then have been the first application of the biology-plus-relationship test outside the context of mere parental identity. In addition, the dissent should have directly confronted the relationship between rights and responsibilities, particularly in light of the majority's rather shocking embrace of the government's claimed interest in protecting itself from citizenship claims brought by the children of U.S. military personnel serving abroad. *See* Silbaugh, *supra* note 15, at 1159 (noting that the *Nguyen* Court failed to see "that the conferral of a right is also the conferral of a responsibility in this citizenship statute"); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222 (2003).

234. The Court's decision in *U.S. v. Virginia*, 518 U.S. 515, 533, 536-40 (1996), had strongly suggested that the government could not justify a sex classification on the basis of state interests first identified for purposes of the litigation.

235. *Nguyen*, 533 U.S. at 91 (O'Connor, J., dissenting).

236. *Id.* at 84-85 (O'Connor, J., dissenting). The government's claim was premised on an actual relationship with the mother creating a concrete tie to the United States, at least an arguably relevant factor in conferring citizenship. It is much harder to say (and the majority did not say) why a person's right to claim U.S. citizenship should depend on whether she had an "opportunity" to form a bond with the nation between birth and her first nap. Almost as mysterious is the majority's reliance on the need to assure that the aspiring citizen is, in fact, the child of a U.S. citizen. *Id.* at 61. Even setting aside the availability of DNA testing, the sex-based classification of mothers and fathers comes into play only once the child reaches adulthood; if a question arises while the child is still a minor, the father can "cure" the problem through formal acknowledgement of paternity. The Court said the mother would be able to call upon "witnesses to the birth" to confirm her parentage of the grown child. *See Nguyen*, 533 U.S. at 62. The likelihood of a mother being able to produce such testimony eighteen years after the fact seems only slightly greater than the likelihood of the father being able to produce witnesses to the conception.

237. For additional criticism of the *Nguyen* majority decision as essentialist, see Caroline Rogus, *Conflating Women's Biological and Sociological Roles — The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803 (2003), and Ashley Moore, *The Child Citizenship Act: Too Little Too Late for Tuan Nguyen*, 9 WM. & MARY J. WOMEN & L. 279 (2003). One effect of refusing to recognize

new father, has only a *potential* relationship with her child and that a new mother, like the unwed fathers in *Stanley* and *Lehr*, might have no parental rights until she takes additional steps to establish a post-birth relationship. The trouble here is that the premise of *Stanley* and *Lehr* was that the mother already *had* a relationship with the child. Despite the flaws of the *Nguyen* majority opinion, it at least echoed the unwed father cases when it described the statutory requirement as a "reasonable substitute" for the mother's opportunity to form a relationship with her child.[238] The majority said that it was sensible for Congress to provide such a substitute "in terms the male can fulfill."[239] The dissent, like the majority, refused to allow nine months of biological caretaking to establish the mother's relationship with the child because it incorrectly perceived that to do so it would have to rely on stereotypes about mothers' feelings or instincts toward their children.[240]

This fear ignores the rationale behind the unwed father cases, which turned on whether the father had acted as a parent toward the child, not whether he did so lovingly or resentfully or whether the children could be proven psychologically dependent on him.[241] Recognizing that a woman who gives birth has acted as a parent is not essentialism. It is even-handed application of a comparable criterion for women and men claiming parental rights. The Court's parenthood test "in terms the male can fulfill" happens to be a test the female can also fulfill. Equal protection requires acknowledging her parental rights at the same point that she meets the criteria that would earn the father his parental rights. Under those criteria — biology plus relationship — a mother's parental rights are fully established at the time of birth. The *Nguyen* dissent's insistence on maternal and paternal equivalence amounts to redefining parenthood based on a male model that denigrates gestation as an aspect of biological motherhood merely because it has no analogue in biological fatherhood.

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this difference is to normalize reproductive technology. For example, one aspiring female lawyer looked forward to the time when she, like a male attorney, could have a child without the hassle of pregnancy. *See* Merry Jean Chan, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186 (2003). If that route to parenthood becomes widely accepted as a first choice rather than a backup, women's grounds for demanding accommodation of pregnancy will be eroded. Current debates over accommodation of breastfeeding illustrate that certain technologies, such as breast pumps and baby formula, have already been normalized. *See* Frances Bizgidi, *Returning to Work While Breastfeeding*, 68 AM. FAM. PHYSICIAN 2199 (2003). Moreover, the belief that pregnancy is the most difficult part of parenting to combine with a career path designed for unencumbered men is strikingly naïve.

238. *Nguyen*, 533 U.S. at 67.

239. *Id.* at 67.

240. *Id.* at 87-90 (O'Connor, J., dissenting).

241. Lehr v. Robertson, 463 U.S. 248 (1983); Stanley v. Illinois, 405 U.S. 645 (1972).

The foregoing argument treats the mother's gestation both as biology and as analogous to the affirmative acts of parenting required for men to establish parental rights under the unwed father cases. In comparison to those affirmative acts, gestation seems passive, and it is possible to endure nine months of pregnancy without taking an affirmative step to promote the welfare of the eventual child. Nonetheless, the analogy holds both because of the origins of the biology-plus-relationship test and because of what the Court actually required of the unwed fathers.

First, recall that the biology-plus-relationship test was *based* on motherhood and *adapted* to fatherhood. The man has to meet this test by an affirmative act since male caretaking is not biologically necessary for the production of offspring, nor are men capable of biological caretaking. To say that the father's caretaking is superior because it is chosen would be to ignore that his choice is whether to make a contribution to what the mother has already done.[242]

Second, as discussed above, the Court did not require the unwed fathers to produce evidence of either a psychological bond with the child or a history of specific caretaking work — such as changing diapers, making dinner, or the like. Justifying the automatic rights of married fathers would have been harder under such a standard. The Court's concern instead seems to have been whether the father was part of the child's everyday life;[243] whether his influence was good or bad would be the concern of fitness and custody proceedings.[244] Regardless of whether a gestational mother takes affirmative steps to enhance the child's welfare, she is, for better or worse, the child's everyday life.[245]

The Court's recognition of the biological mother as the initial constitutional parent thus serves both of the policies reflected in the biology-plus-relationship test: the maintenance of an existing caretaking relationship and the assignment of parental rights by a rule that cannot be systematically controlled by the state. The approach of both *Nguyen* opinions would undermine these policies by disregarding the caretaking relationship of gestation and denying the

242. It also ignores that the mother, too, has a choice, although the option of abortion is not a practically available option for many women. Even for those to whom it is easily available, it is too complex a decision to treat as the legal equivalent of whether to conceive in the first place. *But see* Baker, *supra* note 111 (arguing that a woman's decision to carry to term over objection of biological father should make her solely responsible for child support).

243. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979).

244. *Cf.* Baker, *supra* note 111, at 1564 (discussing how parents transmit values).

245. As with fathers, the question of parental fitness is distinct from the question of initial parental status. A gestational mother can be deemed the child's initial parent but nonetheless have her parental rights terminated on the same terms that would apply to any other parent. *See* Spitko, *supra* note 9, at 108 n.50.

newborn child's membership, by virtue of birth, in the gestational mother's family.

The remainder of this article turns to some of the questions that reproductive technology raises for the status of the gestational mother. Courts facing disputes over technological parenthood should be mindful of the underlying justifications for the constitutional constraints on parental rights, and of the biology-plus-relationship test that reflects those justifications. That means, first, recognizing that genetics are relatively unimportant to the law's ends. The important role of biology in assigning parental rights lies in the role of gestation, which, in addition to likely giving rise to emotional bonds,[246] assigns newborn children to families in a way the state cannot easily control. None of these considerations alone gives a definitive answer to one important question about the law of reproductive technology: the enforceability of surrogacy contracts. They do, however, shed light on some reasons why we should pause before consigning the rights of gestational mothers to the free market.

B. The Role of Genes

Nguyen notwithstanding, a woman who conceives and gestates offspring is plainly a parent for Fourteenth Amendment purposes because she is the biological parent and is presumed to have a relationship with the child.[247] Since she was the prototype for the biology-plus-relationship test, we should not be surprised that she easily passes it. Worth considering more precisely is *how* the female can fulfill this test designed for the male.[248]

First, we know from *Quilloin* and *Lehr* that her parental rights do not derive solely from her genetic parenthood of the child.[249] If

246. For a brief discussion on the development of emotional bonds between gestational mothers and fetuses, see Amy Salisbury, et al., *Maternal-Fetal Attachment*, 289 J. AM. MED. ASS'N. 1701 (2003).

247. Schultz, *supra* note 3, at 390.

248. *See* Nguyen v. INS, 533 U.S. 53, 67 (2001) ("in terms the male can fulfill").

249. Some writers on surrogacy contracts have argued that the traditional recognition of the birth mother is indeterminate in the surrogacy context because, at common law, birth might merely have been a proxy for genes. *See* Hill, *supra* note 6, at 370 (discussing "the ancient dictum *mater est quam [gestatio] demonstrat* (by gestation the mother is demonstrated)"). This argument is anachronistic: the common law did not need to decide whether its rule was "really" about genes or gestation because the two were inseparable. Genetics is a relatively new field, and at least some contributors to the development of any common law rule that may have existed likely shared the belief that the mother was "merely" a vessel for the father's seed. *See* FIELD, *supra* note 9, at 29; she was nonetheless identified as a parent. Indeed, recent research has shown that the "ancient dictum" relied on by Hill and others in fact originated in 1983. Cindy L. Baldassi, Mater est quam gestatio demonstrat: *A Cautionary Tale* (Univ. of British Columbia Faculty of Law Working Paper

genetics were controlling, then genetic fathers would have exactly the same rights as genetic mothers. The Court, however, held that despite the equality of genetics between men and women, how a woman becomes and is a mother is different from how a man becomes and is a father. The parenthood protected by the Constitution, said the Court, must include a caretaking relationship.

It does not follow that a gestational mother who lacks a genetic tie automatically fails the biology prong of the biology-plus-relationship test. Consider again our prototype, the woman who is a genetic parent of the child and who, for nine months, shares diet, digestion, movements, sleep, and a range of other physical and emotional functions with the child. In the unwed father cases, the Court looked to her and saw two important traits, which it translated into terms men could fulfill. It would be ironic indeed to demand that women satisfy this test on the new male terms to establish parental rights.[250] Men satisfy the "biology" prong of the test merely by contributing genes because that is all they *can* do. A father's "relationship" with his child may be motivated by the biological connection, but the relationship develops independent of biology. The mother has no similarly clear dichotomy between "biology" and "relationship." Her initial relationship with the child flows from biology, a biology far more symbiotic than the transmission of DNA.[251] To hold that women fulfill the biology requirement with genes and the relationship requirement with gestation would impose a male model on women, even in applying a test that was originally based on women's experience.

A gestational mother has both a biological connection with the child and the same caretaking relationship as the prototypical mother. She may lack the genetic tie of the prototypical mother, but she has, by virtue of biological connection and nine months of caretaking, as

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Series, 2006), *available at* http://ssrn.com/abstract=927147 (documenting the coining of the Latin phrase and its mistaken attribution to ancient law, and showing how "a maxim designed to elevate gestation to the definition of legal maternity [has been interpreted] as including or even privileging the genetic tie"). Whatever the content or intent of the common law rules, however, the unwed father cases tell us that genes alone are not sufficient for constitutional purposes.

250. *See* Colb, *supra* note 94, at 114 (arguing that even Justice Scalia's plurality opinion in *Michael H.* elevated genetics because it focused on Michael's genetic connection with Victoria rather than on his caretaking relationship).

251. Although this fact should not be determinative, it is interesting to note increasing evidence that traits, including some heritable traits, are determined not just by DNA but also by the uterine environment. Interest in the newly revived field of epigenetics, which studies this kind of inheritance, is displacing scientists' near obsession with the genome as a "blueprint" for a person. *See generally* Alan P. Wolffe & Marjori A. Matzke, *Epigenetics: Regulation Through Repression*, 286 SCIENCE 481-86 (1999) (explaining the basics of epigenetics); NATIONAL HUMAN GENOME RESEARCH INSTITUTE, FROM THE BLUEPRINT TO YOU (2003) (explaining genomes as blueprints), *available at* http://www.genome.gov/12511466 (click on links to access each chapter) (last visited January 13, 2006).

strong a claim to parental rights as a genetic father who establishes a caretaking relationship after birth.[252]

Despite the unwed father cases and their emphasis on caretaking relationships, genetic ties often overwhelm other considerations when courts have to decide who is the "real" mother. This phenomenon shows two ways in which gametes (sperm and ova) have been commodified. First, society and the courts have readily accepted the practice of sperm and egg "donation," although not really a donation because a fee is often paid.[253] This acceptance of the sale of gametes, however, may also promote the view that gametes belong to their producers unless and until they are properly sold, even if they have been turned into a baby in the meantime.[254] Without proper attention to the principles underlying the assignment of parental rights, ownership of gametes may slip too easily into ownership of children based on genetics alone, regardless of relationship.

For example, in the famous *In the Matter of Baby M*, the New Jersey Supreme Court voided the surrogacy contract between the gestational mother, Mary Beth Whitehead, and the intended parents, William and Elizabeth Stern, only because Whitehead was also the genetic mother, not merely the gestator.[255] The contract thus dismissed, the court saw the case as a custody dispute between genetic mother Whitehead and genetic father William Stern.[256] Elizabeth Stern, the intended mother, had no standing in the dispute.[257]

By contrast, when an intended mother gives an egg for another woman to carry, courts often recognize her as the legal mother regardless of other considerations. For example, in *Johnson v. Calvert*, a California court likened the gestational mother to a foster mother.[258] The court granted exclusive parental rights to the intended parents who had provided the egg and sperm for the gestational mother to carry.[259]

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252. Consider too the alternative: if the gestational mother does not have parental rights to the child of a surrogacy arrangement at the time of birth then, at least as far as the Fourteenth Amendment is concerned, no one does. The genetic parents have not yet established a relationship on which to base a claim. In theory, that leaves the state free, at the time of birth, to recognize none of their claims.

253. *See* Elizabeth Kaledin, *Inside the Business of Egg Donation*, CBS NEWS, May 17, 2006, http://www.cbsnews.com/stories/2006/05/17/eveningnews/printable1626874.shtml (last visited Jan. 13, 2006).

254. *See* FIELD, *supra* note 11, at 17-19.

255. 537 A.2d 1227, at 1246 (N.J. 1988).

256. *Id.* at 1255-56.

257. *Id.* at 1241.

258. 851 P.2d 776, 787 (Cal. 1993).

259. *Johnson* involved a surrogacy contract, but the decision seemed to turn on genes. *See* Dalton, *supra* note 122, at 303 ("It is not clear why genetics suddenly became of paramount importance to the courts, especially considering their long history of downplaying

The New York case of *Perry-Rogers v. Fasano* also elevated genetics over other factors.[260] The Perry-Rogerses created embryos through *in vitro* fertilization, but attempts to implant them in Deborah Perry-Rogers were unsuccessful.[261] At least one of their embryos, however, was mistakenly implanted in Donna Fasano, another patient at the same fertility clinic. Fasano, who for nine months believed herself pregnant with twins, gave birth to one boy who was her and her husband's genetic child and another who was the Perry-Rogerses' genetic son.[262] Fasano voluntarily surrendered custody of the second child to the Perry-Rogerses, on condition that they allow her visitation.[263] When they reneged and she sought to enforce that agreement, the court declared that Fasano was a legal stranger to the second child, and that the Perry-Rogerses were his parents.[264]

A genetic relationship has several advantages for determining parenthood that make it attractive to courts. Identifying parents by DNA is easy and can be done at any time.[265] At least for now, testing always results in exactly one female mother and exactly one male father. It is superficially sex-neutral, since the mother and father make equal genetic contributions.[266] For a court in search of a clear rule for identifying parents, the only drawback to genetics is the widespread social acceptance of donating sperm and, increasingly, ova. Those practices, however, can be accommodated by allowing genetic rights to be transferred like any other property.[267] Thus, in the California case *In re Marriage of Buzzanca*, a couple created an embryo using donated genetic material, which was then implanted in another woman for gestation.[268] The court allowed the intended mother to stand in the shoes of the egg donor and be recognized as the legal mother.[269]

The problem arises when the rules of the gamete market are applied to babies already born, as in *Perry-Rogers*. In that context, the

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its importance in favor of other factors . . . .").

260. 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

261. *Id.* at 21.

262. The difference was readily apparent because the Fasanos were black and the Perry-Rogerses were white. *Id.* at 22. It seems likely that the racial difference influenced the court's emphasis on genetics. *See* Bender, *supra* note 215, at 54-76.

263. *Fasano*, 715 N.Y.S.2d at 22.

264. *Id.* at 25, 27.

265. *See* D.H. Kaye, *DNA Paternity Probabilities*, 24 FAM. L.Q. 279, 281 (1990).

266. *Id.* at 283.

267. For discussions of property rights assigned to ova and sperm, see Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997); Bonnie Steinbeck, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57 (1995).

268. 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

269. *Id.* at 291.

genetic approach has several pernicious effects. First, treating DNA as the essence of biological parenthood ignores that biological motherhood consists not just of DNA but also of other biological functions. To thus elevate DNA is to impose the experience of biological fatherhood on biological motherhood. Second, others have chronicled the harm that exaltation of genetics works for families with adoptive, same-sex, or other non-traditional sets of parents.[270]

Third, the genetic preference currently being written into surrogacy law encourages practices that will harm some of the parents and children in those arrangements. Couples interested in hiring a "surrogate" gestational mother are well-advised that their legal claim to the child(ren), should the gestational mother change her mind, will be much stronger if the egg comes from the couple.[271] The law thus gives them an incentive to undergo egg extraction, a prolonged, difficult process culminating in surgery.[272] The resulting eggs are fertilized *in vitro* (with sperm from the couple or a donor), and several embryos are implanted in the gestational mother, often resulting in a risky pregnancy (to her and the babies).[273] Although some people might choose these risks regardless of the law due to a personal belief in the importance of genetics, for the law to promote such activity is perverse, especially when the law itself has consistently downplayed genetics. Despite the compelling *ex post* argument that a woman who has undergone egg extraction has a stronger claim to the resulting child than one who has merely made payments on a surrogacy contract, to distinguish between the two is likely a mistake.[274]

In summary, genes alone are not sufficient for constitutional status as a parent. Gestation is the traditional means of identifying an initial parent, and it satisfies the biology-plus-relationship test. Gestation should thus be sufficient to establish constitutional parental rights. By analogy to gestation, genes plus a relationship are also sufficient. That leaves the question of contract, including a contract

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270. *See* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 325, 329 (2004); *see also* Julie Shapiro, *A Lesbian Centered Critique of "Genetic Parenthood"*, 9 J. GENDER RACE & JUST. 591, 594-608 (2006).

271. *See* In the Matter of Baby M., 537 A.2d 1127 (N.J. 1988).

272. *See* Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 903-04 (2000) (describing the risks involved in egg extraction).

273. Multiple pregnancies can also lead to disputes when the gestational mother refuses the intended parents' demand that she undergo a reductive abortion. Buss, *supra* note 15, at 674 n.89 (citing Tyche Hendricks et al., *More Than They Bargained For: Surrogate Mother Sues Berkeley Couple After Refusing to Abort One of Their Twin Fetuses*, S.F. CHRON., Aug. 11, 2001, at A1).

274. The same is true in cases involving lesbian couples, who in most cases do not need a surrogate gestational mother. One member of the couple may choose to have an egg extracted for the other to carry for personal reasons, but the law should not compel them to take this route to secure their joint parental status.

in which the consideration comprises not only a benefit to the obligor but also a physical and emotional detriment (egg extraction) by the obligee.

C. Family Citizenship

Assigning parental rights to the gestational mother is a more faithful application of the unwed father precedents than assigning parental rights on the basis of genetics. The preference for the gestational mother is grounded in the caretaking she necessarily performs, not on a stereotype that women, but not men, are inherently nurturing. Neither of these conclusions, however, necessarily prevents the gestational mother from waiving her parental rights through contract. This section offers some thoughts on the issue of surrogacy contracts: what effect should the existence of a contract, or other pre-conception arrangement by adults, have on the gestational mother's status as a constitutional parent?

Reproductive technology has made more tenable the idea of disregarding biology to assign parental rights on the basis of "pre-conception intent."[275] "Pre-conception intent" can include, for example, an agreement among a lesbian couple and a sperm donor that makes the two women the "intended parents" of the biological offspring of one of the women and the sperm donor.[276] Intent theory would protect the parental rights of both women if they later disputed custody rather than favoring the biological mother.[277] Intent theory also favors enforcement of surrogacy contracts.[278]

The main practical justification for intent theory is that it protects the "right to procreate": enforcing surrogacy contracts helps infertile couples become parents.[279] It thus protects the abstract longing for a child discussed above. Proponents of the theory also argue that refusing to enforce surrogacy contracts when gestational mothers change their minds is paternalistic and perpetuates stereotypes of women as excessively emotional and flighty.[280] Finally, Marjorie Schultz and others have argued that intent theory and reproductive

275. *See* Schultz, *supra* note 3; Hill, *supra* note 6.

276. *See, e.g.*, Charisma R. v. Kristina S., 44 Cal. Rptr. 3d 332 (Cal. Ct. App. 2006).

277. *But see* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005) (discussing problems with applying intent theory to lesbian couples, including judicial reluctance to extend the intent approach to lesbians and the theory's focus on pre-conception intent rather than agreements arising after birth).

278. *See* Schultz, *supra* note 3, at 352.

279. *Id.*

280. *Id.*

technology are a path to gender neutrality in family law.[281] These issues have been widely debated, and full treatment of them is beyond the scope of this article.[282] What follows are some points that courts should consider when trying to square the law of reproductive technology with the justifications for constitutional protection of parental rights.

First, intent theory elevates the abstract desire of the contracting couple above the concrete connection between the child and the gestational mother, reversing the priorities embodied in existing precedent.[283] It disregards both the biology and the caretaking relationship of pregnancy.[284] The couple's interest in the child appears at least somewhat analogous to Jonathan Lehr's in that it is based on an abstract desire for the child rather than on a relationship with the particular human being that the child is.[285] Yet this analogy also seems unfair in light of the effort and emotion the couple has invested, especially in cases involving egg donation. A great deal of attachment is likely on their side, but none is likely on the child's side. Why the couple's attachment should trump the surrogate's when only the latter's is even possibly shared by the child is unclear.[286]

Enforcement of surrogacy contracts is also in tension with more usual adoption procedures, in which a gestational mother cannot sign a binding release of her parental rights until after the birth.[287] If women should be bound by their contracts and can be expected to refrain from bonding with fetuses who are not "theirs," why are first-trimester adoption agreements not enforceable? The answer is that

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281. *Id.*

282. For broad responses to the points mentioned in the prior paragraph, see Shanley, *supra* note 9, and Garrison, *supra* note 9.

283. *See* Schultz, *supra* note 3, at 322-23.

284. Unlike the political justification for parental rights, the concern for the connection between the parent and child also serves the child's interests. Intent theory disregards the child's interest and privileges a pre-conception decision made by a group of adults, none of whom, at the time, is entitled to speak for the child. *See* Shanley, *supra* note 9, at 621. Although enforcement of surrogacy contracts is often defended as respecting the gestational mother's autonomy, this argument assumes that all she is doing is giving up her own rights, which is not the case: she is also making a decision on behalf of the child. *Id.* The notion that she can do so in advance fits comfortably with a property model that sees newborns as fungible.

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

286. One can argue that the gestational mother will refrain from bonding with the child because she "knows" it is not "hers," but that argument is a function of the legal rule and could as easily (and as unrealistically) be applied to the contracting couple. *See* DAN SAVAGE, THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GET PREGNANT (1999) (describing the need, as a prospective adoptive parent, to remind himself constantly that "birth mothers change their minds," *id.* at 149, and describing the birth mother's tearful relinquishment of the child, *id.* at 214).

287. If anything, U.S. adoption laws are subject to criticism for not allowing enough time for birth mothers to change their minds. *See supra* note 143.

intent theory is more concerned with ownership of the child as a product and tends to vest gender-neutral "authorship"[288] of the child with greater importance than the gendered care provided through gestation.

Second, the intent theory, like the *Nguyen* opinions, may undermine the political justification for parental rights. By suggesting that neither parent has a significant relationship with the child until after birth, *Nguyen* places both parents in the position of unwed fathers like Lehr who have no day-to-day relationship with their children and consequently no parental rights protected by the Constitution. Taken to its logical conclusion, this position would let the state remove a child at birth and assign her to whatever parents the state decides are best. Because one reason for protecting parental rights is to minimize state choice in assigning children to families, at least one person should be recognized as a parent at the time of birth without involving the state in an evaluation of that person's merit as a parent. Recognizing that the mother has a relationship with the child by virtue of gestation and birth satisfies this need.

The immigration context of *Nguyen* highlights this political function of parental rights in assigning a child "citizenship" in a particular family. Like the parental rights doctrine, which assigns a child to the family of her biological origin, the Citizenship Clause of the Fourteenth Amendment assigns a child national citizenship based on her place of birth. Both doctrines, biological parental rights and *jus soli* citizenship, guard against state bias in making the assignment to country or family.

As the *Nguyen* majority noted, the doctrine of *jus soli* citizenship creates a classification on the basis of sex: any female citizen can transmit citizenship to her child by ensuring that she is in the United States for the child's birth, but a male citizen, who cannot control where his child is born, has no constitutional guarantee of his child's citizenship.[289] Although the statute challenged in *Nguyen* was

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288. *See* Chan, *supra* note 237, at 1213-25 (analogizing children to intellectual property).

289. Thus when Congress drafted the naturalization statutes, it began with a constitutional inequality, which it amplified by providing that any child of a female U.S. citizen, *no matter where born*, can claim U.S. citizenship. This provision relieves a woman living abroad of having to return to the U.S. during pregnancy to ensure her child's citizenship. In effect, when a pregnant citizen travels abroad, she takes a little piece of the nation with her.

This discussion is premised on the Court's holding in *Miller v. Albright* that the ability to pass on citizenship is an interest held by the parent, so that, for example, the child seeking citizenship lacked standing to challenge discrimination based on the sex of the parent. Miller v. Albright, 523 U.S. 420, 444-45 (1998). This model of citizenship is a troubling one in light of some of the factual scenarios addressed in the *Nguyen* opinions, particularly the question of citizenship for the children of American servicemen serving abroad. *Id.* at 438-39; *see also* Weinrib, *supra* note 233. The *Nguyen* majority endorsed

more restrictive to fathers than to mothers, so is the Constitution.[290] The *Nguyen* Court was unwilling to demand that Congress make up for either the constitutional inequality or the difference in how men and women are situated at their children's birth.[291] Like the practice of assigning a child to the family into which he or she is born, the Citizenship Clause accepts the circumstances and location of birth as determinative of status. To the extent that parental rights are protected not just as a matter of individual interests but as a matter of political organization, applying the same rule to families makes sense.

In place of this automatic assignment of family "citizenship" based on the child's place of gestation and birth, intent theory offers the free market and its inherent bias in favor of wealth. Although this market is not wholly controlled by the state (indeed, as is increasingly the case with traditional, domestic adoptions, the gestational mother may exercise substantial control in choosing the intended parents) neither is the market necessarily committed to maintaining pluralism or ensuring the transmission of a variety of cultures. A small surrogacy market will not transform us into Plato's republic, but that step toward commodifying children and reproduction is a step away from Fourteenth Amendment values.[292]

None of the foregoing compels the conclusion that the gestational mother has all the parental rights and that the contracting couple has none. The couple's investment is hard to ignore, especially in cases involving egg extraction. States appear to have, and probably should have, substantial leeway within broad constitutional constraints on who may be deemed a parent.[293] Consideration of the justifications

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as a legitimate congressional objective the desire to *avoid* granting citizenship to such a child unless the father voluntarily sought to take responsibility for the child. Nguyen v. INS, 533 U.S. 53, 54 (2001). As the dissent pointed out, Congress's and the majority's model of gender and citizenship is based on stereotypes about responsibility for children born out of wedlock extended to an international scale. *Id.* at 86-87 (O'Connor, J., dissenting). Although this article addresses parental *rights* and argues that the birthright model of citizenship supports a model of birth-based assignment to a family, models of parental *responsibility* might usefully inform reconsideration of a statute consciously designed to promote avoidance of paternal responsibility by denying national responsibility. *See generally* Silbaugh, *supra* note 15 (discussing rights and responsibilities in family law).

290. *Nguyen*, 533 U.S. at 54-55 (2001).

291. *Id.* at 55.

292. In addition, how much the reproductive market will grow if it is legally acceptable and its contracts usually enforced is impossible to say. Surrogacy, for example, could remain a last resort for the infertile, or, if social regularization follows legal regularization, become a matter of personal choice (as is, for example, the choice of breast-feeding versus formula), with resulting effects on career expectations as well as the rationalization and internationalization of the industry. The argument that reproductive technology is a path to gender equality in reproduction points in the direction of surrogacy as a widespread option, not a medical last resort. *See* Schultz, *supra* note 3, at 372-94.

293. *See* Buss, *supra* note 15.

for parental rights and the essential elements of parenting that informed the unwed father cases suggests that the Constitution requires some recognition of parental rights as a consequence of gestational mothering.

CONCLUSION

The Supreme Court's unwed father cases relied on a web of doctrine to give fathers an entitlement to parental rights comparable to the rights of mothers. Analyzed thus, *Stanley* and *Caban* could serve as a model for overruling cases such as *Geduldig*, which relied on biological sex differences to justify discrimination, and as a model for advancing a more flexible approach to equality in cases in which women, rather than men, are disadvantaged by biology. Instead, they are in danger of being rewritten to define constitutionally protected parenthood based on a male baseline. This denigration of maternity is more than a missed opportunity to radicalize the Supreme Court's jurisprudence on sex discrimination: it undermines the overall protection of parental rights and helps commodify reproduction. Even if the Court does not want to extend the same approach to sex discrimination cases, *Stanley* and *Caban*'s approach to equality in parenthood is still worth saving, understanding, and applying to the new dilemmas presented by reproductive technology.