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Constitutional Parentage

Joanna L. Grossman

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INTRODUCTION

Who is a legal parent? Advances in reproductive technology, the emergence of widespread lesbian and gay co-parenting, and the dramatic rise in non-marital childbearing have made it more difficult to determine which adults are legally tied to which children. Yet, sharper differentiation in constitutional terms between parents and non-parents has made the question of legal parentage even more important. It may seem obvious that the oldest of recognized privacy rights—the right of parents to the care, custody, and control of their children—would factor heavily in the determinations of something as important as parent-child relationships. But in the last few decades, during which parentage law has evolved at a breakneck pace, the role of constitutional parental rights has not always stayed front and center. This Article will bring those rights back to the foreground—showing the many ways in which constitutional parental rights haunt or help the development of parentage doctrine, which is as complex as the array of families it governs.

As Justice O'Connor wrote in *Troxel v. Granville*, the "demographic changes of the past century make it difficult to speak of an average American family."[1] It is likewise difficult to speak of a typical parentage rule or a typical role for constitutional parental rights. Although sometimes invisible, constitutional protection for parental rights lurks in *every* determination of parentage. In some situations, those rights are the reason why a state *must* recognize a particular person or a category of people as legal parents. In others, those rights are the reason a person *cannot* be recognized as a parent. And in still others, it is an invisible force that quietly dictates the way parentage law has

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

taken shape or the procedures it employs to determine which adults have the rights and obligations that come with legal parent status.

One might observe that over the course of the last century, constitutional protection for parental rights has grown more robust. But one might also observe that the law of parentage—the set of rules and doctrines that determine who is a legal parent—has expanded to at least potentially recognize a broader array of individuals as legal parents, including individuals such as unwed fathers, lesbian co-parents, intended parents, and sometimes even sperm donors. Yet little attention has been paid to the natural points of conflict between these two developments. When parental status is granted to one adult, the rights of any other legal parent are diluted. That's not necessarily a bad thing. Indeed, the other parent may have been the one to insist on recognition of the second parent. Or the legal parent's sense of exclusivity may not have been warranted in the first instance. But parentage doctrine must square its rules with the constitutional protections to which any adult may legitimately lay claim. Courts, legislatures, advocates, and commentators need to be more explicit—and more careful—about how to account for those constitutional parental rights when determining parentage.

In this Article, I will first chronicle the development of constitutional parental rights from the beginning to the end of the twentieth century. This part will explore the scope and origin of those rights, as well as the central role they played in the development of the broader right to privacy. Second, the Article will consider the initial clash between parental rights and parentage law, which took place in the 1970s and 1980s fight over the rights of illegitimate children and unwed fathers. In that era, the Supreme Court made clear that state parentage laws were constrained by federal constitutional protection for parental rights, a tension that had never before reached the courts. The final section explores four modern contexts in which constitutional parental rights and parentage law are most likely to cross paths—non-marital childbirth, sperm donation, surrogacy, and lesbian co-parenting. In each context, I consider the ways in which constitutional parental rights have—or should have—affected the rules to determine which adults have rights and responsibilities with respect to which children. The influence of constitutional parental rights on parentage determinations is

discernible, but not always explicit, predictable, or a matter of consensus across different jurisdictions. By analyzing the concrete ways in which constitutional challenges have shaped parentage law, I hope to contribute to the development of such a system that does boast those characteristics.

I. THE PROVENANCE OF CONSTITUTIONAL PARENTAL RIGHTS

It is a fundamental tenet of family law that parents are imbued with constitutionally protected rights, an idea cemented by a series of cases in the early twentieth century. This began with *Meyer v. Nebraska*, in 1923, in which the Court invalidated a Nebraska law banning instruction at home or in school in any foreign language before ninth grade.[2] The state did have a right to try to "foster a homogeneous people with American ideals," but it was not strong enough to override the parents' right to have their children learn German.[3] The Due Process Clause protects individual liberty, which "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[4] Nebraska's restriction on foreign-language instruction materially interfered "with the power of parents to control the education of their own."[5] Without any evidence that the mere learning of a foreign language was harmful to children, or that the government had some particular expertise about this matter, the state had exceeded its power. Our system is not, the court noted, the one suggested by Plato, under which "no parent is to know his own child, nor any child his parent."[6] But this approach, though "deliberately approved by men of great genius" was based on "ideas touching the relation between individual and state [that] were wholly different from those upon which our institutions rest."[7] While the ancient Greeks trusted only the state to raise and inculcate ideal citizens, American states trust parents, who operate within a sphere of

2. 262 U.S. 390, 402–03 (1923).
3. *Id.* at 402.
4. *Id.* at 399.
5. *Id.* at 401.
6. *Id.* at 401–02 (quoting Plato's Commonwealth).
7. *Id.* at 402.

personal and family life that is protected from unnecessary governmental intrusion. Only when the child faces imminent risk of harm can the state intervene, which it does primarily through the child abuse and neglect system. Parents were "within the liberty of the [Fourteenth] [A]mendment" when deciding whether to instruct their children in a foreign language.[8]

This balance of power between parents and the state is a delicate one, but the Supreme Court repeatedly reaffirmed that the weight tips heaviest in favor of the parents. The Court's ruling in *Pierce v. Society of Sisters* followed just two years later.[9] Here, the Court invalidated an Oregon law that required children between ages eight and sixteen to attend public school.[10] States could require that children attend school. They could also regulate the schools and even the curriculum. But they could not insist that children be educated only in government-run schools.[11] A child was "not the mere creature of the state," whose education could be standardized without regard for the desires of "those who nurture him and direct his destiny."[12] Parents, the Court wrote, "have the right, coupled with the high duty, to recognize and prepare [children] for additional obligations."[13] That meant that the compulsory *public* education law in Oregon "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[14]

In the final piece of the trilogy, in 1944, the Court ruled in *Prince v. Massachusetts* that a child's guardian—her aunt—*could* be convicted for allowing her niece to sell religious pamphlets on the street in violation of state labor law.[15] Here, it was the child's rights that were invoked, and they were not sufficiently strong to override the state's interest in restricting child labor.[16] The Court reaffirmed the super-parent role of the state, charged with protecting "the welfare of children," but also made clear that power has to be balanced against "the parent's claim to authority

8. *Id.* at 400.
9. 268 U.S. 510 (1925).
10. *Id.* at 534–36.
11. *Id.*
12. *Id.* at 535.
13. *Id.*
14. *Id.* at 534–35.
15. 321 U.S. 158, 163 (1944).
16. *Id.*

in her own household and in the rearing of her children."[17] Citing *Meyer* and *Pierce*, the Court now pronounced it "cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[18] In this particular case, the Court found the state's interest to outweigh the guardian's; "child employment" is among those "evils" most likely to justify state intervention.[19]

Those early cases stood not only for robust parental rights, but also as the foundation upon which a broad right of privacy would develop. As the Court wrote in *Moore v. City of East Cleveland*, a case in which it recognized the right to live with extended family, "A host of cases, tracing their lineage to *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, have consistently acknowledged a 'private realm of family life which the state cannot enter.'"[20] The Court returned to the scope of constitutionally protected parental rights in 2000, in *Troxel v. Granville*.[21] There, a plurality of the U.S. Supreme Court wrote with a broad brush when it sharply limited the rights of non-parents to seek visitation with children over the objection of a fit parent.[22]

In *Troxel*, the Supreme Court considered the constitutionality of a Washington state statute that permitted "any person" to petition for visitation with a child and permitted courts to grant such petitions as long as it was in the best interests of the child.[23] The trial court had granted substantial visitation to the paternal grandparents of two girls over the objection of their mother. The girls' parents, Tommie Granville and Brad Troxel, had never married, but had cohabited and raised the children together during the early part of the children's lives. The couple broke up in 1991, and Brad committed suicide in 1993. But for the two years in between, Brad lived with his parents and usually brought the girls to their house for his visitation weekends. After

17. *Id.* at 165.
18. *Id.* at 166.
19. *Id.* at 168.
20. 431 U.S. 494, 499 (1977) (citing cases about the right to marry, the right to avoid involuntary sterilization, the right to contraception and abortion, and the right to raise children).
21. 530 U.S. 57 (2000).
22. *Id.* at 61–63.
23. WASH. REV. CODE §§ 26.09.240, 26.10.160(3) (1994).

Brad's death, the Troxels sought to maintain substantial visitation with their granddaughters—a schedule that was more akin to that of a non-custodial parent than a grandparent. Tommie consented to some visitation, but Brad's parents sued for more, which the trial court gave them.[24] At the Supreme Court, a plurality of the Justices agreed with Tommie that Washington state's third-party visitation law was unconstitutional as applied to her. The *Troxel* plurality began by noting that the "liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[25] In the *Meyer*/*Pierce*/*Prince* trilogy, the Court had affirmed "that there is a constitutional dimension to the right of parents to direct the upbringing of their children."[26] The right to raise one's children is "essential"[27] and "far more precious than any property right."[28] And in later cases, the Court had recognized specific instances in which parents might exercise those parental rights—and the limits placed on those rights.[29] These rights are not absolute, and the state can temporarily or permanently override these rights when parents are proven unfit by clear and convincing evidence.[30] A fit parent, however, must be presumed to be acting "in the best interests of their children."[31] The "natural bonds of affection"[32] lead parents to act in just that way—leaving "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[33]

24. *Troxel*, 530 U.S. at 71.

25. *Id.* at 65.

26. *Id.*

27. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

28. Santosky v. Kramer, 455 U.S. 745, 758–59 (1982).

29. *See, e.g.*, *id.* at 745 (right of procedural due process before involuntary termination of parental rights); Parham v. J.R., 442 U.S. 584 (1979) (right of a child not to be admitted to mental institution by parents without review by independent authority); Wisconsin v. Yoder, 406 U.S. 205 (1972) (right of Amish parents to cease formal education for their children after the eighth grade); *Stanley*, 405 U.S. at 645 (right of unwed fathers not to be categorically disregarded as parents).

30. Troxel v. Granville, 530 U.S. 57, 68–69; *Stanley*, 405 U.S. at 651.

31. *Troxel*, 530 U.S. at 68; *cf. In re* Ta. L., 149 A.3d 1060, 1084 (D.C. 2016) (parents whose rights are still intact are entitled to have their preference for adoptive parents to be given great weight).

32. *Troxel*, 530 U.S at 68 (citing *Parham*, 442 U.S. at 602).

33. *Id.* at 68–69.

Encompassed within the right of "care, custody, and control" is the right to exclude. Just as parents have the right to decide where and how to educate their children, they have a right to decide in ordinary circumstances whether their children will have contact with other adults.[34] But even fit parents do not have absolute power over their children or the relationships they are allowed to have with third parties. The balance between the rights of the parent who objects to continuing contact and those of the child and/or the third party is delicate, but, according to the Court in *Troxel*, must be clearly weighted in favor of the parent. As the plurality wrote in *Troxel*, the "problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests."[35] In the words of the plurality, a court must give "special weight" to a parent's every decision, including one to deny visitation to a child's grandparents, and the burden must lie with the non-parent rather than the parent.[36] The Washington statute, by relying solely on the "best interests of the child," without evidence of unfitness or even special circumstances, left too much room for courts to trammel the rights of fit parents. As applied to Tommie Granville's decision to restrict visitation with her daughters' paternal grandparents, the trial court constitutionally overstepped.

Third parties, especially grandparents, can still sometimes win the right to visitation with someone else's child, but the circumstances in which such a right will be acknowledged have narrowed.[37] What drives these cases, and the statutes that underlie them, is the clear delineation between parent and non-parent. The third party seeking visitation typically does not claim to be a *parent*; thus, the constitutional hierarchy is clear. But what about someone who does claim to be a parent? The law's conception of any individual's parental status must account for the biological

34. *Id.* at 72 (awarding visitation to the children's paternal grandparents "was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters").

35. *Id.* at 69.

36. *Id.* (finding fault with the trial court's presumption that visitation was appropriate and forcing the mother to prove otherwise).

37. After *Troxel*, courts in many states faced challenges to their own third-party visitation laws. Some survived; some fell. *Compare* Harrold v. Collier, 836 N.E.2d 1165 (Ohio 2005) (upholding third-party visitation statute), *and In re* Harris, 96 P.3d 141 (Cal. 2004) (same), *and* Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002) (same) *with* Santi v. Santi, 633 N.W.2d 312 (Iowa 2001) (invalidating third-party visitation statute).

mother's parental rights. It does this, explicitly or implicitly, in different ways depending on the context.

II. THE INTERSECTION BETWEEN PARENTAL RIGHTS AND PARENTAL STATUS

There can be no question after this clear and unambiguous line of cases that fit parents have constitutionally protected parental rights. But which adults qualify as parents who possess *Meyer/Pierce/Troxel*-type rights? That question has driven decades of litigation over parentage—who is a legal parent—in a wide variety of contexts. This section will explore the period in history when the Supreme Court first confronted the potential conflict between parental rights and parental status—and produced an array of opinions that set the parameters for many of the cases that have since followed.

The most powerful rights-holder is the biological mother. Outside of an enforceable surrogacy arrangement, the act of giving birth almost always gives rise to legal motherhood.[38] Unlike those of biological fathers, her rights cannot be undercut by her failure to act as a parent once the child is born (unmarried biological fathers) or by disproving the alleged genetic tie to the child (husbands without a biological tie to wives' offspring). A woman who gives birth is a mother unless and until her rights are surrendered or involuntarily terminated due to abuse or neglect. Her rights are broad and, indisputably, include the right to "care, control, and custody" of her child. This includes, as a general matter, the right to decide with whom her child might develop relationships.

Every child is given birth to by a mother. But when are that mother's rights exclusive and when are they shared? Before *Troxel*, but many decades after the establishment of constitutional protection for parental rights, the Supreme Court grappled with the first conflict between parental rights and parentage law. For most of American history, unwed fathers were not considered the legal parents of their offspring. Identifying fathers as a source of support, through civil and criminal bastardy laws, came many

38. *See, e.g*, D.C. CODE § 16-909 (2017); OHIO REV. CODE ANN. § 3111.97(A) (West 2017); WASH. REV. CODE § 26.26.735 (2017); UNIF. PARENTAGE ACT § 201(a) (UNIF. LAW COMM'N 2002) ("The mother-child relationship is established between a woman and a child by . . . the woman's having given birth to the child" unless otherwise provided in a rule permitting enforceable surrogacy agreements).

decades before any push to identify them because they might have rights.[39] States typically bifurcated paternal status, leaving some men with obligations but not rights, and others with both. This system was the subject of several challenges in the 1970s, beginning with *Stanley v. Illinois*, in which the Supreme Court considered whether Illinois had run afoul of the Due Process Clause by categorically excluding unwed fathers from the definition of "parent."[40]

Although parental rights were entrenched in constitutional privacy jurisprudence long before most other rights, the Court had never once been asked, until *Stanley*, whether they applied to unwed fathers. The question may not have arisen because the illegitimacy rate remained very low until the 1970s, estimated at only 1.8% in 1915; and only 3% in 1940.[41] And many of those births were concealed from the father as well as the public, thus reducing the practical opportunities for men to assert claims to their out-of-wedlock children. A discernible trend towards non-marital childbearing took hold in the 1970s, and the percentage of all children born to unmarried mothers reached 22% by 1985, 32% by 1994, and plateaued around 40% in the 2010s, coming down from a peak of 43% in 2007.[42]

There is no one explanation for this meteoric rise in non-marital childbearing, but the second half of the twentieth century bore witness to the systematic dismantling of a system that had tried to confine all legitimate sex to marriage—and to ignore or criminalize the consequences when it took place in any other context. The developing right of privacy gave individuals control over contraception and abortion, and the Supreme Court explicitly extended such rights to unmarried couples.[43] Non-

39. 4 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 5 (1936).

40. 405 U.S. 645 (1972).

41. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 96 (1994); Stephanie J. Ventura, *Nonmarital Childbearing in the United States, 1940–99*, 48 NAT'L VITAL STAT. REP., no. 16, 2000.

42. *See* Ventura, *supra* note 41, at 17, tbl. 1; Brady E. Hamilton et al., *Births: Preliminary Data for 2015*, 65 NAT'L VITAL STAT. REP., no. 3, 2016, at 3–4, 10, tbl. 4.

43. *See* Roe v. Wade, 410 U.S. 113 (1973) (right to terminate pregnancy before a certain point); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of access to contraception for single adults); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of access to contraception for married couples).

marital cohabitation began to rise,[44] and, eventually, states caught up to their residents by decriminalizing cohabitation and establishing the possibility of property-sharing rights between cohabitants.[45] The stigma on unwed mothers precipitously declined.[46] Legislators and courts continued to favor and promote sex and reproduction within marriage, but the practice of ignoring all other family forms began to subside.

Illegitimate children struck the first blow to the traditional system. States reflexively drew stark and often harsh distinctions between children born to married and unmarried parents. Within a few years, the Supreme Court would strike down a number of these laws and establish that classifications on the basis of illegitimacy were entitled to heightened scrutiny under the Equal Protection Clause.[47] Despite the fact that states had gone to some lengths to penalize mothers for non-marital childbearing, neither legislatures nor courts seemed to question the existence of the legal mother-child relationship. The question was whether the state could allocate benefits differently on the basis of illegitimacy, not whether the woman was any less a mother because of the child's status. After the Supreme Court was done dismantling the traditional system, it was clear that mothers had the same legal relationship to their non-marital children as to their marital children. This queued up a quite natural question: why was this not true for fathers, too?

The Supreme Court tackled the questions surrounding the treatment of unwed fathers, beginning in 1972 with *Stanley v. Illinois*.[48] Peter Stanley had lived intermittently with Joan Stanley and their three children. But when she died, the children were declared wards of the state, since, under Illinois law, they had no

44. *See* Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615, 621 (1989).

45. On these developments, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 124–141 (2011).

46. *See generally* ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006) (chronicling the strong social and family pressure for unwed women to give up children before adoption).

47. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Glona v. Am. Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

48. 405 U.S. 645 (1972).

surviving legal parent.[49] He argued that the Illinois law that treated him as a stranger rather than a father violated the Equal Protection Clause. The Court was asked, in effect, whether constitutional parental rights include the right to be recognized as a parent in the first instance.

The Court dealt first with the suggestion that states could simply refuse recognition to unwed fathers because of a preference for the traditional family. Such a suggestion was undermined by the Court's recent decisions in the illegitimacy cases, however.[50] As the Court observed, the state does not have unfettered discretion to draw the "'legal' lines [of parenthood] as it chooses."[51] The scope of those limits has driven, if sometimes only implicitly, the development of parentage law over almost half a century.

With respect to unwed fathers, the Court concluded that Illinois had drawn with too broad and harsh a brush. The categorical rule of non-recognition actually undermined the state's identified interests.[52] Illinois aimed to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible."[53] Yet, the law allowed children to be cut off from custodial, biological fathers (Stanley, e.g.) based solely on marital status. "[T]he State registers no gain towards its declared goals," the Court wrote, "when it separates children from the custody of fit parents." "Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."[54] The Court was not optimistic that many unwed fathers would make the grade—it may be that "most unmarried fathers are unsuitable and neglectful parents"—but at least a select few are "wholly suited to have custody of their

49. *Id.* at 646.

50. *Id.* at 652 (internal citations omitted) (noting prior cases holding that "children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit").

51. *Id.* (citing *Glona*, 391 U.S. at 73).

52. *Id.*

53. *Id.*

54. *Id.* at 652–53.

children."[55] Peter Stanley, in the Court's view, was entitled to an opportunity to make his case as a father deserving of custody.[56]

The parentage questions that have occupied courts in recent decades stem from the tension the Supreme Court first identified in *Stanley* between parentage laws that are typically left to state legislatures, on the one hand, and federal constitutional protection for parental rights, on the other.

III. CONSTITUTIONAL PARENTAGE IN THE NON-TRADITIONAL FAMILY

Parentage law has been challenged by each move away from the traditional family composed of married heterosexual spouses who conceive and raise children with biological ties to both of them. With each move—from marital to non-marital, from biological to functional parenting, and from heterosexual to homosexual adult relationships—courts have had to grapple with the indicia of parentage. Biology, marriage, intent, function, and contract have all emerged as possible bases on which to recognize legal parentage, but, in any given case, those factors can be in tension or even completely at odds with one another. This section will consider the development of parentage law in different contexts as it relates to constitutional protection for parental rights.

A. UNWED FATHERS

Stanley started the conversation about the constitutional parental rights of unwed fathers, but it took several additional cases to work out their contours. The Supreme Court revisited the parental rights of unwed fathers several times, asking *which* unwed fathers had the right to be treated like parents, with the constitutional right of "care, custody, and control" that came with the status. The Court continued to insist that unwed fatherhood not be categorically ignored, but began to hammer out the degree to which states could still differentiate between the parental rights of unwed mothers and those of unwed fathers. In *Quilloin v. Walcott*, the Court upheld a provision of the Georgia code that denied an unwed father the right to veto a proposed adoption.[57]

55. *Id.* at 654.
56. *Id.*
57. 434 U.S. 246, 255–56 (1978).

Georgia provided a mechanism for legitimation, but the father had not used it. Without legitimation, the Supreme Court wrote, "the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, including the power to veto adoption of the child."[58] Adoption by the child's stepfather was approved over the objection of the child's biological father. This stark differentiation between unwed mothers and unwed fathers seemed to violate the principles elucidated in *Stanley* just six years earlier, but the Court saw more substantial "countervailing interests" in this case.[59] In *Stanley*, the choice was between the children's remaining with their custodial, biological father or becoming wards of the state.[60] His interest was "cognizable and substantial," while the state's interest in caring for children with a fit parent was "de minimis."[61] But here, the Court found the countervailing interest in cementing an existing, stable family unit, consisting of mother, child, and stepfather, was more substantial.

In two later cases, the Supreme Court would further outline unwed fathers' rights, sticking to the robust version suggested in *Stanley*. In *Caban v. Mohammed*, the Court invalidated a provision of New York law that gave unmarried mothers the exclusive right to consent to, or veto, the adoption of a child.[62] Abdiel Caban had fathered two children while living with their mother; he refused to consent when the mother married someone else and sought a stepparent adoption.[63] The Court rejected New York's defense that "a natural mother" usually has a "closer relationship with her child . . . than a father does" and insisted that unwed mothers and fathers be treated equally.[64] Moreover, Caban had a much stronger claim as a social father than did the man in *Quilloin*. The Court left open the question whether unwed fathers would have the same equal claim to infants, with whom they had not yet developed a social or emotional relationship. Just four years later, though, the Court said no.

In *Lehr v. Robertson*, the Court held that unwed fathers—unlike unwed mothers—were not entitled automatically to full

58. *Id.* at 249.
59. *Id.* at 247–48.
60. *Stanley*, 405 U.S. at 658–59.
61. *Id.* at 651–52, 657–58.
62. 441 U.S. 380, 394 (1979).
63. *Id.* at 382.
64. *Id.* at 388–89.

parental rights.[65] Women became full parents by giving birth, but men had to assert paternity and take advantage of the opportunity to develop an attachment with their biological children.[66] This case involved an eight-month-old infant, born out of wedlock, who was adopted by her stepfather. Her biological father, Jonathan Lehr, objected that he did not receive notice or the chance to object. Like many other states, New York maintained a "putative father registry," which gives unwed fathers the chance to notify the state of their intention to assert paternity over a child—or a potential child.[67] Jonathan had neither registered, nor satisfied any other criteria to receive notice of his child's adoption.[68] He argued that a putative father's "actual or potential relationship" with his child was a "liberty" protected by the Constitution, and that the differential treatment of unwed mothers and fathers was an equal protection violation.[69] The Supreme Court disagreed, ruling that Jonathan's biological tie to Jessica was not enough to justify full constitutional protection of his parental rights.[70] The Court distinguished between a "developed parent-child relationship," and a potential one. The biological tie offers the natural father a unique opportunity to "develop a relationship" with the child, and if he "grasps that opportunity," and accepts some "responsibility for the child's future," he may "enjoy the blessings of the parent-child relationship."[71] But if not, the Constitution will not "automatically compel a state to listen to his opinion of where the child's best interests lie."[72]

The unwed father cases both reinforced and fueled a shift in the conception of the non-marital family. Marriage and parentage became less entangled, and courts and legislatures began to rethink the parameters of parent-child relationships. The recognition of constitutional parental rights for fathers forced states to abandon their old systems, which gave little or no protection to unwed fathers, and replace them with statutory schemes that balanced fathers' rights with the desire to facilitate

65. 463 U.S. 248, 262 (1983).
66. *Id.* at 250–52.
67. *See, e.g.*, N.Y. SOC. SERV. LAW § 372-c (McKinney 2017).
68. *Lehr*, 463 U.S. at 251–52.
69. *Id.* at 255.
70. *Id.* at 262.
71. *Id.*
72. *Id.*

adoption where the mother sought it. The result was statutes that treat men as legal fathers only if they meet one of several criteria.[73] This represented a shift away from marital status as a proxy for biological fatherhood and towards recognition of emerging as well as full-fledged father-child relationships, paving the way for many of the analogies urged and drawn in more complex family situations.

In this long-running conflict over the treatment of unwed fathers, states struggled to maintain a system that did not impede adoption placements but was also sufficiently protective of the constitutional parental rights of unwed fathers. The genetic tie gives rise to a constitutional right to parent, which, in turn, sets the parameters for state parentage law. States cannot define parentage in a way that excludes men who grasped the opportunity to parent and earned constitutional parental rights. As we will see, some other conflicts between parental rights and parental status are harder to resolve because state parentage law often seeks to expand the parental status of a person without a constitutional claim to parental rights. That doesn't prevent the state from acting, as a matter of policy, but it raises the possibility of intruding on the rights of an existing parent.

B. SPERM DONORS

In what ways do constitutional parental rights intersect with the law of sperm donors? In this context, states have been relatively aggressive about codifying parentage rules, in the hopes of creating certainty and predictability in a setting that, by definition, requires advance planning. But in their haste, many legislatures failed to account for the potential constitutional rights of men who might inadvertently have parental rights severed despite intending to retain them—or for the rights of mothers, whose desire to exclude the donor as a parent may be material to her willingness to conceive with donor sperm and reflect a life choice that deserves respect. These rights have arisen in litigation from both sides, forcing courts to grapple with the tension the legislatures ignored.

States still vary significantly in their treatment of parentage in the context of sperm donation. Three-quarters of the states have a statute that applies a rule of non-paternity in at least some

73. *See, e.g.*, UNIF. PARENTAGE ACT § 204 (amended 2002), 9B U.L.A. 22–23 (2017).

situations. They vary in scope, although none apply to conceptions achieved through sexual intercourse. These statutes are all modeled on the presumption that a sperm "donor" is someone who provides sperm to a woman without the intent to parent any resulting child, and that she accepts the sperm without the intent to share parenting (at least not with the donor). What courts have added to this formula is that a donor who provides sperm with the intent to parent—and the mother accepted it on those terms—may be entitled, constitutionally, to be treated like other unwed fathers.

The parentage question only arises with known donors. Most state sperm donor laws do not differentiate between known and unknown sperm donors on their face. And courts have tended to rule that non-paternity rules are not limited to anonymous donors. In other words, known donors can be precluded from establishing paternity even if there was a prior sexual relationship between the donor and the mother.[74] Moreover, sperm donor statutes do not lend themselves to judicial discretion. They provide bright-line rules about when the non-paternity rule should be applied, and courts have tended to give them that effect. That is why William Marotta, who donated free sperm to a lesbian couple who found him on Craigslist, was deemed a legal father even though they had entered into a written agreement providing otherwise.[75] Because the sperm donation was not done through a licensed physician, the Kansas non-paternity law did not apply. He is the legal father of the child and is obligated to provide support.

The strict application of non-paternity rules invites constitutional challenges by some men who believe they have been misclassified as donors rather than dads. While no court has ever found a non-paternity rule to violate equal protection principles—the law supports at least modest distinctions between unwed mothers and unwed fathers based on the different biological roles in reproduction[76]—some courts have concluded,

74. *See* Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 392, 394 (1986); Steven S. v. Deborah D., 127 Cal. App. 4th 319, 325 (2005); *In re* R.C., 775 P.2d 27, 35 (Colo. 1989); A.A.B. v. B.O.C., 112 So. 3d 761, 763–64 (Fla. Ct. App. 2013); Lamaritata v. Lucas, 823 So. 2d 316, 318–19 (Fla. Ct. App. 2002); McIntyre v. Crouch, 780 P.2d 239, 242–44 (Or. Ct. App. 1989).

75. State v. W.M., No. 12D2686, Kan. Dist. Ct. (Jan. 22, 2014).

76. *See, e.g.*, *In re* K.M.H., 169 P.3d 1025, 1039 (Kan. 2007); *McIntyre*, 780 P.2d at 244–45; L.F. v. Breit, 736 S.E.2d 711, 721 (Va. 2013).

or suggested in dicta, that a non-paternity rule might run afoul of substantive due process principles if applied to a known donor where he and the mother had clearly reached a pre-insemination agreement about joint parenting. To avoid constitutional problems, some courts have found that the non-paternity rule does not apply where the mother and donor clearly intended that the donor would be a father. In *In re R.C.*, for example, the Colorado Supreme Court concluded that when

> the unmarried recipient and the known donor at the time of insemination agree that the donor will be the natural father and act accordingly based on an express understanding that he will be treated as the father of any child so conceived, we concur with commentators, as well as [other] courts, that agreement and subsequent conduct are relevant to preserving the donor's parental rights despite the existence of the statute.[77]

The case was remanded for a determination whether the mother and donor had agreed *at the time of insemination* that the donor would be the father of any resulting child. "If no such agreement was present at the time of insemination, then [the non-paternity rule] operates to extinguish [the donor's] parental rights and duties . . . ."[78]

In some cases, the clash between the statute and the constitution is unavoidable. Known donors have launched due process challenges when they have clear evidence of a mutual agreement to share parenting rights and responsibilities but are nonetheless barred from establishing paternity. These cases revolve around *Lehr v. Robertson*[79] and the notion that unwed biological fathers cannot be deprived of parental rights unless they have failed to grasp the opportunity for a parent-child relationship. In *In re K.M.H.*, for example, the Kansas Supreme Court considered the claim of a known donor, a friend of the mother, for parental rights.[80] He claimed they had orally agreed

77. *In re* R.C., 775 P.2d 27, 35 (Colo. 1989).

78. *Id.*; *see also* C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. Com. Pleas 1994) (holding that, in order to avoid constitutional questions, the non-paternity rule does not apply where a woman solicits a known donor and the parties agreed that the donor would have a relationship with the child); D.M.T. v. T.M.H., 129 So. 3d 320, 334-41 (Fla. 2013) (holding the egg donor law of non-maternity would be unconstitutional as applied to a woman who provided the egg for a child carried by her partner with the intent to co-parent).

79. 463 U.S. 248, 262 (1983).

80. 169 P.3d at 1029.

that he would have a relationship with any child resulting from the insemination, but Kansas law applies a rule of non-paternity unless the donor and mother agreed otherwise in writing. The donor claimed that the statute was unconstitutional as applied to him because it recognized only written agreements regarding parental status and not oral ones. The court read *Lehr* to prevent a state from absolutely barring a biological parent from asserting parental rights, but distinguished the Kansas statute because of the opt-out provision. "Even a sperm donor with no relationship to a child's mother can forge and protect his parental rights by insisting on a written agreement."[81] The court rejected the donor's argument that the opt-out clause was too narrow because only written expressions of intent mattered, noting that a primary purpose of the parentage act was "to prevent the creation of parental status where it is not desired or expected."[82]

Sperm donor laws that do not permit an intended father to opt out of a rule of non-paternity may be unconstitutional. In *L.F. v. Breit*, the Virginia Supreme Court considered the claim of a known donor who *had* entered into a pre-insemination written agreement (and a voluntary acknowledgment of paternity executed by both biological parents after birth), but in a jurisdiction with no opt-out provision in the non-paternity rule.[83] The court concluded that the non-paternity rule nonetheless did not apply where "the biological mother and sperm donor were known to each other, lived together as a couple, jointly assumed rights and responsibilities, and voluntarily executed a statutorily prescribed acknowledgment of paternity."[84] The court suggested in dicta that the statute would have been unconstitutional as applied to the donor on due process grounds.

The existing cases on the constitutional aspects of sperm donation have virtually all focused on the donor's potential rights and whether his classification as a donor runs afoul of *his* parental rights. But these cases also potentially implicate the parental rights of the mother. If her rights include the right to exclude, then those cannot be diluted by recognition of the donor as a father unless she, too, intended that result at the time of insemination. Conception through sex gives both genetic parents the right to

81. *Id.* at 1040.
82. *Id.* at 1041.
83. 736 S.E.2d 711 (Va. 2013).
84. *Id.* at 720.

become parents, but when a woman relies on artificial insemination, and the donor is subject to a non-paternity rule, the child comes into this world with only one legal parent—the mother. Elevating the status of the donor can only be done consistently with her rights, perhaps on a theory of consent as discussed below for de facto parentage.[85]

C. SURROGACY

An increasingly popular type of family creation, surrogacy involves an agreement that one woman will conceive and carry a child for someone else to raise.[86] In its traditional form, a woman conceived a child using her own egg and sperm from the husband of an infertile woman. In its modern form, the surrogate contributes no genetic material; *in vitro fertilization* is used to implant an embryo. The legal questions about surrogacy arise out of governing contracts that purport to assign parentage to someone other than the person designated by the traditional rules. Can parentage be relinquished—and assumed—prior to the birth of a child? Can one parent who contributes genetic material to the conception agree to share parentage with a partner who did not? After birth, the substitution of one set of legal parents for another would be governed by adoption law, with rules about the revocability of consent, screening of the adoptive parent, and so on. But surrogacy arrangements rely on the enforceability of the pre-conception agreement, without which the child would never have been brought into the world, and its ability to bind every party. Although constitutional parental rights are rarely mentioned in the context of surrogacy, they underlie the entire arrangement.

The well-known *Baby M.* case brought the emerging issue of surrogacy into the public consciousness.[87] There, a traditional surrogate, who had been paid $10,000 to conceive and gestate a child for another couple, refused to honor the agreement. The

85. *See* Jason P. v. Danielle S., 226 Cal. App. 4th 167, 176 (2014) (holding that the non-paternity rule precludes "a sperm donor from establishing paternity based upon his biological connection to the child").

86. Amy Garrity, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain—A Proposed Model Statute for Louisiana*, 60 LA. L. REV. 809, 809 (2000).

87. For a history of this case and its role in the surrogacy debate, see Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009); *see also* Carol Sanger, *Developing Markets in Baby-Making*: *In the Matter of Baby M.*, 30 HARV. J.L. & GENDER 67 (2007).

case unfolded dramatically, culminating in a ruling from the New Jersey Supreme Court that the agreement was void as against public policy.[88] With the contract deemed unenforceable, the traditional rules of parentage came into play. The child's legal parents were her biological mother (the surrogate) and biological father (the sperm donor and intended father). Both the surrogate and the biological father had made unsuccessful constitutional claims. Mary Beth Whitehead argued that her parental rights could not be voluntarily relinquished prior to birth, nor involuntarily at any point without a showing of parental unfitness. She asserted that her right of procreation included the "right to the companionship of her child."[89] The court never reached her constitutional claim because it ruled that the surrogacy contract was unenforceable. The biological father asserted that his right to have children included the right to care, custody, and control of the child. The court rejected his claim because, if taken as far as he asserted, it would interfere with Whitehead's comparable right of procreation. "[I]t would be to assert," the court wrote, "that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation."[90]

A gestational carrier in the next big case, *Johnson v. Calvert*, argued that it would infringe her constitutionally protected parental rights to enforce the surrogacy contract and require her to relinquish parental status to the intended parents. The California Supreme Court rejected the argument because it "depends on a prior determination that she is indeed the child's mother."[91] The question, then, was whether it was unconstitutional for the trial court to determine that she was not the child's legal mother. With respect to that decision, the gestational carrier held constitutional interests, at best, that were "something less than those of a mother."[92] She did not have a genetic tie necessary to rely on the unwed father cases, and she did not have a separate liberty interest. There was no tradition of

88. *In re* Baby M., 537 A.2d 1227, 1234 (N.J. 1988).

89. *Id.* at 1253.

90. *Id.* at 1254.

91. Johnson v. Calvert, 851 P.2d 776, 785–86 (Cal. 1993). California codified the ruling in *Calvert*, adopting a statute that expressly makes surrogacy agreements enforceable as long as they satisfy certain minimal conditions. *See* Cal. Fam. Code § 7962 (2017).

92. *Johnson*, 851 P.2d at 786.

protecting the "right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own."[93] Thus, she could not claim that she was directly protected by substantive due process principles. Moreover, the court concluded, "if we were to conclude that [the gestational carrier] enjoys some sort of liberty interest in the companionship of the child, then the liberty interests of [the intended parents], the child's natural parents, in their procreative choices and their relationship with the child would perforce be infringed."[94] Thus, giving effect to the parties' agreement about parentage "does not offend the state or federal Constitution;" enforceability is a question of public policy rather than a matter for constitutional debate.[95]

The *Baby M.* ruling reverberated on a national scale, provoking a contentious public debate and a wide range of legislative responses that are still felt today. Today, almost thirty years later, surrogacy remains controversial for both same-sex and different-sex families, and states remain split over its legality.[96] As gestational surrogacy has become the norm—the carrier provides only the womb, not the egg—some states have begun to permit surrogacy but to regulate it by statute.[97] The debate continues, but little of the attention is on constitutional parameters. And perhaps this is appropriate, given that we permit parents to surrender parental rights by placing a child for adoption. If those rights could not be waived or surrendered, we would expect every adoption decree (and facilitating law) to be challenged on constitutional grounds. But we don't. Courts have largely seen fit to recognize that no one's constitutional rights are abridged by a state's decision whether or not to permit enforcement of a surrogacy contract.

93. *Id.*

94. *Id.*; *see also* C.M. v. M.C., 7 Cal. App. 5th 1188, 1203–05 (2017) (rejecting constitutional claims by gestational carrier).

95. *Calvert*, 851 P.2d at 778.

96. *Compare, e.g.*, *In re* the Paternity of F.T.R, 833 N.W.2d 634 (Wis. 2013) (holding the surrogacy agreement entered by the parties as a valid and enforceable contract) *with* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (holding that surrogacy agreement between the surrogate mother and father was unenforceable); *see also* N.Y. DOM. REL. § 123 (McKinney 1993) (prohibiting compensated surrogacy).

97. *See, e.g.*, 750 Ill. Comp. Stat. Ann. 47/5 (2017).

D. LESBIAN CO-PARENTS

Litigation between lesbian co-parents over parental status—and concomitant rights and responsibilities—represent the lion's share of parentage litigation today. In broad brush, lesbians began co-parenting children before gay men did, and they remain much more likely to do so. Much of parentage law that has developed since the late 1980s has revolved around lesbian couples raising children with a genetic tie to one parent, but not the other.[98] Doctrinal development has been piecemeal not only because of the expected jurisdictional variation but also because of the dramatic change over time in parentage law and in the treatment of gay and lesbian individuals and families. Yet, it is crucially important given the sheer number of same-sex couples who are raising children together. An estimated 125,000 same-sex couples are raising nearly 220,000 children in the United States.[99] How has constitutional protection for parental rights influenced the development of lesbian co-parent rights? Courts have reconciled the tension between parental rights and parental status in this context based on the notion of consent—that a biological mother can consent to the sharing of her constitutionally protected parental rights. Differences of judicial opinion about the forms that consent can take or how it can be measured account for a landscape that remains relatively chaotic despite many decades of work.

1. Second-Parent Adoption

A central site for conflicts between state parentage law and constitutional parental rights is in the decision whether to recognize a lesbian co-parent as having protected ties to her partner's child. Although the two women may have undertaken and carried out parenting jointly, one of the women has full-blown parental rights and the other has no constitutionally recognized claim to parental status. Thus, the constitutional question is when and under what circumstances the parental rights of the biological mother can be shared—or must be shared.

98. Nancy D. Polikoff, Brief Amicus Curiae, R-Y v. Robin Y., N.Y. Cty. Fam. Ct. Docket No. P388491, *reprinted in* 22 N.Y.U. REV. L. & SOC. CHANGE 213, 219–20 n.2 (1996) (citing documentation of early lesbian planned families).

99. GARY J. GATES, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW, LGBT PARENTING IN THE UNITED STATES 1 (2013).

Before the ruling in *Obergefell v. Hodges*,[100] in which the Supreme Court recognized that same-sex couples had a right to marry, lesbian couples began to use second-parent adoption to cement their family ties.[101] This type of adoption is "modeled on step-parent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating that parent's rights, thereby leaving the child with two parents."[102]

The Massachusetts Supreme Judicial Court was among the first to countenance second-parent adoption, in 1993, in *Adoption of Tammy*.[103] Two women jointly petitioned to adopt the child to which one of them had given birth.[104] The governing statute did not explicitly rule out adoption by an unmarried couple, and the court allowed it to take place given the overwhelming evidence of a stable family unit.[105] The Supreme Court of Vermont had approved a lesbian second-parent adoption earlier that same year.[106] After 1993, but before *Obergefell* in 2015, several states began to allow this type of adoption, either via statute or appellate court ruling, or at the trial court level without express authority.[107] Today, same-sex spouses should have the same access to stepparent adoption as different-sex spouses, as well as equal opportunity to jointly adopt a child.[108]

Legislative and judicial approval of second-parent adoptions require two steps from the traditional parentage rules: (1) that a child can have two legal parents of the same sex; and (2) that a legal mother can allow her unmarried partner to adopt without severing her own ties with the child. For our purposes, the second

100. 135 S. Ct. 2584 (2015).

101. On the development of second-parent adoption for same-sex couples, see generally GROSSMAN & FRIEDMAN, *supra* note 45, at 320–29.

102. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J.C.R. & C.L. 201, 2015 (2009*); see also* Erin J. Law, *Taking a Critical Look at Second Parent Adoption*, 8 LAW & SEXUALITY 699, 701, 707 (1998).

103. 619 N.E.2d 315, 318 (Mass. 1993).

104. *Id.* at 315.

105. *Id.* at 317–18.

106. *See* Adoption of B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993).

107. *See, e.g.*, COLO. REV. STAT. §§ 9-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5) (2012) (recognizing second-parent adoption); *see also* Sharon S. v. Super. Ct., 73 P.3d 554, 568, 572 (Cal. 2003) (allowing second-parent adoption and noting that twenty thousand such adoptions had already taken place in the state).

108. *See* Campaign for Southern Equality v. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 697 (D. Miss. 2016) (striking down last state law barring adoption by same-sex couples).

deviation is more important. Second-parent adoptions endorse the idea that a legal parent can waive the exclusivity of her parental rights—not only to a substitute parent as in a traditional adoption, but also to a joint parent. Express consent of the recognized parent plays a fundamental, indeed essential, role in second-parent adoptions. Adoption is the most secure form of parental status because adoption decrees are entitled to the most exacting form of full faith and credit.[109] But can parentage also be shared through less formal mechanisms? This, too, requires some form of consent by the recognized parent.

2. Shared Parental Rights by Agreement

In just the past decade, several state supreme courts have held that co-parents can gain legal parent or quasi-parent status based solely on a co-parenting agreement with an unmarried partner. *Boseman v. Jarrell* grew out of the decision by Melissa and Julia, two women in a committed relationship, to have a child.[110] The couple decided that Melissa would bear the child, but both women were involved in every stage of the process. A trial court approved their petition for a second-parent adoption in 2005, even though the North Carolina Code did not expressly provide for one.[111] The decree explicitly stated that it would create a full parent-child relationship between Julia and the child, while "not sever[ing] the relationship of parent and child between the individual adopted and that individual's biological mother."[112]

The following year, the two women terminated their relationship, but Julia continued to support Melissa and the child. Melissa soon reduced Julia's contact with the child, and Julia filed a complaint seeking custody. Melissa argued that the adoption decree was invalid because the judge exceeded his legal authority.[113] Without the adoption, she argued, Julia was not a "parent" and could not seek custody. On appeal, the North Carolina Supreme Court agreed that the adoption was void *ab*

109. *See* V.L. v. E.L., 136 S. Ct. 1017, 1021–22 (2016) (per curiam) (reversing a ruling from the Alabama Supreme Court refusing effect to a second-parent adoption decree from Georgia).

110. 704 S.E.2d 494 (N.C. 2010).

111. *Id.* at 497.

112. *Id.*

113. *Id.* at 498.

initio.[114] This holding put Julia on tenuous footing as a non-parent, but the court felt she was not a typical third party. A parent can lose out, the court reasoned, on the absolute nature of parental rights, not only by demonstrating unfitness but also through a "voluntary grant of nonparent custody."[115] Melissa "intentionally and voluntarily created a family unit in which [Julia] was intended to act—and acted—as a parent," with "no expectation that this family unit was only temporary."[116] She thus "acted inconsistently with her paramount parental status," and was entitled to no special preference in a custody dispute with Julia.[117] Julia, in effect, was entitled to joint custody without first obtaining the status of legal parent.

In *In re Mullen*, the Ohio Supreme Court reached a similar conclusion.[118] Like Melissa and Julia, Kelly and Michele had jointly participated in the planning, conception (including the expense of IVF), delivery, and raising of a child to which Kelly gave birth. Kelly and the sperm donor settled on an agreement providing that while his name would be listed on the birth certificate, he would not retain any parental rights or be obligated to support the child. Kelly executed a will and a health-care proxy in which she gave Michele the authority to act as Kelly's agent with respect to the child. In these documents, Kelly stated that she was the legal parent, but that Michele was her "child's co-parent in every way."[119] When the relationship ended, Michele filed a complaint for shared custody, in which she alleged that Kelly had "created a contract through her conduct with [her] to permanently share legal custody of the child."[120] The Ohio Supreme Court affirmed the lower court's ruling that denied Michele any rights as a parent or co-parent, but it made clear that a lesbian co-parent *could* acquire parenting rights by virtue of an enforceable shared-parenting agreement. The court confirmed that a "parent may voluntarily share with a nonparent the care,

114. *Id.* at 496.
115. *Id.* at 503.
116. *Id.* at 504.
117. *Id.* at 505; *see also* Eldredge v. Taylor, 339 P.3d 888, 894 (Okla. 2014) (upholding lesbian co-parenting agreement over constitutional objection of biological mother because she is presumed to have been acting in their best interests when she intended to raise them with a partner and signed agreements consenting to share her parental authority).
118. 953 N.E.2d 302 (Ohio 2011).
119. *Id.* at 304.
120. *Id.*

custody, and control of his or her child through a valid shared-custody agreement," the essence of which "is the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child."[121] Such an agreement "recognizes the general principle that a parent can grant custody rights to a nonparent and will be bound by the agreement."[122] A valid shared-parenting agreement is enforceable as long as the co-parent is a "proper person to assume the care, training, and education of the child," and the agreement serves the child's best interests.[123] Michele simply did not have sufficient proof of an agreement. Although this approach disregards de facto parenting in many cases, the court felt that "the best way to safeguard both a parent's and a nonparent's rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent."[124]

Finally, in *Frazier v. Goudschaal*,[125] the Kansas Supreme Court also ruled that enforceable parental rights could be created by contract. The two women in that case had entered into written co-parenting agreements prior to the birth of each of two children, which provided that the non-biological parent would be a "de facto parent" and that her "relationship with the children should be protected and promoted;" that the parties intended to "jointly and equally share parental responsibility;" that expenses of childrearing should be borne proportionately relative to income; and that in the event of a separation "the person who has actual physical custody w[ould] take all steps necessary to maximize the other's visitation" with the children.[126] Over the objection of the biological mother, the court read the Kansas Parentage Act to permit enforcement of shared parental rights.[127]

Together, these cases set a strong precedent for the sharing of parental rights despite the traditional rules of parentage law. De facto parentage, which is taken up in the following section, accomplishes a similar result through different means.

121. *Id.* at 305–06.
122. *Id.* at 306.
123. *Id.*
124. *Id.* at 308.
125. 295 P.3d 542 (Kan. 2013).
126. *Id.* at 546.
127. *Id.* at 558.

3. De Facto Parentage

The third doctrine for lesbian co-parents that raises constitutional issues is de facto parentage. De facto parentage enables an adult without any formal *legal* ties to a child to be granted legal parent, or at least parent-like, status based on functional parentage.[128] It presents one of the more complicated clashes between parental rights and parental status because it relies on conduct rather than formal expressions of consent by the biological mother. But it also introduces the possibility that lesbian co-parents have an inchoate right to be recognized, akin though not equivalent to the rights vested in unwed biological fathers.

The first appellate case to recognize a lesbian co-parent as a "de facto parent" was *In re Custody of H.S.H.-K*.[129] In this 1995 case, the Wisconsin Supreme Court relied on this concept to allow a lesbian co-parent, who was not related to the child by blood or adoption, to seek visitation over the objection of the child's biological mother. In what today feels like a familiar story, Elsbeth and Sandra were intimate partners and planned together to start a family. The women participated equally in every aspect of planning for and parenting a child during the first four years of the child's life. But when the two women broke off their relationship, Elsbeth cut off contact between Sandra and the child. In a suit for custody and visitation, Sandra sought to be recognized as functional parent. Her claim did not fit nicely into the state family law code, yet, the state's highest court concluded that she had standing to seek visitation with the child.[130] Taken together, the statutes governing custody and visitation showed the "continuing legislative concern with identifying the triggering events that warrant state interference in an otherwise protected parent-child relationship."[131] The court recognized an equitable right for Sandra to seek visitation based on her functional parent-

128. States differ as to the scope of rights held by a de facto parent. *Compare* V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (holding that the psychological parent "stands in parity with the legal parent," and "[c]ustody and visitation issues between them are to be determined on a best interests standard") *with In re* Custody of H.S.H.-K, 533 N.W.2d 419, 423–24 (Wis. 1995) (noting that custody, as opposed to mere visitation, cannot be granted to a de facto parent without evidence that the legal parent is unfit).

129. 533 N.W.2d at 420–21.

130. *Id.* at 435.

131. *Id.* at 427.

child relationship.[132] Elsbeth argued that any recognition of the relationship between Sandra and the child over Elsbeth's objection would violate her constitutional parental rights.[133] But the court observed that those rights are not absolute; state public policy "directs the court to respect and protect parental autonomy and at the same time to serve the best interest of the child."[134]

In this type of case, the balance was struck by allowing a court to hear a petition for visitation when "it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[135] The parent-like relationship is established through four elements: (1) consent by the biological parent to foster the formation of the parent-child relationship; (2) living in the same household with the child; (3) assuming the obligations of parenthood, including support and childrearing; and (4) sufficient duration to establish "with the child a bonded, dependent relationship parental in nature."[136] The triggering event, in turn, must be established with proof that the biological parent interfered with the petitioner's parent-like relationship and that the petitioner sought court-ordered visitation "within a reasonable time."[137] Once established, the de facto parent must also show that visitation is in the child's best interests.[138]

This test became the gold standard for de facto parentage.[139] Recognition of de facto parentage, however, is not universal. Several states have rejected it outright.[140] Their chief

132. *Id.* at 425–36.
133. *Id.* at 434.
134. *Id.* at 435.
135. *Id.* at 421.
136. *Id.*
137. *Id.* at 436.
138. *See id.* at 421.
139. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546, 559–60 (Colo. Ct. App. 2004); Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000). Several other states adopted the doctrine of de facto parentage without strictly adhering to the Wisconsin test. *See, e.g.*, Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009); Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999).
140. *See, e.g.*, Guardianship of Z.C.W. and K.G.W., 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999); Wakeman v. Dixon, 921 So. 2d 669, 673 (Fla. Dist. Ct. App. 2006); Matter of Visitation with C.B.L., 723 N.E.2d 316, 320–21 (Ill. App. 1999); Matter of Visitation with C.B.L., 723 N.E.2d 316 (Ill. App. 1999); B.F. v. T.D., 194 S.W.3d 310, 312 (Ky. 2006); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999); Jones v. Barlow, 154 P.3d 808, 809–10

concern is intruding on the rights of the biological mother, in violation of her constitutionally protected parental rights.[141] For example, a court of appeals in Louisiana reasoned de facto parentage should be rejected because a mother's "paramount right of a parent in the care, custody, and control of his or [sic] child" can be abrogated only in "rare circumstances."[142] The Utah Supreme Court rejected the doctrine simply because it "would abrogate a portion of the [biological mother's] parental rights."[143]

Are these courts right that de facto parentage presents an irreconcilable conflict with the biological mother's constitutional parental rights? One constitutional objection to the doctrine is that lesbian co-parents are third parties unless and until the parent-child relationship is cemented through adoption or some other formal mechanism. And, in a dispute over custody or visitation, the parent and non-parent are not on equal footing; their dispute cannot constitutionally be resolved based solely on the best interests of the child.

In *Stadter v. Siperko*,[144] for example, a Virginia court ruled that a lesbian co-parent was, for *Troxel* purposes, like any other third party seeking to override the wishes of a fit parent. Despite equal participation in all aspects of planning for and raising the child, the co-parent was not entitled to the more lenient "parent-standard" when in a dispute with the biological mother. Rather, she could gain visitation over the mother's objection only if the mother had "voluntarily relinquished" custody to the non-parent or if clear and convincing evidence established that a "denial of visitation would be harmful or detrimental to the welfare of the child."[145] The *Stadter* court refused to recognize de facto parentage as a means of rebutting the *Troxel* presumption that the fit parent's decision to deny visitation was the right one.[146]

Have courts been hasty in assuming that recognition of the doctrine of de facto parentage is inconsistent with the biological

(Utah 2007); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997); Stadter v. Siperko, 661 S.E.2d 494, 499–501 (Va. Ct. App. 2008).

141. *See, e.g.*, *Thompson*, 11 S.W.3d at 918–19; *Jones*, 154 P.3d at 819.

142. Black v. Simms, 12 So. 3d 1140, 1143 (La. Ct. App. 2009).

143. *Jones*, 154 P.3d at 819.

144. 661 S.E.2d 494 (Va. Ct. App. 2008).

145. *Id.* at 498.

146. *Id.* at 498–99; *see also* Pitts v. Moore, 90 A.3d 1169, 1176 (Me. 2014) (recognizing a de facto parent only "when the failure or refusal to so determine will result in harm to the child" because the "intrusion into a parent's fundamental rights is substantial").

mother's constitutional parental rights? As we have seen in the context of adoption and co-parenting agreements, a legal parent can consent to share parental rights with a co-parent. So maybe the question should only be whether that consent can be adequately measured outside of a formal adoption process or a written co-parenting agreement. As the court noted in *In re H.S.H.-K*, "[t]hrough consent, a biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child."[147] Adopting the same test in a lesbian co-parent case, the New Jersey Supreme Court emphasized that the first prong "is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child;" by fostering the relationship, "the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-à-vis the child that the third party's status would not otherwise warrant."[148] The parent can protect "a zone of autonomous privacy," but, once ceded, she loses the right to terminate the parent-child relationship unilaterally.[149]

Perhaps the best way to think about de facto parentage is not as a dispute in which a parent has consented to share rights with a non-parent, but as a dispute in which both women are rights-holding parents based on their intent to parent and actual parenting contributions. In a dispute between two fit parents, disputes can be resolved by a simple best-interests analysis—thus bypassing the constitutional problem altogether. When the Washington Supreme Court adopted de facto parentage in *In re Parentage of L.B.*, it concluded that "*Troxel* does not establish that recognition of a *de facto* parentage right infringes on the liberty interests of a biological or adoptive parent."[150] If the co-parent meets the criteria to be a de facto parent, then the

147. *In re* Custody of H.S.H.-K, 533 N.W.2d 419, 436 n.40 (Wis. 1995).

148. V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000).

149. *Id.*; *see also* Gordius v. Kelley, 139 A.3d 928, 930 (Me. 2016) (noting that a claim of de facto parentage is one of the situations "that will interfere with the normal parent-child relationship" in a way that is "constitutionally permitted"); Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000) (by allowing her partner to "assume an equal role as one of the child's two parents," a biological mother "rendered her own parental rights with respect to this boy less exclusive and less exclusory than they otherwise would have been had she not by word and deed allowed [her partner] to establish a parental bond with the child and then agreed to allow reasonable visitation").

150. 122 P.3d 161, 178 (Wash. 2005).

biological mother and the co-parent "would *both* have a 'fundamental liberty interest[]' in the 'care, custody, and control' of [the child]."[151] *Troxel*, the Washington court wrote, "did not address the issue of state law determinations of 'parents' and 'families'" and does not "place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family."[152] Parentage, in other words, is a threshold determination that precedes the exercise of parental rights. The Delaware Supreme Court reached a similar conclusion in *Smith v. Guest*, explaining that a de facto parent's claim is not like that of a "third party having no claim to a parent-child relationship."[153] Rather, the plaintiff in that case is a "de facto parent who . . . would also be a legal 'parent'" and would thus have a "co-equal 'fundamental parental interest'" in raising the child.[154] Allowing her "to pursue that interest through a legally-recognized channel cannot unconstitutionally infringe Smith's due process rights."[155]

In two recent, noteworthy opinions, state supreme courts reversed themselves by adopting the de facto parentage doctrine after having explicitly rejected it. In both cases, the shift reflects a difference in the view of the co-parent—as an individual with inchoate parental rights rather than as a third party. In Maryland, the state's highest court had held in *Janice M. v. Margaret K.* that the doctrine was not a viable means for a lesbian co-parent to petition for custody or visitation.[156] The court characterized the case as a dispute between a fit parent and a third party and found the plurality opinion in *Troxel v. Granville* instructive: the parent is asserting a constitutional right—the right to exclude—and the "third party" is not.[157] In such a dispute, the non-parent can only prevail by proving the unfitness of the parent or the existence of

151. *Id.*

152. *Id.* Kennedy suggested this line of reasoning in his dissent in *Troxel*. *See* Troxel v. Granville, 530 U.S. 57, 100–01 (Kennedy, J., dissenting) ("a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another") (emphasis omitted); *see also id.* at 98 ("Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.").

153. 16 A.3d 920, 931 (Del. 2011).

154. *Id.*

155. *Id.*

156. 948 A.2d 73, 87 (Md. 2008).

157. *Id.* at 81.

"exceptional circumstances." It thus refused to "recognize *de facto* parent status."[158] In 2016, however, the Maryland court reversed itself, ruling in *Conover v. Conover* that de facto parentage is a viable basis for standing to petition for custody or visitation.[159] The key to the shift was in re-characterizing the would-be de facto parent as something other than a "pure third party." People in a "parental role" stand above the world of true third parties and are entitled to have the parent-like relationship considered in the determination of legal status.[160] Thus, the

> *de facto* parent doctrine does not contravene the principle that legal parents have a fundamental right to direct and govern the care, custody, and control of their children because a legal parent does not have a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it.[161]

The evolution in New York was similar to Maryland, only there the state's highest court had twice rejected the doctrine of de facto parentage, seventeen years apart. In *Alison D. v. Virginia M.*, one of the first cases in which lesbian co-parent rights were litigated, the court held that a mother's lesbian partner was not a "parent" within the meaning of the custody and visitation statute.[162] When the court agreed to review a case presenting the same issue in 2010, it was widely expected that it would reverse itself—given the dramatic change in the law and social norms surrounding parenting by same-sex couples. But it did not. In *Debra H. v. Janice R.*, the New York Court of Appeals again rejected the doctrine of de facto parentage in order to promote "certainty in the wake of domestic breakups" and avoid "disruptive battles over parentage."[163] Just six years later, though, the same court finally reversed itself, holding in *Brooke S.B. v.*

158. *Id.* at 87.

159. 146 A.3d 433 (Md. 2016).

160. *Id.* at 443.

161. *Id.* at 447; *see also* A.A. v. B.B., 384 P.3d 878, 885–92 (Haw. 2016) (adoptive parent who chose to share physical custody and parenting responsibilities with a same-sex co-parent "does not have a protected privacy interest in excluding [the co-parent] from [the] [c]hild's life" under the state or federal constitution); R.M. v. T.A., 233 Cal. App. 4th 760, 776 (2015) (when "a two parent relationship has *in fact* been developed with the child," "the interests of the child in maintaining the second parental relationship can properly take precedence over one parent's claimed desire to raise the child alone."); Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. 195 (2014).

162. 572 N.E.2d 27 (N.Y. 1991).

163. 930 N.E.2d 184, 191–92 (N.Y. 2010).

Elizabeth A.C.C. that "where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child."[164] The court expressly reserved the question whether a co-parent who came onto the scene after conception of the child could be treated as a de facto parent, opting for a narrow holding that would "protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children."[165] Like the Maryland court, the New York court created a path to de facto parentage by recharacterizing the co-parent's claim. "[H]ere," the court wrote, "we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a 'parent' with coequal rights."[166]

The approaches taken by the Maryland and New York courts in recent cases are perhaps illustrative of a trend, but they do not yet represent a universal position. Consent has emerged as an increasingly important concept in the sharing of parental rights, but the question remains open whether a non-biological parent might have rights akin to those of, say, an unwed father, but rooted in intent and function rather than reliance.[167]

CONCLUSION

Although we are many decades removed from *Stanley v. Illinois* and the Supreme Court's observation that parentage rules must themselves be constitutional, parentage law is still in a state of relative chaos. There remains significant jurisdictional variation in almost every rule of parentage, and it is hard for individuals to predict whether the children they create and the relationships they nurture will be protected by law. This uncertainty is aggravated by the complicated role that constitutional parental rights can play in parentage determinations—sometimes requiring the recognition of a parent,

164. 61 N.E.3d 488, 501 (N.Y. 2016).

165. *Id.* at 499.

166. *Id.*

167. *But see, e.g.*, Russell v. Pasik, 178 So. 3d 55, 60 (Fla. 2015) (rejecting the argument that an intentional co-parent may have some constitutional interest in being a parent akin to the "inchoate right to be a parent" possessed by an adult with a biological or legal connection to a child).

sometimes precluding it, and other times invisibly or quietly undergirding the decision. But vagueness about when, where, and how constitutional parental rights are relevant to parentage is unacceptable given what is at stake for parents and children. As a starting point, this Article steps through the case law and intersecting statutory rules of parentage to map out the current landscape—a tedious process, to be sure, but a necessary one. What this analysis reveals is that while courts are generally cognizant of constitutional parental rights and their potential relevance to parentage determinations, they do not always grapple with those rights in ways that reflect a full grasp of their importance or a consensus on the best way to resolve the points of tension. Lawmakers and courts need to more explicitly account for parental rights when determining parental status, and scholars need to lay the groundwork for resolving the tensions between the two.