

Essentially a Mother

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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, I argue that a gestational mother has a constitutional claim to be recognized as a legal parent.

I begin with the “unwed father cases” from the 1970s. Despite believing that natural sex differences justified distinctions in parental rights, the Court crafted a test giving men parental rights if they established relationships with their biological children. I argue that this test was modeled on what the Court saw as the essential attributes of motherhood. I offer this reading as an alternative to the standard feminist critique that the unwed father cases are notable only for their zeal to enforce the traditional family. I also show how the theoretical approach of these cases supports feminist claims for equal treatment despite biological difference (such as accommodation of pregnancy).

Turning to current debates, my focus is 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. I show that 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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“... law, like nature itself, makes no provision for dual fatherhood.”¹

Motherhood, alas, knows no such simplicity. Even as Justice Scalia wrote these words in 1989, science had already prevailed over nature to split biological motherhood into two parts—begetting by the “genetic mother” and bearing by the “gestational mother.” The free market splintered off a third role—expecting. Formerly a euphemism for pregnancy, an “intended mother” can now achieve this state by contracting out the begetting and bearing. Law has lagged behind, trying to decide which mother (genetic mother, gestational mother, or intended mother) is the true mother.

In their efforts to identify the true mother, courts have largely failed to apply the most relevant line of Supreme Court precedent for defining who is a parent. The Court has already spelled out when an unwed father must be treated as a parent for purposes of the parental rights protected by the Fourteenth Amendment. In a series of cases, the Court created a standard by which fathers could be recognized as equal to mothers, despite men’s biological disadvantage.² Some feminists have criticized this effort as shoring up men’s power in the patriarchal family. But although the result elevated the rights of men, it did so by defining parenthood in terms of motherhood and making fatherhood fit a female model. These cases are alone in the Court’s jurisprudence of sex discrimination in taking the female experience rather than the male as the baseline. Partly for that reason, the Court’s assumption of a female baseline has been attacked from both sides: as wrongful stereotyping of women and as insufficiently protective of men’s rights.

¹ Michael H. v. Gerald D., 491 U.S. 119, 118 (1989) (referring to California law).

² Men are disadvantaged in that they are unable to become pregnant and give birth to a child. Cf. Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (1990) (noting “disadvantage men experience in accessing child-nurturing opportunities”).

Adding to this old debate, new reproductive technologies have spurred new proposals for determining parentage, from purely genetic standards to purely contractual ones. Many of these proposals minimize or eliminate the parental rights of the gestational mother. Such proposals change the definition of parenthood from a woman-centered one to a man-centered one and in the process denigrate and commodify the non-genetic aspects of biological reproduction. Proposals that favor enforcement of surrogacy contracts also raise serious policy concerns, including the commodification of gestation and the creation of perverse incentives to use riskier rather than safer methods of reproduction. My claim in this article is that conferring parental rights on the gestational mother would be more consistent with the best aspects of existing constitutional precedents and, for the most part, would produce better outcomes.³

³ Legal scholarship on the question of surrogacy contracts runs the gamut from those who argue 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 Schultz, *supra* note 2 (focusing on intended parents' commitment, gender-neutrality, and concern for stereotyping women); 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 (1991) (focusing on certainty, contract principles, and but-for causation); JOHN A. ROBERTSON, 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, 912-17 (2000) (focusing on lack of established relationships at birth, gender-neutrality, and stereotypes about mother-child bond). 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 (1993) (analyzing surrogacy as alienated labor). A third strand of opinion, 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 surrogacy is protected while all parties agree but state may choose policy once agreement breaks down). I generally agree with those who would class surrogacy contracts with other adoptions, voidable by the gestational mother, regardless of her genetic relationship with the child. My project in this article is to set out the constitutional underpinnings of parental rights as they pertain to the gestational mother's claim.

I use the word “essentially” in the title of this article with tongue somewhat in cheek. I do not argue that women are essentially “maternal” in the sense of being inherently more nurturing or loving toward children than are men. Rather, I adopt the view reflected by precedent that women and men both have the capacity to love a child deeply and that this capacity is brought out by active engagement in caring for a child. But 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 was asked to decide when and how a man acquires parental rights, the standard it created was based on mothering. That standard should be the starting point for constitutional analysis 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.⁴

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, with the right to maintain a relationship with his child and block the child’s adoption by another. Part II examines what, exactly, 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. In Part III, I argue that the Court’s test for parenthood is appropriate and show that, as applied to women, it supports the

⁴ Surrogacy is sometimes portrayed as a service one woman provides to another, and the resulting disputes as between two women contending to for the role of “mother.” In the more common “traditional surrogacy” arrangement, however, the contract is between the husband/genetic father and the “surrogate,” who is actually 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.) I refer here to the surrogates’ claims to parental rights as the claims of women because they are always so, while the opposing claim to enforce the surrogacy contract could, in theory, be made by a person of any sex who entered into a contract for production of a baby by a surrogate.

gestational mother's claim. Without delving into every aspect of the debate over surrogacy contracts, I also suggest 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 liberties protected by the Liberty Clause of the Fourteenth Amendment.⁵ A person deemed by the law to be the “parent” of a particular child⁶ must be accorded a great deal of say in how that child will be reared and with whom she will spend her time.⁷

But to enforce constitutional rights for parents is to beg the question of who is a parent: the rights of parenthood would be eroded if states could deny them merely by changing the legal definition of “parents.”⁸ The problem of definition first came to the Court in cases involving fathers—specifically, 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.

⁵ “No state shall ... deprive any person of ... liberty ... without due process of law.” U.S. CONST. amend. XIV. *See* *Wis. v. Yoder*, 406 U.S. 205 (1972); *Prince v. Mass.*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebr.*, 262 U.S. 390 (1923). For a discussion of the relationship among 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 the reasons for parental rights, *see infra* Part II.

⁶ Who may or may not be a biological 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. Adoptive parents, of course, have the same rights as other parents.

⁷ *See infra* Part II.A.

⁸ *But see* Emily Buss, “*Parental*” *Rights*, 88 VA. L. REV. 635 (2002) (arguing that Constitution should afford strong protection to parental authority but allow states leeway in deciding who is parent); *see also* 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*⁹

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.”¹⁰ The biological father of an “illegitimate” child was excluded.

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. The state responded that it need do no such thing: 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. 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.¹¹

The Court refused to resolve the case on straight equal protection grounds, grounds which 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.¹² 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*,¹³ decided the year before *Stanley*. *Reed* struck down the preference as “arbitrary,”¹⁴ and no one on the Court had yet proposed a heightened standard.¹⁵ It would have been a difficult next step for the Court to hold that a distinction between mothers and fathers was similarly arbitrary.

⁹ 405 U.S. 645 (1972).

¹⁰ *Id.* at 650 (quoting ILL. REV. STAT., ch. 37, §§ 701-14).

¹¹ *Id.* at 664-65 (Burger, C.J., dissenting).

¹² That would come four years later in *Craig v. Boren*, 429 U.S. 190 (1976).

¹³ 404 U.S. 71 (1971).

¹⁴ *Id.* at 74.

¹⁵ Heightened scrutiny was first proposed by a plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Instead, the Court took a *sua sponte* detour into both substantive and procedural due process. 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.¹⁶ It therefore balanced Stanley's private interest in his relationship with his children against the state's interest in avoiding a hearing.¹⁷ It found Stanley's liberty interest in the "companionship, care, custody, and management" of the "children he has sired and raised" to be weighty, while the state's interest in avoiding a fitness hearing was minimal and inconsistent with its stated goal of protecting the welfare of children.¹⁸

That much of the Court's ruling, as a matter of procedural due process, would at least have gotten Stanley a hearing with substantial procedural trappings.¹⁹ That much, however, the state was already willing to provide. Stanley could have petitioned for custody of his children and received a hearing governed by the "best interest of the child" standard.²⁰ But in the course of assessing Stanley's private interest, the Court slipped in a different substantive standard: not only would there be a hearing; the hearing would be governed by the substantive rule of decision, "Is he a fit parent?"²¹—the standard that governs terminations of parental rights. 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.²²

¹⁶ *Stanley v. Ill.*, 405 U.S. 645, 649 (1972).

¹⁷ *Id.* at 651-58.

¹⁸ *Id.* at 651, 657-58.

¹⁹ 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 specifying the decision-making criteria themselves. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁰ *Stanley*, 405 U.S. at 648-49.

²¹ *Id.* at 649.

²² 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).

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.²³

Why the detour into due process instead of a clean equal protection analysis? The dissent argued—and the majority failed to dispute—that equal protection would not suffice because it was eminently reasonable to distinguish between unwed mothers and unwed fathers. The dissent offered three reasons, all related to the mother’s role in gestation. First, “In almost all cases, the unwed mother is readily identifiable, generally from hospital records.”²⁴ 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 elected the unwed mother, rather than the unwed father, as the biological parent with that legal responsibility.”²⁵ 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

²³ 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 hooked 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 does not survive in *Stanley*’s progeny.

²⁴ Stanley, 405 U.S. at 664 (Burger, C.J., dissenting).

²⁵ *Id.* at 661 n. 1 (Burger, C.J., dissenting) (quoting Illinois’s brief, alteration by the Chief Justice). 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 Silbaugh, *supra* note 8, at 1152-53; 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).

and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.²⁶

The majority did not dispute the dissent's characterizations of mothers and unwed fathers. However, foreshadowing the Court's reasoning in *Craig v. Boren*,²⁷ the majority argued that even if unwed fathers were typically irresponsible toward their children, this stereotype should not control an individual case.²⁸ Indeed, 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."²⁹

In retrospect,³⁰ the surprising point about *Stanley* is that a father's biological relationship with to 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 a relationship with and history of caring for the children was also required. 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 once it had declared sex

²⁶ *Stanley*, 405 U.S. at 665-66 (Burger, C.J., dissenting).

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

²⁸ *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.

²⁹ *Id.* at 666 (Burger, C.J., dissenting).

³⁰ 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.

classifications to be inherently suspect.³¹ While in *Stanley* the contest was between the father and the state after the mother's death, in the next case, *Quilloin v. Walcott*,³² the contest was between the father and mother. In *Quilloin*, a unanimous Court rebuffed the claim of an unwed father of an eleven-year-old child. The mother had married another man, and the father, Leon Quilloin, sought to block the adoption of the child by the mother's husband.³³ Under state law, the unwed mother had the sole power to consent to adoption of her child.³⁴ 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.³⁵ Unlike in *Stanley*, both Quilloin and the Court focused on substantive due process as the doctrinal basis for his claim.³⁶

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. 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 supervision, education, protection, or care of the child."³⁷ 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. The Court said that *Stanley* had

³¹ Or at least "quasi-suspect." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 324 (1976).

³² 434 U.S. 246 (1978).

³³ *Id.* at 247.

³⁴ *Id.* at 248 (citing GA. CODE § 74-403(3) (1973)).

³⁵ *Quilloin*, 434 U.S. at 247.

³⁶ *Id.* at 254-55.

³⁷ *Id.* at 253, 256.

left the rights of unwed fathers “unresolved” in situations where “the countervailing interests are more substantial.”³⁸ Thus, the Court implied that even if Quilloin had had an established relationship with his child, the state 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. But Quilloin did not preserve a sex discrimination claim, and the Court did not consider the issue.³⁹

The issue of sex discrimination was preserved and was decisive in *Caban v. Mohammed*,⁴⁰ decided the year after *Quilloin*. *Caban*, like *Quilloin*, involved a father trying to block adoption of his children by the mother’s new husband. In this case, however, the father and his new wife also sought to adopt the child.⁴¹ The father, Abdiel Caban was more like Peter Stanley than Leon Quilloin in his involvement with his children, and the Court sided with him. Moreover, applying intermediate scrutiny,⁴² 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.”⁴³

³⁸ *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*.

³⁹ *Quilloin*, 434 U.S. at 554 n. 13.

⁴⁰ 441 U.S. 380 (1979).

⁴¹ *Id.* at 383.

⁴² 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. It contrasts with strict scrutiny—requiring 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.

⁴³ *Caban*, 441 U.S. at 391. This argument may remain available to block an unwed 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

The Court suggested that a 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.”⁴⁴

A few years later the Court applied the relationship requirement, almost with a vengeance, in *Lehr v. Robertson*.⁴⁵ Jonathan Lehr was the biological father of a baby whose mother disappeared with the child shortly after the birth. She married another man when the baby was eight months old. When the child was just over two, the mother and stepfather petitioned for an adoption. In the meantime, Lehr had been searching for the child. He hired private investigators

necessarily have prevailed if he had sought to un-do an adoption and remove the children from the adopted home. Cf. Garrison, *supra* note 3, 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* would require them to have to block a step-parent adoption. See *infra* Part I.D.

On the flip side, it seems likely that courts would apply a more lenient standard for fatherhood if the mother tried to deny the biological father access to the child without providing a replacement father to adopt the child. See Garrison, *supra* note 3, at 896. But it would be wrong to constitutionalize that reduced burden. 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.

⁴⁴ *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 been killed in a car accident. Georgia law precluded an unwed father from suing for wrongful death unless he had formally “legitimated” the child. 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. The deciding vote, however, came from Justice Powell, who wrote the opinion of the Court in *Caban* and wrote separately in *Parham*. Justice Powell applied intermediate scrutiny in both cases. 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. The relatively minor burden to the father of formally asserting paternity seemed to Justice Powell reasonable in light of the difficulties of proving paternity.

⁴⁵ 463 U.S. 248 (1983).

and filed a petition to obtain a declaration of paternity and visitation rights.⁴⁶ Despite knowing of that petition, the mother, her husband, and the judge finalized the adoption without giving Lehr notice of the proceeding.⁴⁷

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.⁴⁸ The *Lehr* Court endorsed part of a dissent from *Caban*, which drew a “clear distinction between a mere biological relationship and an actual relationship of parental responsibility”:⁴⁹ “Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”⁵⁰ *Lehr* also noted the *Caban* dissent’s observation that traditionally, in the context of marriage, a father’s rights derive from his relationship with the mother.⁵¹ The *Caban* dissenters had been willing to let the mother “place a limit on whatever substantive constitutional claims might otherwise exist by virtue of

⁴⁶ *Id.* at 268-69 (White, J., dissenting). Some commentators characterize the majority opinion as denying these facts. While the majority did speak dismissively of Lehr’s efforts to establish a relationship with the child, I read the majority not as denying Lehr’s factual claims (which would have been improper, given the procedural posture of the case) but as ignoring those claims as irrelevant, given the lack of an actual relationship with the child. *See* Spitko, *supra* note 3, at 123 n. 119.

⁴⁷ 463 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. 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. Domestic Relations Law § 111-a). 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 if in the child’s best interests. Nonetheless, many states seem to have taken Lehr as indicating that at least this minimal notice to unwed fathers is required. *See infra* Part I.D.

⁴⁸ *Lehr*, 463 U.S. at 260-62.

⁴⁹ *Id.* at 259-60.

⁵⁰ *Id.* at 260 (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)) (emphasis omitted).

⁵¹ *Lehr*, 463 U.S. at 260 n. 16.

the father's actual relationship with the children."⁵² They would have drawn a line between a father's rights against the state and his rights against the mother; only the former deserved 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.⁵³

All of the fatherhood cases⁵⁴ assumed that a mother's rights are established by the birth of the child. 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.⁵⁵ But if that relationship is established, 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*. For the moment, I ask the reader to set aside the rightness or wrongness of the Court's premise that mothers' rights

⁵² *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

⁵³ After *Lehr* it is unclear whether the father is entitled to some form of notice and, 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 possibility of woman being required to serve notice by publication to 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. 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.), 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 a right).

⁵⁴ For readers familiar with the cases and waiting for the other shoe to drop: *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is discussed in the next section and *Nguyen v. INS*, 533 U.S. 53 (2001) in Part III.A.

⁵⁵ 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 44.

are automatic and consider 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 the larger category of sex discrimination cases in which biological differences are invoked to justify treating the sexes differently—the “real differences” cases. From *Stanley* to *Lehr* and continuing through *Nguyen v. INS*⁵⁶ (discussed in Part III, below), the Court 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.⁵⁷ 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*,⁵⁸ the plaintiff and the dissenting Justices argued that excluding pregnancy⁵⁹ from a disability insurance plan for state employees constituted sex discrimination. 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, say, prostatectomies, gout, or circumcision—conditions that were covered for men.⁶⁰ Because men received comprehensive income protection for disability, the

⁵⁶ See *Nguyen v. INS*, discussed *infra* Part III.A, in which the Court explicitly reaffirmed that the biological difference between men and women justifies different legal rules.

⁵⁷ 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); *Geduldig v. Aiello*, 417 U.S. 48 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

⁵⁸ 417 U.S. 484 (1974).

⁵⁹ Originally, the plan denied coverage for any pregnancy-related disability. 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. *Geduldig*, 417 U.S. at 490-91.

⁶⁰ *Id.* at 501 (Brennan, J., dissenting).

dissent argued that true equality required comparable protection for women, including coverage of pregnancy-related disability.

The Court, 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. As the Court said, the classification was between “pregnant ... and non-pregnant persons”⁶¹—as if each were a permanent category. The Justices did acknowledge that there was some sex-specificity to this classification, but they threw up their hands in the face of inequitable biology.⁶² Women, said the Court, were saddled by nature with the disproportionate burden of reproduction. This burden inherently inhibited women’s 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 law’s “majestic equality, [which] forbids rich and poor alike to sleep under bridges.”⁶³ Women, the analogous poor in the Court’s eyes, are burdened by a biological destiny that hinders their participation in the paid workforce.

But the Court’s opinions on parental rights are just the reverse: women who can bear children are rich by virtue of their biology. It is mothers who, by virtue of having produced their children, have a facially stronger claim to parental rights.⁶⁴ In *Geduldig*, the Court let the state define rights by taking men’s biology (that is, men’s inability to become pregnant) as the norm. If the Court had used this accommodation-oriented approach in *Stanley* and *Caban*, it would have let the state define parenthood in a way that only women could fulfill.⁶⁵ The Court

⁶¹ *Id.* at 496 n. 20.

⁶² *Id.*

⁶³ ANATOLE FRANCE, *THE RED LILY* ch. 7 (trans. Winifred Stevens 1922).

⁶⁴ See MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 56 (1995).

⁶⁵ *Cf.* Silbaugh, *supra* note 8, at 1153 (analogizing *Geduldig* to unequal treatment of mothers and fathers at time of birth).

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.”

But of course that is not how the unwed father cases ended. 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 the same. 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.”⁶⁶

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 he had put his physical health at risk for the child in a manner comparable to the mother’s risk: the father 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.

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.⁶⁷

⁶⁶ *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 also Shanley, *Unwed Fathers’ Rights*, *supra* note 53 at 88-90 (stating that model parent is pregnant woman but “different biological roles of men and women in human reproduction make it imperative that law and public policy ‘recognize that a father and a 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, 807 (1991)).

⁶⁷ This approach is analogous to the theory of “comparable worth” in employment, which holds that the Equal Pay Act should be expanded to 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

Furthermore, the accommodation approach defines what is comparable by using criteria that are appropriate to the biology and life experience of both sexes. While a woman acquires initial parental rights⁶⁸ 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.⁶⁹ 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.⁷⁰

comparable levels of effort, skill, and training, even if it is otherwise quite different. The theory is that the pay disparity between, say, teenage babysitters and teenage lawn-mowers is due to pervasive sex bias that undervalues the work of women. Comparable was generally rejected by federal courts as a theory of equality under the Equal Pay Act or Title VII, and proposed federal legislation failed.

⁶⁸ I am speaking here of 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 3. Parental rights can also be acquired 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.

⁶⁹ 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 positive 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).

⁷⁰ The Court’s foray into this more flexible approach to sex equality was a limited one—*Parham v. Hughes*, 441 U.S. 347 (1979) (discussed *supra* note 44), shows that the biology-plus-relationship test does not give father’s 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. (The requirement that paternity be legally acknowledged is more burdensome in that it requires formal legal action as opposed to every-day participating in child-rearing. Of course, the latter is a more significant undertaking, and a father could, in theory, merely acknowledge paternity without participating in the child’s care. It seems unlikely, however, 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 in fact.) The state law at issue in *Parham* allowed an unwed father to sue for wrongful death only if he had formally acknowledged paternity before the death, a requirement that the Court saw as overly burdensome in *Caban*. 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.” *Parham*, 441 U.S. at 358 n. 12.

2. *The role of marriage*

My analysis of the unwed father cases takes the *Caban* Court at its word that the problem was one of sex equality. I have argued that the Court fashioned a definition of parental rights for unwed fathers that accommodated men's biological disadvantage. It did so by letting them prove they had a made commitment to parenthood that was comparable to the commitment that biological motherhood entails. I do not claim that the Court did so for the reasons I might have preferred—such as desire to support men in caretaking work—or that it did not indulge many of the same stereotypes on which the challenged laws were based. But in the end the Court claimed to decide *Caban* as a matter of sex discrimination law. If we take the Court at its word, then we have before us a remarkably flexible and accommodating theory of equality.

An alternative reading of the unwed father cases has been put forth by conservatives and feminists alike: that the unwed father cases are about not the promotion of sex equality but the protection of the traditional/nuclear/patriarchal family (cause for praise from conservatives and condemnation from feminists).⁷¹ 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 descriptive matter, preference for nuclear families alone does not explain the unwed father cases.⁷² Equal protection, after all, supplied the

⁷¹ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion by Justice Scalia), discussed *infra*; FINEMAN, *supra* note 64, at 85; Shanley, *supra* note 53; Schultz, *supra* note 2, at 318; Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 647, 650 (1993); Kathryn D. Katz, *Lawrence v. Texas: A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN'S RTS. L. REP. 249, 252 (2004); 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).

⁷² Some of the opinions display a near-horror at the prospect of illegitimacy that 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 acknowledge paternal rights even where the father had not formally "legitimated" the child and even where the father was not competing merely with the mother but with a nuclear

doctrinal basis for the outcome of *Caban*; the Court's own claim to be promoting equality ought to count for something. Moreover, "the Court" that made this claim in *Caban* included Justices Brennan and Marshall—who dissented from *Geduldig*⁷³—while all three *Caban* dissenters who had the opportunity to do so joined the majority opinion in *Geduldig*.⁷⁴ It is more plausible to suppose that the swing Justices were more sympathetic to the accommodation approach when men's rights were at stake than to imagine 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.⁷⁵

Of course, one need not *agree* with Justices Brennan and Marshall that their approach was best for sex equality and/or for women.⁷⁶ But I think we are better off taking seriously the claim that the goal was equality. 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

family that included the mother and her new 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 erecting 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.

⁷³ Justice Douglas also dissented from *Geduldig* but had been replaced by Justice Stevens by the time the Court decided *Caban*.

⁷⁴ The *Caban* dissenters were Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens; Justice Stewart wrote the majority opinion in *Geduldig*, which Burger and Rehnquist joined; Stevens was not yet on the Court. Under my analysis, Justices Brennan 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*.

⁷⁵ Inclusion on this list may not be entirely fair to Justice Stevens, whose opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), discussed *infra*, was driven in part by deference to the mother, similar to the approach of some feminists.

⁷⁶ For example, in Part III, I argue 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 and embraces the narrow conception of equality that gave us *Geduldig*.

do support the equality reading, and it is their approach to equality as accommodation of difference—rather than equality as sameness—that could make them most 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. Indeed, the Court said married fathers were presumed to have satisfied the relationship prong of the biology-plus-relationship test.⁷⁷ Yet in *Quilloin* the Court rejected an equal protection claim based on a comparison between married and unmarried fathers, while in *Caban* it accepted an equal protection claim based on a comparison between mothers and fathers. The Court’s discussion of married fathers served not as a model for creating the biology-plus-relationship test but as a justification of the state’s distinction between married and unmarried fathers. 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; it focused instead on “the daily supervision, education, protection, [and] care of the child”⁷⁸—activities that, on the whole, are stereotypically maternal. The Court’s descriptions of what counts as a parental relationship track 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.⁷⁹

⁷⁷ *Quilloin*, 434 U.S. at 256.

⁷⁸ *Id.* at 256.

⁷⁹ See, e.g., Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 *Emory L.J.* 1271 (2005); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-*

In addition to rewarding unwed fathers based on non-traditional criteria, the Court in *Caban* applied these criteria to protect the biological father at the expense of a nuclear family. Some commentators have suggested that the Court's decision turned on the fact that the father had previously lived with the mother and children. Though unwed, perhaps the couple still qualified as a nuclear family entitled to protection under a patriarchal view of men's rights. But according to the Court, the main factor was the father's connection to the child. Most involved and connected fathers are likely to look at least a little "traditional" in having had physical custody of the child at some point; isolated visits are not likely to involve a parent deeply in the child's care.⁸⁰ 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. Indeed, it is hard to imagine that the Court would deny 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.⁸¹ 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.

Centered Perspective on Parents' Rights, 14 CARDOZO L. REV. 1747 (1993) (advocating theory of generative fathering).

⁸⁰ 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.").

⁸¹ These decisions do enforce the "sexual family" by treating fathers, and only fathers, as even eligible for parental rights to the child of an unwed mother. Clearly, 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 unwed father's rights does reduce the mother's ability to make these other choices and further entrench the sexual relationship between the two adults as the core of a family. See generally FINEMAN, *supra* note 64.

Justice Scalia sought to enshrine a nuclear family preference in an opinion of the Court in *Michael H. v. Gerald D.*,⁸² but he marshaled only four votes. Justice Scalia's plurality opinion proposed that an already-established nuclear family should not be disrupted by the claim of an unwed father. But the deciding fifth vote was cast on a theory that recognized at least some rights in the unwed father that would disrupt the mother's pre-existing nuclear family.⁸³

The case arose out of Michael's affair with Carole, who was married to Gerald. Carole's daughter, Victoria, was born from the affair but was initially treated as a child of the marriage. When Carole left Gerald to live with Michael, blood tests showed that Victoria was Michael's child. Carole took a few years to choose between the two men, going back and forth in the meantime. During a reunion with Gerald, Michael sued for the right to visit Victoria. He challenged 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.⁸⁴ 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.⁸⁵

The Court's resolution of the case sidestepped the question "who is the father?" in two ways. First, the Court refused to consider that question directly.

⁸² 491 U.S. 110 (1989).

⁸³ See *infra* (discussing Justice Stevens's concurrence in *Michael H.*).

⁸⁴ *Michael H.*, 491 U.S. at 116. The law thus accomplished what was, in effect, an automatic adoption by the mother's husband, so long as he and the mother did not object.

⁸⁵ *Id.* at 113-16 (plurality). 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 the father of her love child than to maintain a legal fiction that a man's wife is 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 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).

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.⁸⁶

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. But Justice Stevens voted with the plurality only because the state allowed Michael to petition for visitation under the best interests of the child standard.⁸⁷ Michael's right to bring such a petition was not limited in time. Thus, even though the plurality favored California's presumption of legitimacy, Justice Stevens's rationale left Michael with the right to petition for visitation,⁸⁸ regardless of whether he could be declared "the father." Justice Scalia's effort to solidify the husband's 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.⁸⁹

Even in *Michael H.*, then, the unwed father had a right to maintain some sort of relationship with his child, so long as doing so was in the child's interest.⁹⁰

⁸⁶ *Michael H.*, 491 U.S. at 126 (plurality); *id.* at 132-33 (Stevens, J., concurring in the judgment).

⁸⁷ *Id.* at 133-34 (Stevens, J., concurring in the judgment).

⁸⁸ 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 married parents. In practice, unwed fathers have been accorded 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. It was thus similar to the third-party visitation statute struck down as applied in *Troxel v. Granville*, 530 U.S. 57 (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.*

⁸⁹ See Silbaugh, *supra* note 8, at 1157 n. 96 (giving references to literature on Justice Stevens's jurisprudence of parental sex differences).

⁹⁰ Nonetheless, Justice Stevens was apparently willing to let stand the trial court's ruling that visitation was not in Victoria's best interest, based on that court's preference for the mother and nuclear family. Barbara Bennett Woodhouse argues that the better question to ask in *Michael H.* was whether it was good or bad to have "two daddies" and points to evidence that Michael did not, in fact, have an established parenting relationship with Victoria. Woodhouse, *Hatching the Egg*,

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,”⁹¹ and the biological father’s ability to attain parental rights depended at least in part on the mother’s cooperation.

D. 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.⁹² Or, it could 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.⁹³

supra note 79 at 1857, 1864-65 (quoting Victoria’s description of Michael, “the crazy man from California who thinks he’s my father”). However, that *is* the question the trial court asked, and like Justice Scalia it found categorically that having two daddies would be bad. 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 whether Michael had established a true parenting relationship with Victoria is a more objective question and 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. It is also worth noting that the *Michael H.* dissenters (Brennan, Marshall, and Blackmun) all joined the Court’s opinion denying the unwed father’s claim in *Quilloin*.

⁹¹ This phrase is Gary Spitko’s, *supra* note 3.

⁹² While they could have still argued a due process liberty claim, the trigger for men’s liberty right is defined by the accommodating equal protection approach of *Caban*. The rights of unwed fathers thus 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 Equal Protection Clause to extend to unmarried couples the right to use contraception recognized for married couples in *Griswold v. Conn.*, 381 U.S. 479 (1965)); *but see Lawrence v. Tex.* (relying directly on Liberty Clause to extend sexual privacy rights).

⁹³ The pros and cons of these two extremes are reviewed in Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 *Tex. L. Rev.* 967, 978-1000 (1994).

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. Women would be deemed not merely the archetypal but the sole holders of constitutionally grounded parental rights. That approach is tempting in light of how some men use parental rights to control women.⁹⁴ Yet in the long run women lose more than they gain if men are cut off from parental rights by a sterile and “surface-hugging”⁹⁵ theory of equality.⁹⁶ 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, though, than cutting back fathers’ rights in order to protect mothers’ prerogatives would be what we are seeing now: reversion to a sameness model of equality that strengthens fathers’ rights by defining their experience, rather than mothers’, as the baseline. A drift in that direction is apparent in how states have implemented *Lehr*, in at least one recent Supreme Court decision, and in many treatments of cases involving reproductive technology.

On first reading, *Lehr* appears to be a defeat for fathers’ rights: *Lehr* was a sympathetic father trying to connect to this child, and the Court harshly rejected

⁹⁴ See Baker, *Property Rules*, *supra* note 80, at 1568; Davis, *Male Coverture*, *supra* note 25, at 101 (discussing feminists’ reluctance to challenge notion that women have special connection to children).

⁹⁵ 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 Rehnquist Court’s approach to equal protection).

⁹⁶ See Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1514-19 (1997).

his claim, largely due to alleged deception by the mother.⁹⁷ 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. As discussed above, New York's registry did not actually promise parental rights, only an opportunity to appear at the adoption hearing.⁹⁸ 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 a right for unwed fathers to be notified of adoption proceedings. 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.⁹⁹

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 2 and 4, respectively, based on lack of proper notice to biological fathers who did not know the children before initiating litigation.¹⁰⁰ Such outcomes reinforce the notion that biological

⁹⁷ It should be noted, as Mary Shanley points out, 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, *Unwed Fathers' Rights*, *supra* note 53, at 77-78.

⁹⁸ See *supra* notes 47, 53. See also Spitko, *supra* note 3, at 110 (arguing that father must make substantial showing before acquiring rights, usually impossible before birth).

⁹⁹ 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."); 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.").

¹⁰⁰ *In interest of B.G.C.*, 496 N.W.2d 239 (Iowa 1992) (Jessica); *In re Petition of Kirchner*, 649 N.E.2d 324 (Ill. 1995) (Richard). David Meyer gives a heart-wrenching account of the ultimate transfer of custody from Richard's point of view. Meyer, *supra* note 22, at 753. In both cases, the

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 nurturing 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 below in Part III, contributes to a climate conducive to 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 tells us 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 looks at the Court’s protection of this bond and identifies other 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 the

litigation was in fact initiated by the mother, who regretted the adoption decision. Both cases thus probably could have been avoided if the waiting periods for adoption in this country were similar 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 (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).

new situations made possible by reproductive technology. Because, however, the Court's definition of parenthood is an exercise in accommodating biological difference, extending that definition to new biological possibilities requires us to step back and be sure we understand the point of the exercise.¹⁰¹

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, so 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.¹⁰² If the bond between parent and child were the only reason for protecting parental rights, and if no bond exists

¹⁰¹ To continue the analogy suggested in note 67, the comparable worth theory of equality in employment was rejected by courts in part because it was difficult as a practical matter to decide when two very different jobs were "comparable" in terms of skill, effort, and other relevant factors (or even what factors should be deemed relevant).

In the reproductive context, Marjorie Schultz argues that accommodation of men via reproductive technology is a necessary complement to feminist demands for accommodation of pregnancy in the workplace. Schultz, *supra* note 2, at 303, 385. As discussed in above, I agree with Schultz that men's reproductive disadvantage should be accommodated, but believe that 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 an 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*, _ F.Supp.2d _, 2006 WL 1983210. In my view, the latter arguments reflect fundamental misapprehension of the nature of the abortion right and the abortion decision.

¹⁰² 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).

with either mother or father at the child’s birth, there would be no constitutional bar to the state seizing newborns and distributing them to parents by some administrative scheme.

But 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 in order 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—to families.

Fourteenth Amendment parental rights—the rights the Supreme Court insists the states may not deny to those who are deemed parents—are aimed at both these concerns: the emotional bond between parent and child and the parent’s right to control the upbringing of the child. And the biology-plus-relationship test accords with those justifications for protecting parental rights as a matter of constitutional law.

A. *The meaning of constitutional 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.”¹⁰³ But the Supreme Court’s early parental rights cases protected a motley assortment of rights, mostly related to control over the child’s education.¹⁰⁴ More comprehensive, but in the end surprisingly narrow, was the Court’s affirmation of

¹⁰³ Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 406 (1988); *cf.* *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) (describing “the interest of the parent in the companionship, care, custody, and management of his or her children”).

¹⁰⁴ *See* cases cited, *supra* note 5.

parental rights in *Troxel v. Granville*.¹⁰⁵ Despite the narrowness of the holding, however, *Troxel* runs counter to the protection for unwed fathers carved out by Justice Stevens’s opinion in *Michael H.*

Troxel produced six opinions, which give a glimpse of what the Court saw as the core parental rights protected by the Fourteenth Amendment. The immediate result in *Troxel* was to strike down a Washington trial court’s application of a third-party visitation statute to require more frequent visits with the children’s grandparents than the mother preferred.¹⁰⁶ 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.*¹⁰⁷ The Court’s many opinions left a great deal of uncertainty for states that want to allow non-parental visitation orders,¹⁰⁸ and it reveals 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 let *anyone* petition a court for a visitation order. The order could be issued based solely on a finding that visitation would be in the best interests of the child. The statute thus authorized sweeping intrusions on parental rights, virtually eliminating the parent’s special claim to the child—except that the statute permitted only visitation, not actual transfer of physical or legal custody. The plurality opinion condemned this sweeping intrusion, but the Court declared the statute unconstitutional only as applied in *Troxel* itself.¹⁰⁹ While the micromanaging of the mother in *Troxel* was particularly egregious, the “third parties” seeking visitation were sympathetic.

¹⁰⁵ 530 U.S. 57 (2000).

¹⁰⁶ *Id.* at 61.

¹⁰⁷ *Id.*

¹⁰⁸ See generally Janet Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337 (2002); Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279 (2000).

¹⁰⁹ *Troxel*, 530 U.S. at 73.

They were, after all, the children's biological grandparents. Their son, the father, had died, and they sought the visitation order in response to finding their contacts with his children reduced as the mother moved on with her life.¹¹⁰ It is hard to imagine a better case for third-party visitation than the claims of these particular grandparents.¹¹¹ We 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 as well. But it is hardly a robust presumption. That is, *Troxel* holds that the state cannot override the parent's decisions based *solely* on a difference of opinion about the child's best interests. 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.¹¹² It appears, then, that the mother in *Troxel* had only 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.¹¹³

¹¹⁰ *Id.* at 60-61.

¹¹¹ Except perhaps for Michael H., who is discussed further below.

¹¹² *Troxel*, 530 U.S. at 69.

¹¹³ See generally David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 U.C.L.A. L. REV. 1125, 1140 (noting that the mother in *Troxel* won by the skin of her teeth). 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 sub-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 (1999).

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 to be¹¹⁴ a more or less equal contender with the mother on questions of the child's best interests.¹¹⁵

These are also the same rights that Carole and Gerald retained when the Supreme Court let stand California's presumption of Gerald's paternity. But in their case, parental rights were expressly conditioned, by Justice Stevens's opinion, on Michael's ability to seek visitation based on Victoria's best interests. 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.*¹¹⁶

Michael H. could be modified to be consistent with *Troxel* without jettisoning Justice Stevens's opinion in favor of the plurality's. The simplest modification would be to beef up the standard Michael must meet to obtain visitation. Instead of "Michael is entitled to any visitation that is in Victoria's best interests," we would have something like, "Michael is entitled to visitation if the failure to require 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 just permitted, to allow for the

¹¹⁴ And to remain. 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 was, Quilloin would be cut off from all future decisions and any right to visitation.

¹¹⁵ 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.

¹¹⁶ 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*, 530 U.S. at 87-89.

possibility of visitation by non-legal fathers who satisfy the biology-plus-relationship test.¹¹⁷

Alternatively, one could also leave the resolution of *Michael H.* intact and simply treat it as an exception to *Troxel*. The rule would be: 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 biological presumption of paternity.¹¹⁸

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 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

¹¹⁷ I am assuming, for the sake of discussion, 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. It is quite possible he did not have proven a sufficient relationship. See Woodhouse, *Hatching the Egg*, *supra* note 93, at 1864-65 (1993).

¹¹⁸ I do not mean to preclude the possibility that a similar status could be accorded to other contenders for quasi-parental status, such as birth parents in cases of botched adoptions, *see* Meyer, *supra* note 22 (proposing that law allow for adoption to stand yet allow for visitation by birth parents), and partners of legal parents who become functional parents in the absence of a biological tie, *see* Spitko, *supra* note 3 (proposing that caretaker who assumes explicitly parental role, with consent of existing legal parent(s), should be deemed legal parent).

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.

1. Concrete connection between parent and child

The unwed father cases focused on the real-life 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"¹¹⁹ that can send even the most conservative judge looking for a constitutional text on which to hang reversal.¹²⁰ 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.¹²¹ Before the unwed father cases, states operated on the assumption that only women formed these bonds with children. The Court rejected this stereotype and said that, at least given sufficient time after birth, men too can form emotional bonds with their children.

The protection of parental rights in *Caban*, however, was triggered by a history of day-to-day caretaking, *not* by requiring the father to make a showing of actual emotional attachment. In other words, the "biology-plus-relationship" test

¹¹⁹ CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 105 (1997) (proposing quoted language as test for violation of Privileges or Immunities Clause); compare *Meyer v. Nebr.*, 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").

¹²⁰ In *Troxel*, Justice Scalia voiced his objection to the enterprise of substantive due process yet indicated 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).

¹²¹ *Quilloin*, 434 U.S. at 251 and n. 11.

analogized to what, in the Court's eyes, mothers *do*, not what mothers *feel*.¹²² The Court did not ask whether Caban changed diapers resentfully or joyfully, only whether he changed them.¹²³ Parental rights attach because the parent assumes responsibility, not purely as a balm for the heart.¹²⁴ That is why I refer to this justification for parental rights as 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 Court's solicitude for their existing bond is embodied in the relationship prong of the test.¹²⁵ Parental rights were earned by conduct that is reasonably assumed to give rise to an emotional bond.¹²⁶

Interests other than emotions may also be protected by honoring a caretaking bond. The best interests of the child may well be served by committing her future care to a person with a track record of willingness to provide that

¹²² As noted above, it is not clear what would pass as the “bare minimum” for claiming parental rights under the biology-plus-relationship test. However, the degree to which the Court's decisions emphasize daily caretaking responsibilities over more stereotypically male parenting such as giving gifts or providing financial support. While 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*.

¹²³ 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 79. 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 129.

¹²⁴ 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 (comparing relative expertise of parents and states with respect to unique needs of particular child).

¹²⁵ 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. It is unlikely that the Supreme Court will require states to recognize such parents as a matter of constitutional law, but it is also unlikely that the Court will prohibit the states from doing so.

¹²⁶ 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. While 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.

care.¹²⁷ Or the fact that the parent has labored to rear the child may intensify the sense that the child is the property of the parent.

But in the unwed father cases, the Court evinced concern primarily for the emotional connection presumed to arise from caretaking. In *Caban*, after all, there was no shortage of parents willing and demonstrably able to care for the child. And while 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—the child-as-property seems an unlikely candidate as a constitutional *justification* for parental rights.¹²⁸ 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.¹²⁹ By requiring caretaking, the biology-plus-relationship test 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.

¹²⁷ For cases in which this is not so, *Stanley* made clear that the standard for removing the child is the unfitness of the parent. That is, initial identification of the legal parent is a distinct question from the termination of parental rights. Avoiding the latter requires only basic fitness.

¹²⁸ 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. While 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 if in a direction that serves an unacknowledged and illegitimate goal.

¹²⁹ This model 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. 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 3. My 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 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.

The concrete connection protected by the biology-plus-relationship test is also to be distinguished 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.¹³⁰ There is some support for this argument in *Skinner v. Oklahoma*,¹³¹ which struck down a statute employing sterilization as a penalty for certain crimes, and in *Eisenstadt v. Baird*,¹³² which characterized the right to privacy as including the decision whether to "bear or beget" a child.

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. 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. Such claims go well beyond the concerns about involuntary sterilization in *Skinner*.¹³³ 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.

2. *Political role of the family*

While *Skinner* suggests the possibility of some protection for the "right to procreate," it was actually decided as a matter of equal protection, not liberty—

¹³⁰ See, e.g., ROBERTSON, *supra* note 3.

¹³¹ 316 U.S. 535 (1942).

¹³² 405 U.S. 438 (1972).

¹³³ See Rao, *supra* note 3, 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 WES. L. REV. 323 (2004); Justyn Lezin, *(Mis)conceptions: Unjust Limits on Unmarried Women's Access to ARTs*, 14 HASTINGS WOMEN'S L.J. 185 (2003) (discussing contested status of "right to procreate").

doctrinally, the problem was arbitrary sterilization, not sterilization itself.¹³⁴ *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*¹³⁵ and *Pierce v. Society of Sisters*,¹³⁶ which argued that protection of parental rights is linked to the preservation of our 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."¹³⁷ While the first rationale focuses on the privacy of family relationships, this one 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.¹³⁸

And in *Pierce* the Court summarized,

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children.¹³⁹

¹³⁴ By deciding *Skinner* on equal protection grounds, the Court avoided direct conflict with *Buck v. Bell*, 274 U.S. 200 (1927) ("Three generations of imbeciles are enough."). While *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.

¹³⁵ 262 U.S. 390 (1923).

¹³⁶ 268 U.S. 510 (1925).

¹³⁷ *Palko v. Conn.*, 302 U.S. 319, 325 (1937).

¹³⁸ *Meyer*, 262 U.S. at 627-28.

¹³⁹ *Pierce*, 268 U.S. at 573.

In both cases, the family is treated as a micro-culture which must be permitted a say in raising “its own” children in order 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 *Meyer* and *Pierce* is that they were written at a time when the U.S. 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.¹⁴⁰ 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).¹⁴¹ That history has also given us the Indian Child Welfare Act,¹⁴² 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.¹⁴³ To a much lesser degree, the specter of Spartan standardization of

¹⁴⁰ See STEVE HENDRICKS, *THE UNQUIET GRAVE: THE FBI AND THE STRUGGLE FOR THE SOUL OF INDIAN COUNTRY* (2006) (describing Native children forced to cut hair and burn traditional clothes, punished for practicing religion or speaking language). Protection of parental rights is also consistent with the historical origins and purposes of the Fourteenth Amendment. See Davis, *Family Values*, *supra* note 5 (discussing deprivation of parental rights under slavery and Jim Crow).

¹⁴¹ 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); see also *id.* at 1000-01 (“*Meyer* announced a dangerous form of liberty, the right to control another human being.”). Woodhouse acknowledges the 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. I hope I have avoided some of those dangers by 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.

¹⁴² Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978).

¹⁴³ State- and local-level policies arguably reflect the same concern when they promote race-matching or religion-matching in adoptions.

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.

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. My focus here is 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 caretaking relationship with 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. However, I do not think this aspect of parental status should play any 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 elected [her].”¹⁴⁴ Regardless of whether it is “necessary” to assign responsibility

¹⁴⁴ *Stanley v. Ill.*, 405 U.S. 645, 661 n. 1 (1972) (Burger, C.J., dissenting) (quoting Illinois's brief, alteration by the Chief Justice).

to the mother at birth, 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.¹⁴⁵ While 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, from a feminist perspective, the privatization of dependency is generally considered a bad thing, and many feminists argue that the state should see itself as substantially more responsible for children. 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. The success of this critical project thus depends on establishing greater separation between parental rights and responsibilities.¹⁴⁶ 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).¹⁴⁷

Because the Fourteenth Amendment is primarily understood as imposing constraints on state action, it makes sense that the policies underlying parental

¹⁴⁵ The facts of *Stanley* actually 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. 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.

¹⁴⁶ Just as divorced parents link visitation and child support despite judicial admonishment, 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).

¹⁴⁷ 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).

rights doctrine should be those policies likely to be threatened by the state. While the rules of parental responsibility may serve the state's interest in avoiding public responsibility¹⁴⁸ (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. But to do so would allow the state to standardize its children through legislative and judicial biases—that is, to assign children to parents it deemed deserving, based on 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. It also parallels the Fourteenth Amendment's method for assigning national citizenship (of which more later): if you are born here, you are ours.¹⁴⁹ 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. In that situation, the relationship hurdle may seem unduly high: Given a choice between the state and even an uninvolved father, the political rationale would prefer 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

¹⁴⁸ I do not mean to imply that it is actually in the interest of society to avoid responsibility for children, only that our current society wishes to do so.

¹⁴⁹ "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 in which they reside." U.S. Const. amend. XIV, § 1.

within an alternative family form—a same-sex household, an extended family, adoptive parents—that may not include a clear analogue to the father, the political perspective would see not the absence of a father but a different kind of family.¹⁵⁰ 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 together¹⁵¹; and third by providing the child of an involved father with a back-up 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.

In Part III, I evaluate the premise of mothers’ rights that was the basis for the “biology-plus-relationship” test and defend that premise against the accusation that it improperly stereotypes and essentializes women as loving mothers. I also consider the law’s choice among three contending mothers—genetic, gestational, and intended—in light of the policies justifying constitutional protection of parental rights. I conclude that those policies favor recognizing the gestational mother as a parent of the child she bears.

¹⁵⁰ 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 person and the child. *See, e.g., Spitko, supra* note 3.

¹⁵¹ 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.

III

*What makes a woman a mother?
Essentialism and biology*

While 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 the marketplace that has grown beside them, have led inevitably to litigation over who is the "true mother." Disputes over motherhood arise not only in cases where the gestational mother tries to keep the child despite a surrogacy contract¹⁵² but also in cases where fertility clinics have made mistakes, such as implanting an *in vitro* embryo in the wrong woman.¹⁵³ Although the Supreme Court has not yet accepted a case raising the issue of disputed motherhood, for years lower courts have grappled with

¹⁵² See, e.g., *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

¹⁵³ See, e.g., *Perry-Rogers v. Fasano*, 715 N.Y.S.2d (App. Div. 2000). See generally Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who is the Mother*, 16 L. & Ineq. 289 (1998); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, and Law*, 12 COLUM. J. GENDER & L. 1 (2003).

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.) This definitional move can be accomplished in different ways, depending on the particular facts of the case. In every case, however, the proponents of surrogacy contracts must endorse the denigration of birth and gestation I have described in *Nguyen*, in order to conclude that she is "not the mother." Once that re-definition is accomplished, however, it becomes the legal definition of maternity and will be applied even in cases where 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 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 (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.

reproductive technology that no longer allows them to take the identity of the mother as a given.

Yet the emergence of new technology does not mean the law of parental status must be reinvented from scratch.¹⁵⁴ The Court's biology-plus-relationship test tracked the first of the two reasons why parental rights are protected.¹⁵⁵ 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 addressing issues of reproductive technology, especially surrogacy contracts, have largely ignored the doctrinal roots of parental rights.¹⁵⁶ In this Part, I consider how the unwed father cases apply to women, and I defend the Court's premise in those cases that a mother's parental rights are established by pregnancy and birth against the charge of essentialism: the accusation that the Court's premise stereotypes women as inherently nurturing. I also argue 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*

I have so far relied on the Court's premise that gestation and birth establish the same kind of relationship between a woman and child that the Court

¹⁵⁴ See Garrison, *supra* note 3 (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 non-uniqueness of "law of billboards").

¹⁵⁵ 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*. See, e.g., Helms & Spence, *supra* note 53 (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.

¹⁵⁶ This is not surprising, since these courts are adjudicating the question of parental rights in a family law setting that involves many additional considerations, and are probably most accustomed to deciding cases according to the best interests of the child.

demanding of the unwed fathers who claimed parental rights. But a substantial body of feminist criticism calls that premise essentialist and accuses the Court of stereotyping women as mothers and nurturing caregivers. While the opinions in the unwed father cases do reflect gender stereotypes and while the Court at times cast women, post-birth, as inherently nurturing and loving toward their children, rejecting these stereotypes does not require that we also reject any meaningful difference between biological motherhood and biological fatherhood.

Nonetheless, there is a growing belief in case law and commentary that it is inappropriately essentialist to recognize any difference between a mother's and a father's relationship to newborn offspring.

The accusation of essentialism dominated the opinions in *Nguyen v. INS*.¹⁵⁷ Tuan Anh Nguyen was the child of an American man and a Vietnamese woman. He was born in Vietnam but raised almost entirely by his father, with whom he lived in the U.S. from the time he was five years old. At the age of 22, Nguyen pleaded guilty to a felony, and the INS tried to deport him. Nguyen claimed he was entitled to U.S. citizenship.¹⁵⁸ By federal law, any child of a female U.S. citizen can claim citizenship no matter where born, but a child born abroad to an unwed American father can become a U.S. citizen only if formally acknowledged or "legitimated."¹⁵⁹ Nguyen's problem was that the acknowledgement must occur before the child turns 18; he and his father had missed their chance. 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.¹⁶⁰

¹⁵⁷ 533 U.S. 53 (2001).

¹⁵⁸ *Id.* at 57.

¹⁵⁹ *Id.* at 59 (citing 8 U.S.C. § 1409(a)).

¹⁶⁰ 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.

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. A mother, said the INS, has a relationship with her child by the fact of gestation and birth, while a father might not even know his child exists.¹⁶¹ 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.¹⁶²

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. The additional requirement for a father (that he must acknowledge the child) was needed because there was no guarantee that he had ever had a similar opportunity, since he was not necessarily present at birth. 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.¹⁶³

¹⁶¹ Nguyen, 533 U.S. at 79-80.

¹⁶² *Id.* at 64-68.

¹⁶³ See *Dumbo* (opening sequence, in which Mrs. Jumbo establishes her relationship with Jumbo Jr., later dubbed Dumbo, after delivery by stork; at no point in the film is there any reference to a Mr. Jumbo).

Justice O'Connor's dissent (joined by Justices Souter, Ginsburg, and Breyer) correctly lambasted the majority's new "opportunity" rationale.¹⁶⁴ There was no evidence that this rationale described Congress's actual purpose when it passed the law,¹⁶⁵ 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."¹⁶⁶ The dissent also questioned whether the "opportunity" rationale qualified as an "important" governmental interest, as required for intermediate scrutiny.¹⁶⁷

¹⁶⁴ *Nguyen*, 533 U.S. at 85-87. Largely for the reasons mentioned in this paragraph, my criticism of the *Nguyen* dissent does not necessarily mean I believe *Nguyen* was correctly decided, although I do believe it is a harder case for feminists than the dissent suggests. Because there clearly was a parent-child relationship, the citizen-father and child should have been deemed similarly situated to citizen-mothers and their children, triggering intermediate scrutiny. *Nguyen* would then have been the first application of the biology-plus-relationship test outside the context of mere parental identity. In addition, I would have liked the dissent to confront directly the relationship between rights and responsibilities, particularly in light of the majority's rather shocking embrace of the U.S.'s claimed interest in protecting itself from citizenship claims brought by the children of U.S. military personnel serving abroad. See Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222 (2003); Silbaugh, *supra* note 8, at 1159 (noting that *Nguyen* Court failed to see "that the conferral of a right is also the conferral of a responsibility in this citizenship statute").

¹⁶⁵ 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.

¹⁶⁶ *Nguyen*, 533 U.S. at 91.

¹⁶⁷ *Id.* at 84-85. 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. Even setting aside the availability of DNA testing (which, under my argument, would be less than conclusive as to mothers), the sex-based classification of mothers and fathers truly 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.) It is difficult to imagine that, 18 years after the fact, the mother will be able to call upon "witnesses to the birth" who will be available to testify and competent to identify the now-grown child as the baby they helped deliver. The likelihood of a mother being able to produce such testimony seems only slightly greater than the likelihood of the father being able to produce witnesses to the conception.

But the dissent also refused to acknowledge any difference between motherhood and fatherhood, even at the time of birth, which is troubling.¹⁶⁸ The dissent's approach suggests that a new mother, like a 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.¹⁶⁹ The majority said that it was sensible for Congress to provide such a substitute "in terms the male can fulfill."¹⁷⁰ 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.

This fear ignores the rationale behind the unwed father cases, which emphasized only 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

¹⁶⁸ 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 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—breast pumps and baby formula—have already been normalized.) 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.

¹⁶⁹ *Nguyen*, 533 U.S. at 67.

¹⁷⁰ *Id.* at 67.

psychologically dependent on him. 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" so 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 analog in biological fatherhood.

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 was actually required of the unwed fathers.

First, recall that the biology-plus-relationship test was *based* on motherhood and *adapted* to fatherhood. Of course it is necessary for the man 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.¹⁷¹

¹⁷¹ It also ignores that the mother, too, has a choice. However, I hesitate to treat the option of abortion as an important factor in an analysis of parental rights. For many women, it is not a

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—changing diapers, making dinner, or the like. Indeed, it would have been harder to justify the automatic rights of married fathers under such a standard. Rather, the Court’s concern seems to have been whether the father was part of the child’s everyday life; whether his influence was good or bad would be the concern of fitness and custody proceedings.¹⁷² 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.¹⁷³

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

In the remainder of this article I turn 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

practically available option. 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 80 (arguing that woman’s decision to carry to term over objection of biological father should make her solely responsible for child support).

¹⁷² Cf. Baker, *supra* note 80, at 1564 (discussing how parents transmit values).

¹⁷³ 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 3, at 108 n. 50.

important role of biology in assigning parental rights lies in the role of gestation, which, in addition to likely giving rise to emotional bonds, assigns newborn children to families in a way the state cannot easily control.

None of these considerations alone gives a definitive answer to one central question of reproductive technology: the enforceability of surrogacy contracts. But they do 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.¹⁷⁴ Since she was the prototype for the biology-plus-relationship test, we should not be surprised that she easily passes it. But it is worth considering more precisely *how* the female can fulfill this test designed for the male.¹⁷⁵

First, we know from *Quilloin* and *Lehr* that her parental rights do not derive solely from her genetic parenthood of the child.¹⁷⁶ If genetics were controlling, then genetic fathers would have exactly the same rights as genetic mothers. But the Court held that despite the equality of genetics between men and women, there was a difference in how a woman becomes and is a mother and how a man becomes and is a father. The parenthood protected by the Constitution, said the Court, must include a caretaking relationship.

¹⁷⁴ Schultz, *supra* note 2, at 390.

¹⁷⁵ See *Nguyen*, 533 U.S. at 67 (“in terms the male can fulfill”).

¹⁷⁶ 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. I find this view somewhat anachronistic: the common law did not need to decide whether its rule was “really” about genes or gestation because the two were inseparable. Moreover, genetics is a relatively new field, and at least some contributors to the development of the common law rule likely shared the belief that the mother was “merely” a vessel for the father’s seed; she was nonetheless identified as a parent. Whatever the intent of the common law rules, however, the unwed father cases tell us that genes alone are not sufficient for constitutional purposes.

It does not follow, however, 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 in order to establish parental rights.¹⁷⁷ 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. For the mother, there is 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.¹⁷⁸ 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. While she may lack the genetic tie of the prototypical mother, she has, by virtue of biological

¹⁷⁷ See Colb, *supra* note 69, 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)

¹⁷⁸ Although I do not believe this fact should 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.

connection and nine-months' caretaking, as strong a claim to parental rights as a genetic father who establishes a caretaking relationship after birth.¹⁷⁹

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”—not really donation because a fee is often paid. 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. Without proper attention to the principles underlying the assignment of parental rights, ownership of gametes slips too easily into ownership of children based on genetics alone, regardless of relationship.

For example, in the famous *In re Baby M*,¹⁸⁰ the New Jersey supreme court threw out 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. The contract thus dismissed, the court saw the case as a custody dispute between genetic mother Whitehead and genetic father William Stern. Elizabeth Stern, the intended mother, had no standing in the dispute.

By contrast, when an intended mother is the genetic mother—that is, the woman who 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.*

¹⁷⁹ 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 so 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.

¹⁸⁰ 537 A.2d 1227 (N.J. 1988).

Calvert,¹⁸¹ a California court likened the gestational mother to a foster mother. The court granted exclusive parental rights to the intended parents who had provided the egg and sperm for the gestational mother to carry.¹⁸²

The most extreme case elevating genetics over other factors is the New York case of *Perry-Rogers v. Fasano*.¹⁸³ The Perry-Rogerses created embryos through *in vitro* fertilization, but attempts to implant them in Deborah Perry-Rogers were unsuccessful. 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 boy who was the Perry-Rogerses'.¹⁸⁴ The court declared that Fasano was a legal stranger to the second child, and that the Perry-Rogerses were his parents.

A genetic relationship has several advantages for determining parenthood that make it attractive to courts. Identifying parents by DNA is clear and can be tested at any time. 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. 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. Thus, in the California case *In re Marriage of Buzzanca*,¹⁸⁵ a

¹⁸¹ 851 P.2d 776 (Cal. 1993).

¹⁸² *Johnson* involved a surrogacy contract, but the decision seemed to turn on genes, so I include it here. See Dalton, *supra* note 85, at 303 ("It is not clear why genetics suddenly became of paramount importance to the courts, especially considering their long history of downplaying its importance in favor of other factors.").

¹⁸³ 715 N.Y.S.2d 19 (App. Div. 2000).

¹⁸⁴ The difference was readily apparent because the Fasanos were black and the Perry-Rogerses were white. It seems likely that the racial difference influenced the court's emphasis on genetics. See Bender, *supra* note 153.

¹⁸⁵ 61 Cal.App.4th 1410 (1998).

couple created an embryo using donated genetic material, which was then implanted in another woman for gestation. The court allowed the intended mother to stand in the shoes of the egg donor and be recognized as the legal mother.

The problem arises when the rules of the gamete market are applied to babies already born, as in *Perry-Rogers*. The 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.¹⁸⁶

And 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. The law thus gives them an incentive to undergo egg extraction, a prolonged, difficult process culminating in surgery. 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 (to her and the babies) pregnancy.¹⁸⁷ Although some people might choose these risks regardless of the law, because of a personal belief in the importance of genetics, it is perverse for the law to

¹⁸⁶ See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323 (2004); see also Julie Shapiro, *A Lesbian Centered Critique of “Genetic Parenthood”*, 9 J. GENDER RACE & JUST. 591 (2006).

¹⁸⁷ Multiple pregnancies can also lead to disputes when the gestational mother refuses the intended parents' demand that she undergo a reductive abortion. Buss, “*Parental*” Rights, *supra* note 8, 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).

promote such activity 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, it is likely a mistake to distinguish between the two.¹⁸⁸

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 where 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

I have argued above that assigning parental rights to the gestational mother is a better application of the unwed father precedents than assigning parental rights on the basis of genetics. I have also defended the preference for the gestational mother against the charge of essentialism. 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."¹⁸⁹ "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

¹⁸⁸ 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.

¹⁸⁹ See Schultz, *supra* note 2; Hill, *supra* note 3.

the biological offspring of one of the women and the sperm donor. Intent theory would protect the parental rights of both women if they later disputed custody, rather than favoring the biological mother.¹⁹⁰ Intent theory also favors enforcement of surrogacy contracts.

The main practical justification for intent theory is that it protects the “right to procreate”: enforcing surrogacy contracts helps infertile couples become parents. It thus protects the abstract longing for the 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.¹⁹¹ Finally, Marjorie Schultz and others have argued that intent theory and reproductive technology are a path to gender neutrality in family law.¹⁹²

These issues have been widely debated, and full treatment of them is beyond the scope of this article.¹⁹³ What follows are some points that should be considered by courts 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. It disregards both the biology and the caretaking relationship of pregnancy.¹⁹⁴

¹⁹⁰ *But see* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. UNIV. L. REV. 433 (2005) (discussing problems with applying intent theory to lesbian couples, including judicial reluctance to extend to lesbians and focus on pre-conception intent rather than agreement arising after birth).

¹⁹¹ *See, e.g.*, Schultz, *supra* note 2, at 352.

¹⁹² *Id.*

¹⁹³ For broad responses to the points mentioned in the prior paragraph, *see* Shanley, “*Surrogate Mothering*” and Garrison, *supra* note 3.

¹⁹⁴ 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. While enforcement of surrogacy contracts is often defended as

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. Yet this analogy also seems unfair in light of the effort the couple has expended, especially in cases involving egg donation. There is likely a great deal of attachment on their side—but none on the child's. It is unclear why the couple's attachment should trump the surrogate's when only the latter's is even possibly shared by the child.¹⁹⁵

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.¹⁹⁶ 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? I would suggest that the answer is that intent theory is more concerned with ownership of the child as a product and tends to vest gender-neutral “authorship”¹⁹⁷ of the child with greater importance than then 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

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. The notion that she can do so in advance fits comfortably with a property model that sees newborns as fungible.

¹⁹⁵ 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* (describing need, as prospective adoptive parent, to constantly remind himself that “birth mothers change their minds,” and describing birth mother's tearful relinquishment of child).

¹⁹⁶ 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 100.

¹⁹⁷ See Chan, *supra* note 168 (analogizing children to intellectual property).

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, it is important that at least one person 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 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—are means to 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.¹⁹⁸ Although the statute challenged in *Nguyen*

¹⁹⁸ 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. 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. See Weinrib, *supra* note 164. The *Nguyen* majority endorsed as a legitimate congressional objective the desire to *avoid* granting citizenship to such a child unless the father voluntarily

was more restrictive to fathers than to mothers, so is the Constitution. 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. 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, it makes sense to apply the same rule to families.

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. While 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 committed to maintaining pluralism or ensuring the transmission of a variety of cultures. While a small surrogacy market will not transform us into Plato's republic, that step toward commodifying children and reproduction is a step away from Fourteenth Amendment values.¹⁹⁹

None of the foregoing compels the conclusion that the gestational mother has all the parental rights and the contracting couple has none. The couple's

sought to take responsibility for the child. 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. While my topic here is parental *rights*, and I argue here 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 8 (discussing rights and responsibilities in family law).

¹⁹⁹ In addition, it is impossible to say how much the reproductive market will grow if it is legally acceptable and its contracts usually enforced. Surrogacy, for example, could remain a last resort for the infertile, or, if social regularization follows legal regularization, become a matter of personal choice (like, say, 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.

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.²⁰⁰ But consideration of the justifications 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—substantive due process, procedural due process, and equal protection—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.

²⁰⁰ See Buss, “Parental” Rights, *supra* note 8.