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THE CONSTITUTIONALITY OF “BEST INTERESTS” PARENTAGE

David D. Meyer*

INTRODUCTION

The premise of this Symposium is unabashedly radical: to imagine a new law of parentage focused exclusively on the needs and interests of children. Participants were invited to set aside questions of political feasibility and the constraints of settled law in asking how the law should assign parentage if its only goal were to maximize the welfare of children.

The notion is radical because, traditionally, parentage law has been driven significantly by the needs and interests of adults — a sense of the natural entitlement of genetic parents, for instance, or society’s desire to protect marriage or enable the orderly transfer of wealth between generations. One need only recall parentage law’s historical treatment of non-marital children — classifying them as *filius nullius*, or the child of no one — to appreciate the point.¹ Even more strikingly, perhaps, the invitation expressly assumes a governmental control over the question of parentage that would strike many as alien. In its foundational case recognizing constitutional protection for family privacy, after all, the Supreme Court described the idea that government might reassign parentage in order to advance its own vision of child welfare as resting on “ideas touching the relation between individual and State . . . wholly different from” our own.²

And, yet, the invitation to think creatively and expansively about the meaning of legal parentage is extremely timely. Judges and legislators around the country are wrestling with the question as never before.³ The easy certainty of DNA testing and

* Professor of Law and Mildred Van Voorhis Jones Faculty Scholar, University of Illinois. I am grateful to the other participants in this Symposium and to Amy Gajda and Harry Krause for their insightful comments and reactions to an earlier draft of this paper, to the editors of the *William & Mary Bill of Rights Journal* for hosting an engaging and lively conference, and to Jim Dwyer for inviting me to take part.

¹ See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 3 (1971). As Professor Janet Dolgin has pointed out, “Before the Industrial Revolution the welfare and interests of children were not relevant to determination of custody and parentage. When called upon to determine a child’s custody or parentage, English common law virtually ignored the child’s welfare.” JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 217 (1997).

² *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

³ See June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295 (2005); David D. Meyer, *Parenthood in a Time of Transition*:

the fluidity of modern childrearing arrangements have combined to test fundamental assumptions about the meaning of kinship between adults and children.⁴ And, in responding to the challenge, some courts have opened the door to the idea of assigning parentage based directly on a judicial determination of a child's best interests.⁵ Accordingly, the work of crafting an explicitly "child-centered" parentage law is not solely a matter of academic interest; it is already the real-world occupation of at least some judges and lawyers.

The question that I take up in this article is whether the toe-hold that "best interests" parentage has established in American law can be sustained against objections that it violates the fundamental constitutional rights of traditional parents. In other words, is it constitutional to premise legal parentage on a governmental finding of a child's "best interests"? The answer that I come to is that, perhaps not surprisingly, it depends. Part I of the Article sketches the context in which the question now arises: the breakdown of traditional parentage law — in which legal parentage was tied closely to clear markers relating to blood, marriage, and adoption — and the emergence of judicial interest in mediating conflicts among competing parental figures by resort to a child's best interests. Part II considers whether substantive due process protection for family privacy limits the state's power to pick and choose among the competing claimants. It concludes that, notwithstanding recent suggestions of an essentially plenary state power to redefine parental status, the Constitution likely does confer a privacy right to parental identity on at least some individuals.

Finally, in Part III, I consider whether the privacy right to parental identity might be overcome based solely on a governmental assessment of a child's best interests. In my view, the answer is to be derived not from a rigid application of strict constitutional scrutiny, but from a more nuanced evaluation of the competing public and private interests at stake. Such an evaluation, I conclude, suggests that states enjoy considerable latitude to reorient parentage law in a child-centered direction. At the same time, any law that would defy widely shared social expectations in withholding parentage must be justified by something more compelling than a bare "best interests" showing. This counsels care — but not necessarily timidity — in rethinking the traditional boundaries of parentage.

Tensions Between Legal, Biological, and Social Conceptions of Parenthood, 54 AM. J. COMP. L. 125 (2006).

⁴ See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323 (2004); June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011 (2003).

⁵ See *infra* notes 30–41 and accompanying text.

I. THE BREAKDOWN OF SETTLED LAW AND THE EMERGENCE OF "BEST INTERESTS" PARENTAGE

Until quite recently, parentage appeared to be "a settled category" in the law.⁶ For decades now, much of family law has seemed unstable and disputed — the importance and meaning of marriage, the rights and obligations of unmarried cohabitants, gender roles within the family, and the availability and consequences of divorce.⁷ But there was relatively little disagreement about the identity of the persons who were entitled to call themselves parents.⁸

For most of its history, American law proceeded on the assumption that parents were persons who created a child through sexual reproduction or who assumed the legal obligations of parenthood through formal adoption. Identifying adoptive parents was mostly a straightforward matter because the kinship tie typically depended on the satisfaction of a formal legal process.⁹ Identifying birth mothers was also relatively easy, given the circumstances of childbirth and the usual presence of witnesses.¹⁰ Identifying birth fathers was a trickier matter, of course, especially before the advent of modern blood-typing and DNA analysis,¹¹ but the law made do through the use of widely accepted presumptions. Under these rules, a husband was strongly presumed to be the father of a child born to his wife. The presumption could be overcome only by evidence precluding any procreative role by the husband, such as by showing that the husband and wife were separated at all times of possible conception under circumstances that guaranteed the husband's "nonaccess" to his wife.¹² In the absence of scientific proof to the contrary, however, the law considered the husband's paternity conclusively established if they cohabited when the child was likely conceived.¹³

⁶ Carbone, *supra* note 3, at 1295.

⁷ See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

⁸ See Carbone, *supra* note 3, at 1295; Ira Mark Ellman, *Thinking About State Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 51–52 (2002).

⁹ Although informal adoption was practiced to some extent, most adoptions were documented by courts, legislatures, or agencies. For discussion of historical practice, see Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U.L. REV. 1038 (1979); Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263 (2002).

¹⁰ *Nguyen v. INS*, 533 U.S. 53, 62 (2001); *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 912 (2000).

¹¹ See NANCY E. DOWD, *REDEFINING FATHERHOOD* 115–16 (2001).

¹² *In re Marriage of Schneckloth*, 320 N.W.2d 535, 536–37 (Iowa 1982); see also *L.F.R. v. R.A.R.*, 378 N.E.2d 855, 856 (Ind. 1978); see generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 200–01 (1985).

¹³ Compare *L.F.R.*, 378 N.E.2d at 857 (refusing to permit a husband to rebut a presumption of paternity based solely on testimony that he and his wife did not engage in sexual

By allowing rebuttal with proof that the husband could not have been the biological father, the marital presumption was implicitly premised in part on a policy linking parenthood with biological reproduction and on an assumption about the probability of the husband's genetic contribution.¹⁴ In practice, the presumption often protected *social* parentage over *biological* parentage.¹⁵ By barring challenges to the presumption by persons outside the marriage, traditional parentage law was willing to forgo an accurate attribution of biological parentage in favor of a higher social interest in preserving the sanctity of the "unitary family" against a destabilizing outside attack.¹⁶ Yet, given the unavailability until relatively recent times of scientific proof of biological paternity, the law could act on the assumption that a child's marital father was also her biological father.¹⁷

In recent decades, of course, the circumstances that enabled the law's tidy assumptions linking parenthood with biology and adoption have collapsed. Scientific proof now makes it possible to know with virtual certainty whether a man is genetically related to a child. Advertisements hawk "home DNA tests" enabling men (or women) to resolve their suspicions on the payment of a few hundred dollars.¹⁸ At the same time, greater fluidity and diversity in family life, as well as the advent of new reproductive technologies, have greatly increased the incidence of childrearing by adults who are not related to a child by blood or adoption. As a result, courts now regularly confront claims by ex-husbands seeking to *disavow* paternity based on newly acquired DNA evidence, notwithstanding their having long performed the social role of father to a child, as well as claims by others seeking to *establish* parenthood based on past performance of a social parenting role, notwithstanding the conceded absence of any blood or adoptive tie.

Courts and legislatures have responded inconsistently to these developments, introducing a fundamental incoherence to the law of parentage. On one hand, some jurisdictions have placed significant new emphasis on biology by allowing husbands and other established fathers to disclaim paternity, even after years of acting as a father, based solely on DNA evidence.¹⁹ Along the same lines, a growing number

relations during the likely period of conception), *with* *Minton v. Weaver*, 697 N.E.2d 1259, 1259–60 (Ind. Ct. App. 1998) (finding the marital presumption overcome when a DNA test established a 99.97% likelihood of genetic paternity in another man).

¹⁴ See Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 645–46 (2003).

¹⁵ 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, 12–14 (2004).

¹⁶ See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

¹⁷ Carbone & Cahn, *supra* note 4, at 1019; Ellman, *supra* note 8, at 52.

¹⁸ See, e.g., Paternity Testing Home DNA Test Kits, <http://www.homedna-test.com> (last visited Jan. 28, 2006).

¹⁹ See, e.g., *Williams v. Williams*, 843 So. 2d 720 (Miss. 2003); *Gebler v. Gatti*, No. 349 WDA 2005, 2006 WL 241506 (Pa. Super. Ct. Feb. 2, 2006); *Doran v. Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003); see also Bartholet, *supra* note 4; Theresa Glennon, *Somebody's Child*:

of legislatures and courts have modified the marital presumption to allow men outside the marriage to establish their paternity based on DNA evidence, regardless of the wishes of the marital couple.²⁰ Some of these decisions rigidly favor a biological conception of parenthood, even when doing so risks destruction of substantial social parenting bonds.²¹

In other cases, however, courts have placed new emphasis on the significance of "social parenting" by extending custodial rights — and in a few cases even parenthood itself — to non-traditional caregivers who have assumed the functional role of a parent.²² A number of states now permit a longtime caregiver who has played a major role in a child's upbringing with the consent of a parent to seek custody or visitation of the child as a "de facto" or "psychological" parent.²³ More significantly, some states have come to allow persons to acquire legal parentage — even

Evaluating the Erosion of the Marital Presumption of Paternity, 102 W. VA. L. REV. 547 (2000); Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004). In 1991, for example, Illinois amended its parentage law to permit a man to obtain a judicial declaration of "the non-existence of the parent and child relationship" upon offer of a preclusive DNA test. Illinois Parentage Act of 1984, 750 Ill. Comp. Stat. Ann. 45/7(b-5) (West 2005). The statute further directs: "If, as a result of the deoxyribonucleic acid (DNA) tests, the plaintiff is determined not to be the father of the child, the adjudication of paternity and any orders regarding custody, visitation, and future payments of support may be vacated." *Id.* See also Steven N. Peskind, *Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L.J. 811 (2004). A similar Ohio law, enacted in 2000, was recently sustained against constitutional attack. See *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006).

²⁰ See, e.g., *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999); *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001); *In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994); *State ex rel. Roy Allen S. v. Stone*, 474 S.E.2d 554 (W. Va. 1996); see also Carbone, *supra* note 3, at 1317 ("Over twenty states permit putative fathers to establish paternity even over the objections of the mother and her husband.").

²¹ For example, in *J.S.A. v. M.H.*, 797 N.E.2d 705 (Ill. App. Ct. 2003), *vacated on other grounds*, 841 N.E.2d 983 (Ill. App. Ct. 2005), an appellate court held that a man was entitled to establish paternity through DNA tests of a child fathered during an extramarital affair with a married woman, notwithstanding the opposition of the married couple and a trial court's determination that DNA testing would not be in the child's best interests. In a separate case, the Illinois Supreme Court rejected a husband's facial constitutional attack against the statute allowing his parental status to be set aside based on DNA testing sought by the wife's paramour. See *In re Parentage of John M.*, 817 N.E.2d 500 (Ill. 2004).

²² See Bartholet, *supra* note 4, at 326–27 ("Increasing emphasis is being placed on established and intended parenting relationships, with these factors sometimes weighing equally with or even out-weighting biology.").

²³ See, e.g., *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Clifford K. v. Paul S.*, 619 S.E.2d 138 (W. Va. 2005); see also Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2003).

in the absence of a marriage license, adoption decree, or any pretense of a genetic connection — based primarily upon the *intentions* of the party to assume that status. This is possible, for instance, in cases in which a couple uses assisted reproduction to produce a child genetically unrelated to one or both of the partners,²⁴ or in which a man executes a voluntary acknowledgment of paternity with full knowledge that he is not the child's biological father.²⁵ In 2005, the supreme courts of California and Washington each held that when a lesbian couple undertakes together to conceive and raise a child, both partners should be considered legal parents of the resulting child.²⁶

Thus, the law of parentage seems to be lurching erratically in different directions at the same time. In one context, an understanding of parenthood rooted essentially in biology looms larger than ever, allowing a biological father to displace a marital father on the basis of a DNA test. In another, new and dominant weight is given to social parenting and the assumption of a caregiving role. Taken together, these developments have broadened the bases on which parentage can be claimed and created substantial new potential for conflicts among assertions of parentage grounded variously in marriage, biology, adoption, and caregiving.

The burgeoning indeterminacy in the law of parentage has opened new space for considerations of a child's interests in the matter. Where there are multiple plausible claims to parentage of a child, there must be some basis for favoring one over the other. At one time, the law reflected a clear sense of priority: the social interest in preserving the intact marital family against disruption might trump an outsider's

²⁴ See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998); *In re C.K.G.*, No. M2003-01320-COA-R3-JV, 2004 WL 1402560 (Tenn. Ct. App. June 22, 2004), *aff'd in part, vacated in part*, 173 S.W.3d 714 (Tenn. 2005); see also Unif. Parentage Act § 703 (amended 2002), 9B U.L.A. 356 (Supp. 2005); Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL FORUM 393, 410–21; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

²⁵ See, e.g., *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002); Michael Higgins, *Meaning of 'Dad' Widened by Judge: Man Ruled Father of Unrelated Boy*, CHI. TRIB., Sept. 17, 2004, at A1. But see *Seger v. Seger*, 780 N.E.2d 855, 857 (Ind. Ct. App. 2002) (holding that a man's voluntary acknowledgment of paternity — in the face of knowledge that he was not the child's biological father — was "fraudulent" and therefore legally ineffective). See generally Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479 (2005) (discussing the voluntary paternity acknowledgment process and the problems resulting from allowing later actions to disestablish paternity).

²⁶ See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005). An intermediate appellate court in Indiana reached the same conclusion a year earlier. See *In re A.B.*, 818 N.E.2d 126, 131–32 (Ind. Ct. App. 2004) ("We . . . hold that when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child."), *vacated*, 837 N.E.2d 965 (Ind. 2005). See generally Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U.L. REV. 433 (2005).

claim of biological parentage, as in *Michael H.*;²⁷ where marital stability was already lost, biological connection often trumped social role in determining parentage, as when a husband sought promptly to rebut the marital presumption of paternity with proof of his complete "non-access" to his wife.²⁸ "[S]ocial parenting" — without adoption, marriage to the mother, or any pretense of genetic parentage — clearly came last and ordinarily provided no basis at all for legal parentage.²⁹

Today, however, there is no settled categorical ranking of the various bases for parentage. In the resulting muddle, some judges have concluded that the priorities should be sorted out from case to case by determining the best interests of the affected children. In *In re Jesusa V.*,³⁰ the California Supreme Court held that when multiple adults potentially qualify as a child's parents, the court should determine which among them would be the most appropriate parent by "'weigh[ing] considerations of policy and logic.'"³¹ In that case, two men each qualified as "presumed father[s]" of a two-year-old girl under California's version of the Uniform Parentage Act.³² Heriberto was the girl's biological father and had lived with the girl and her mother for much of the child's life.³³ Paul was married to the girl's mother, though they had lived apart at the time of Jesusa's conception, and he testified that "Jesusa had lived with him from time to time when her mother came to San Diego to visit her other children" in Paul's custody.³⁴ Accordingly, both men qualified as "presumed father[s]" because each had "received the child into his home and openly held her out as his child."³⁵ In

²⁷ See *supra* note 16 and accompanying text.

²⁸ See *supra* note 13 and accompanying text.

²⁹ For example, in *C.M. v. P.R.*, 649 N.E.2d 154 (Mass. 1995), the Massachusetts Supreme Judicial Court ruled that there was simply no legal basis for an unmarried man to establish parentage of a child he had neither fathered biologically nor adopted. The court readily acknowledged that the man had lived with the mother during her pregnancy and taken on the functional role of a parent:

The plaintiff [man] attended child birth classes . . . and was in the delivery room when the child was born. His name appears as the father on the child's birth certificate. The parties chose the name of the child together and the child has the plaintiff's last name. The plaintiff, the mother, and the child lived together as a family for three years. The plaintiff devoted much time to caring for the child. At times, he served as primary caretaker while the mother worked.

Id. at 154–55. Nevertheless, the court found no basis for conferring legal parentage: "A non-parent can establish parental rights by adopting the child. The plaintiff did not adopt the child." *Id.* at 155 n.5 (citation omitted).

³⁰ 10 Cal. Rptr. 3d 205 (Cal. 2004).

³¹ See *id.* at 215–16 (quoting CAL. FAM. CODE § 7612(b)).

³² *Id.* at 215.

³³ *Id.* at 219.

³⁴ *Id.* at 211.

³⁵ *Id.* at 215 (citing CAL. FAM. CODE § 7611(d)).

addition, Paul qualified on the separate ground that he was married to Jesusa's mother at the time of the child's birth.³⁶

Faced with conflicting presumptions of paternity, the court reasoned that it was required to select the best candidate by identifying "the presumption which on the facts is founded on the weightier considerations of policy and logic."³⁷ This entails a highly discretionary balancing of "all relevant factors" bearing on a child's interests under which no single consideration — whether biological connection or a history of social parenting — would be entitled to presumptive priority.³⁸ Under this test, "the scales favored Paul" because he had offered a stable, nurturing home environment with extended family while Heriberto had brutally assaulted Jesusa's mother.³⁹

The California court's assumption of authority to assign parentage between competing claimants based upon its determination of the child's best interests finds support in several other jurisdictions.⁴⁰ In a real sense, then, some courts have already embraced the premise of "best-interests" parentage. And, given the growing indeterminacy of parentage law, it is likely that more jurisdictions will follow in the same direction.⁴¹ It remains, however, to be determined whether an exclusively child-centered approach to parentage is constitutional.

II. A FUNDAMENTAL RIGHT TO PARENTAL IDENTITY?

At first glance, a "best interests" approach to parentage of the sort embraced in California and contemplated by some of the reform proposals in this Symposium might seem to face daunting constitutional challenges. In *Meyer v. Nebraska*, the

³⁶ *Id.* (citing CAL. FAM. CODE § 7611(a)).

³⁷ *Id.* at 215–16 (quoting CAL. FAM. CODE § 7612(b)).

³⁸ *Id.* at 220.

³⁹ *Id.* at 219–20.

⁴⁰ *E.g.*, *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000); *Doe v. Doe*, 52 P.3d 255 (Haw. 2002); *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001); *Dep't of Soc. Servs. ex rel. Wright v. Byer*, 678 N.W.2d 586 (S.D. 2004); *G.D.K. v. Dep't of Fam. Servs.*, 92 P.3d 834 (Wyo. 2004); *Baker*, *supra* note 15, at 13 ("In cases in which two . . . [paternity] presumption[s] clash or where one of the presumptions clashes with biological evidence, courts often resolve the issue with reference to a best interest of the child analysis, not by virtue of a blood test.").

⁴¹ Professor Janet Dogin, for example, suggests that surrogacy and other assisted-reproduction cases may spur greater judicial resort to "best interests" assessments in assigning parentage. *See* DOLGIN, *supra* note 1, at 213–15. Miller, *supra* note 14, at 707–11 (advocating the use of a best interests test to determine the parentage of children born through assisted reproduction where the parties have failed to assign parentage through a judicially approved contract). Ironically, however, the collapse of social consensus about the meaning of parenthood may render the indeterminate "best interests" standard essentially unhelpful at the same time that it makes resort to the standard more likely. As Professor Dolgin notes, "Reliance on the best interests principle depends on at least the illusion (if not the reality) of shared assumptions within society about the contours and meaning of family relationships." *Id.* at 214.

Supreme Court had suggested that utopian ideas about state reassignment of parentage were fundamentally incompatible with American ideas about "the relation between individual and State."⁴² Much more recently, in *Troxel v. Granville*,⁴³ the Supreme Court expressed dismay at what it called a "breathtakingly broad" statute that permitted "[a]ny person" to seek visitation with a child "at any time" based solely on a judge's determination that contact would be in the child's "best interest[s]."⁴⁴ Application of the statute to award regular visitation to grandparents was said to violate a mother's fundamental rights as a parent because it "place[d] the best-interest determination solely in the hands of the judge," without requiring any deference to the parent's own assessment of her children's interests.⁴⁵ If the Court in *Troxel* was distressed over the breadth and novelty of a law that permitted "best interests" visits over a parent's objection, how much more shocking would it find a scheme that allowed the reassignment of *parenthood* on the same basis?

In point of fact, *Troxel* was careful to stop short of holding that the use of a "best interests" standard is altogether impermissible in non-parent visitation cases, concluding instead only that the trial court's application of that standard in the particular case gave too little deference to the parent's own views on the matter.⁴⁶ Nevertheless, if

⁴² 262 U.S. 390, 402 (1923). Indeed, just eleven years before *Jesusa V.*, a majority on the California Supreme Court had rejected the idea of assigning parentage based on a child's "best interests" as raising "the repugnant specter of government interference in matters implicating our most fundamental notions of privacy." *Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal. 1993).

⁴³ 530 U.S. 57 (2000).

⁴⁴ *Id.* at 67 (emphases in original).

⁴⁵ *Id.*

⁴⁶ *See id.* at 72–73. Accordingly, even after *Troxel*, a number of state courts have concluded that use of the "best interests" standard is constitutional in non-parent visitation cases, so long as judges give substantial deference to the concerns of parents in assessing the interests of children. *See, e.g.,* *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. Ct. App. 2004); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005); *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001). Some others, however, have extended the holding of *Troxel* to preclude non-parent visitation based solely on a "best interests" determination. *E.g.,* *Denardo v. Bergamo*, 863 A.2d 686 (Conn. 2005); *Griffin v. Griffin*, 581 S.E.2d 899 (Va. Ct. App. 2003). Indeed, Professor John DeWitt Gregory has noted that "subsequent state court decisions treating grandparent visitation have made law on the subject even more disordered than it had been before the case was decided." John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 175 (2002). *See also* Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14 (2003). The diversity of reactions, as Professor Dolgin has observed, is rooted in *Troxel*'s own uncertainty about how to reconcile traditional assumptions with the fluid realities of modern family life:

That *Troxel* can be invoked to justify both judicial reliance on the notion of de facto parentage . . . and the courts' privileging of parents' interests above competing interests . . . reflects the deep ambivalence

a parentage law were to operate throughout a child's upbringing, permitting a "best interests" *reassignment* of parenthood at any time, there is no doubt that it would face very strong constitutional objection. The loss of established parental status on the basis of a bare best interests finding would plainly collide with constitutional doctrine recognizing the fundamental rights of parents and demanding heightened substantive and procedural protection in actions to terminate parental rights.⁴⁷

The participants in this Symposium, however, were asked to limit their focus to the legal assignment of parentage at the time of a child's birth. Limiting the scope of a child-centered parentage law to the initial assignment of parentage at or near the child's birth suggests a ground upon which *Troxel* and other parents' rights cases might be distinguished. For, while the Constitution clearly protects "parents' rights," it does not clearly or necessarily say *who* a parent is. Thus, in *In re Parentage of L.B.*,⁴⁸ the Washington Supreme Court held that the Constitution did not bar courts from recognizing a new basis for parenthood in the common law for persons who assume a parental role with the consent of a traditional legal parent. In that case, after the break-up of their eleven-year relationship, a biological mother sought to cut off her former partner from all contact with the child they had "jointly decided to

and widespread confusion that underlie the Supreme Court's "family" jurisprudence — especially in cases involving children or the parent-child relationship.

Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 404 (2002). *See also* Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523 (2000) [hereinafter Dolgin, *Choice, Tradition, and the New Genetics*]. She writes:

[R]ecent cases about paternity — both the unwed father cases and cases . . . involving married men disclaiming the paternity of their wives' children — illustrate the law's striving to preserve a traditional view of family, while simultaneously constructing a series of new, but not altogether consistent, rules that reflect various dimensions of actual contemporary families.

Id. at 534.

⁴⁷ *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that an indigent parent is entitled to waiver of filing fees in appealing termination of parental rights); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that due process requires that the state prove grounds for termination by clear and convincing evidence); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding that appointment of counsel for indigent parents facing termination of parental rights may be required on a case-by-case basis). Accordingly, state and lower federal courts have widely considered it "settled that a state cannot terminate a parental relationship based solely on the "best interests" of the child without some showing of parental unfitness." *In re Heather B.*, 11 Cal. Rptr. 2d 891, 904 (Cal. Ct. App. 1992); *see also In re J.P.*, 648 P.2d 1364, 1374–77 (Utah 1982) (striking down state that permitted terminate based upon a finding that "such termination will be in the child's best interests"); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 782–87 (1999).

⁴⁸ 122 P.3d 161 (Wash. 2005).

conceive and raise.”⁴⁹ The court, emphasizing that the state’s paramount public policy is “to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to . . . children,” recognized a new form of common-law parenthood founded on the joint undertaking of a parental role.⁵⁰ In response to the biological mother’s claim that conferring parentage on her former partner would violate her constitutional rights as a parent, the court insisted that its extension of parenthood to the former partner mooted the constitutional objection.⁵¹ The court reasoned:

Britain’s primary argument is that the State, through judicial action, cannot infringe on or materially interfere with her rights as a biological parent in favor of Carvin’s rights as a nonparent third party. However, today we hold that our common law recognizes the status of *de facto* parents and places them in parity with biological and adoptive parents in our state. Thus, if, on remand, Carvin can establish standing as a *de facto* parent, Britain and Carvin would *both* have a “fundamental liberty interest” in the “care, custody, and control” of L.B.⁵²

In effect, the court ruled that the constitutional barrier to “third party” custody or visitation could be sidestepped simply by designating the third party a “parent.”⁵³ While the court agreed that a visitation order on behalf of the former partner would have to survive strict judicial scrutiny if she were a non-parent, no such scrutiny was required of the court’s extension to her of parental status.⁵⁴ *Troxel*’s reaffirmation of the fundamental rights of “parents” limits state power to redefine the substantive prerogatives accorded parents, but does *not* “place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family.”⁵⁵

⁴⁹ *Id.* at 163–64.

⁵⁰ *Id.* at 176–77.

⁵¹ *See id.* at 178.

⁵² *Id.* (alteration in original) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). The California Supreme Court relied on a similar rationale in *Johnson v. Calvert*. See 851 P.2d 776 (Cal. 1993). *Johnson* held that a wife who had donated an egg used in assisted reproduction — rather than the surrogate who had carried the fetus and given birth — was the mother of the resulting child based upon her intention to become a parent. *See id.* The court held that the denial of parenthood to the surrogate implicated no “parental rights” under the Constitution because those rights are dependent on recognition as a parent under state law. *Id.* at 786.

⁵³ *See In re Parentage of L.B.*, 122 P.3d at 178.

⁵⁴ *Id.* at 177–78.

⁵⁵ *Id.* at 178. The court elaborated:

[C]ontrary to Britain’s assertions, *Troxel* does not establish that recognition of a *de facto* parentage right infringes on the liberty interests of a biological or adoptive parent. . . . *Troxel* did not address the issue of

Along similar lines, Professor Emily Buss has contended that

the Constitution should be read to afford strong protection to parents' exercise of child-rearing authority but considerably weaker protection to any individual's claim to parental identity. This means that a state has broad authority to identify nontraditional caregivers as parents, and, if it does so, it must afford their child-rearing decisions the same strong protection afforded more traditional parental figures.⁵⁶

For Professor Buss, the Constitution should be interpreted to protect the *rights* of parents, without specifying the *parents* who hold rights, because such an approach best serves the interests of children.⁵⁷ Parental rights under the Constitution are justified, in her view, by their utility in promoting child welfare.⁵⁸ "[S]trong deference to parents' child-rearing decisions serves children well,"⁵⁹ Professor Buss argues, for at least two reasons. First, "[p]arents' strong emotional attachment to their children and considerable knowledge of their particular needs" generally give them superior judgment about the child's interests.⁶⁰ And, second, "even good state decisions about child-rearing practices are likely to produce bad results when the state relies on resistant parents to carry them out."⁶¹ These rationales support strong constitutional concern for the authority exercised by parents, but relatively little interest in the identity of the persons who are assigned that role.⁶² That assignment

state law determinations of "parents" and "families," [but] rather simply disapproved of the grant of visitation in that case, narrowly holding that [t]he problem . . . is not that the [trial court] intervened but that, when it did so, "it gave no special weight at all" to the *parents'* determination regarding the *grandparents'* visitation.

Id. (quoting *Troxel*, 530 U.S. at 69) (emphasis in original).

⁵⁶ Emily Buss, Essay, "*Parental*" *Rights*, 88 VA. L. REV. 635, 636 (2002).

⁵⁷ *See id.* ("What drives this constitutional interpretation is, at bottom, an assessment of its value to children.").

⁵⁸ *Id.* at 646.

⁵⁹ *Id.* at 647.

⁶⁰ *Id.* *See also* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071 (2003).

⁶¹ *See Buss, supra* note 56, at 649.

⁶² *See id.* at 653.

While we can generally expect private individuals to make better judgments than the state about how to raise their own children because of their greater knowledge of, commitment to, and responsibility for those children, this reasoning does not tell us how to distinguish among various private competitors who all aim for this level of knowledge . . .

Id.

would, of course, be of profound concern to the adults who desire that role, but would be largely incidental to this child-centered conception of parental rights.

On these theories, reform proposals that operate in the initial assignment of parentage largely evade the constitutional radar. And there is, in fact, some Supreme Court authority which seems to point in this direction, suggesting that states do indeed have broad authority in defining the scope of parenthood. *Prince v. Massachusetts*,⁶³ for example, assumed that a custodial aunt could assert constitutional parenting rights based on her status as the child's guardian. Because state law granted the guardian parental authority, the Court readily extended to her the constitutional "rights of parenthood."⁶⁴ For much the same reason, most courts have concluded without any difficulty that adoptive parents are entitled to the same constitutional rights as biological parents: parental rights under the Constitution follow the state's choice to designate new parents.⁶⁵

The Court's recent decision in *Elk Grove Unified School District v. Newdow*⁶⁶ is perhaps even more striking in its assumption of a broad state authority to control the scope of parental rights under the Constitution. The Court concluded that a father lacked standing to assert rights as a parent to object to the recitation of the Pledge of Allegiance at his daughter's public school because a state court custody order gave final authority over her upbringing to the girl's mother.⁶⁷

Significantly, both Justice Stevens, writing for the Court, and Chief Justice Rehnquist, concurring in the judgment, assumed that Michael Newdow's standing to assert constitutional rights as a parent rested entirely on state law: "Newdow's parental status," Stevens wrote, "is defined by California's domestic relations law."⁶⁸ That law "vests in Newdow a cognizable right to influence his daughter's religious upbringing" through his own interactions with her, but not "to dictate to others what they may and may not say to his child respecting religion."⁶⁹ The parental authority that Newdow specifically wished to assert — "to challenge the [religious] influences to

⁶³ 321 U.S. 158 (1944).

⁶⁴ *Id.* at 166.

⁶⁵ See, e.g., *In re Nelson*, 825 A.2d 501, 502 (N.H. 2003) (noting that case law has "extended such protection [of parental rights under the state constitution] to both natural and adoptive parents"); *Owenby v. Young*, 579 S.E.2d 264, 267 (N.C. 2003) (stating that the Constitution's protection of parental rights "is irrelevant in a custody proceeding between two natural parents, whether biological or adoptive").

⁶⁶ 542 U.S. 1 (2004).

⁶⁷ See *id.* at 13–18. Although the custody orders nominally granted both parents "joint legal custody," the Supreme Court read them to assign final decisionmaking authority over the girl's education to her mother in the event the parents disagreed. *Id.* at 2310 n.6 ("Under either [custody] order, Newdow has the right to consult on issues relating to the child's education, but Banning [the mother] possesses what we understand amounts to a tiebreaking vote.").

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 16–17.

which his daughter may be exposed in school” — had been assigned by the state court’s custody order to the girl’s mother instead.⁷⁰ Given the mother’s endorsement of the state’s mandate of the Pledge, Newdow had no standing to complain.⁷¹ Although Rehnquist, based on a different construction of California custody law, would have permitted Newdow to present his constitutional claim, he agreed with the majority that “[t]he correct characterization of respondent’s [constitutional] interest [as a parent] rests on the interpretation of state law.”⁷²

In this way, *Newdow* might be seen as treating “parenthood” like “property” under the Constitution⁷³ — the good itself is protected, but its definition is generally left to the states.⁷⁴ If this is right, then states might well have broad discretion to redefine who counts as a parent, including the power to base that decision on their assessment of the interests of children.

Yet, on the question of state power to define parentage, this line of cases ending in *Newdow* is only half the story.⁷⁵ There are other cases — most obviously the Supreme Court’s “unwed father” cases — suggesting the existence of meaningful constitutional limits to a state’s power to withhold parenthood. In *Stanley v. Illinois*,⁷⁶ the Court effectively overruled a policy choice by the State of Illinois to deny parental status to unwed biological fathers. The Supreme Court held, however, that Peter Stanley, like “all Illinois parents,” was “constitutionally entitled to a hearing on [his] fitness before

⁷⁰ *Id.* at 17.

⁷¹ *See id.*

⁷² *Id.* at 23 (Rehnquist, C.J., concurring in the judgment).

⁷³ This argument is presented at greater length in David D. Meyer, *Partners, Caregivers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE’S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (Robin Fretwell Wilson ed., 2006).

⁷⁴ As the Court has often explained, “Property interests are not created by the Constitution, ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). *See also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.5 (3d ed. 1999 & Supp. 2005) (explaining the procedural due process protection accorded property).

⁷⁵ And maybe not even that: after all, there is good reason to think that other reasons — including, most obviously, a desire to avoid decision on the merits of an awkward and politically explosive issue — may have driven the result in *Newdow*. *See Newdow*, 124 U.S. at 25 (Rehnquist, C.J., concurring in the judgment) (describing the Court’s standing concerns as “ad hoc improvisations” for avoiding the merits of Newdow’s claim); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) (observing that “[i]n *Newdow*, it may have been politically impossible to affirm and legally impossible to reverse” on the merits of the First Amendment claim).

⁷⁶ 405 U.S. 645 (1972).

[his] children [could be] removed from [his] custody."⁷⁷ Implicit in this holding, of course, was a judgment that unwed fathers such as Peter Stanley are constitutionally entitled to state recognition as parents.

Subsequent cases have made clear that this entitlement rests on something more than just a genetic connection, and that unwed fathers who hesitate to get involved can forfeit any claim to parenthood.⁷⁸ But "[t]he significance of the biological connection," the Court explained in *Lehr v. Robertson*,⁷⁹

is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.⁸⁰

Lehr is ambiguous, but it can be read to support a constitutional claim based on "parenting aspirations." The important question that *Lehr* left unanswered is whether the Constitution values only *established* parenting relationships or whether it protects the very *opportunity to develop* a parenting relationship for those who did what they could.⁸¹ *Lehr* itself was not required to resolve the question because the majority concluded that Jonathan Lehr, in all events, had not done all he could have to demonstrate his paternal interest.⁸² There is plausible support for each understanding of the case. On the one hand, the Supreme Court has sometimes suggested that the Constitution's protection of family relationships arises from the lived "intimacy of daily association," implying that protection would not be triggered in the absence of established emotional bonds.⁸³ On the other, *Lehr* and other cases seem to take

⁷⁷ *Id.* at 658.

⁷⁸ See Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005); Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47 (2004); Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence, 28 CAP. U. L. REV. 1 (1999).

⁷⁹ 463 U.S. 248 (1983).

⁸⁰ *Id.* at 262.

⁸¹ For a fuller discussion of this point, see Meyer, *supra* note 47, at 762–66.

⁸² See *Lehr*, 463 U.S. at 262. But see *id.* at 270–71 (White, J., dissenting) (portraying Lehr's conduct more charitably).

⁸³ See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) ("[T]he importance of the familial relationship, to the individuals involved and to the society, stems [largely] from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." (second alteration in original) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33

account of the moral desert of putative fathers in drawing the boundaries of constitutional protection, implying that a man who was wrongly blocked by others in his efforts to establish a relationship with his child might deserve constitutional protection. This is precisely the view that some state courts have taken in holding that “thwarted fathers” are constitutionally entitled to block the adoptions of their children.⁸⁴

Michael H. v. Gerald D.,⁸⁵ the Supreme Court’s next case involving the rights of unwed fathers, might be thought to have disproved the notion that parenting “aspirations” are protected, given that it upheld the state’s decision to ignore the aspirations of a genetic father who had in fact developed a caregiving relationship with his daughter.⁸⁶ In that case, an unmarried man who had fathered a child during an affair with a married woman was precluded from establishing his paternity by a California law that barred third-party challenges to the marital presumption of paternity.⁸⁷ Even though the claimant had lived for a time with the girl and her mother, before the mother reunited with her husband, the Court held that he was not constitutionally entitled to foist himself upon “the unitary family.”⁸⁸ Yet, *Michael H.* is not conclusive here because it refused to credit parenting aspirations in a very particular context — where crediting those aspirations would have intruded directly on the role and status of an established parent (the husband). In that sense, *Michael H.* is much like *Smith v. Organization of Foster Families for Equality & Reform*,⁸⁹ in which the Court subordinated the parenting aspirations of foster parents to the

(1972)); see also *Lehr*, 463 U.S. at 261 (noting that when an unwed father demonstrates a commitment to parenting, his interest in contact with his child acquires constitutional protection); *Dawn D. v. Superior Court*, 952 P.2d 1139, 1145 (Cal. 1998) (“A biological father’s mere desire to establish a personal relationship with the child is not a fundamental liberty interest protected by the due process clause.”); *Lisa I. v. Superior Court*, 34 Cal. Rptr. 3d 927, 935 (Cal. Ct. App. 2005) (“A protected liberty interest does not arise from biological connection alone but from the existing relationship, if any, between the biological father and child.”).

⁸⁴ Best known on this point are the Baby Richard and Baby Jessica cases. See *In re Kirchner*, 649 N.E.2d 324, 333 (Ill. 1995); *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992); *In re Clausen*, 502 N.W.2d 649, 664 (Mich. 1993). Many other courts, however, have agreed that the Constitution protects an “opportunity interest” for parents to develop a relationship with their children, even if the opportunity may be fleeting. See, e.g., *In re Adoption of Connor W.*, No. B164756, 2003 WL 22941219 (Cal. Ct. App. Dec. 15, 2003); *In re Appeal of H.R.*, 581 A.2d 1141, 1162–63 (D.C. 1990); *Bowers v. Pearson*, 609 S.E.2d 174, 176–78 (Ga. Ct. App. 2005); *In re Marriage of Gallagher*, 539 N.W.2d 479, 487 n.1 (Iowa 1995); *Smith v. Malouf*, 722 So. 2d 490, 497 (Miss. 1998); *Brown v. Malloy*, 546 S.E.2d 195, 200–01 (S.C. Ct. App. 2001); *In re C.L.*, 878 A.2d 207, 210–11 (Vt. 2005); *Kessel v. Leavitt*, 511 S.E.2d 720, 747–50 (W. Va. 1998).

⁸⁵ 491 U.S. 110 (1989) (plurality opinion).

⁸⁶ *Id.* at 118–30.

⁸⁷ See *id.* at 117–18.

⁸⁸ See *id.* at 123–24.

⁸⁹ 431 U.S. 816 (1977).

established ties of the "natural" family.⁹⁰ Accordingly, neither *Michael H.* nor *Smith* excludes the possibility that the Constitution might protect well-grounded parenting aspirations in circumstances where realization of the aspirations would not *displace* another, existing parenting bond.⁹¹

What criteria then would define what qualifies as a "well-grounded" parenting aspiration? The Supreme Court has given hints, of course: *biology* (as in *Stanley*⁹² and *Lehr*⁹³); *caregiving* (as in *Caban v. Mohammed*⁹⁴ and *Lehr*⁹⁵); *marriage* and the assumption of stable commitments (in *Michael H.*⁹⁶); and, in all cases, *diligence* in demonstrating parental interest — all are relevant, yet none alone is sufficient.⁹⁷ Some combination of these factors, however, will almost certainly be enough to trigger constitutional protection. Imagine, for example, a genetic father who, with the full support of the mother, has done everything possible to assume a caregiving role — attending childbirth and parenting classes with the expectant mother, contributing financially toward her prenatal expenses, forgoing career opportunities in anticipation of substantial childcare responsibilities after the child's birth, and generally joining with the expectant mother in planning for the child's future. And suppose further that

⁹⁰ See *id.* at 846; cf. DOWD, *supra* note 11, at 112 (noting that "outside marriage, fatherhood has been protected only as long as it does not threaten the marriage of another man.").

⁹¹ This appears to be the conclusion of the California courts. The California Supreme Court has held that substantive due process protects the "opportunity interest" of an unmarried biological father to establish and develop a parent-child relationship where adoption of the child is sought by others. See *In re Adoption of Kelsey S.*, 823 P.2d 1216, 1228–29, 1236–37 (Cal. 1992); cf. *In re Zacharia D.*, 862 P.2d 751, 761–62 (Cal. 1993) (suggesting same entitlement in context of a child dependency proceeding). But it has also held that no such "opportunity interest" exists where the child is residing with the mother and her husband and where its realization would disrupt the child's established ties to the marital father. See *Dawn D. v. Superior Court*, 952 P.2d 1139, 1145 (Cal. 1998) ("[A] biological father's mere desire to establish a personal relationship with the child is not a fundamental liberty interest protected by the due process clause."), *cert. denied*, 525 U.S. 1055 (1998); see also *Lisa I. v. Superior Court*, 34 Cal. Rptr. 3d 927, 938 (Cal. Ct. App. 2005). The Georgia Supreme Court has come to the same conclusion. Compare *In re Baby Girl Eason*, 358 S.E.2d 459 (Ga. 1987) (holding that an unwed father is constitutionally entitled to block adoption unless he has acted to abandon his "opportunity interest" in developing a parent-child relationship), with *Dano v. LaBrec*, 549 S.E.2d 76, 77 (Ga. 2001) (holding that an unwed father has no constitutional right to establish a parent-child relationship where doing so would entail "delegitimiz[ing] a legitimate child and . . . break[ing] up a legally recognized family unit already in existence").

⁹² *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

⁹³ *Lehr v. Robertson*, 463 U.S. 248, 258–61 (1983).

⁹⁴ 441 U.S. 380, 392–93 (1979).

⁹⁵ *Lehr*, 463 U.S. at 266–68.

⁹⁶ *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

⁹⁷ See *Baker*, *supra* note 15, at 34 (contending "that the most important factor in determining whether a genetic father will be entitled to constitutional protection of his parental rights is his relationship with the mother," and noting that unmarried fathers generally prevail where there is evidence of an agreement with the child's mother to share parental status).

recognizing this man's expected parenthood would not displace any other parental relationship. At least on these facts, the man's expectations of parenthood would seem to be very strong indeed and would find wide social acceptance. If the state were to intervene at the time of the child's birth and deny him parental status, the Constitution would surely demand something more from the state than merely rational conjecture as the basis for its action. It would recognize that such an individual is presumptively entitled to fulfill his aspirations to become a parent absent a demonstration of a substantial public interest to the contrary.

Some will object that thinking about parenthood in this way — as triggered by some formula of factors — is not child-focused, and that its operation would sometimes lead to the destruction of caregiving relationships that fall outside the formula.⁹⁸ This criticism strikes me as quite accurate, and yet I am not convinced that the Constitution itself is truly so child-centered in its protection of parental rights. Rather, it seems to me that family-privacy rights, like other non-textual constitutional rights, are ultimately grounded in strong social consensus that the right at issue deserves protection.⁹⁹ The social consensus that undergirds parental rights is based partly on the assumption that they work to the benefit of children, but partly also on a sense of justice and desert for adults.¹⁰⁰ Our social understandings of parenthood are now fluid and complex, which is why it is so difficult to identify with precision when constitutional protection is triggered in the unwed father cases.¹⁰¹ But to the extent parentage reform proposals would place significant barriers in the path of persons regarded as "parents" by widely shared social consensus, it will trigger serious constitutional review.

⁹⁸ As Professor Buss cogently observes:

The problem with the *Lehr* formula is the problem with any formula that confers parental identity on an individual without regard to his parental competitors. While requiring some relationship in addition to biological paternity will in many cases identify an individual who stands in an unambiguous parental relationship with a child, it will also capture those whose relationships are less central, in relative terms, to children. Where one relational claim may compete with others, automatically conferring identity rights on one subset of relational claimants is as destructive for children as automatically conferring identity rights on the basis of biology alone.

Buss, *supra* note 56, at 660.

⁹⁹ For a more complete articulation of this point, see David D. Meyer, *Justice White and the Right of Privacy: A Model of Realism and Restraint*, 52 CATH. U. L. REV. 915 (2003).

¹⁰⁰ Elizabeth Bartholet, James Dwyer, and Barbara Woodhouse have each powerfully demonstrated this point in scholarship critically examining the history and contemporary application of parents-rights doctrine. See, e.g., ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999); JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

¹⁰¹ See Dolgin, *Choice, Tradition, and the New Genetics*, *supra* note 46, at 534; Meyer, *supra* note 3.

III. SCRUTINIZING THE BEST INTERESTS TEST IN THE CONTEXT OF PARENTAGE DETERMINATIONS

Of course, saying that substantive barriers to parenthood will trigger serious review does not necessarily mean they are unconstitutional. It means only that the barrier must be scrutinized to determine whether its public justifications outweigh its private costs for the individual rights-holder. In this part, I suggest some of the considerations that courts are likely to weigh in determining the constitutionality of denying parentage to persons with qualifying parental aspirations in order to further the best interests of children.

To begin, the appropriate test in this context is *not* strict scrutiny. To be sure, Justices Scalia and Thomas, as well as many state courts, have expressed the view that strict scrutiny applies to any significant incursions on fundamental rights of family privacy.¹⁰² And that is certainly in keeping with the usual practice in the broader context of fundamental rights under substantive due process. In the particular context of family-privacy rights, however, the Supreme Court has repeatedly sidestepped strict scrutiny in favor of softer, or at least more ambiguous, standards of review. In cases going back to *Moore v. City of East Cleveland*¹⁰³ and *Zablocki v. Redhail*,¹⁰⁴ the Court has seemed to hedge in its description of the applicable standard, omitting the usual catch phrases of strict scrutiny ("compelling" interests and "narrow tailoring").¹⁰⁵

More recently, and more tellingly, *Troxel v. Granville* pointedly failed to employ strict scrutiny after having found a significant burden on the fundamental rights of a parent. Justice Thomas wrote separately in *Troxel* to point out the "curious[]" omission of strict scrutiny, but the omission was plainly not an oversight.¹⁰⁶ As the Oregon Supreme Court recently observed:

[T]wo conclusions safely can be drawn from *Troxel*. First, with the exception of Justice Scalia, all the members of the Court agreed that the Due Process Clause protects, to some degree, a fit parent's right to make decisions for a child. Second, of the eight justices who recognized a constitutional protection for parental rights, only Justice Thomas concluded that the constitution requires

¹⁰² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment); *In re L.F.*, 121 P.3d 267, 270 (Colo. Ct. App. 2005); *In re R.A.*, 891 A.2d 564, 576 (N.H. 2005); *MBB v. ERW*, 100 P.3d 415, 419 (Wyo. 2004).

¹⁰³ 431 U.S. 494 (1977).

¹⁰⁴ 434 U.S. 374 (1978).

¹⁰⁵ See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 540–44 (2000).

¹⁰⁶ See 530 U.S. at 80 (Thomas, J., concurring in the judgment).

strict scrutiny of state actions that intrude upon those rights. The other opinions articulated an undefined but less exacting standard.¹⁰⁷

The Court followed the same path three years later in *Lawrence v. Texas*.¹⁰⁸ There, in striking down a Texas law criminalizing sexual intimacy between two persons of the same sex, the Court again failed to apply any clearly recognizable standard of constitutional scrutiny. Justice Scalia, dissenting in the case, pounced on language in the majority opinion stating that the Texas law “furthers no legitimate state interest”¹⁰⁹ in order to characterize the decision as embracing rational-basis review and finding no fundamental right.¹¹⁰ A careful reading of the Court’s opinion, however, arguably suggests that *Lawrence* did indeed find that the statute intruded upon a fundamental privacy right.¹¹¹ The Court went to considerable pains to explain why protection of the petitioners’ relational interests in *Lawrence* followed directly and logically from the line of fundamental privacy cases stretching back to *Griswold v. Connecticut*.¹¹² Its failure, then, to employ strict scrutiny and its use instead of a more indeterminate standard is surely notable.¹¹³

¹⁰⁷ *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 730 (Or. 2004) (footnote omitted), *cert. denied sub nom.* Lamont v. O'Donnell, 543 U.S. 1050 (2005). See also Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279 (arguing that the Court is unsuccessfully attempting to chart a middle course between the preservation of parental rights and the recognition of nonparental claims); Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69 (2001) (criticizing *Troxel*'s “tacit intermediate-scrutiny review” for giving inadequate protection to parental prerogative); David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1140–50 (2001) (suggesting that the *Troxel* decision represents a lack of confidence by the Court about constitutional intervention into the family).

¹⁰⁸ 539 U.S. 558 (2003).

¹⁰⁹ *Id.* at 578.

¹¹⁰ *Id.* at 586, 594 (Scalia, J., dissenting).

¹¹¹ See David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004). For a review of the many different ways in which *Lawrence* has been understood, see Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Moral Misinterpretations of Lawrence v. Texas*, 15 S. CAL. REV. L. & WOMEN'S STUD. 95 (2005).

¹¹² *Lawrence*, 539 U.S. at 564 (stating that “the most pertinent beginning point is our decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965).”).

¹¹³ See Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA J. CONST. L. 954, 958–70 (2004) (noting that *Lawrence*'s seeming use of a standard of scrutiny in between ordinary rational basis review and strict scrutiny raises fundamental questions about “the utility . . . of identifying any given liberty as fundamental, quasi-fundamental, nonfundamental but still special, or just plain nonfundamental”); Michael A. Scaperlanda, *Illusions of Liberty and Equality: An “Alien’s” View of Tiered Scrutiny, Ad Hoc Balancing,*

The Justices' failure to apply strict scrutiny in *Troxel*, *Lawrence*, and other cases almost certainly stems from their appreciation of the special complexities that often attend adjudication of family privacy claims. Unlike many other assertions of fundamental rights, family-privacy controversies often involve conflicting claims of individual rights. As various Justices have observed, vindication of one parent's "fundamental right" to the "care, custody, and control" of her child, for example, may well impede directly on the privacy rights of the other parent, or potentially the child, a sibling of the child, or another family member.¹¹⁴ The need to mediate among conflicting individual interests within the family counsels avoidance of a standard like strict scrutiny which heavily privileges the rights of a single claimant. As Justice O'Connor explained, in the year following her plurality opinion in *Troxel*:

[T]he adjudication of constitutional disputes does not necessarily translate to the *effective* resolution of family disputes. While constitutional due process doctrine is primarily concerned with the relationship of individuals to the State, the resolution of family disputes focuses primarily on the relationship of individuals with

Governmental Power, and Judicial Imperialism, 55 CATH. U. L. REV. 5, 6 (2005) (observing that "*Grutter* and *Lawrence* are but the latest in a series of cases trending away from several decades of categorical balancing and toward a new regime of ad hoc or sliding scale balancing," and criticizing this trend as giving inadequate protection to individual rights); Tribe, *supra* note 111, at 1916–17 (discussing *Lawrence*'s "[m]ysterious' standard of review").

¹¹⁴ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting). Justice Stevens, for example, noted:

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies — the child.

....

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

Id. at 86–88 (citation omitted). See also *id.* at 97–98 (Kennedy, J., dissenting) (noting that assertion of a parent's rights may intrude upon the child's established relationships with a non-parent caregiver); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (observing that "[t]he difficulty . . . is that Newdow's rights, as in many cases touching upon family relations, cannot be viewed in isolation," and that vindication of Newdow's claim might conflict with the rights of the child and her mother). Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 Tul. L. Rev. 955, 986–87 (1993) ("Unlike the right of individual privacy — which entitles the individual to rights against the state and over herself — parental rights entitle parents to rights against the state, but over another person.").

each other. In family cases, the rights of individuals are intertwined, and the family itself has a collective personality. Thus, the due process model may not be the best framework for resolving multi-party conflicts where children, parents, professionals, and the State all have conflicting interests.¹¹⁵

Accordingly, instead of insisting on proof of “compelling interests” and “narrow tailoring,” the Court has weighed in a more nuanced and flexible manner the competing public and private interests, varying the aggressiveness of its review depending on several recurring considerations, including the extent of the burden the challenged action would impose on family privacy, the degree to which family members are unified in resisting the state’s imposition, and the novelty or historical pedigree of the private interest and the state action.¹¹⁶

In evaluating a law that made parentage contingent on an assessment of the best interests of children, the fact that the reforms we are discussing would operate at or near birth is plainly relevant. A core reason why the Constitution requires deference to parents’ own judgments about their children’s best interests is that parents are presumed to have superior knowledge of their children and motivation to act on their behalf.¹¹⁷ But the basis of parents’ presumed insight is *not* biology (because, after all, adoptive parents are entitled to deference too¹¹⁸), but *experience* and *attachment*. By intervening so early, before a parent has much chance to acquire child-specific experience and attachment, there may be a somewhat broader allowance for the substituted judgment of courts.

There are, however, other concerns about the best interests test, including the potential for bias and arbitrariness that flows from its essential indeterminacy. The best interests standard has faced long and widespread criticism from scholars and judges alike for this reason.¹¹⁹ These concerns might well push courts to demand some

¹¹⁵ The Honorable Sandra Day O’Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 575–76 (2001).

¹¹⁶ See Meyer, *supra* note 105, at 579–94.

¹¹⁷ See Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733, 778–79 (2001); Buss, *supra* note 56, at 647–48; Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 953–55 (1996); Scott, *supra* note 60, at 1078–79.

¹¹⁸ See *supra* note 65 and accompanying text.

¹¹⁹ See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 53–64 (1994); Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449 (2005); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 MICH. L. REV. 2215, 2220–23 (1991); Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115,

restraint in applying the standard — just as *Troxel* effectively required judges to incorporate a presumption in favor of parental judgment into any application of the best-interests test in non-parent visitation cases — but would not necessarily bar its use altogether in the parentage context.¹²⁰

Finally, constitutional scrutiny would certainly take account of the stakes of the best-interests decision for the putative parent. That application of a best-interest parentage law threatens a total loss of the parent-child relationship — as opposed to a lesser burden, such as having to suffer unwanted contact with a grandparent or even a loss of custody — would clearly ratchet up the demands of the public justification. Courts routinely and properly take into consideration the quality and degree of state intrusion on protected privacy interests in calibrating the strength of judicial review, demanding a stronger showing of public need to justify terminating parental rights, for instance, than for a mere visitation order.¹²¹ To be sure, a parentage law that denied a claimant a legitimate *expectation* of parenthood would entail a lesser burden than a law which terminated the parental rights of a long-established caregiver. Nevertheless, the total loss of even an *expectancy* of a parent-child relationship remains a very substantial imposition on the individual, increasing the appropriate degree of scrutiny.

This mix of considerations suggests that judicial tolerance of a best-interests standard in assigning parentage would vary with the circumstances of individual cases. Given the high stakes for the individuals involved, however, and general doubts about judicial competence in administering the best interests test, courts are likely to demand something more than simply the state's discernment of a marginal advantage to a child from shifting parentage away from a figure widely regarded as a parent by social consensus. Conceivably, the required showing might be satisfied by a convincing demonstration of a very substantial benefit to the child (a sort of heightened best-interests showing) or a serious risk of harm to the child from recognition of parentage in the claimant figure.

In the final chapter of his new book, in presenting his full proposal for parentage law reform, Professor Dwyer points to empirical evidence about the prospects for harm to children from being raised by parents with certain backgrounds or personal

119–20, 164 n.247 (2003). As Professor Starnes notes, “The difficulty of applying this vague standard to the complex task of choosing a child’s custodian inspired courts to rely on numerous heuristics, among them the ‘tender years’ doctrine, an assumption that nature intends young children to be with their mother,” and deference to an older child’s stated preference. Starnes, *supra*, at 119–20 (footnote omitted).

¹²⁰ See Dowd, *supra* note 78, at 1331 (acknowledging but overcoming potential objections to the best interests standard).

¹²¹ See, e.g., *Crowley v. McKinney*, 400 F.3d 965, 968–69 (7th Cir. 2005) (considering the relative degree of intrusion on parental control of education in reducing constitutional scrutiny of public school’s decision to bar a non-custodial parent from campus); see also Meyer, *supra* note 105, at 587–89.

attributes.¹²² He observes that characteristics such as “drug or alcohol abuse, being of a very young age, criminality, past abusiveness toward children or adults, and mental illness” correlate with higher rates of parental failure.¹²³ Courts would surely demand exceedingly persuasive proof of these claims. It strikes me that certain very narrow restrictions on parenthood might be sustained on evidence specific to the putative parent (such as a history of committing severe abuse on other children, for instance), but that more expansive restrictions (based solely on the claimant’s age or poverty, for instance) would stand on far more doubtful ground.¹²⁴

CONCLUSION

The invitation of this Symposium to rethink the laws assigning parentage is a welcome one. Comprehensive reexamination of our parentage laws is very much needed. At present, parentage law is growing more incoherent because of ill-considered responses by courts and legislatures to new methods of scientific proof of paternity, breakthroughs in reproductive technology, and changes in family living patterns. Moreover, the aspiration of this Symposium to reform parentage law in a direction that takes greater account of the needs and interests of children is also well-timed.

¹²² DWYER, *supra* note 100, at 256–57.

¹²³ *Id.* at 256.

¹²⁴ In this article, I have evaluated the “best interests” screen as if it applied to all potential parents. But, of course, virtually all of the reform proposals generated by this Symposium draw a number of classifications — including those based on gender, marital status, age, disability, poverty, and other traits. In keeping with the space constraints of the Symposium, I will simply acknowledge without attempting to address seriously the equal protection issues raised by these various classifications. Setting aside the gender distinctions — and acknowledging that the Supreme Court has been willing to tolerate some fairly significant gender distinctions in the parentage context based on fundamental sex differences relating to procreation and childbirth, *see* *Nguyen v. INS*, 533 U.S. 53, 62–66 (2001) — the proposed classifications are otherwise non-suspect under equal protection doctrine, notwithstanding any disproportionate impact they might have along racial, ethnic, or other lines. Yet, if it is true that substantive due process would recognize a fundamental right of at least some persons to assert parental identity, then classifications bearing on that right would also be subject to close scrutiny under the Equal Protection Clause. *See, e.g., In re D.W.*, 827 N.E.2d 466, 481–82 (Ill. 2005) (closely scrutinizing classifications in a statute stating grounds for terminating parental rights). Without carefully scrutinizing each of these, I would only mention here that classifications based on poverty or disability are likely to face especially rough sledding. In the context of other fundamental rights, such as voting and access to the courts, the Supreme Court has been hostile toward classifications that penalize the poor, *see, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); *Douglas v. California*, 372 U.S. 353, 356–57 (1963), and I would expect the same result here. *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1996) (recognizing special constitutional protection for an indigent parent “endeavoring to defend against the State’s destruction of her family bonds”).

Throughout family law — and even in the constitutional law of family privacy — courts and lawmakers are beginning to recognize and credit in a more substantial way the independent interests of children within the family.¹²⁵

While I therefore welcome the ambition of this Symposium and many of the specific proposals it has inspired, I also believe that the Constitution places meaningful outer limits on state discretion to reinvent the concept of parenthood. Those limits are grounded in core social consensus about who counts as a parent. Given shifting attitudes and contemporary uncertainty on this point, the scope of our consensus is surely narrower today than it was fifty or even twenty-five years ago. Accordingly, the constitutional limits, though real, are broad — and almost certainly broad enough to accomplish significant and much needed child-focused reform of traditional parentage laws.

¹²⁵ See David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1119–20 (2003).