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## Parental Rights

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## ESSAY

### “PARENTAL” RIGHTS

*Emily Buss\**

There is growing concern among courts, commentators, and the public that the law gives inadequate protection to the relationships that develop between children and “nontraditional” caregivers. The concern is clearly appropriate: The law governing these relationships is poorly developed, and children’s emotional interest in maintaining these relationships is often very high. But this concern is taking the law in a bad direction, a direction that threatens to upset the balance between family and state that serves children well.

More precisely, the efforts to protect nontraditional caregiving relationships is producing two related mistakes: the first a mistake of constitutional interpretation, the second a distortion of private custody law. Courts and scholars make the first error when they oppose the claims of nontraditional caregivers to those of parents protected by the Constitution and therefore press for a diminution of parental rights to make room for these other relationships. This sort of error pervades the Supreme Court’s analysis in *Troxel v. Granville*,<sup>1</sup> the Court’s most recent case considering the protection afforded parents under the Due Process Clause. State legislatures and domestic relations courts make the second error when they authorize the distribution of custodial fragments to individuals not recognized as a child’s parents. This second error is well illustrated by the American Law Institute’s newly adopted Family Dissolution

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<sup>1</sup> 530 U.S. 57 (2000).

Principles,<sup>2</sup> as well as the recent explosion in legislation authorizing third-party visitation orders.<sup>3</sup>

This Essay attacks both of these errors with a single argument. It argues 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. It also means, however, that if a state chooses not to recognize these nontraditional figures as parents, the Constitution prevents the state from offering these figures some more limited right of contact or custodial control.

While this argument draws heavily on the Supreme Court's parental rights doctrine, its ultimate aim is normative rather than descriptive: What drives this constitutional interpretation is, at bottom, an assessment of its value to children. But the fact that the Court's doctrine is in line with this argument is important for a number of reasons. First, it counters common claims that the doctrine stands as an obstacle to the recognition of nontraditional claims. Second, it makes sense of a doctrine that otherwise appears fundamentally confused. And third, in doing so, it challenges the common assumption that the Court's parental rights doctrine takes inadequate account of children's interests.

Part I of this Essay will describe the emerging problem in the law governing the allocation of parental authority, as revealed in the Court's recent analysis, scholarly commentary, and state law-making. Part II will argue that children are well served by a system that sharply limits a state's ability to interfere with a parent's child-rearing decisions but that affords the state substantially more authority to assign parental identity where that identity is in dispute. This allows the state to recognize nontraditional caregivers as parents in some circumstances, but it does not allow the state to compel contact with these nontraditional caregivers where they are not identified as parents. Part III will demonstrate that the Court's

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<sup>2</sup> Principles of the Law of Family Dissolution (forthcoming 2002).

<sup>3</sup> The Court noted in *Troxel* that, at the time of its decision, all fifty states had enacted some form of third-party visitation statute. 530 U.S. at 73 n.\*.

parental rights cases prior to *Troxel* support this approach. Part IV will apply this analytic distinction to various claims brought by nontraditional caregivers, drawing some conclusions about the nature of the protection the law should afford these claims.

### I. PROBLEMATIC TRENDS IN THE LAW

The traditional conception of a family includes two parents, one of each sex, and the group of biologically-related children under their care. Many children are not, however, raised in such traditional homes. Children often are raised by single parents, by same-sex couples, by extended family, or by unrelated caregivers.<sup>4</sup> Moreover, advances in reproductive technology are producing an expanding array of potential parental claimants, some linked to their children by biology, others only by contract.<sup>5</sup>

A growing awareness of this variation in child-rearing structures has called into question the ongoing relevance of traditional parental rights principles that were developed around the conventional nuclear family model. In particular, lawmakers and scholars have expressed increasing concern that this body of law inadequately protects the important relationships children commonly develop with adults other than their biological parents.<sup>6</sup> For many, these

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<sup>4</sup> U.S. Census Bureau statistics report that the number of children raised in single parent homes more than doubled to 25% from 1970 to 1990, and that children raised by non-parents have held steady for much of the century at approximately 4%. Among those children not living with either parent in 1996, nearly half live with grandparents, 21% with other relatives, and 22% with non-relatives including foster parents. See U.S. Census Bureau, Population Division, Fertility & Family Statistics Branch, *Living Arrangements of Children*, Tbls. 1 & 2, <http://www.census.gov/population/www/socdemo/child/la-child.html> (1996).

<sup>5</sup> In 1998, 28,500 births through Assisted Reproductive Technology ("ART") were reported to the Centers for Disease Control and Prevention. Approximately 3,500 of these births involved donor eggs. Another 240 births through the use of surrogate or gestational carriers were reported to the Centers that same year. See Centers for Disease Control and Prevention et al., 1998 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports, <http://www.cdc.gov/nccdrh/art98/PDF/art1998.pdf>. The number of babies conceived with donor sperm, not by itself reported as an ART procedure, has been estimated at 20,000 to 30,000 per year. Rita Rubin, *Who's My Father?: Progeny Seek Some Conception of Sperm Donors*, USA Today, Nov. 2, 2000, available at 2000 WL 5794389.

<sup>6</sup> See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has*

demographic trends justify a departure from the tradition of strong parental deference and an expansion of the state's involvement in the decisionmaking of the private family. Two examples, one framed in constitutional terms and one focusing on state custody law, reflect lawmakers' inclination to depart in these fairly radical ways from our traditional approach to family law. This Essay reveals the problems associated with this departure and suggests an alternative means of accommodating nontraditional relational claims that preserves the benefits provided to children by the traditional allocation of authority between parent and state.

### A. *Troxel v. Granville*

In 2000, the Supreme Court considered a constitutional challenge to Washington State's "third-party" or "non-parental" visitation statute.<sup>7</sup> At issue in the case was whether a state could order visits with a non-parent against the wishes of a parent if the state determined that such visits were in the child's best interests. At the time the case was heard, all fifty states had enacted some form of third-party visitation statute, many of them singling out grandparents, others granting standing more broadly.<sup>8</sup> Several advocacy organizations for grandparents and children filed amicus briefs emphasizing the changing look of American families and the importance of children's maintaining relationships with those non-traditional caregivers to whom they had formed attachments.<sup>9</sup> These

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Failed, 70 Va. L. Rev. 879 (1984); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747 (1993) (arguing that parental rights fail to take adequate account of children's need for nurturance and care); cf. David D. Meyer, *The Paradox of Family Privacy*, 53 *Vand. L. Rev.* 527, 586-87 (2000) (suggesting that state action aimed at facilitating ongoing relationships with extended family members justifies greater intrusions in parental decisionmaking).

<sup>7</sup> *Troxel*, 530 U.S. at 57.

<sup>8</sup> *Id.* at 73 n.\*.

<sup>9</sup> See, e.g., Brief of Amicus Curiae National Association of Counsel for Children, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138) (supporting state's authority to order visits with third parties who had served in a parental role because of the importance of these relationships to the child); Brief of Amicus Curiae Center for Children's Policy Practice & Research, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138) (cautioning the Court to avoid broad language suggesting that parents have a constitutional right to exclude family members and other "informal kin" from contact with a child that might disrupt the child's important relationships); Brief of Amicus Curiae of Grandparents United For Children's Rights, *Troxel v. Granville*, 530 U.S.

sorts of arguments appear to have strongly impressed the Court, inspiring a majority of the justices to offer only constrained support for parental rights.

While a majority of the Court voted to strike down the challenged visitation order as a violation of the mother's constitutional rights, the scope of the Court's ruling and an analysis of the various opinions reveals a Court scrupulously avoiding any strong endorsement of parental rights.<sup>10</sup> The four-Justice plurality limited its holding to a determination that the statute was unconstitutional as applied and seemed to signal its approval of several other states' third-party visitation statutes through favorable citation.<sup>11</sup> Announcing that the "demographic changes of the past century make it difficult to speak of an average American family," Justice Sandra Day O'Connor's plurality opinion noted that affording legal protection to a child's relationship with nontraditional caregivers would come at a cost to the traditional parent-child relationship protected by the Constitution.<sup>12</sup> Viewing these claims in competition, the plurality tepidly concluded that the Due Process Clause entitled parents' decisions about their children's associations and activities to "at least some special weight."<sup>13</sup>

Even this lukewarm endorsement of parental rights, however, was too strong for Justices Anthony M. Kennedy and John Paul Stevens, who each made clear that their interest in protecting non-traditional family relationships inspired their dissents. Justice Kennedy's "principal concern" with the Court's holding was that it "seem[ed] to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child."<sup>14</sup> Justice Stevens pointed to "[t]he almost infinite variety of family relationships that pervade our ever-changing society" to argue against an interpretation of parental rights that would prevent courts from

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57 (2000) (No. 99-138) (arguing that children have a constitutional right to maintain their relationships with their grandparents).

<sup>10</sup> For a more detailed treatment of this interpretation, see Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 Sup. Ct. Rev. 279.

<sup>11</sup> *Troxel*, 530 U.S. at 71-72.

<sup>12</sup> *Id.* at 63-64.

<sup>13</sup> *Id.* at 70.

<sup>14</sup> *Id.* at 98.

forcing unwilling parents to allow visits the court deemed were in their children's best interests.<sup>15</sup>

For a majority of the Court, the rise of the nontraditional family counseled caution in their embrace of parental rights. Justices O'Connor, Kennedy, and Stevens's opinions all portrayed the claims of nontraditional caregivers as opposed to those of parents and suggested that protecting these relationships could only be accomplished at some cost to parental rights. But opposing these alternative caregiving claims to the claims of parents trivializes the most significant among these nontraditional claims even as it threatens to do real harm to the parental rights doctrine. It blurs rights of parental authority with rights of parental identity and elevates parental identity rights to a status neither required by the law nor in keeping with children's best interests.

### *B. The ALI's Principles of the Law of Family Dissolution*

As *Troxel* was making its way through the courts, the American Law Institute ("ALI") was drafting its Principles of the Law of Family Dissolution. Of considerable concern to the drafters, as it was to the Court, was the harm that can come to children when former caregiving relationships with non-parents are severed after separation or divorce. While acknowledging that parental deference helps to maximize parents' commitment to their child-rearing responsibilities, the drafters warned that disregarding the interests of other adults who have served as caregivers "ignores child-parent relationships that may be fundamental to the child's sense of security and stability."<sup>16</sup> In the final version of the Principles, adopted in May 2000, the ALI's endorsement of nontraditional custody claims represents one of its most significant departures from standard family law principles.

The problem with the ALI's approach, however, is that it encourages courts to draw additional claimants into the custodial circle without taking adequate account of the potential harm to children caused by this diffusion of parental authority. Under the ALI Principles, the court can proliferate custodial fragments

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<sup>15</sup> *Id.* at 90.

<sup>16</sup> Principles of the Law of Family Dissolution (Tentative Draft No. 3, Part I, 1998), at 6 (Introductory Discussion) [hereinafter Principles, Draft No. 3].

among individuals to whom the law assigns, at best, qualified parental identity and responsibility. This proliferation, in turn, undermines the legal parents' ability to fulfill those weighty responsibilities associated with raising children.

More specifically, the ALI Principles call for three changes to standard custody law that become problematic in combination. First, two categories of individuals—"parents by estoppel" and "de facto parents"—are added to the list of those afforded standing to assert custodial claims and the right to notice where such custodial claims are asserted by others.<sup>17</sup> Second, categorical terms such as "visitation" and "custody," and "physical custody" and "legal custody," are abandoned in favor of a noncategorical approach that distributes portions of "custodial" and "decision-making" authority among multiple claimants based on various considerations.<sup>18</sup> Third, the dominant factor to be applied in determining this allocation is historical practice.<sup>19</sup> In the average case, the past distribution of caregiving and decisionmaking authority among custodial claimants is to determine the allocation prescribed in the custodial decree. Together, these three provisions are intended to give courts authority to design a custodial plan that protects a child's relationship with a broad range of former caregivers.

In the ALI's terminology, the traditional parental claimants whose parental identity is clearly established by biology, adoption, or, in some states, the operation of an irrebuttable presumption, are called "legal parents."<sup>20</sup> Individuals who have held themselves out as parents, either because they believed they qualified as legal parents or because they agreed with legal parents to do so, are "parents by estoppel," afforded the same rights of standing and notice in custodial proceedings as legal parents.<sup>21</sup> "De facto parents," in contrast, are those who, while never holding themselves out as parents, performed such a large portion of the caretaking function (under circumstances other than the provision of babysitting or fos-

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<sup>17</sup> Principles of the Law of Family Dissolution § 2.03 (Tentative Draft No. 4, 2000) [hereinafter Principles, Draft No. 4].

<sup>18</sup> Id. §§ 2.09–2.10; see also Principles, Draft No. 3, *supra* note 16, at 8–9 (Introductory Discussion).

<sup>19</sup> Principles, Draft No. 4, *supra* note 17, §§ 2.09–2.10.

<sup>20</sup> Id. § 2.03(1)(a) cmt.

<sup>21</sup> Id. §§ 2.03(1)(b), 2.04(1)(b).



ter care services) that they are likely to have established a parent-child relationship of some significance with the children in question.<sup>22</sup> These *de facto* parents are afforded significant rights to standing and notice under the Principles, but rights clearly subordinated to those of legal parents and parents by estoppel.<sup>23</sup>

The Principles' articulation of multiple parental categories suggests a hierarchy of rights among these categories both in and outside the custody context. While the Principles only expressly assign subordinate rights to *de facto* parents, the distinction between "legal parents" and "parents by estoppel" can be expected to have significance in other contexts where parental rights are implicated. Most significantly, the ALI gives no indication that the custody proceeding can transform parents by estoppel into the sort of parents entitled to special constitutional protection under the Due Process Clause, and it seems unlikely that the ALI would be calling for such a proliferation of constitutionally protected parents without any acknowledgment of this significant change. Indeed, there is little evidence that the ALI drafters gave any attention to the constitutional implications of their expansion of custodial claimants.

The second shift advocated by the ALI Principles is from rigid categories of custodial offerings, classically the categories of "custody" and "visitation," to a full, graduated spectrum of custodial and decisionmaking authority to be divvied up among claimants by the court. While at some point along the spectrum the portion of custodial authority might look much more like a classic visitation award, the intent of the drafters was to get away from the "adversarial, win-lose nature of the process" associated with the sorting of visitation and custody rights.<sup>24</sup> They aimed to reconceive the allocation of custody as a "dynamic and complex process," distributing

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<sup>22</sup> *Id.* § 2.03(1)(c).

<sup>23</sup> *Id.* § 2.03(1)(b) cmt. ("A parent by estoppel is afforded all of the privileges of a legal parent under this Chapter, including . . . priority over a *de facto* parent and a non-parent in the allocation of primary custodial responsibility under § 2.21"); *Id.* § 2.21(1)(a) (stating the general rule that a court should not allocate "the majority of custodial responsibility to a *de facto* parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility," and setting out limited circumstances justifying a departure from this rule).

<sup>24</sup> Principles, Draft No. 3, *supra* note 16, at 9 (Introductory Discussion).

“custodial responsibility” and “decision-making responsibility” in a wide array of different forms.<sup>25</sup>

The third shift endorsed by the ALI is the reliance on the historical distribution of caregiving and decisionmaking responsibility to determine how custodial responsibilities should be allocated between separating parents. This historical focus also reflects a kind of deference to private decisionmaking, suggesting that the terms the interested parties agreed upon, before they were in conflict, tell the court a great deal about these parties’ assessment of what division can most workably serve their child’s best interests even after conflicts arise.<sup>26</sup> Read together, these three changes endorse an expansion in the number and nature of custodial claims asserted, as well as the number and nature of custodial dispositions available to the courts.

These three aspects of the Principles are all clearly driven by the ALI’s attempt to embrace developments in custody law that will better serve children’s interests than the traditional approach. In particular, the Principles are designed to preserve important and successful child-rearing relationships at the time of family fragmentation. But as with the Court’s analysis in *Troxel*, the drafters of the Principles are attempting to achieve good ends through bad means. Indeed, the weakness of the ALI Principles complements the constitutional error of the Court. Where the Court squarely addressed the constraints imposed by the Constitution on the visitation claims of non-parents and suggested that these constraints are relatively weak, the ALI proposes a custodial scheme that assumes the weakness of those constitutional constraints.

The ALI’s custodial scheme—including the proliferation of quasi-parental claimants, the disaggregation of custodial authority, and the reliance on past practice to set the future custodial allocation—is problematic in several interrelated respects. First, while the ALI concedes that increasing the number of those with custodial involvement can produce conflict and coordination problems

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<sup>25</sup> Id. (Introductory Discussion).

<sup>26</sup> Id. at 11 (Introductory Discussion) (“[W]hen parents do not agree [on how to allocate decisionmaking at the time of separation], past divisions of responsibility may be the most reliable proxy for the shares of responsibility they would agree upon if they were focused on their child.”).

that adversely affect children,<sup>27</sup> it fails to acknowledge the particular problems produced when the additional custodial figures are kept in a subconstitutional status. We can expect special problems to arise for two distinct reasons. First, in affording these claimants authority to assert custodial claims while defining them outside the class of parents entitled to constitutional protection against intervention from the state, the scheme limits these claimants' ability to exercise their portion of custodial responsibility effectively. Second, by offering the state authority to distribute portions of custodial authority without taking the bigger step of recognizing these custodians as full, constitutionally protected parents, the ALI fails to impose any discipline on the state's distribution of custodial involvement. Confining the distribution of custodial authority to those on whom the state is willing to confer full parental status ensures that the state will exercise considerable caution in expanding the number of custodial figures in a child's life.

These problems of custodial proliferation will only be exacerbated by the ALI's second proposal: the abandonment of the traditional categories of custody and visitation. As intrusive as visits can be for parents exercising primary authority over children, the impact of contacts framed as "visits" is significantly circumscribed by this framing. Visits take time and scheduling control away from children's primary parental figures. They also expose children to other adults who will exercise at least some physical and emotional control over them, and who may try to maximize their influence in a way that undermines the primary caregivers' control.<sup>28</sup> But if these attempts are found objectionable, the fact that an individual "only has visitation rights" will give the primary caregiver considerable leverage to control the objectionable conduct in and out of court.

The ALI's abandonment of the custody/visitation dichotomy and the system of "winners and losers" it produces has the effect, apparently deliberate, of blurring the lines of custodial authority among the various custodial claimants. In lieu of a system of custo-

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<sup>27</sup> Principles, Draft No. 4, *supra* note 17, § 2.21(1)(b) (directing a court to limit or deny an allocation of custodial responsibility to a non-parent that would otherwise be appropriate "if, in light of the number of other adults to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter.").

<sup>28</sup> This problem is discussed at somewhat greater length in Buss, *supra* note 10.

dial allocation that establishes a pecking order among custodial authorities, the ALI encourages courts to customize custodial packages to suit the circumstances of each individual case. While this aspect of the Principles seems designed with the two-parent model in mind, it also applies to the expanded range of custodial claimants the Principles invite. The ease with which courts can expand the list of individuals with custodial authority, and the flexibility with which custodial responsibilities can be divided among these individuals, threatens the ability of any individual to perform those responsibilities effectively for the child.

The third distinctive aspect of the ALI's custody principles, namely the reliance on past practice to determine future custody allocation, fails to account for the difference between those arrangements worked out cooperatively, when custodial authority is not an issue, and those arrangements that are compelled by a court, when that authority is contested. This objection has considerable force even in the context of simple disputes between a divorcing couple. But what is difficult to manage, at two, is likely to become even more so as the numbers increase. The problems created by recognizing multiple caregivers might well prevent a court from ordering such a custodial division, but the presumption favoring preservation of whatever shared caregiving arrangements were worked out in a spirit of cooperation will press in a direction that may well be harmful to children once that spirit disappears.

At least as significant, the assignment of custodial authority to these other caregivers will often come as a surprise to the legal parents. People have a general understanding that both legal parents will have custodial rights should they separate, but many will not realize that agreeing to a cooperative caregiving arrangement with others may have the effect of bestowing custodial rights on those cooperators. And while the problem of surprise could be dismissed as a temporary problem that will be solved as people begin to learn about these new rules of custodial allocation, the problem created by this learning is likely to be at least as harmful for children. A fear that involving additional caregivers could give those caregivers authority to seek custodial rights in court will surely inspire some parents to avoid involvement they would otherwise consider beneficial to their children. Part IV argues that caregivers should be allowed to assert a claim for full parental

rights, based on an established relationship with a child. But that argument is premised on the assumption that the significance of allocating full parental status to a new individual will deter many caregivers from asserting the claim, and most courts from granting it. The problem with the ALI's proposal is that it gives courts authority to allocate fragments of custodial authority, fragments that caregivers will likely want, and that courts will too readily give.

Ultimately, then, the problem with the ALI Principles is not that they recognize additional non-biological parental claimants to child-rearing authority, but that they do so in a context that encourages the fragmentation of parental authority. Because custody courts are routinely in the business of dividing up the custodial package between parental claimants, adding claimants to their list offers a deceptively easy way to afford additional adult-child relationships some degree of protection. It is this diffusion of custodial authority disconnected from the disciplining constraint that comes with the recognition of parental rights that will create problems for children.

The Court's analysis in *Troxel* and the ALI's custody principles suffer from similar failings: They both classify nontraditional caregivers as distinct from constitutionally protected parents and then endorse these non-parents' custodial access to children. This approach gives the nontraditional caregivers both too little and too much. It screens them out of the full parental status to which they are sometimes entitled, and it affords them authority, independent of that status, that will interfere with others' effective exercise of their parental duties.

Children will be better served by a constitutional approach that affords states considerable control over the assignment of parental identity but that prevents states from requiring contact between children and non-parents, if such contact is opposed by their parents. After discussing the benefits to children of distinguishing between parental rights of authority and identity in this way, this Essay demonstrates that this approach is entirely consistent with—indeed, best accounts for—the Court's parental rights decisions prior to *Troxel*.

## II. CONCEIVING PARENTAL RIGHTS IN CHILD-SERVING TERMS

*A. Rights of Child-Rearing Authority*

A primary premise of this Essay is that a legal system that shows strong deference to parents' child-rearing decisions serves children well.<sup>29</sup> Parents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances. In contrast, the state's knowledge of and commitment to any particular child is relatively thin. A scheme of strong constitutional rights shields the parent expert from the intrusive second-guessing of the less expert state.

This is not to say that the law's deference to parental control should be absolute. State interests, whether focused on the child in question or on other societal concerns, will sometimes be great enough to justify interference with parental control.<sup>30</sup> In assessing whether other societal interests are sufficiently compelling to justify interference with parental control, the relative child-rearing expertise of parent and state is beside the point. But where, as in our context, state intervention aims to serve the interests of the very child whose parents oppose intervention, the relative competence of parent and state should be our central concern.

The state can legitimately claim at least two sorts of child-rearing expertise superior to that of individual parents. First, the state has the advantage in overseeing what we might call the child's "public development." Because the state is the relative expert on its own design and function, it is in a better position than a parent to judge what education and experiences are most likely to prepare a child for participation in the state's economy and government. At least where parents share the ultimate aim of public participation,

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<sup>29</sup>This position has been expounded in greater detail elsewhere. See, e.g., Buss, *supra* note 10, at 287-98; 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).

<sup>30</sup>These two sorts of state interests justify state intervention in the name of *patria potestas* and police power, respectively.

the state's expertise in public development offers special justification for state intrusions designed to achieve this aim.<sup>31</sup>

Second, the democratic process makes the state the relative expert in identifying community consensus about the appropriateness of particular child-rearing practices, including practices that have only private developmental effects. But this consensus can, at best, justify state intervention where it condemns or applauds certain child-rearing choices in all circumstances. The best example of such categorical condemnation is the state's prohibition of child abuse and neglect.<sup>32</sup> Once the state is called upon to make individualized judgments about whether a particular choice is appropriate for a particular child, we should have no confidence that the state can do a better job than the parent in choosing the course of private development for that child.

But even where the state's relative child-rearing expertise is greatest—where the developmental stakes are most public, or where the consensus is most unqualified—we should be slow to allow state intervention if the child's welfare is our goal. This is because the state will have to rely on the parents to implement, or at least facilitate, its unwelcome interventions. For the best parents, this unwelcome obligation will have a certain undermining effect. By definition, it will force them to act, or encourage their children to act, in a manner that they believe disserves their children's interests. We can, however, also count on the best parents to take pains to fulfill whatever obligations the state imposes in a manner that is healthiest for their children.

But not all parents are this competent and self-sacrificing. Indeed, it is precisely those parents whose decisionmaking most inspires state intervention who are likely to do the most damage when forced to do what they do not want to do. The undermining effect of unwelcome obligations is likely to be particularly strong

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<sup>31</sup> It is a separate and important question whether parents can decide, on behalf of their children, to prevent precisely this development into economically and politically participating citizens. This question, which is beyond the scope of this paper, is a central question raised by *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972), discussed briefly in Section III.A.

<sup>32</sup> Of course, even categorical prohibitions must be applied to specific facts, and this involves the courts in difficult, case-specific assessments of whether abuse or neglect in fact has occurred. But the justification for this intrusive intervention is the condemnation of abuse and neglect in all circumstances.

for parents struggling to meet their parental responsibilities. And parents whose child-rearing choices are skewed by selfishness or immaturity will bring that same selfishness and immaturity to their implementation of those obligations. In short, 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, and the self-interested or overstressed parent can be expected to do a particularly bad job of coping with these intrusions.

Because state intervention in child rearing inevitably comes at a cost, it should be limited to those circumstances where the costs of failing to intervene are great enough to justify the costs of intervention. State intervention, therefore, should be limited to those circumstances in which the state deems intervention necessary to protect a child from harm and, again, only from harm the state has some special expertise to assess. In the public realm, for example, the state has special expertise to assess risks associated with certain educational decisions. In the private realm, the state's expertise allows it to prohibit child abuse and neglect as a child-generic harm condemned by the community.

But where the choices to be made concern a child's intimate associations as they do in our context, both the private and child-specific nature of the inquiry make the state a particularly ill-qualified decisionmaker.<sup>33</sup> Because the parent knows herself, her child, and her entire household better than the state knows them, and stands in a position of greater influence than the state over the behavior of all three, the parent is best situated to decide what private relationships should be fostered.<sup>34</sup> Under a competence-based regime of parental rights, protection against state intervention to compel the child's contact with non-parents should be especially strong.

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<sup>33</sup> While the courts' and legislatures' recognition of an expanded list of custodial claimants may reflect society's general views about the value to children of maintaining relationships with grandparents and long-term caregivers in some circumstances, none of these legal developments call for court-ordered visitation or other custodial involvement for all those who lawfully request it.

<sup>34</sup> The state has a considerably stronger interest (and, relatedly, expertise) in associational decisions aimed at serving children's public development as citizens. See Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. Chi. L. Rev. 1233 (2000).



The legal scheme best designed to keep primary child-rearing authority in the hands of parents is a scheme of strong constitutional rights. As a matter of definition, a scheme that affords parents no constitutional protection shifts the ultimate allocation of child-rearing authority to the state. Perhaps less obviously, a scheme that affords parents a weaker or less crisply defined constitutional protection is likely to shift that allocating authority as well—this time to the courts interpreting the murky constitutional protection.<sup>35</sup> In contrast to both, a strongly protective constitutional right reduces the role of the courts to enforcer of the strong protection, a reader of the scales tipped heavily in the parent's favor. Stated another way, a move to weaken the protection afforded parents under the Constitution is at least as threatening to parental autonomy as a move to eliminate the protection. Both moves threaten to shift decisionmaking to a state actor with considerably less child-specific competence than a parent and with the power to cause harm through the process and outcomes of its decisionmaking.

### *B. Rights of Parental Identity*

The argument for strong parental deference assumes, however, that parental identity is clear. In most cases, parental identity, whether established through traditional sexual reproduction, assisted reproductive technology, adoption, or other means, is, in fact, uncontested. But where one individual disputes the parental identity of another, this dispute will dramatically undermine the ability of either competitor to exercise the authority that justifies such deference. The most compelling claims of “nontraditional families” are those that contest a biological parent's claim to parental identity. Where such contests occur, the state facilitates rather than undermines the exercise of parental authority by stepping in to resolve the dispute.

In analyzing identity rights, as in the previous analysis of authority rights, this Essay aims for a legal scheme that serves children's interests. Thus, authority to assign parental identity, like authority to control child rearing, should be allocated in a manner that ex-

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<sup>35</sup> The Court in *Troxel* appears to be headed in this direction. Buss, *supra* note 10, at 283–84.

exploits the relative expertise of private parties and the state and minimizes the harms associated with state intervention. These same considerations, however, justify considerably greater state intervention in the assignment of parental identity than can be justified in the child-rearing choices of identified parents.

Where there is no dispute among private individuals about who counts as a parent, deferring to this process of self-identification comports with our child-focused conception of parental rights. The individual's self-identification reveals her willingness (frequently even eagerness) to undertake parental responsibilities, and her growing knowledge and attachment nurtured through day-to-day parental interaction fosters her relative expertise. In contrast, the state has no special commitment to or expertise about the child that would allow it better to assess the quality of the parenting provided, let alone to compare it to the potential parental quality of others. Moreover, removing a child from a clearly identified family unit will predictably impose a double harm: It will create family conflict by introducing a family competitor, and it will deprive the child of the value of the original parents' accumulated child-specific expertise. In the absence of competitors, then, individual choices about parental identity can be conceived as an aspect of their exercise of parental authority, entitled to strong constitutional protection from state interference.

If parental identity is used to mark those entitled to deference in their exercise of child-rearing authority, then it belongs with whom-ever has undertaken parental responsibilities and thereby established her expertise. Assigning parental rights to those closest to the child's familial core will ensure that those bearing responsibility for the child's upbringing will have the authority to carry out that responsibility. This suggests that parental identity derives not from any set of individual characteristics, but rather from the parent-child relationship itself and, more particularly, the centrality of the relationship in the child's life.

We should, then, avoid assigning distinct constitutional identity rights to any set of individuals based on their particular characteristics. Rather, we should conceive of identity rights as a form of familial right, the right of the family to control its child-rearing structure free from state interference. This is not to suggest that a parental right of identity is not an individual right, but rather that

the assignment of that right derives from family status. This also suggests that the authority of private individuals to self-identify as parents depends upon the clarity of their familial claim. Where familial relationships do not offer clear answers to the question of parental identity, deferring to private arrangements may prevent any individuals from exercising child-rearing authority effectively. In such circumstances, the state facilitates rather than compromises parental authority by resolving the disputes that stand in the way.

As with parental authority rights, we can justify state intervention in the assignment of parental identity where the state brings some superior competence to the decisionmaking process. Here, the state can claim three sorts of special competence that pertain to identity choices. First, it can claim the same expertise about community attitudes toward parenting practices that was discussed in the authority context. Whereas, in that context, the expertise justified prohibiting practices (such as abuse and neglect) viewed as inappropriate in all circumstances, in this context, the expertise justifies the state in depriving parents who nevertheless engage in such practices of their parental identity. Second, the state can claim special competence to establish default rules of parental identity around which private parties can bargain. Third, the state can claim special competence as the resolver of disputes over parental identity. These second and third forms of expertise bear most directly on the state's authority to identify nontraditional caregivers as parents.

While the state cannot justify reassignment of parental identity in the absence of conflict, it can help to avoid these conflicts by establishing identity default rules. Where a state announces presumptive rules of parental identity and the process through which an individual can defeat the presumption, it can help individuals clarify their identity claims from the outset. Requiring parents to declare their parental identity when it might not be obvious establishes who bears parental responsibility and, therefore, who qualifies for the high degree of deference championed above. This requirement, in turn, should help individuals avoid future conflicts by forcing them, at or near the child's birth, to address identity issues otherwise left ambiguous.

The state is uniquely qualified to establish these default rules for two reasons. First, only the state can establish and publish a single

set of rules binding on all residents. Second, as already discussed, the state has superior expertise in assessing the community's categorical preferences among child-rearing arrangements. While this general community expertise cannot displace the child-specific expertise that develops in the course of an actual parent-child relationship, it can serve to justify the default rules from which parties can depart through some combination of bargaining and public declaration.<sup>36</sup>

Finally, the state has special competence to resolve disputes among individuals competing for parental identity. 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, commitment, and responsibility. Moreover, until the conflict among parental claimants is definitively resolved, all parental claimants will be compromised in their ability to develop and exercise that superior competence. In such cases, the state is uniquely qualified to provide this needed resolution. This is not because the state has any special expertise in choosing among parental claimants, but rather because it is the only entity that can serve as the authoritative resolver of these disputes. Just as separating couples turn to the state to work out shared child-rearing responsibilities better left to private resolution were the family still intact, so the state offers a neutral, if decidedly inexperienced, decisionmaker to sort among competing parental claims where the circumstances of a child's creation or upbringing raise questions about parental identity.

While consideration of relative competence justifies some qualification of parental rights in both the authority and identity contexts, this consideration has very different implications for the claims of nontraditional caregivers in these two contexts. As argued previously, the state has no comparative advantage over a parent in assessing the value to a child of maintaining particular private relationships with non-parental figures. In contrast, the state is

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<sup>36</sup> Allowing states to play this role in assigning default rules governing parental identity also allows for the kind of legal experimentation demanded by the increasing diversity of familial arrangements and familial claims.

uniquely qualified to prevent, or, when necessary, resolve parental identity disputes between traditional and nontraditional parental claimants.

A regime of parental rights designed to serve children's interests would sensibly afford parents considerable deference in exercising parental authority but would allow the state to intervene in ways designed to avoid or resolve conflicting claims of parental identity. Such a regime would allow the state to identify nontraditional caregivers as additional or alternative parents, entitled to this heightened deference. But where the state refused to identify a nontraditional caregiver as a parent, it would have no authority to compel contact between the caregiver and child. In such circumstances, parents and not the state would be left to decide this child-specific question affecting the child's private development. This scheme well-describes the Supreme Court's parental rights doctrine set out in its cases prior to *Troxel*. It is to these cases that I now turn.

### III. PARENTAL RIGHTS UNDER THE DUE PROCESS CLAUSE

While the Supreme Court cases addressing parental rights are frequently analyzed as a single block,<sup>37</sup> they are better understood as two separate sets of cases that address the two distinct issues of parental authority and identity. In the first set, the Court considered the extent to which a state could intervene in child-rearing decisionmaking where a child's parental figures were clearly identified. In these core cases, the Court has interpreted the Constitution to afford these parents strong protection against state interference with their decisionmaking authority. In the second set, comprised primarily of the "unwed father" cases, the Court considered the extent to which the state could choose among competing parental claimants. In these cases, the Court interpreted the Constitution to impose minimal constraints on a state's authority to assign parental identity among disputing claimants. These two sets of cases reflect the bifurcated approach to parental rights advocated in this Essay. Read together, they support an approach to nontraditional paren-

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<sup>37</sup> See, e.g., *Troxel*, 530 U.S. at 65–66 (citing broad array of cases for the general proposition that the Constitution affords parents strong protection).

tal claims that will serve children better than the sort of approach embraced by *Troxel* and the ALI.

*A. The Constitution's Strong Protection of Parental Rights of Authority*

The constitutional protection afforded parents' child-rearing authority under the Due Process Clause has proved remarkably hardy. First recognized by the Supreme Court in the 1920s,<sup>38</sup> parental rights survived the collapse of the *Lochner* era doctrine that produced them. Uncompromised by that collapse, the early parental rights cases served a foundational role in the Court's reconstruction of substantive due process rights in their contemporary form.<sup>39</sup> Among the contemporary claims for protected liberty interests, none has received more widespread and consistent endorsement than a parent's "fundamental right" to control the upbringing of her children.

Parental rights under the Constitution are clearer in concept than in detail. Prior to *Troxel*, the Court had addressed the core right in only four cases, none of which squarely considered its scope. In the first two, *Meyer v. Nebraska*<sup>40</sup> and *Pierce v. Society of Sisters*,<sup>41</sup> the Court's recognition of parental rights was incidental to its consideration of the economic liberty claims of educators. In the second pair, *Prince v. Massachusetts*<sup>42</sup> and *Wisconsin v. Yoder*,<sup>43</sup> parental rights claims were entangled with religious liberty claims, and the Court did little to untangle the two claims with its analysis. Despite the sparseness of the analysis and the imperfection of the fit, the Court routinely cites to these cases to demonstrate its long

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<sup>38</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down a state law requiring all students to attend public school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down state law that prohibited the teaching of languages other than English to students who had not yet completed the eighth grade).

<sup>39</sup> *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citing *Meyer* and *Pierce* to support a finding of a fundamental right to privacy that extends to protect a woman's right to choose to undergo an abortion); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (relying on *Meyer* and *Pierce* to strike down Connecticut's law banning the use of contraceptives as a violation of rights of marital privacy protected by the Constitution).

<sup>40</sup> 262 U.S. 390.

<sup>41</sup> 268 U.S. 510.

<sup>42</sup> 321 U.S. 158 (1944).

<sup>43</sup> 406 U.S. 205 (1972).

and consistent support for parental rights.<sup>44</sup> The doctrine's survival on this arguably shaky foundation is itself an odd testament to the doctrine's strength.

While *Meyer* and *Pierce* say very little, they do capture the essential wisdom behind affording parents great deference in their child-rearing choices. "The child," the Court declared in *Pierce*, "is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>45</sup> This language, repeatedly quoted in cases analyzing parental rights, captures the basic rationale for a strongly deferential approach. The law places primary responsibility for child rearing with parents—a responsibility that includes the intense day-to-day involvement of nurturance and the long-term investment that instills values and fosters skills. Affording parents strong protection from outside interference, *Pierce* suggests, is the best means of ensuring the effective satisfaction of these important responsibilities.

This is not to say that the primary focus of the Supreme Court's parental rights analysis in the 1920s, or of the common law courts before then, was on child well-being. Indeed, much of the history suggests that the law focused heavily on the benefits to parents, with little regard for the children they controlled.<sup>46</sup> The cases do suggest, however, that the law has long recognized the link between the interests of parent and child, and between parental rights and the fulfillment of parental duties. Today, the proprietary conception of parental rights is roundly condemned.<sup>47</sup> But the benefits to children, first acknowledged when parental rights were conceived in proprietary terms, now stand as an independent justification for continuing to afford parents a tremendous degree of control.

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<sup>44</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>45</sup> 268 U.S. at 535.

<sup>46</sup> See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 *Wm. & Mary L. Rev.* 995, 1112–13 (1992) (arguing that the conception of parental rights enshrined in *Meyer* and *Pierce* "had a strong property component").

<sup>47</sup> See, e.g., *id.*; *Troxel*, 530 U.S. at 88–89 (Stevens, J., dissenting) ("At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.").

*B. The Court's Weak Protection of Parental Rights of Identity*

In the first set of parental rights cases, parental identity was not at issue. Indeed, parental identity was assumed, even in the case of *Prince*, where the individual asserting parental rights was actually an aunt with custody of her niece.<sup>48</sup> Where the core cases focused on issues of parental authority, the Court's next set of parental rights cases addressed this issue of parental identity. These cases merit closer attention, both because they have been misconstrued to support a qualification of parental rights of authority to accommodate a non-parent's claims for contact, and because, properly understood, they suggest the state has considerable power to recognize nontraditional caregivers as parents themselves.

In a string of five "unwed father" cases, biological fathers asserted the right to be legally identified as their children's fathers and to be afforded the authority associated with that legal identity.<sup>49</sup> These men asserted parental rights not, as in the core cases, to prevent the state from interfering with the choices made by familial child rearers, but rather to prevent the state from depriving them of the status and authority of parents altogether. Where these biological fathers faced paternal competitors, however, the Court refused to afford their identity claims any due process protection and left the states with considerable latitude to assign parental identity among competing claimants. Acknowledging the link between clarity in lines of parental authority and the successful fulfillment of parental responsibilities, the Court suggested that such a state definitional role may serve precisely those interests protected by the Due Process Clause.

While the only parental claims rejected by the Court in the unwed father cases were *identity* claims, these cases have been misconstrued to support a diminution of parental *authority*, particularly authority over a child's associations. Justice Stevens, for example, cited these cases in *Troxel* for the proposition that "[d]espite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be

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<sup>48</sup> 321 U.S. at 159.

<sup>49</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).



without limits.”<sup>50</sup> He then went on to rely on these cases to support his conclusion that the state could compel a child to visit with a non-parent against the parent’s wishes. But these cases neither embrace the rights of non-parents nor call for any qualification of parental rights to accommodate these non-parents’ claims. Rather, they simply recognize the state’s legitimate role in resolving disputes among multiple parental contenders.

In the first of the unwed father cases, *Stanley v. Illinois*,<sup>51</sup> the Court struck down a law that treated the children born to an unmarried mother as orphans when their mother died, regardless of whether their biological father had formed a parental relationship with them. In this context, where the biological father had no parental competitors, the Court held that the state could not deny the father’s parental identity without some form of a hearing.<sup>52</sup> While *Stanley* opened the door to a host of parental identity claims, the case itself captures a mix of identity and authority issues. Because *Stanley* was the only private parental claimant available, his was a battle between the private family and the state for parental control. As in the core cases discussed above, the Court rejected the state’s attempt to wrest control from the private family. In the four unwed father cases that followed, however, the primary issue was the state’s authority to decide *among* private parental contenders. In this context, the Court has tolerated considerable state intrusions, noting that these intrusions are aimed at facilitating, rather than disrupting, the functioning of a private familial unit.

In the next three cases, *Quilloin v. Walcott*,<sup>53</sup> *Caban v. Mohammed*,<sup>54</sup> and *Lehr v. Robertson*,<sup>55</sup> the Court appeared to be moving purposefully toward a systematic account of parental identity rights. In *Quilloin*, the Court upheld a law that deprived a biological father of authority, under certain circumstances, to block an adoption. In particular, Mr. Quilloin sought to prevent his biological child’s adoption by a man whose decade-long marriage to the child’s mother and assumption of child-rearing responsibilities es-

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<sup>50</sup> 530 U.S. at 87 (Stevens, J., dissenting).

<sup>51</sup> 405 U.S. 645.

<sup>52</sup> *Id.* at 658.

<sup>53</sup> 434 U.S. 246.

<sup>54</sup> 441 U.S. 380.

<sup>55</sup> 463 U.S. 248.

tablished the strength of his own parental claim. While only Mr. Quilloin pressed his claim under the Constitution, the Court clearly saw the case as one in which the state was deciding between the claims of two plausible, but incompatible, paternal claimants. Conceding that the "relationship between parent and child is constitutionally protected,"<sup>56</sup> the Court concluded that the state could legitimately play a role in identifying the relevant relationship that would qualify for that protection. Indeed, the Court suggested that the state's facilitation of the adoption had the effect of giving "full recognition to a family unit already in existence."<sup>57</sup>

Notably, the Court in *Quilloin* did not justify the state law as a permissible limitation on a constitutional right. That is, it did not recognize Mr. Quilloin's constitutional rights as a father, but then conclude that those rights could nevertheless be infringed to serve the state's important interest in maintaining family unity and stability. Indeed, it never suggested that Mr. Quilloin had any constitutionally protected right whatsoever. *Quilloin*, then, reflects not a curtailment of parental rights, but rather a minimization of the role of biology in assigning those rights. Lacking a right to parental identity, Mr. Quilloin had no constitutional basis on which to contest the state's assignment of parental rights elsewhere. By assigning parental rights to the stepfather through adoption, the state established to whom parental rights—including strong rights against state interference in child rearing—belonged.

In the next case, *Caban*, the Court again considered a biological father's challenge to a law limiting his ability to block his biological children's adoption by another man. As in *Quilloin*, the biological mother sought to have her children adopted by the man she had married, but unlike Mr. Quilloin, Mr. Caban had assumed some responsibility and developed a relationship with his biological children. Indeed, he too wished to have his children adopted by his wife. Relying on the Equal Protection Clause rather than the Due Process Clause, the Court struck down the law, concluding that, at least where mothers and fathers were similarly situated, the Constitution required that they be afforded similar rights of parental identity. While the state had considerable authority to choose

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<sup>56</sup> *Quilloin*, 434 U.S. at 255.

<sup>57</sup> *Id.*

among parental competitors, it could not, the Court held, make those choices on the basis of gender alone.<sup>58</sup>

In *Lehr v. Robertson*, the Court again allowed the state to confer parental identity on an adoptive father, without regard to the biological father's objections. But while the Court's holding endorsed the state's authority to decide among parental competitors, it suggested, in dicta, a significant limitation to that authority. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause."<sup>59</sup> While the Court clearly intended with this description to capture less traditional arrangements that nevertheless fulfilled the parental role, the suggestion that parental identity rights could automatically be derived from some combination of biology plus relationship threatened to give these rights force independent of their value to children.

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. In suggesting that biology plus some relationship might be enough to confer parental identity, the *Lehr* Court failed to consider how assigning identity rights to one category of individuals might interfere with other parental claimants' exercise of parental authority.

This sort of conflict was squarely pressed by the facts of *Michael H. v. Gerald D.*<sup>60</sup> In *Michael H.*, a biological father challenged a California law that gave him no legal authority to identify himself

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<sup>58</sup> *Id.* at 391.

<sup>59</sup> *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392) (citation omitted).

<sup>60</sup> 491 U.S. 110 (1989).

as the father of a child born to a married couple, absent the cooperation of either the biological mother or her husband. In the particular case, both the biological father and the presumed (marital) father had held themselves out as the child's father, developed a parental relationship with her, and provided for her support. The Court upheld the law, but the fragmentation of the opinions left the doctrine somewhat confused. The case is worth considerable attention, nevertheless, because it is here that the Court confronted the state's ability to deny legal identity to an involved biological parent.

In a plurality opinion, Justice Antonin Scalia concluded that biology plus a parental relationship was not sufficient to establish a constitutionally protected liberty interest, at least where that claim competed with the interests of the "unitary family" represented by the marital unit.<sup>61</sup> Buried in Justice Scalia's lengthy discourse on history and tradition are two valuable insights. The first insight, offered only tentatively, is that constitutional identity rights will vary with context. The second insight, built more directly on the analysis of the earlier unwed father cases, is that conferring identity rights on one individual necessarily encumbers the exercise of parental authority by another. Recognizing the danger of attaching constitutional rights of parental identity to any group of individuals in a vacuum, Justice Scalia properly concluded that resolving disputes among parental competitors was best left to the states.

Although Justice Scalia concluded that an unwed father had no constitutionally protected claim to paternity where a child was born into a marital family whose "marital parents" were committed to raising the child, he noted that this same father's claim might be protected if the "marital parents [did] not wish to raise [the child] as their own."<sup>62</sup> This unorthodox, conditional conception of individual rights prompted harsh criticism from Justice William J. Brennan, Jr.<sup>63</sup> But conditioning parental identity rights in this way is entirely consistent with the Court's precedents and describes a

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<sup>61</sup> Id. at 123.

<sup>62</sup> Id. at 129 & n.7.

<sup>63</sup> Id. at 146 (Brennan, J., dissenting) (criticizing Justice Scalia for "suggest[ing] that if Carole or Gerald alone wished to raise Victoria, or if both were dead and the State wished to raise her, Michael and Victoria might be found to have a liberty interest in their relationship with each other.").

scheme well suited to serve children's interests. Where private individuals establish a family unit uncontested by parental competitors, the Court has made clear that the state must defer to those choices, whether those choices pair children with an unmarried biological father, as in *Stanley*, an aunt, as in *Prince*, or a grandmother and an uncle, as in the related case of *Moore v. Cleveland*.<sup>64</sup> In contrast, where there is disagreement among private individuals about who has authority over a child's upbringing, the Court has allowed the state to resolve the conflict by assigning parental identity to one competitor over another.

Justice Scalia's refusal to afford Michael H.'s identity claim constitutional status was driven by his appreciation of the problems created by proliferating parental figures. Noting that "to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa,"<sup>65</sup> he left to the state the business of assigning parental identity. While he went too far (and beyond the force of his own arguments) when he suggested that the state must choose between paternal claimants,<sup>66</sup> he was right to recognize that any expansion of the number of individuals identified as parents would necessarily come at a cost.

Because Justice Scalia's opinion is most noted for its celebration of history and tradition in defining substantive due process rights, and because this emphasis suggests a potential hostility toward parental claims explicitly recognized as "nontraditional," it is worth saying a word in criticism of this analysis and to note what little effect it had on Justice Scalia's ultimate conclusions. Awarding parental identity rights on the basis of historical support suffers from the same weakness as the other formulaic approaches that Justice Scalia properly rejected. Any simple formula—whether based on history, biology, or biology plus some relationship—that purports to establish to whom parental rights belong will fail, in some circumstances, to account for those who constitute a child's familial core. A constitutional protection reduced to any such formula will therefore disserve the important child-rearing interests the Constitution should be construed to protect. In the end, Justice

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<sup>64</sup> 431 U.S. 494 (1977).

<sup>65</sup> *Michael H.*, 491 U.S. at 130.

<sup>66</sup> Justice Scalia says this only indirectly, if forcefully, by asserting that "California law, like nature itself, makes no provision for dual fatherhood." *Id.* at 118.

Scalia only relied on history to reject Michael H.'s claim and declined to base any positive conclusions about rights on that history. While his interpretation of history pointed strongly in favor of affording protection to the marital unit,<sup>67</sup> Justice Scalia properly left the choice among parental competitors to the state.<sup>68</sup>

Neither of Justice Scalia's insights—his recognition that identity rights might be conditioned on the lack of parental competitors, or his appreciation of the threat posed to the exercise of parental authority by the proliferation of legal parents—illuminates the other opinions in *Michael H.* Most notably, Justice Brennan's dissent attempted to avoid the problems created by recognizing categorical identity rights by shifting his focus from substantive to procedural due process issues. His use of procedural mechanisms to obscure the significance of parental identity choices echoes the problematic approach of *Troxel* and the ALI Principles and therefore merits some attention here.

Justice Brennan suggested that he could avoid the problems created by parental competition by framing Michael H.'s rights in largely procedural terms. His procedural analysis focused on Michael H.'s right to a hearing—the right to have the state consider his particular claims for parental connection before he was cut out

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<sup>67</sup> *Id.* at 124 (concluding that it is "impossible" to find that the relationship between an adulterous father and his child was "treated as a protected family unit under the historic practices of our society," and that "quite to the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts").

<sup>68</sup> *Id.* at 130 ("Our disposition does not choose between these two 'freedoms' [the freedoms to pursue fatherhood in the forms represented by Michael H. and Gerald D.], but leaves that to the people of California."). States continue, in fact, to resolve the question in different ways. Some follow the approach of California at the time of *Michael H.*, preventing putative fathers from asserting paternity claims absent the cooperation of at least one member of the marital unit, see, e.g., *J.K. v. R.S.*, 706 So. 2d 1262 (Ala. Civ. App. 1997) (holding that an alleged biological father did not count as a parent for purposes of standing to bring an action for custody of a child born to a married couple); *S.B. v. D.H.*, 736 So. 2d 766 (Fla. Dist. Ct. App. 1999) (concluding that a putative biological father could not maintain a paternity action concerning a child conceived by a married woman over the objections of the married woman and her husband); others give biological fathers a legal means to self-identify and, once identified, to seek a parental relationship with a child, see, e.g., *In re Paternity of S.R.I.*, 602 N.E.2d 1014 (Ind. 1992) (interpreting the relevant statute to allow a putative father to establish paternity without regard to the mother's marital status); *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001) (finding that the alleged father of a child born while the mother was married to another man could assert a paternity claim).

of his daughter's life. To the extent conflict among parental figures made this contact destructive for his daughter, Justice Brennan suggested, the state could take the conflict into account in this more individualized fashion.<sup>69</sup>

There are at least two significant problems, however, with relying on process to diffuse the conflicts created by recognizing multiple parents. The first is that the process itself will undermine the parental functioning of other parents. The second is that the procedural analysis leads us right back to the substantive issues that press the conflict.

In Justice Brennan's view, Michael H.'s procedural rights included the right to a hearing on whether he should be identified as the father and, if so, whether he should have ongoing contact with his child. While Justice Brennan suggested that the court could assess the harm caused to the child by parental conflict in the context of this hearing,<sup>70</sup> he failed to account for the harm to parental functioning imposed by the hearing itself. The very appearance of another man in court seeking to be identified as "the" or even "a" father of a child would have some undermining effect on the marital father's parental authority, and the conduct of the hearing could be expected to exacerbate that effect considerably. The hearing would subject the marital relationship and the relationships between the child and the various parental contenders to judicial scrutiny and require the marital unit to bear the emotional, temporal, and financial costs of defending their parental claim.

Moreover, Justice Brennan's procedural focus merely papered over the substantive issues pressed by the case. Michael H. asserted the right to be identified as the child's father and to have contact with her as a result of that identity. The fact that these rights might be curtailed or eliminated by procedural means makes the rights themselves no less substantive. Indeed, the ease with which these rights could be curtailed is directly tied to the nature of these substantive rights.

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<sup>69</sup> Id. at 147 n.5 (Brennan, J., dissenting) (suggesting that fathers such as Michael H. might be denied the parental relationship they seek, where a court found such relationships against their children's best interests).

<sup>70</sup> Id. at 156 (Brennan, J., dissenting).

Procedural due process analysis ties the extent of process required to the weight of the interest at stake,<sup>71</sup> and the Court has repeatedly stressed the special weightiness of a parent's interest in a relationship with his child.<sup>72</sup> A hearing seeking to deprive a parent of this interest must afford that parent generous procedural protections, protections that will increase the emotional and financial costs of litigation and, perhaps, make it especially difficult for opponents to prevail.<sup>73</sup> Moreover, whatever hearing the Constitution affords the parent will tie decisionmaking to some substantive standards. While Justice Brennan suggested that a state could apply a best interest standard not only to prohibit visits but also to terminate parental rights,<sup>74</sup> it is unclear why this low standard would suffice, in light of the constitutional weightiness of a parent's interest in the relationship. Indeed, the Court has repeatedly suggested that the Constitution may require a finding of unfitness before an individual's parental rights can be terminated.<sup>75</sup>

As the next Section shows, some nontraditional claims will force a consideration of these procedural questions. But recognizing parental rights and then providing a procedural means of curtailing those rights clearly imposes real costs on other parental figures trying to raise children successfully. Children will be better off with a legal scheme that allows states to limit the field of those identified

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<sup>71</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (explaining that the extent of process due depends upon a balancing of three factors: the private interests affected by the proceedings, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting use of the challenged procedure).

<sup>72</sup> See, e.g., *Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'") (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

<sup>73</sup> See *infra* Section III.C.

<sup>74</sup> *Michael H.*, 491 U.S. at 147 n.5.

<sup>75</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 n.10 (1982) ("Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness."); cf. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'") ((citing *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in the judgment)).



as parents at all, thereby reducing the number of individuals whose parental identity can only be terminated through an elaborate, potentially destructive hearing. This approach, endorsed in Justice Scafia's opinion, best captures the import of the unwed father cases leading up to *Michael H.*

### C. Constitutional Protection for the Child

There is one last aspect of *Michael H.* worthy of particular consideration before this Essay more directly addresses the claims of nontraditional caregivers. *Michael H.* may be the only Supreme Court case involving parental rights in which the child's interests were independently represented. Victoria, Michael H.'s biological daughter, was represented by a guardian ad litem who, consistent with the recommendations of a court-appointed psychologist, determined that it was in Victoria's interest to maintain a relationship with both father figures.<sup>76</sup> Despite the independence of her claim and its distinct psychological basis, the Court showed itself entirely unable to conceive of Victoria's claim on its own terms. In the three paragraphs of his opinion devoted to the question, Justice Scafia concluded that "we find that, at best, [Victoria's] claim is the obverse of Michael's and fails for the same reasons."<sup>77</sup> All other opinions, concurring and dissenting, engage in no separate analysis of Victoria's claim.

This avoidance of any distinct analysis of the claims of the individual most likely to be affected by the outcome of the litigation seems as troubling in moral terms as it is understandable in pragmatic terms. Surely the law ought to be designed to account for children's interests, but how this should be done is another question. If we are to recognize distinct constitutional rights in children to develop and maintain relationships with adults, then we need a method for balancing or prioritizing rights where the claims of the multiple rights holders clash. Such multi-party balancing acts are likely to leave the constitutional protection of some, and perhaps all, with very little force. And even if we are to vest constitutional rights in children in lieu of vesting any such relational claims in

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<sup>76</sup> *Michael H.*, 491 U.S. at 115.

<sup>77</sup> *Id.* at 131.

adults, then we need to worry about who is speaking for the child, and on what basis that adult representative determines the child's position.<sup>78</sup> Recognizing separate relational rights in children does little to guarantee that their interests will be better served.

A better way of avoiding the moral peril of ignoring children's interests while maintaining the simplicity necessary to secure constitutional protection of any force is to define the family around the child and to refuse all adults any special constitutional status absent an undisputed claim to a parent-child relationship within that family unit. As discussed, we have good reason to expect that children within an undisputed family unit will do best if most child-rearing decisions are left to their parents. Where the identity of those parents is in dispute, however, there will be no obvious best surrogate decisionmaker among the adults. In such circumstances, the state can play a unique role in sorting among contenders and establishing that surrogate. As in the realm of private custody disputes between parents, assigning the state this decisionmaking authority offers a good, if imperfect, means of securing a child's healthy upbringing where real disputes over parental authority threaten to undermine that upbringing.

In sum, the Court's parental rights doctrine, though not sharply reasoned, reflects considerable wisdom about the relative strengths of the family and the state in child rearing. Families, as the child-specific experts, can be expected to make better decisions for their particular children than the state will make in all but the starkest situations. The state, in contrast, has a special role to play in helping establish the authority of those child-specific experts in the face of competitors. By affording parents in established families strong constitutional protection for their child-rearing decisions while severely limiting an individual's right to claim parental identity without regard to family structure, the Court's cases embrace a scheme of constitutional interpretation that distributes authority in a manner well-designed to serve children's interests. In keeping with these interests, such a scheme gives states authority to recognize nontraditional caregivers as parents, but it prevents the state

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<sup>78</sup>The case of *Elian Gonzalez* well illustrates the problems created when a rights-bearing child depends upon adults to assert those rights, and when the various possible adult representatives do not agree about where the child's interests lie. *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

from granting them parent-like privileges short of full parental identity. The next Part applies this constitutional scheme to a range of nontraditional claims.

#### IV. NONTRADITIONAL CAREGIVERS' PLACE UNDER THE CONSTITUTION

There is considerable variety among nontraditional parental claims, and the constitutional analysis varies with the claims. This next section considers three types of claims that capture the primary constitutional issues: disputes between biological and adoptive parents that arise near the time of birth, disputes among individuals who have collaborated to produce a child through artificially assisted means, and disputes among various parental claimants later in a child's life after parental identity has been firmly established. In the first context, the Constitution should be read to afford the state broad authority to assign parental identity to either the adoptive or biological parents, but, once it has done so, no authority to compel ongoing visits with those not identified as parents. In the context of assisted reproductive technology, the Constitution should be read to prevent the state from intervening in private arrangements, so long as they remain amicable. Where disputes arise, however, the state should be able to decide whether, and to what extent, it wants to enforce those agreements. The hardest cases are the proposed mid-life switches. Because the state threatens to take away parental rights previously vested in the original parents, these actions implicate both substantive and procedural due process protections. While these protections have appropriately been interpreted to impose significant constraints on state attempts to redefine parental identity, these constraints should be modestly relaxed where mid-life switches are initiated by private competitors rather than the state.

##### *A. Babies Jessica and Richard*

The cases of Baby Jessica<sup>79</sup> and Baby Richard<sup>80</sup> are the sort of battles between biological and non-biological parents that produce

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<sup>79</sup> In Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992).

<sup>80</sup> Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995).

the greatest public outcry, and for good reason. In both cases the child knew only one set of parents, the adoptive parents, with whom the child had lived since birth. Despite this fact, Baby Jessica at two-and-one-half years old, and Baby Richard at almost four years old, were ordered to go live with their biological fathers, whom the courts recognized as their sole legal parents. Over the course of the litigation in these cases, the intended adoptive parents and the child advocates who supported them pressed for some combination of parental rights, custody, or visitation, all in the name of preserving the relationships these children had with their adoptive families.<sup>81</sup> Under the scheme advocated in this Essay, however, the Constitutional implications of these various demands are dramatically different. Under this scheme, the Constitution would allow the state to declare the intended adoptive parents the sole legal parents based on their established parental relationships with the children, but if the state concluded that the parental identity belonged with the biological father, the Constitution would prevent a court from ordering ongoing contact with the unsuccessful parental claimant.

What makes the Baby Jessica and Baby Richard cases difficult is that both mothers employed deception to prevent the biological fathers from having the opportunity to oppose the children's adoptions. In the case of Baby Jessica, the biological mother intentionally misidentified the father when she relinquished the baby for adoption.<sup>82</sup> In the case of Baby Richard, the mother falsely told the biological father that the baby had died, and the Illinois Supreme Court concluded that the adoptive parents had encouraged the deception.<sup>83</sup> Were it not for the deception, both cases should have been easy cases for the adoptive parents to win. State law routinely provides only a small window of time for a biological father to block an adoption to which the biological mother has already consented, assuming those fathers have been provided with reasonable notice. But where a man is never informed (or has been misinformed) about a child's conception, birth, or survival, it will strike many as

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<sup>81</sup> *Kirchner*, 649 N.E.2d at 326–27; *B.G.C.*, 496 N.W.2d at 241.

<sup>82</sup> *B.G.C.*, 496 N.W.2d at 241.

<sup>83</sup> *Kirchner*, 649 N.E. 2d at 326–27. But see *id.* at 341–42 (Miller, J., dissenting) (contending that the supreme court's conclusions about the adoptive parents' involvement in the deception had not been established through proper evidentiary development).

unfair to deny him a subsequent opportunity to assert his parental rights. Even those who think the individual man's rights ought not outweigh the child's interest in family stability might worry that providing no protection to men in such circumstances will encourage women and adoptive parents to engage in such deception when they wish to avoid involving the biological father in adoption decisionmaking.

A constitutional approach that gives no individual an automatic right to parental identity would allow the state to define even a deceived biological father as a non-parent. While a state's concern for the incentive effects might lead it to refuse to enforce adoption arrangements produced through deceptive practices, the Constitution should not be read to require this result, which would amount to conferring parental identity rights on a set of individuals without regard to family status. In contrast, allowing states to determine whether these men ought to be identified as fathers is consistent with an approach that limits parental identity rights to individuals attached to an uncontested family unit. State adoption procedures are designed to achieve clarity about who constitutes a child's family core as quickly as possible. A biological father, no matter how well-intended, would have no constitutional claim where he had failed to establish himself as part of the child's family core.<sup>84</sup>

Under this scheme, the Constitution should not be read to prevent the state from recognizing the adoptive parents as the children's exclusive or additional legal parents, even where a biological parent neither agreed to the adoption, nor was given an opportunity to object. But if a court decides, for whatever reason, that the child should be raised by the biological parents, the state should have no authority to qualify those parents' child-rearing rights by compelling ongoing visits or other sub-parental contact between the former adoptive parents and the child against the biological parents' wishes. The ALI Principles, however, would produce

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<sup>84</sup>This theory suggests that the Illinois Supreme Court was wrong to conclude that Baby Richard's biological father's due process rights were violated. See *Kirchner*, 649 N.E.2d at 333 ("[F]athers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship. To hold otherwise would be to encourage and reward deceit similar to that which occurred in the instant case.").

precisely the opposite effect. Under the Principles, the prospective adoptive parents would have no authority to defeat the father's claim of legal parenthood, but would clearly have authority as "de facto" parents to seek some custodial and decisionmaking authority over the child, ranging from primary custodial authority to much more minimal ongoing contact.

Stated more generally, the importance of a relationship between a parent and child should bear on the state's determination of who counts as a parent, but if not persuasive on that point, should not be allowed potentially to undermine the parental relationship chosen in its stead. Indeed, it is in precisely those cases where the relational claims of non-parents are the strongest that the disruption caused by compelling visits is likely to be greatest, and the parents are likely to be least prepared to withstand the intrusion. Where parental authority is most vulnerable to challenge, the designated parent will need the most help in establishing her legitimacy. One way, of course, to establish that legitimacy is to facilitate ongoing connections between her child and those with whom the child has formed close relationships. If a parent does not see things this way, however, compelling her cooperation will only further undermine her effectiveness as the legally recognized parent.

### *B. Children Produced Through Assisted Reproductive Technology*

Reproductive technology has produced an expanding number of potential parental claimants including those who contribute genetic material, those who contribute other biological material and processes,<sup>85</sup> and those responsible for planning and paying for the conception and gestation of the child. These arrangements are generally developed through private agreement, and in the vast majority of cases, these agreements produce clearly identified parents who assume parental control over the children born without conflict. But where conflicts do arise, either because the terms of the

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<sup>85</sup> The most common arrangement involving a non-genetic biological contribution at this point in the technology's development is the gestational surrogacy arrangement, in which a woman carries a fetus conceived through the use of someone else's eggs. Increasingly, however, physicians are experimenting with injecting an infertile woman's genes into the healthy but geneless eggs of a donor, and additional uses of non-genetic biological materials will likely be developed in the future. See Beating Biology, *Newsweek*, Aug. 13, 2001, at 45 (discussing this egg-fusing procedure).

agreement were ambiguous or because the parties changed their minds, disputants turn to the courts to resolve issues of parental identity and related rights of contact with the child.

Under the constitutional scheme endorsed in this Essay, individual choices, regardless of the parental configuration, would produce parental rights absent dispute. This does not necessarily mean that the state could not prohibit particular methods of assisted reproduction, but rather, that if a child was nevertheless produced by such a method, the parents should still be those privately identified. Where disputes arise among private parties, however, the state would have some authority to resolve them. At birth, this authority would be near absolute, whereas later in life the state's authority to reallocate parental identity would become considerably qualified. To minimize the risk of future disputes, the law's tolerance of a wide range of individually designed parenting arrangements should bring with it a commitment to ensuring that parental identity is clearly assigned.

Even in the absence of disputes, these high-tech arrangements press some constitutional questions about the scope of an individual's procreative rights. Do individuals have a right to procreate through the use of reproductive technology, or can the state ban certain technological means of reproduction altogether? Alternatively, can the state assign parental authority in a manner inconsistent with that arranged by the parties? While the first question is not my focus here, I am inclined to think the Constitution should be read to give the state authority to ban the use of certain reproductive methods viewed as dangerous or inappropriate. But whether or not the state has such authority, it should not be allowed to reassign parental identity, absent private dispute, where the reproductive method in question actually produces a child. While an argument could be made that the production of the child introduces third-party effects that justify a compromise rather than an expansion of an individual's liberty rights, the same concerns about the state's relative incompetence and the threat of third-party harms associated with state intervention argue for private control. Private arrangements reflect the commitment of individuals to undertake parental responsibilities and the terms under which they are eager to do so. Second-guessing such decisionmak-

ing threatens to undermine the satisfaction of those responsibilities by introducing conflict and changing the terms.

So long as the private individuals involved cooperate successfully, the state should be required to accept the private individuals' designation of parental figures, whether those figures include a married heterosexual couple with no genetic relationship to the child, or a lesbian couple, one genetically related to the child, one not, and the sperm-contributing friend. The state can, however, require these figures to take some form of official action to identify themselves (or disavow their identity) as the child's parents and can establish default rules that determine who counts as a parent where the parties fail to comply with these requirements. Such identification requirements, paralleling the recording of information about maternal identity on birth certificates in the more conventional context, make both clear and public who possesses parental rights and, relatedly, ensure that all involved have come to terms with the assignment of parental identity and the distribution of authority that follows. Children can be expected to be well-served by this combination of private choicemaking in the undertaking of parental responsibilities, and public identification of where those responsibilities lie.

Where the private individuals disagree about this allocation of responsibility, however, either because the terms of their agreement are unclear or because they change their minds, they routinely turn to the state to resolve the disagreement.<sup>86</sup> If the dispute arises around the time of birth, the state could refuse to enforce the terms of the contract without disturbing anyone's parental rights, for, again, parental rights should not be tied to any individual's particular characteristics, whether biological or contractual. And, again, this is because the Constitution will serve children best if it functions as a protector of private child-rearing choices against state intervention, but not as an obstacle to state intervention aimed at resolving private disputes that stand in the way of anyone's effective child rearing.

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<sup>86</sup> See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (conferring parental identity on genetic parents against opposition of gestational surrogate); *L.A.L. v. D.A.L.*, 714 So. 2d 595 (Fla. Dist. Ct. App. 1998) (barring sperm donor from establishing paternity absent a court finding that the contract providing that he would have no parental rights to any offspring produced from that sperm was unenforceable).



While we might generally object that holding private parties to their previous contractual commitments protects private child-rearing choices,<sup>87</sup> this objection frames the question in terms relevant to adults, but not to children. For children, the only commitments and attitudes that matter are those adults hold at the time of actual child rearing. Regardless of how harmonious an earlier plan to allocate child-rearing authority may have been, children's successful child rearing will be threatened if that harmony has disappeared by the time the child-rearing plan is to be executed. While children are generally best served by leaving private individuals free to make child-rearing decisions where their authority to do so is uncontested by competitors, they are not necessarily served by continuing to defer to such arrangements once some of the contracting parties oppose the arrangement. Where the dispute arises at birth, the state should be free to assign parental rights based on a genetic, gestational, or contractual relationship, or on any other grounds not otherwise constitutionally prohibited.

Of course, a state choice not to enforce such contracts would likely discourage people from entering these contracts in the first place.<sup>88</sup> Again, discouraging such arrangements might have implications for individuals' rights of procreation and body control, but they implicate no parental identity rights, rights that only come into play when there is a child in existence. For those considering entering such an agreement, the promise or risk of non-enforcement would encourage them to assess their degree of confidence that other parties will voluntarily comply with the terms of the agreement. This assessment, in turn, is likely to serve children well.

All this is not meant as an argument against the enforceability of these agreements, but rather as an argument against affording these agreements any constitutional protection. The world of assisted reproductive technology is a brave new world in which ever-improving techniques and ever-expanding contractual terms are producing ever-changing issues of parental identity.<sup>89</sup> To protect

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<sup>87</sup> See Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 *Va. L. Rev.* 2305 (1995).

<sup>88</sup> *Id.* at 2339–40 (arguing that a failure to enforce surrogacy contracts fully will reduce the number of parties willing to make surrogacy arrangements).

<sup>89</sup> In a recent case filed in California, for example, a dispute between a gestational surrogate and the intended parents (the father of whom was genetically related to the

children from the harms that can come with this level of change and novelty, states should have the freedom to experiment with different rules and to adapt those rules over time. In circumstances where individuals create an undisputed family unit through the use of assisted reproductive technology, the benefits of legal experimentation are predictably offset by the harms that come to children when the state interjects conflict where conflict is otherwise absent. But where the arrangement dissolves in a dispute, we should have no confidence about which constellation of parental figures, or which means of resolving disputes, is best for children.

Where disputes among parties to these agreements arise later in a child's life after some significant period of cooperation, the complexity of the constitutional issues depends upon what is being disputed. Where the dispute is about who counts as a parent, the Constitution imposes considerable procedural and substantive brakes on the state's ability to reconfigure parental identity after it has been firmly established elsewhere. The next Section takes up these procedural and substantive limitations. But where the parties all continue to adhere to their original arrangement as to parental identity, but now dispute how custodial authority should be divided among them,<sup>90</sup> a state can intervene to allocate that authority, just as it does in a more traditional two-parent custody split. In such circumstances, the contractual terms governing parental identity bind the court (assuming the parties have complied with state registration requirements), but any terms providing for visits or other custodial rights of non-parents cannot be enforced against the parents' wishes without violating those parents' constitutional rights.<sup>91</sup>

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twin fetuses) over whether the surrogate was required to abort one of the twins at the intended parents' request, raised the question of who, among the three involved parties, had authority to approve the twins' adoption by others. See 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.

<sup>90</sup> *McDonald v. McDonald*, 684 N.Y.S.2d 414 (N.Y. Sup. Ct. 1998) (rejecting father's attempt to gain custody of twin daughters based on his claim that ex-wife's deception during infertility procedures demonstrated her unfitness as a custodian).

<sup>91</sup> In one case, an individual who had served as a co-parent but who lacked a genetic relationship with that child agreed to relinquish any claim to parental status in exchange for an agreement to ongoing visits. See, e.g., *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000). In another, a court ordered ongoing visits without clearly resolving parental identity issues. *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000). Under the scheme

As in more traditional custody disputes, courts could still order visits, but only among those identified as parents.<sup>92</sup>

### C. Mid-Life Parental Switches

The most constitutionally complex cases are those in which a dispute among parental claimants arises after a period when parental identity has been clearly established. In these cases, a child classically lives with one or both biological parents for some period of her life, but at some point, others assume much or all of the parents' child rearing responsibilities. This shift of child-rearing responsibility might be initiated by an overwhelmed or uncommitted parent, by the concerned substitute caregiver, or by the state. It might be intended as a temporary or permanent shift; it might occur all at once, or gradually over time. However the shift occurs, it sometimes leads the substitute caregiver to seek recognition as a parent in addition to, or in lieu of, the original parents. These are the nontraditional cases the ALI seems most concerned about addressing in the Principles, and, perhaps, those that most constrained the Court's exposition of parental rights in *Troxel*.<sup>93</sup>

In all such cases, the Constitution limits the state's authority to reassign parental identity against the original parents' wishes. In these cases, unlike those discussed in the previous two Sections, parental identity has been established, and even recognized by the state, prior to the litigation contesting that identity. Any state change or expansion of those with parental authority under these circumstances will therefore deprive the previously identified parents of an important liberty interest protected in both substantive and procedural terms by the Constitution.

These protections should, however, vary with the circumstances of the shift. The most significant distinction in circumstances is between attempts to shift parental rights initiated by the state and

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described in this Essay, the court would have no authority to compel visits under either scenario.

<sup>92</sup> See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (finding that non-biologically related lesbian partner qualified as parent, and ordering visitation accordingly).

<sup>93</sup> See, e.g., *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting) ("My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child.").

those initiated by other private parties. Where the state seeks to terminate parental rights, it pits itself in the sort of direct contest against the parent that justifies the highest degree of constitutional protection. But where the state serves only as adjudicator of a contest pressed by a private competitor, the role the Constitution should play in controlling that adjudication is somewhat less obvious. For the most part, nontraditional claims will be pressed by nontraditional caregivers, and therefore fall into the second category. Before considering these hardest of cases, this Section considers what we can learn from the state-initiated cases, whose constitutional boundaries have already been explored by the Court.

### *1. Involuntary Termination of Parental Rights*

In the classic involuntary termination case, the state petitions the court to terminate parental rights and to bestow upon the state full authority over a child. Such cases, then, present a version of the classic state-parent contest, implicating constitutional protections in their starkest terms. As in *Stanley v. Illinois*,<sup>94</sup> the state seeks to displace some private family unit with its own authority, but even more troublesome than in *Stanley*, the state's attempt at displacement occurs after some period of state recognition of the family unit in question. Where the state seeks to wrest parental authority from an established familial core, the Constitution imposes formidable limits on those efforts. The parents' substantive due process rights limit a state's grounds for termination to those of great weight (classically parental "unfitness"), and their procedural due process rights require that these grounds be particularly well-proved.

In *Santosky v. Kramer*,<sup>95</sup> the Court reasserted the strength of parents' constitutional protection against state intervention by striking down a law that allowed a court to terminate parental rights where parental unfitness was only proved by a "preponderance of the evidence." While some of the Court's analysis is confused, its general approach is entirely in line with this Essay's analysis.

In *Santosky*, the Court concluded not only that the parent's interest at stake was particularly strong, but that the state's parents

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<sup>94</sup> 405 U.S. 645 (1972).

<sup>95</sup> 455 U.S. 745 (1982).

patriae interest in the child's welfare fell, in most cases, on the same side of the balance. Quoting *Stanley*, the Court explained that "the state registers no gain toward its declared goals when it separates children from the custody of fit parents."<sup>96</sup> This analysis reflects the child-focused justification behind affording parents strong rights against state intervention, discussed above in Part II: We can generally expect parents to be better than the state at meeting their children's needs, and therefore should severely limit the state's authority to intervene, even when it has some concern about a parent's child-rearing practices. Only where the state can prove that children will be seriously harmed by their parents' exercise of child-rearing authority should it be allowed to take that authority away from them. While the substantive standard for termination was not at issue in *Santosky*, the Court's analysis nevertheless endorsed a high, unfitness-based standard.

While parents' comparative advantage in child rearing supports a high substantive standard for termination, it is not clear how it bears on assigning a standard of proof. Where the high substantive standard limits termination to those cases in which termination would clearly serve a child's interests, a shift in standard of proof will only increase the chance that those well-justified cases will go unproved. The Court attempted to excuse this result by suggesting that an erroneous failure to terminate parental rights would do far less harm to a child than an erroneous termination would do for either parent or child,<sup>97</sup> but this aspect of the Court's reasoning is unconvincing. While an adult individual certainly suffers a serious loss when his parental rights are terminated, it is hardly obvious that a child will suffer more from being separated from a fit parent than from being left with one who is unfit.<sup>98</sup>

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<sup>96</sup> *Id.* at 767 (quoting *Stanley*, 405 U.S. at 652).

<sup>97</sup> *Santosky*, 455 U.S. at 765-66 (noting that "parents and the child share an interest in avoiding erroneous termination," and that "[f]or the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo," whereas "[f]or the natural parents . . . the consequence of an erroneous termination is the unnecessary destruction of their natural family.").

<sup>98</sup> The Court suggested that an erroneous failure to terminate parental rights would have less serious consequences, because the child would likely remain in foster care rather than being returned to her parents. But this argument fails to account for the serious harm done to children who are left indefinitely in foster care. Moreover, the Court's suggestion that the state can simply petition again, while legally correct is, in

The Court suggested that raising the standard of proof would have an error-reducing (as well as an error-shifting) effect, by righting a power imbalance between the state and parent in litigation. The Court pointed to three types of advantages the state has over parents in termination proceedings: its greater expertise and resources available to prove its case,<sup>99</sup> its ability to manipulate the evidence by controlling the nature and extent of a parent's contact with her children in foster care,<sup>100</sup> and its ability to exploit the class and race biases of the courts to the parent's disadvantage.<sup>101</sup> All three of these factors, the Court noted, are likely to skew the courts' decisions against the parents, producing erroneous findings of parental unfitness. By forcing courts to be particularly confident about their termination decisions, the Court argued, a higher standard of proof could reduce the overall error rate in these proceedings.

In *Santosky*, the Court appropriately relied on the Constitution to allocate child-rearing authority toward the more competent parent and away from the more powerful state. The extent to which this constitutional protection should change where the competition is among private parties rather than between a unified private family and the state is the subject of the next Section.

## 2. Private Battles for Parental Authority

Where one set of caregivers goes to court to claim some or all authority from a child's original set of parents, the state's role is reduced to that of dispute resolver. Here too, the state threatens to deprive a parent of his rights, but from a considerably more passive position. In these cases, the presence of private competitors complicates the arguments of superior competence and inferior power that justify strong constitutional protection in the state-initiated cases. These complications, in turn, make it considerably more dif-

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practice, unrealistic. When a state loses its attempt to terminate parental rights, it rarely tries again.

<sup>99</sup> *Santosky*, 455 U.S. at 763 (pointing to the state's greater spending, legal expertise, and access to psychological and medical experts as examples of the state's superior "ability to assemble its case.").

<sup>100</sup> *Id.* at 763 & n.13 (stating that "the State even has the power to shape the historical events that form the basis for termination" by controlling visits, requiring the parents to work with their choice of social workers, et cetera).

<sup>101</sup> *Id.* at 763 ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias.") (citation omitted).

difficult to assess the connection between children's interests and parental rights. Focusing on this connection, I endorse a modest diminution of the substantive and procedural protections afforded original parents where the competing claimants are private individuals rather than the state.

Among those private claimants competing for legal recognition as a child's parents, we cannot assume that the originally identified parents will be the superior decisionmakers. Indeed, these disputes often arise because someone close to the child concluded that the original parents' child-rearing skills and commitment were seriously inadequate. In addition, the intensity of the relationship formed with and commitment shown to these children by some alternative caregivers suggests that these caregivers will frequently possess the same special qualifications to act on a child's behalf as more conventional parental figures are assumed to possess. But while the assumptions about parents' superior competence are undermined by the presence of committed competitors, the state's relative incompetence in assessing individual children's best interests still cautions against affording states much authority to choose among these competitors.

The difference between the state's near-absolute power to assign original parental identity, on the one hand, and far more limited power to shift parental identity once established, on the other, rests on two important distinctions in the state's relative competence at these two stages. First, the state's relative advantage is as representative of community views about what family configurations best serve children in the aggregate. Its relative disadvantage, in contrast, is in assessing how any particular child will actually be best served. It will do better, then, at resolving disputes among parental claimants where not required to make a child-specific assessment of the value of the various competing relationships in which a child is already involved. Second, the state's intervention at the outset offers the child a more unambiguous benefit: It resolves conflicts early on, thereby freeing those identified as parents to begin exercising parental authority most effectively. In contrast, whatever benefits a state offers a child in shifting parental authority from a less to more competent caretaker will be at least somewhat offset by the destabilizing effect of such a mid-life move. An approach that gives the state near-absolute power to resolve conflicts in pa-

rental identity at the outset, and only limited power to shift that identity later in a child's life, well allocates decisionmaking to serve the interests of children.

The Constitution's strong protection of parental rights thus sensibly extends to the parents' right to maintain parental identity, once firmly established. The state's ability to shift or proliferate that parental identity to another private claimant should, just as in publicly initiated termination proceedings, therefore be limited to those circumstances in which such a change is necessary to protect a child from serious harm. How harm is measured, however, ought to change in the context of these private disputes. In particular, a court could properly reconfigure parental identity among private disputants to protect a child from the harm associated with disrupting an important caregiving relationship, but could not approve a state-requested termination on this basis. This is, again, because of the power disparity between private parent and state, a disparity that, as the *Santosky* Court pointed out, would allow the state to manipulate the child's relationships to improve its case. Allowing the state to rely on relational harms to justify termination would encourage the state to nurture parent-child bonds in foster care that would obstruct a parent's attempt to regain custody of her child.

In contrast, private disputes are the result of relationships fostered, or at least tolerated, by the parents themselves.<sup>102</sup> When parents choose to involve others in the caregiving of their child, or allow such involvement to continue when others step in, they are choosing to blur the lines of the child's family core. Such a choice will commonly serve the child's interests while maintaining the

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<sup>102</sup> Note that voluntary foster care arrangements seem to represent a difficult case in the middle. The coerced nature of many so-called "voluntary" foster care arrangements counsels caution in equating such arrangements with the voluntary arrangements reached informally with other individuals. See Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 *Harv. Educ. Rev.* 599, 601 (1973) ("A substantial degree of state coercion may be involved in many so-called voluntary placements, making the distinction between voluntary and coercive placement illusory."). However, where such arrangements could, in fact, be shown to be voluntary, and the development of the foster family relationship not destructively manipulated by the state, the Constitution should not be read to prevent the court from taking the relational harm associated with a child's removal from foster care into account in determining whether parental rights should be terminated.



parents' ultimate authority over the family unit. But where collaboration ultimately breaks down, the court can appropriately consider whether the harm caused by disrupting the nontraditional parent-child relationship justifies a shift in parental authority. Thus, a court could decide that a nontraditional caregiver was entitled to parental identity rights to the exclusion of a biological parent, or that a divorced stepparent was entitled to parental rights in addition to the biological mother and father.

We might well worry that courts will be too quick to find relational harm. Indeed, this inclination is precisely what makes the ALI's expansion of custodial claimants so threatening. But, again, this inclination can be dramatically checked by preventing the court from allocating anything less than the full parental package. A court cannot attempt to maintain a child's relationship with a non-parent caregiver by awarding visits, for such an order constitutes a direct threat to the exercise of the undisputed parent's authority. But if the relationship with the nontraditional caregiver is strong enough to inspire that caregiver to seek legal authority to take over as parent, the court can appropriately consider whether denying the request will cause serious harm to the child. Barring the court from distributing fragments of parental authority can be expected to have a significant limiting effect on the nontraditional caregiver's interest in litigation and the court's ultimate willingness to intervene.

Children are likely to be better served, even in the context of these private disputes, by limiting the courts' authority to reallocate parental rights to those cases where a failure to do so would subject the children to serious harm. It is less clear, however, that these children would be well-served by imposing on these private disputants the same heightened standard of proof imposed on the state in *Santosky*. The nontraditional caregivers have none of the special litigation advantages of the state, nor can we expect the court systematically to prefer their claims.<sup>103</sup> Indeed, in these cases, control over the factual record is, to a large degree, in the hands of the "defending" parents, who can control the extent to which any individual develops a caregiving relationship with her child. Absent

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<sup>103</sup> As with all litigation, self-selection is likely to produce plaintiffs relatively well-prepared to litigate.

proof of a particularly strong relationship between a nontraditional caregiver and the child, a claimant has little chance of convincing a court that a failure to shift parental authority will cause the child serious harm.

#### CONCLUSION

Current attempts to protect nontraditional caregiving relationships, while well-intended, are poorly designed. They threaten to undermine protections afforded parents by the Constitution that serve children well. The mistake of these approaches begins with a narrow view of parentage that leaves nontraditional caregivers outside the reach of constitutional protections. To afford them any protection, the reasoning goes, the constitutional rights of parents must necessarily be compromised. Instead, the Constitution should be read to afford the state broad authority to recognize nontraditional caregivers as parents. Once parents are identified, however, the Constitution affords them strong protection against state intervention, a protection well-designed to assist parents, however defined, in the rearing of their children.

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