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The Constitutionalization of Fatherhood

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Abstract

Beginning in the 1970s, the Supreme Court heard a series of challenges to family law statutes brought by unwed biological fathers, questioning the constitutionality of laws that treated unwed fathers differently than unwed mothers. The Court's opinions created a starkly different constitutional status for unwed fathers than for unwed mothers, demanding additional actions and relationships before an unwed father was considered a constitutional father.

Although state parentage statutes have progressed beyond their 1970s incarnations, the doctrine created in those family law cases continues to have impact far beyond family law. Transmission of citizenship in the context of immigration law and the inheritance rights of children of unwed parents whose fathers died without a will echo the reasoning of the family law cases, including two unwed-father principles giving legal imprimatur to stereotypes about fathers. Across multiple areas of law, therefore, unwed fathers are not constitutional fathers.

It is not enough, however, to simply revive past challenges to such statutes: separate criticisms of each line of cases have not prompted reconsideration of the cases reforming family law, immigration law, or inheritance law individually. This Article identifies a new approach using modern precedents to provide a clearer theory of constitutionalizing fathers: *Obergefell v. Hodges* illustrates a methodology of analyzing claims that involve the unequal application of a fundamental right, and *Sessions v. Morales-Santana* provides the substantive rejection of gendered, parental stereotypes that fills out Obergefell's framework. The result is an unambiguous argument rooted in the Equal Protection Clause that will constitutionalize fathers across the law.

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CONTENTS

INTRODUCTION

When is a biological father not a constitutional father? The answer is surprisingly simple: when he is unmarried. Unwed biological fathers are not parents under constitutional doctrine as outlined by the Supreme Court until they take actions far beyond those required of unwed biological mothers.

Such unwed biological fathers may be *legal* fathers under state law identifying legal parents, so one might think that this gendered approach to constitutional parentage has been effectively mooted through legislative reform. The Supreme Court's approval of gendered constitutional parental rights, however, extends into other areas of law where those areas intersect with determinations of parentage. For example, transmission of citizenship from one U.S. citizen parent does not rely upon any individual state's laws as to legal parentage, and the gendered treatment of unwed fathers and mothers in family law cases has been imported to justify gendered treatment of unwed fathers in their ability to transmit American citizenship. Similarly, children who claim inheritance from an unwed father who died without a will face the same gendered logic imported from family law into inheritance law.

The result is that unwed biological fathers are not constitutional fathers. Gender stereotypes about fathers in general have been used to justify treating unwed fathers starkly differently than unwed mothers. Previous challenges to such laws have used two different arguments: first, that the parent-child relationship is a fundamental right; and second, that such differential treatment violates the Equal Protection Clause. The challenges were largely unsuccessful, in part because courts used gender stereotypes positing that fathers and mothers are situated differently at birth to answer both claims, even as society and medical

technology have developed in ways that fundamentally undercut such stereotypes.

Modern caselaw, however, provides a clearer approach. *Obergefell v. Hodges*[1] addressed an argument involving the combination of due process and equal protection issues, in which the fundamental right of marriage was unequally made available according to the gender of the spouses. The case demonstrates a methodology for such joint claims, focusing attention upon the message and effect of the unequal application of a fundamental right. Furthermore, *Sessions v. Morales-Santana*,[2] which assessed a statute related to the transmission of citizenship, provides the substantive evidence of the unconstitutional stereotypes upon which gendered parental status relies.

Gendered treatment of unwed parents is unconstitutional, most clearly so under the Equal Protection Clause. This Article demonstrates the harm of the existing constitutional doctrine and outlines a path to addressing it. Part I addresses the family law treatment of unwed parenthood; it describes both the statutory definitions of legal parenthood and Supreme Court cases approving of a starkly different constitutional parental right for unwed fathers and mothers. This Part also traces the development of the unwed-father principles to two key assumptions about fathers and mothers upon which family law and other fields rely. Part II illustrates the impact of family law constitutional doctrine upon other areas of law, using the examples of transmission of citizenship and intestate inheritance rights to show the ongoing effects of the earlier family law cases. In particular, the unwed-father principles are cited again and again outside of family law to justify continued gendered treatment of unwed fathers. Part III outlines how to equalize treatment of unwed fathers and mothers and constitutionalize fathers, using *Obergefell v. Hodges* and *Sessions v. Morales-Santana* to map out a modern understanding of the Equal Protection Clause's application to parentage statutes.

I. EQUAL PROTECTION ISSUES IN THE LAW OF PARENTAGE

Status as a legal parent is an odd legal creation in many ways. Most of the time, it is established through a largely invisible, uncontested, and informal process, although it is one of the most significant legal statuses that a person can hold. The methods and rules by which a person either self-identifies or is identified by a court as a parent are set by state statutes, yet one of the oldest fundamental rights identified by the Supreme Court is the fundamental right inherent in the parent-child relationship.[3] This Part outlines some of the statutory paths to

1. 135 S. Ct. 2584 (2015).

2. 137 S. Ct. 1678 (2017).

3. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000).

parenthood, then explains why the constitutional status of parenthood is completely different than the statutory paths. Furthermore, the Supreme Court has repeatedly endorsed different constitutional paths to parenthood for mothers and fathers. By approving starkly different treatment of unwed fathers and mothers, the Supreme Court has labeled unwed fathers non-constitutional parents lacking constitutional rights and status.

A. The Progressive Nature of Statutory Parenthood

Every state has statutes defining legal parentage, specifying multiple ways in which an adult could assert their status as a legal parent to a specific child. The ways that an adult might claim status as a parent have multiplied in recent decades due to state legislatures adding new rules in a sedimentary process as the social acceptance of families and new fertility technologies developed. While parentage statutes have been generally progressive, the process of individually revising state laws results in some variety among states as to who is a legal parent; particularly in newer contexts such as surrogacy,[4] as well as contexts in which multiple rules identify multiple parents.[5]

The oldest rule is the most common-sense rule of thumb: a woman giving birth is the mother of that child.[6] The marital presumption adds to identification of the mother; it establishes that when a child is born to a married woman, her husband is the legal father.[7] Because of the historical stigma against illegitimacy, the marital presumption was applied very broadly, even in circumstances where the husband's biological paternity was unlikely.[8] This also made sense in a world lacking reliable and accessible genetic tests, as presumably most of the time the marital presumption could serve as a proxy for genetic

4. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 232–34 (2012).

5. The vast majority of states cap the number of legal parents at two, meaning that if parentage statutes identify more than two possible legal parents, a further winnowing must take place. California, however, recently enacted legislation allowing a child to have more than two legal parents, meaning that the multiple rules of parentage can result in three or more parents. CAL. FAM. CODE ANN. § 7612(c) (2017).

6. This is a bit of an oversimplification at the modern and ancient ends; today, this rule is complicated with the development of surrogacy, and historically a child born to an unmarried woman was *filius nullius*, or the legal child of no one. *See* Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2043 (2016).

7. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 232–34 (2006).

8. *See id.*

fatherhood. As the availability of genetic tests expanded, however, states retained the marital presumption and added proof of genetic connection as another method to establish parentage.[9]

Reforms over the last few decades have complicated the picture even further. As it became more common for people to use donated sperm and eggs in the process of having children, states added provisions to their laws to establish that donors who used the services of fertility clinics or other medical professionals to provide their donations were *excluded* from the possibility of being identified as legal parents, along with the attendant responsibilities such as child support.[10] Similarly, as the use of surrogates to carry pregnancies to term became more widely available and utilized, some states established rules regarding whether surrogates would be identified or excluded from status as legal parents.[11] There are thus multiple entrances to the status of legal parent (giving birth, the marital presumption, genetic connection, etc.), as well as possible exits from that status (if the potential parent worked with a fertility clinic or other medical professional to donate gametes or serve as a surrogate).

This reformation process, while significant, remains incomplete and ongoing. For example, some of the most notable current proposed changes appear in the most recent revisions to the Uniform Parentage Act (UPA),[12] drafted to serve as a model statute for state legislatures. The 2017 UPA makes a variety of progressive steps—notably, it eliminates gender as it appeared in the previous UPA, equalizing the treatment of men and women as they are identified as mothers and fathers.[13] Such amendments are a significant step, but will not change statutes overnight. The UPA is used only as a model for state legislatures and is not itself binding law.

Additionally, an important counterweight to reform efforts is the lasting effect of gender stereotypes. When state legislatures are considering whether to reform parentage statutes, societal expectations about parents and gender roles sometimes work against proposed amendments.[14] Because parentage statutes originated at a time that

9. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125–26 (2006).

10. *Id.* at 134.

11. Purvis, *supra* note 4, at 232–34.

12. UNIF. PARENTAGE ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).

13. Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 592 (2018).

14. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2268 (2017).

contemplated only heterosexual parents,[15] parentage laws were built upon stereotypes about the gendered nature of parenthood, in which mothers are the first and closest parent.[16] As Douglas NeJaime recently described, this stereotype views mothers as "the parental figure who establishes the family," whereas fathers are "a secondary, optional parent, potentially supplementing but certainly not replacing the mother."[17]

Such stereotypes are not necessarily consciously incorporated, and sometimes rules that grew from gender stereotypes can have progressive effects in modern contexts. The marital presumption provides a good example of the complex push and pull of statutory reform. On the one hand, broader application of the marital presumption can have a liberalizing effect. Applying the marital presumption to same-sex couples may break the presumption away from the historical foundation of heterosexual couples and convert the rule into a source of nonbiological parenthood.[18] On the other hand, Clare Huntington has pointed out that the continued vitality of marital family law "wreaks havoc" on nonmarital families who are governed by completely different rules.[19] Huntington argues:

> [T]o put married and unmarried parents on level playing ground, it is essential to disrupt the formal relationship between marriage and parental rights. The most direct way to do so is to eliminate the marital presumption. This legal rule is a shortcut that was originally designed to promote marital harmony and protect children from being rendered illegitimate. But at a time when illegitimacy carries little legal stigma, the marital presumption unnecessarily privileges marital families at the expense of nonmarital families.[20]

As a result of the incomplete process of reform, many scholars have proposed additional modifications to existing parentage laws. Martha Fineman has suggested focusing on the importance of the parent-child dyad, rather than the horizontal relationship between parents.[21] Others

15. *Id.* at 2323.

16. *Id.* at 2328–29.

17. *Id.* at 2329.

18. *See* Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413, 438–39 (2017).

19. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171 (2015).

20. *Id.* at 225 (citations omitted).

21. *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

proposals center on the act of caregiving more generally, without such a strong focus on genetic connections.[22] Clare Huntington and Merle Weiner argue that a better state goal would be to facilitate co-parenting, either completely separated from any marital or romantic relationship[23] or encouraging co-parents to try to remain in a romantic relationship and treating the parent-partner relationship as legally significant.[24]

Underlying all parentage statutes are constitutional rights. One is the fundamental right to the care, custody, and control of one's children.[25] Another is the Equal Protection Clause's guarantee of equal treatment under the law, applied with heightened scrutiny to laws that treat men and women differently.[26] Even as parentage *statutes* progress, they are undergirded by a constitutional law doctrine that is slower to evolve. The next section addresses the gendered nature of parental constitutional rights, identifying unwed mothers as constitutional mothers long before unwed fathers gain commensurate status as constitutional fathers.

B. The Unequal Nature of Constitutional Parenthood

Even as legal parentage is recognized and arguably created by state law, there is a fundamental substantive due process constitutional right inherent in parentage, and choices about when to become a parent must not violate principles of equal protection.[27] Both constitutional rights are implicated in the treatment of unwed biological fathers, whose status as legal and constitutional parents has been particularly unclear.[28] Historically, unwed biological fathers had no legal tie to their children.[29] By the mid-twentieth century this had changed, at least to

22. *See generally* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307 (2004).

23. *See* Huntington, *supra* note 19, at 173.

24. *See generally* MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW (2015); *see also* Dara E. Purvis, *A Parent-Partner Status for American Family Law by Merle H. Weiner*, 31 BERKELEY J. GENDER L. & JUST. 378, 379–80 (2016) (book review).

25. *See* Troxel v. Granville, 530 U.S. 57, 72 (2000).

26. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996).

27. *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 533–34 (2008) (discussing the Court's recognition of several constitutional rights related to family law and recounting the Equal Protection Clause's bearing on family law).

28. *See* Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 314–15 (2017).

29. *See* Baker, *supra* note 6, at 2043 ("A child born to a woman without a legally recognized partner was *filius nullius*, a child of no one.").

the extent that unwed mothers could seek declarations of parentage and child support from the biological fathers.[30] Society also began to change, such that many unwed fathers chose to maintain relationships with their children. State statutes, however, did not reform to keep pace with societal evolution, nor were increases in unwed mothers' ability to impose responsibility on unwed fathers accompanied by increases in the ability of unwed fathers to voluntarily shoulder that responsibility with legal parental status. In the 1970s, a series of unwed fathers challenged such state laws, asserting that gendered laws violated the Equal Protection Clause and failure to provide avenues for unwed fathers to assert parental rights violated the Due Process Clause. The Supreme Court issued decidedly mixed opinions, leading to a modern doctrine that condones significant differences in the constitutional status of mothers and fathers.

The first case arose in Illinois, where Peter Stanley fathered three children with Joan Stanley. The two were in a romantic relationship for almost two decades, and lived together intermittently.[31] At the time, Illinois law provided that the children of an unmarried woman became wards of the state if the mother died.[32] Even though Peter Stanley had been in his children's lives as a father, the law meant that after Joan died the children were taken into the custody of the state, which appointed guardians for the children rather than allowing the children to live with their father.[33]

Stanley argued that the Illinois law violated the Equal Protection Clause due to its unequal treatment of unmarried fathers as compared to married fathers and unmarried mothers, who did not similarly lose custody of their children if their co-parent died.[34] Other parents only lost custody if the State showed that they were unfit parents through a child protective action, which gave a parent notice and an opportunity to argue that they were fit to retain custody at a hearing.[35] By contrast, Illinois presumed that all unwed fathers were unfit parents.[36]

Although Stanley consistently presented his case as a challenge under the Equal Protection Clause, the Supreme Court instead

30. *See* Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 327–28 (2012).

31. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 650.

36. *Id.*

analyzed his claim under the Due Process Clause.[37] The difference meant that rather than compare unmarried fathers to other parents (and ask whether a constitutionally salient difference existed between the groups), the Court asked whether unwed fathers had any constitutional interest that required some process before Illinois could take the interest away. Justice White's opinion for the Court answered immediately that unwed fathers did hold a constitutional interest, speaking generally of the importance of the family[38] and more specifically of the interest of a father in "children he has sired and raised."[39] Framing Stanley's interest as a due process argument also meant that White set Stanley's interest in his relationship with his children against the State's interest in protecting the children of Illinois.[40] There was no alternative father available in the form of a second man claiming to be the children's father—indeed, the alternative to Stanley was to place the children in the custody of the State, with all the accompanying financial and bureaucratic costs.[41] Furthermore, Illinois's interest was to protect children from the care of unfit parents, which Justice White argued was not served by separating children from fit parents.[42] The Illinois statute furthered child protective goals only if all unmarried fathers were unfit parents.[43]

Reduced to such an extreme summary, one might expect the Court to conclude that such a far-reaching generalization about unwed fathers was so inaccurate and demeaning that it violated principles of equal protection. Justice White, however, took a more moderate tone:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.[44]

The Court's opinion concluded that the administrative convenience of assuming all unmarried fathers were unfit parents could not justify denying Peter Stanley and similarly situated fathers a hearing as to

37. *Id.* at 659–60 (Burger, C.J., dissenting) (making note of the discrepancy between the legal theory argued by Stanley and the theory applied by the Court).

38. *Id.* at 650–52 (White, J., majority).

39. *Id.* at 651.

40. *Id.* at 652.

41. *See id.* at 646.

42. *Id.* at 652–53.

43. *Id.* at 653.

44. *Id.* at 654.

parental fitness before taking their children into the custody of the state.[45] Justice White mentioned the Equal Protection Clause at the very end of his opinion, noting that because all parents were entitled to a hearing under the Due Process Clause to determine their fitness before removing children from the home, denying a hearing to unwed fathers (but not married fathers or unwed mothers) violated the Equal Protection Clause.[46]

Chief Justice Burger dissented and focused on the difference between married and unmarried fathers. Pointing out that Stanley had framed his argument under the Equal Protection Clause,[47] Burger turned fully to the significant differences he saw between married and unmarried fathers. Burger argued that marriage created "legally enforceable rights and duties" between spouses and between parents and children, and argued that Stanley failed to "seek the burdens" of those legally enforceable duties by marrying Joan Stanley.[48] The "voluntary" method by which a man could secure legal status as parent was to marry the mother of his children.[49] Because Stanley had failed to do so, he had demonstrated a lack of commitment to his children.[50]

Burger continued to explain the different rights of unmarried mothers versus fathers in terms that the Court would repeat over and over in later cases. The argument relies on two claims about the relative roles of unwed mothers and fathers, which I will call the "unwed-father principles." Principle one has to do with how easily and immediately a biological mother can be identified, versus how a biological father can prove his genetic link. Burger argued that unmarried mothers were immediately identifiable from the moment of giving birth, whereas unmarried fathers had no similar and clear method of identification.[51] "Many" unwed fathers, in Burger's summary, might not even be aware that they had fathered a child out of wedlock, so identifying such fathers would involve tracking men down before administering a paternity test.[52] The first unwed-father principle is thus the biological unwed-father principle, assuming that the biological mother-child

45. *Id.* at 657–58.

46. *Id.* at 658.

47. *Id.* at 659 (Burger, C.J., dissenting).

48. *Id.* at 663–64.

49. *Id.* at 664.

50. *Id.* at 667. There is some evidence that Chief Justice Burger's concern regarding Peter Stanley as a father was justified. *See* Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 WM. & MARY BILL RTS. J. 773, 781 (2016).

51. *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting).

52. *Id.*

relationship is easy to prove, and the biological father-child relationship much more difficult.

The second unwed-father principle voices a stereotype of fathers as uninvolved parents who are likely to evade responsibility and avoid creating a relationship with their child: the stereotype unwed-father principle. Burger cited "common human experience" for the proposition that "the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter."[53] Records from the case indicate that Burger's dissent chose more moderate language than other Justices—Justice Douglas initially drafted an opinion that described Stanley and other unwed fathers as "hit-and-run drivers."[54] Burger argued that the commitment-free status of unmarried fathers was enough to reject Stanley's challenge under the Equal Protection Clause, using gender stereotypes about men and fathers to reject an equality-based argument.

Despite Peter Stanley's ostensible victory before the Supreme Court, the case is not a full-throated defense of unwed fathers. The decision vindicated the right of *all* parents to be granted a minimal amount of due process before losing custody of their children but underscored that the generalization that unwed fathers do not care for their children may be true. Additionally, the case was decided by a seven-member Court, which at the end of the initial conference reached a very different decision: four Justices would have dismissed the writ of certiorari as improvidently granted, with one dissenter who wanted to rule for Illinois and two who wanted to rule for Stanley.[55] A series of vote switches resulted in Justice White's decision ruling nominally in favor of Stanley, but no clear majority existed that seemed willing to support the rights of unwed fathers in later cases.[56] Finally, the primary discussion of Stanley's equal protection claims occurred in dissents arguing that no equal protection violation occurred, laying out the unwed-father principles, and voicing clear gendered stereotypes about fathers.[57]

A few years later, a pair of cases demonstrated the Court's weak conception of the constitutional rights of unwed fathers. The first was *Quilloin v. Walcott*,[58] decided in 1978. Leon Quilloin and Ardell Walcott had a child together in December 1964, but never lived together, and

53. *Id.*

54. Gupta-Kagan, *supra* note 50, at 793.

55. *Id.* at 798.

56. *See id.* at 798–802.

57. *Stanley*, 405 U.S. at 663–67 (Burger, C.J., dissenting).

58. 434 U.S. 246 (1978).

their romantic relationship did not continue for long.[59] Ardell married Randall Walcott in 1967, and the child lived with Ardell and Randall from that point on.[60] Quilloin had a relationship with his child, but provided support irregularly, and as the child's relationship with Randall Walcott strengthened, Ardell decided that Quilloin's visits with the child were disrupting the Walcott family and the child in particular.[61] Additionally, Randall Walcott wished to formally adopt the child,[62] and the child agreed that he wanted to be adopted and to have the last name Walcott.[63]

Randall Walcott filed a petition to adopt the child in 1976, which Quilloin opposed, filing a petition to be legitimated as the child's father, an objection to the adoption petition, and a request for visitation rights.[64] Had Quilloin and Ardell Walcott been married when their child was born, Quilloin would have had to consent or otherwise surrender his parental rights in order for Randall Walcott's adoption petition to be approved.[65] Under Georgia state law, however, adoption of a child born to unmarried parents needed only the mother's approval, and not the father's.[66] Quilloin argued that this unequal requirement of parental consent violated both the Due Process and Equal Protection Clauses.[67]

Justice Marshall, writing for a unanimous Court, rejected both arguments. The Court agreed that taking children away from "a natural family" without a demonstration that the parents were unfit would violate the Due Process Clause.[68] The Court implicitly criticized Quilloin's role as father, however, by noting that he had never petitioned to be recognized as the child's legal father before, nor had he previously requested visitation or custody.[69] Furthermore, the child would not be removed from Quilloin's care and placed in the custody of strangers, as with Peter Stanley's children. Instead, the child would remain living with Randall and Ardell Walcott, who had been raising the child for many years together, "a result desired by all concerned,

59. *Id.* at 247.

60. *Id.*

61. *Id.* at 251.

62. *See id.* at 247.

63. *Id.* at 251.

64. *Id.* at 247, 249–50.

65. *Id.* at 248.

66. *Id.*

67. *Id.* at 252.

68. *Id.* at 255 (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

69. *Id.*

except [Quilloin]."[70] Justice Marshall did not explain why Quilloin's fundamental parentage right would vary according to the alternative custody option available for his child, other than noting that "the result of the adoption in this case is to give full recognition to a family unit already in existence."[71] Randall Walcott, by voluntarily assuming the responsibilities of parenthood and legally binding himself to the child's mother, was apparently in the eyes of the Court a better father than Quilloin.

Quilloin's Equal Protection Clause argument fared no better. He argued that he should have the same ability to veto an adoption by withholding his consent as a married father, a divorced father, or an unwed mother could, and to give unwed fathers less power over adoptions of their children did not give him equal protection of the laws.[72] Again the Court disagreed, focusing on Quilloin's failure to assume the quotidian responsibilities of parenthood by implicitly invoking the second-stereotype unwed-father principle. Having "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,"[73] the Court reasoned, he was properly distinguished from a married father, who would have been engaged in a child's daily care. Because Quilloin's individual relationship with his child did not resemble that of the hypothetical, stereotypical married father, Quilloin's unwed fatherhood was saliently different than, and inferior to, married fatherhood and could thus be constitutionally treated differently by Georgia law. The somewhat implicit skepticism towards unwed fathers generally expressed in *Stanley* thus found an individual example, and more explicit expression, in the Court's criticism of Quilloin. Even though he had provided support to his child and had a relationship with his child, Quilloin's commitment to his child was not the same as Randall Walcott's commitment to the family through marriage to Ardell. Quilloin's unwed fatherhood was fundamentally inferior to Randall Walcott's married fatherhood.

Only one year later, however, the Court faced a case with another unwed father whose relationship with his child was even stronger. Abdiel Caban and Maria Mohammed lived together for five years, and although they never married, apparently told others that they were spouses.[74] During the time that they lived together, they had two

70. *Id.*

71. *Id.*

72. *Id.* at 252.

73. *Id.* at 256.

74. Caban v. Mohammed, 441 U.S. 380, 382 (1979). Caban and Mohammed could not legally marry at the time of their relationship, as Caban was separated from a wife who he did not divorce until 1974. *Id.*

children. Caban was listed as the father on the birth certificate for both children, and the four lived together as a family until the end of 1973. At that point, Maria Mohammed moved out with the children to live with Kazim Mohammed, who she married the next month.[75] Every weekend Maria Mohammed brought the two children to visit her mother, who lived in the same building as Caban, and the grandmother allowed Caban to visit the children each week. These visits continued for nine months, until the grandmother moved to Puerto Rico, taking the two children with her at Mohammed's request.[76] The next year, Caban visited the children in Puerto Rico, where he took them for what the grandmother believed would be a short visit.[77] Instead, Caban took the children back home with him to New York.[78] Mohammed then filed for custody in New York state court.[79]

As the custody fight between Mohammed and Caban progressed, both sides filed a petition for a second parent adoption by each parent's new partner: the Mohammeds, with stepfather Kazim Mohammed seeking to adopt, and the Cabans, with Abdiel's new wife Nina as the potential new mother.[80] As in *Quilloin*, New York law required the consent of an unwed mother for any adoption petition of her children, thus preventing Nina Caban's petition from proceeding.[81] Similarly, New York did not require the consent of an unwed father to approve the adoption of his children, but the unwed father was entitled to speak at a hearing evaluating the proposed adoption.[82] The hearing, however, was not as to his own status as a parent or whether he was a good father with rights to his children—instead, the hearing asked simply whether it was in the best interests of a child to be adopted by the prospective adoptive parents.[83] A Surrogate for a New York Family Court thus heard evidence presented by Caban, but only to the extent that Caban spoke to Kazim Mohammed's qualifications as a prospective father, and granted Mohammed's petition.[84] Following *Quilloin*, Caban

75. *Id.*

76. *Id.*

77. *Id.* at 383.

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.* at 384.

82. *Id.*

83. *Id.* at 386–87.

84. *Id.* at 384.

argued that this process violated the Due Process and Equal Protection Clauses.[85]

In a sharp departure from previous cases, a 5–4 Court held that it was "clear that [New York law] treats unmarried parents differently according to their sex."[86] *Caban* is the only unwed father case in which the Supreme Court found an equal protection violation as the dispositive holding. Justice Powell, writing for the majority, rejected the distinction as the *Quilloin* Court characterized it, between unwed fathers and other parents (including married fathers, married mothers, and unmarried mothers).[87] Instead, Powell wrote that the relevant distinction was between unmarried mothers and unmarried fathers, meaning that in order to withstand Caban's challenge, New York's law must withstand intermediate scrutiny.[88]

New York argued that its different treatment of unwed mothers and fathers was substantially related to an important state interest because the law recognized the "fundamental difference" between mothers and fathers embodied in the second-stereotype unwed-father principle, that a biological mother is simply closer to her child than a biological father.[89] The majority opinion in *Caban* rejected this argument, but crucially did not reject the stereotype unwed-father principle altogether. Instead, the Court relied on the individual circumstances of Abdiel Caban. The Court found that Caban's history "demonstrate[d] that an unwed father may have a relationship with his children fully comparable to that of the mother."[90] The Court spoke approvingly of Caban's role supporting and caring for his children, particularly as they "lived together as a natural family for several years."[91] Powell thus rejected the proposition of a "*universal* difference between maternal and paternal relations at every phase of a child's development."[92] Notably, however, the Court mentioned that Caban's children were four and six years old by the time the adoption petitions were filed, meaning that Caban had cared for them and stood in a role very similar to that of a married father for a significant portion of their

85. *Id.* at 385.

86. *Id.* at 388.

87. *Id.* at 393–94.

88. *Id.* at 388 (reiterating the intermediate scrutiny standard from Craig v. Boren, 429 U.S. 190, 197 (1976), that "Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives'").

89. *Id.*

90. *Id.* at 389.

91. *Id.*

92. *Id.* (emphasis added).

lives.[93] Even as the Court rejected the universal stereotype, it acknowledged a possibility that the stereotype could be true at certain ages, specifically mentioning newborn infants versus older children.[94]

Two Justices wrote dissents, and both argued that differences between unwed mothers and fathers justified different treatment under New York law. Justice Stewart explained that even though the Equal Protection Clause triggered heightened scrutiny for at least some sex-based classifications, "gender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated."[95] He viewed parenthood as an area in which men and women were fundamentally differently situated according to the first biological unwed-father principle: the parental relationship of a mother who gave birth to a child was clear, whereas a father's status as parent had to be demonstrated through other methods.[96] Stewart argued that both the physical and social realities that women were immediately identified as a parent justified granting unwed mothers greater power to veto potential adoption of their child.[97]

Justice Stevens agreed with this analysis in his own dissent, which Chief Justice Burger and Justice Rehnquist joined.[98] Stevens focused on the mother's unilateral power during pregnancy—she could decide whether to terminate the pregnancy without interference or input from the biological father, and controlled his later parental status by choosing whether to tell the biological father that she was pregnant and deciding whether to marry the biological father during her pregnancy.[99] Echoing Stewart, Stevens reasoned that the mother would be immediately identified as a parent at birth, and would almost certainly have custody of the child from that moment.[100] Given that the mother had already been making decisions about the child from the moment of conception, Stevens argued that New York's law merely reflected the existing state of affairs in which the mother was the primary and perhaps only decisionmaker as to the child's care.[101]

Although Abdiel Caban was successful before the Supreme Court, he won by a razor-thin majority. Stevens' dissent acknowledged that

93. *Id.*

94. *Id.*

95. *Id.* at 398 (Stewart, J., dissenting).

96. *Id.* at 398–99.

97. *Id.* at 399.

98. *Id.* at 401 (Stevens, J., dissenting).

99. *Id.* at 404–05.

100. *Id.* at 405.

101. *Id.* at 406.

Caban's longstanding relationship with his children could make Caban an exception to the unwed-father principles rather than a rule that unwed fathers should have rights coextensive with unwed mothers.[102] Justice Stevens's dissent observing that unwed mothers already had control over the relationship between unwed fathers and children was prophetic, as demonstrated in the 1983 case *Lehr v. Robertson*.[103] Jonathan Lehr had been living with Lorraine Robertson for about two years when Lorraine gave birth to their daughter Jessica.[104] When Lorraine was discharged from the hospital after birth, she fled with Jessica and concealed her location from Lehr.[105] Lehr eventually hired a detective agency to locate Jessica and Lorraine, who by that time had married Richard Robertson.[106] Lehr claimed that Lorraine refused to allow him to contact Jessica, rejected his attempts to provide child support, and filed an adoption petition to allow Richard Robertson to adopt Jessica.[107] The petition was approved a few months later, and Lehr later filed a lawsuit challenging the adoption.[108]

Under New York law, Lehr was not entitled even to notice of the adoption proceeding. Several categories of potential unwed fathers were notified if an adoption petition was filed concerning their child: men who had entered themselves into the state putative father registry, men who were listed as the father on a child's birth certificate, men living with the mother and representing themselves as the father in public after the child's birth, and others.[109] Lehr did not fit into any of the categories, so received neither notice of the adoption nor an opportunity to be heard at the adoption proceeding.[110] As with previous appellants, Lehr argued that this unconstitutionally infringed upon his fundamental relationship with Jessica under the Due Process Clause, and that treating unwed fathers differently than unwed mothers and married fathers violated the Equal Protection Clause.[111]

Justice Stevens wrote the opinion for the Court and rejected both arguments. Regarding Lehr's argument that he had a fundamental right as to his relationship with Jessica, Stevens drew a line between *Stanley*

102. *Id.* at 412 (Stevens, J., dissenting).

103. 463 U.S. 248 (1983).

104. *Id.* at 268–69 (White, J., dissenting).

105. *Id.* at 269.

106. *Id.*

107. *Id.*

108. *Id.* at 250, 255 (majority opinion).

109. *Id.* at 250–51.

110. *Id.* at 251–52.

111. *Id.* at 249–50.

and *Caban* on one side and *Quilloin* and *Lehr* on the other. Peter Stanley and Abdiel Caban had existing parental relationships with their children, created through everyday caregiving and commitment to the child over the passage of time.[112] Stevens wrote that when such a father "demonstrates a full commitment to the responsibilities of parenthood" by helping to raise his child, "his interest in personal contact with his child acquires substantial protection under the Due Process Clause."[113] Fathers such as Jonathan Lehr or Leon Quilloin, however, who failed to step up and care for their children, who lacked an emotional relationship in addition to a biological one, did not hold a fundamental right.

It was irrelevant, apparently, that Lehr had been prevented from creating such a relationship by Lorraine Robertson; most of the facts explaining that she had fled with Jessica appeared only in Justice White's dissent. The dissent argued that because Lehr had never been allowed to present a factual case, the Court should have assumed that his rendition of the facts was accurate, "that but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections."[114] In Justice Stevens's eyes, by contrast, Lehr had failed to take what actions he could, even in Lorraine and Jessica's absence, such as placing his name on New York's putative father registry.[115] In the context of Lehr's equal protection challenge, the Court referred to the same perceived difference between mothers and fathers that previous cases described: unwed mothers and fathers were not "similarly situated with regard to their relationship with the child," so the Constitution did not mandate equal treatment.[116]

The Court's opinion focused, as it did in previous cases, on the individual circumstances of Jonathan Lehr, albeit only to a point. It was constitutionally significant, even determinative, that Lehr did not have a substantial relationship with Jessica: because he had not acted like a father, he had no rights of a father. This context, however, did not stretch to the reason that Lehr had not created such a relationship, which, at least by his account, was that Lorraine had knowingly prevented any relationship from the beginning.[117] But at least to some

112. *Id.* at 261.

113. *Id.*

114. *Id.* at 270–71 (White, J., dissenting).

115. *Id.* at 264 (majority opinion).

116. *Id.* at 267–68.

117. Lorraine may well have had good reasons for doing so—for example, one could speculate that Lorraine fled an abusive relationship in order to protect Jessica. Justice White's dissent is correct, however, that neither

readers, it seemed clear that if an unwed father had acted like a father and created a relationship with his child through caregiving and providing support, the Court would recognize that the father had a fundamental right in that relationship.

A few years later, the Court placed a large asterisk on that proposition. In *Michael H. v. Gerald D.*,[118] an even more dramatic and complex set of adult relationships circled around a child's parentage. The mother was Carole D., married to Gerald D.[119] Carole had an extramarital affair with Michael H., which resulted in the birth of Victoria in 1981.[120] Carole and Gerald entered Gerald's name on Victoria's birth certificate as the father, and Gerald always presented Victoria publicly as his own child.[121] Michael knew, however, shortly after Victoria's birth that he was likely the biological father, which was later confirmed by a blood test.[122]

Carole moved with Victoria several times in the next few years, reflecting what relationship Carole was in: they lived for significant periods of time with Michael, during which time he treated Victoria as his daughter and presented her as such publicly, but Carole and Victoria also lived with Gerald during attempts to reconcile, as well as with a third man with whom Carole also had a relatively brief relationship.[123] During one of the times when Carole lived with Michael, they both signed a stipulation that he was Victoria's father, but Carole left Michael the next month and told her attorneys not to file the stipulation.[124] Eventually Carole reconciled with Gerald, moved back in with him on a long-term basis, and they had two children together.[125]

After Michael and Carole's relationship ended, he began to seek visitation rights with Victoria.[126] Gerald intervened in the case and argued that under California law, there were no triable issues of fact as to Victoria's paternity—Gerald was the legal father, so Michael had no

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side had ever presented facts either substantiating Lehr's story or explaining Lorraine's actions.

118. 491 U.S. 110 (1989).

119. *Id.* at 113.

120. *Id.*

121. *Id.* at 113–14.

122. *Id.* at 114.

123. *Id.*

124. *Id.* at 114–15.

125. *Id.* at 115.

126. *Id.*

right to ask for visitation.[127] Gerald's motion was granted, and Michael's challenges to it eventually worked their way up to the Supreme Court.

The underlying statute was California's marital presumption, providing that the child of a married woman living with her husband was "conclusively presumed to be a child of the marriage," meaning that husband and wife were legal father and mother.[128] The presumption could be overcome by introducing blood tests as evidence showing that another man was the biological father, but only the husband or the mother were empowered to introduce such evidence.[129]

Despite having such blood tests showing that he was Victoria's biological father, therefore, Michael had no way of introducing them into evidence or otherwise disturbing the presumption that Gerald was Victoria's father. Michael argued that this violated the Due Process clause, both as a procedural and substantive matter. The Court swiftly rejected Michael's procedural claim,[130] and the vast majority of the decision focused on Michael's argument as to fundamental rights.

Michael's argument was very predictable based on the precedent of *Lehr*: he was the unwed biological father of Victoria, had voluntarily taken on his role and responsibilities as her father, and had created a substantial relationship with her. In his view, this placed him in the same position as Stanley and Caban, holding a fundamental constitutional right in his relationship with Victoria.[131]

Justice Scalia, writing for a 5–4 Court, disagreed. Scalia reasoned that the fundamental parental right protected by the Constitution protected "traditional" marital families, not families made up of unwed (or adulterous) parents.[132] He was particularly concerned that, as with *Quilloin* and *Lehr*, Victoria had an alternative legal father in the form of Gerald. Michael was not asserting a parental right over a child who would otherwise lack a father; Michael's claim would displace Gerald from the marital family that existed at the time of Michael's lawsuit.[133] Presented with two alternative families, one where the parents were split up and never married to each other, and another where the legal father and mother were married and lived together as a unitary family, Scalia concluded that "it is not unconstitutional for the State to give categorical preference to the latter."[134]

127. *Id.*

128. *Id.* (quoting Cal. Evid. Code § 621(a) (1989)).

129. *Id.*

130. *Id.* at 119–21.

131. *Id.* at 123.

132. *Id.* at 125.

133. *Id.* at 123–24.

134. *Id.* at 129.

Justice Brennan dissented, pointing to the Court's past cases to question why such importance was placed on the "only difference" of Gerald's marriage to Carole.[135] Justice White, in a separate dissent that Justice Brennan joined, asked, "in light of Carole's vicissitudes, what more could Michael have done?"[136] White argued that the Court's discussion of the importance of an unwed biological father stepping forward to take on the responsibilities of fatherhood could have been directed at Michael, who followed their instructions—yet the Court nonetheless rejected his constitutional argument.[137]

In the eyes of at least slim majorities of the Court, therefore, unwed biological fathers have a significantly different constitutional status than unwed biological mothers. The unwed-father principles justify treating them differently than unwed mothers. Unwed biological mothers hold decision-making power over their children from the moment of conception and, as a physical and societal matter, are tasked with their children's care. This justifies, according to this line of cases, immediately bestowing a fundamental constitutional right upon unwed biological mothers. Unwed biological fathers, however, have additional requirements before they have any cognizable constitutional interest.[138] They must seek out and assume the responsibilities of fatherhood, regardless of circumstances that might make that difficult or impossible. They must create a substantial relationship with their child through acting like a father, and ideally through acting like a husband, proving that they are an exception to the second-stereotype unwed-father principle.[139] And they must not have become fathers through a nontraditional or even illicit relationship, particularly if a "better" legal father is willing and able to assume the role of legal father.

Furthermore, these same differences, embodied in the unwed-father principles, justify rejecting almost all equal protection claims brought by unwed fathers. The perceived differently situated unwed father is justifiably treated differently under statutory law and by the Constitution.

The Court's treatment of the parentage claims of unwed biological fathers clearly reflects gendered stereotypes regarding fathers versus

135. *Id.* at 143–44 (Brennan, J., dissenting).

136. *Id.* at 160 (White, J., dissenting).

137. *Id.* at 163.

138. But see Jennifer Hendricks, who argues that the additional burden merely equalizes the burden that a birth mother takes on in the form of pregnancy and birth, requiring men to exhibit "parental behavior that is fairly basic, yet appropriate to the facts of men's biology." Jennifer S. Hendricks, *Essentially A Mother*, 13 WM. & MARY J. WOMEN & L. 429, 444 (2007).

139. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 409 (2012).

mothers. As Karen Czapanskiy famously put it, mothers are "draftees," whose parental status and responsibility is assumed, whereas fathers are volunteers who only sign up at will.[140] The flip side of parentage as volunteerism, however, is that not all volunteers are welcome. Mothers are viewed as natural, nurturing parents, whereas fathers lack innate parenting skills.[141]

As I have previously written:

> [Unwed biological fathers' rights are] fundamentally relational, turning either on his relationship with the biological mother or with the child. The only way for a man to ensure parental rights before birth is to marry the biological mother, a marriage-based classification that the Supreme Court has explicitly held raises no equal protection concerns. And the only way for an unwed man to ensure parental rights after birth is to create a functional relationship with the child, which is dependent on the biological mother's willingness to allow such a bond to develop.[142]

The Court is skeptical of unwed biological fathers both as partners (or as failed spouses) and as fathers, citing stereotypical views of masculinity and describing men as eager to evade parental responsibilities.[143] As discussed above, states have liberalized their statutes such that it would be much easier for men in the position of these appellants to be recognized as legal fathers. The constitutional doctrine, however, remains approving of the starkly differential treatment of mothers and fathers.

One reading of the different approach taken by statutes and constitutional analysis is that state legislatures have secured the rights of fathers such that the constitutional doctrine is mooted. In the most superficial analysis of dispositions, this is correct, for example, California amended its marital presumption statute following *Michael*

140. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415–16 (1991); *see also* Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005).

141. Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. 181, 184 (2000).

142. Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 679 (2014); *see also* Murray, *supra* note 139, at 409 (describing the Court as "anchored by a persistent skepticism of non-marriage (and all of its consequences) and a persistent veneration of marriage as the normative ideal for adult intimate life").

143. Nancy Dowd has written extensively about how masculinities affect men as fathers, pressuring them to see nurturing and emotional caregiving as female (and thus unacceptable) characteristics. *See, e.g.*, Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 239 (2008).

H. so that a man in Michael's position would be able to introduce a blood test showing biological fatherhood as evidence to support a petition to establish his paternity.[144]

The constitutional analysis of parental rights incorporating the unwed-father principles, however, reverberates through different areas of the law, meaning that cases typically categorized as solely family law cases impact the analysis of issues far outside the bounds of family law. In this reading, the Supreme Court's unaddressed history of parentage cases in the 1970s and 1980s bolsters the constitutionality of gendered statutes today, as states can point to constitutional analysis in the context of family law to apply in the context of other areas. Crucially, this exporting of family law doctrine is more likely applied to the equal protection side of the cases, as a more attenuated link between parentage and a legal right makes the fundamental right claim remote. The next Part provides examples of the impact of family law constitutionalism, where gendered identification of unwed parents helps to determine the result in immigration, inheritance, and beyond.

II. GENDERED PARENTHOOD IN OTHER AREAS OF LAW

There are scores of contexts outside of family law where the identification of family members plays an important role. Tax law involves defining familial dependents, application of the marital privilege in criminal law necessitates recognizing spouses, and some tort claims may be brought only by certain family members.

In some contexts, the gendered classification of unwed parents in family law has been imported—and more significantly, so has the constitutional analysis of challenges to that gendered treatment of parents. This Part discusses two of the most explicit examples of how family law's dismissal of the constitutional rights of unwed fathers has been underscored in challenges to statutes well outside the ambit of family law: immigration law, in the context of the transmission of citizenship, and inheritance law, in the context of children inheriting from unwed intestate parents.

A. Immigration Law: Transmission of Citizenship

At its root, immigration law regulates the movement of people. Because people often move with their families, regulating the movement of people also implicitly regulates families. The gendered stereotypes

144. *See* Michael L. Oddenino, *The Good, the Bad, and the Ugly: A Critical Analysis of the U.S. Supreme Court Decision in* Michael H. v. Gerald D., 25 FAM. L.Q. 125, 135 (1991).

regarding fathers and mothers are built into federal immigration law from the ground up.[145]

Transmission of citizenship is one such area in which family law's gender stereotypes find an additional and more recent voice.[146] American citizenship via birth can be acquired through two different theories: *jus soli*, known as birthright citizenship, is the grant of American citizenship to any person born on American land,[147] whereas, *jus sanguinis* is the grant of citizenship through the citizenship of a child's parents.[148] This parent-dependent citizenship, however, has two important aspects when considering the echoes of family law's gendered parental stereotypes. The first is that recognition as a parent for purposes of transmitting citizenship can be different than recognition as a parent under state-level family law.[149] The second notable aspect is that parent-dependent citizenship is explicitly gendered, as transmission of citizenship depends on whether the American-citizenship parent is a mother or a father.[150]

Although *jus sanguinis* citizenship has always depended on the gender of the American-citizen parent, which parent can more easily transmit citizenship has shifted over time in a way that demonstrates how directly dominant gender stereotypes of a given time period are incorporated into the law. Initially, in keeping with patriarchal traditions, only fathers could transmit American citizenship to their

145. For examples of commentary upon the gendered aspects of family law and immigration law, see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629 (2014); Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J. L. & GENDER 405 (2013); Kelly, *supra* note 141; Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803 (2003).

146. *See* Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. REV. 1485, 1489 (2011) ("An important goal of the historians' amicus brief filed in *Flores-Villar* is to . . . explain[] how this ostensibly obscure citizenship law is part of a larger historical phenomenon: the persistence of gender-based sociolegal norms in determining citizenship.").

147. Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 565 (2000).

148. *Id.*

149. *See* Abrams & Piacenti, *supra* note 145, at 631–32.

150. Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 179 (2017) (describing the "deeply gendered approach to parent-child citizenship transmission" as "just one part of a complex set of family-based laws that structured entry and political membership along familiar patrilineal lines").

children.[151] Under coverture, women and children's legal personhood was subsumed within their husband or father's, meaning that his citizenship status became their own.[152]

After family law began to reject some of the principles of coverture and exalt a domestic role for women as natural caregivers, immigration law followed by tying children's citizenship status to their mother instead of their father.[153] Today, it is the mother who can more easily transmit citizenship, not the father.

In identifying who is eligible to transmit citizenship, federal statutes have recognized the relationship between an unmarried mother and child much earlier and much easier than the relationship between an unmarried father and child. The Supreme Court has evaluated such distinctions in several cases over the past few decades, and in all but one has held that the challenged statutes do not violate the Constitution. Moreover, the Court repeatedly echoes the same arguments that appeared in family law's constitutional doctrine: mothers and fathers are differently situated with regard to identification of their genetic relationship and how likely each parent is to have an emotional relationship with their child.

One of the earliest cases arose in the 1970s, alongside the family law cases discussed above. The case, *Fiallo v. Bell*,[154] did not directly address citizenship transmission, but the immigration status of close family members of American citizens and lawful permanent residents. The case was brought by three sets of unmarried biological fathers and their children, challenging portions of the Immigration and Nationality Act of 1952 that defined "child."[155] The child of an American citizen or lawful permanent resident would receive preferred status for immigration purposes, but as the Court noted, "child" was defined very specifically: "an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his natural mother."[156] An illegitimate child thus had no way of seeking preference through his or her father. Similarly, the parents of an American citizen or lawful permanent resident would receive preferential status, but parents were identified using the same definition

151. *See* Rachel K. Alexander, Case Note, Nguyen v. INS*: The Supreme Court Rationalizes Gender-Based Distinctions in Upholding an Equal Protection Challenge*, 35 CREIGHTON L. REV. 789, 802 (2002); Kelly, *supra* note 147, at 565.

152. Kelly, *supra* note 147, at 561.

153. *See id.* at 562, 568–71.

154. 430 U.S. 787 (1977).

155. *Id.* at 788, 790.

156. *Id.* at 788.

of "child."[157] The relationship between unwed biological fathers and their illegitimate children, therefore, was not recognized for purposes of immigration where an unwed biological mother's relationship with her illegitimate child was.

The plaintiffs argued that this refusal to recognize the parent-child relationship between unwed fathers and children deprived them of equal protection, due process, and association under the First, Fifth, and Ninth Amendments.[158] The Supreme Court rejected all of these arguments,[159] and instead explained that the policy judgments embodied in the immigration statutes were "entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress."[160] The Court speculated that "perhaps" Congress declined to grant preferential status to the relationship between child and unwed biological father for two familiar reasons repeated in the unwed-father principles: the "serious problems of proof that usually lurk in paternity determinations" and "a perceived absence in most cases of close family ties" between unwed biological fathers and their children.[161]

The Court's opinion did not offer significant analysis of the gendered natures of these presumed justifications, although since the decision was issued in 1977, it was written before almost all of the cases that developed the current doctrine applying heightened scrutiny to classifications based on sex.[162] Even before a robust history of cases discussing gender and equal protection, however, Justice Marshall's dissent clearly identified the gendered dimension to the statute as problematic. He noted that the class of people denied the preferential status was "defined on the basis of two traditionally disfavored classifications—gender and legitimacy."[163] Justice Marshall also pointed out a bizarre consequence to the inclusion of step-parent relationships: an unmarried biological father could never be recognized as a parent under the statute, but if he later married, his wife could qualify for the preferential treatment as a step-parent.[164]

157. *See id.* at 789.

158. *Id.* at 790–91.

159. *Id.* at 799–800.

160. *Id.* at 798.

161. *Id.* at 799.

162. Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 Sup. Ct. Rev. 1, 2 (1998).

163. *Fiallo*, 430 U.S. at 809 (Marshall, J., dissenting).

164. *Id.* at 811–12.

It was not until two decades later that the Court next addressed a challenge to gendered immigration laws in *Miller v. Albright*.[165] The case arose out of transmission of citizenship: Lorelyn Peñero Miller was born in June 1970 in the Philippines to unmarried parents.[166] Her mother was Filipino and her father was American.[167] Her father filed a petition in 1992 that resulted in a Voluntary Paternity Decree, establishing that he was her father.[168] Under the Immigration and Nationality Act (INA), however, because he established his paternity after she turned eighteen years old, she was ineligible to receive American citizenship transmitted through her parentage.[169] Had the citizenship of her parents been switched, such that her mother was the American citizen, the mother's American citizenship would have been transmitted to Miller at birth without any need to take further steps to establish the mother/child link.[170] Miller argued that the differential requirements for fathers and mothers violated the Fifth Amendment.[171]

The Supreme Court, in a plurality opinion, rejected Miller's argument.[172] The Court acknowledged that the transmission of citizenship operated differently depending on the gender of the American-citizen parent, requiring only children born to unmarried citizen fathers to formally establish paternity before they reached the age of eighteen.[173] These differences, however, were "well supported by valid governmental interests," in the eyes of the plurality.[174] The differences are by now very familiar and precisely track the unwed-father principles laid out in the family law cases. First, it was an important governmental objective to ensure that the child seeking citizenship was in fact biologically related to an American citizen.[175] In support of this proposition, the Court cited *Fiallo v. Bell* and *Trimble v. Gordon*,[176] an inheritance case.[177] If the child sought to show a

165. 523 U.S. 420 (1998).

166. *Id.* at 424–25.

167. *Id.* at 425.

168. *Id.*

169. *Id.* at 426.

170. *See id.* at 424.

171. *Id.*

172. *Id.* at 420–21; *see also* Nguyen v. INS, 533 U.S. 53, 58 (2001) (describing the multiple opinions in *Miller*).

173. *Miller*, 523 U.S. at 424.

174. *Id.*

175. *Id.* at 436.

176. 430 U.S. 762 (1977).

177. *Miller*, 523 U.S. at 436; *see also supra* Part II.B.

biological relationship to his or her mother, that was easy enough, as the relationship to the birth mother was "immediately obvious."[178] By contrast, the asserted relationship to the unmarried biological father was unproven and could not be demonstrated through any other contemporaneous public records.[179] The requirement that the father formally establish his paternity, therefore, merely established the existence of an otherwise unproven claim to biological relationships.[180]

A biological relationship, however, could obviously be proven after the child reached the age of eighteen. The second justification for the law addressed the perceived need to establish the relationship while the child was still a minor: "the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States."[181] In other words, transmission of citizenship should take place where the American-citizen parent has at least an opportunity to develop a relationship with his or her child that would also transmit American culture and American values.

It is here that the Court relies most on gendered stereotypes about parenting. The opportunity to create a meaningful relationship, in the Court's eyes, is very different depending upon the gender of the parent:

> When a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child immediately after the birth. Such a child thus has the opportunity to develop ties with its citizen mother at an early age, and may even grow up in the United States if the mother returns. By contrast, due to the normal interval of nine months between conception and birth, the unmarried father may not even know that his child exists, and the child may not know the father's identity.[182]

Congress, in the Court's eyes, acted upon this gendered prediction of the likelihood that fathers versus mothers would have the opportunity to develop a relationship with their child. Congress assumed that mothers have a relationship with children to whom they give birth. Congress was not willing to extend any such assumption to

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 438.

182. *Id.*

fathers, and so placed an additional requirement upon them to show that they acknowledged their child while the child was still a minor.[183]

Notably, the Court explicitly relied upon its family law precedent to conclude the additional burden placed upon unwed fathers was constitutional, arguing that its logic was "directly supported" by *Lehr v. Robertson*.[184] The Court analogized unwed fathers attempting to transmit citizenship to their biological children to unwed fathers attempting to establish a legal relationship to their child under domestic family law, setting Miller's father alongside the father in *Lehr*.[185] The Court compared the burden upon both fathers, and found the argument that Miller's father faced an impermissibly higher gendered burden "even less persuasive."[186] The father in *Lehr* was deprived of his status as legal parent because he was unable to establish his parenthood within about two years of the child's birth, whereas the father in Miller had eighteen years to do so.[187]

As in *Lehr*, the Court denied that the INA requirements rested upon gender or gender stereotypes. The Court noted that transmission of citizenship was regulated by more questions and requirements than the gender of the American-citizen parent alone,[188] and further denied that it was the gender of the parent that actually mattered for purposes of citizenship. The Court asserted that it was not "merely the sex of the citizen parent," but "an event creating a legal relationship between parent and child" that determined eligibility for citizenship: the birth alone for mothers, and post-birth establishment of paternity for fathers.[189] These differential requirements were justified by biological differences, the Court argued, and not gender stereotypes.[190]

The Justices writing in dissent obviously disagreed, both objecting to the Court's reliance on gender stereotypes. Justice Ginsburg noted that although the different requirements might be viewed as "a benign preference, an affirmative action of sorts,"[191] the differences were clearly "based on generalizations (stereotypes) about the way women (or men)

183. *Id.* at 440.

184. *Id.* at 441.

185. *Id.*

186. *Id.*

187. *Id.* This logic somewhat elided the fact that *Lehr* addressed a claim brought by the father, whereas in *Miller* only the child challenged the statute, after her father was dismissed as a party. *Id.* at 426–27.

188. *Id.* at 442.

189. *Id.* at 443.

190. *Id.* at 444–45.

191. *Id.* at 460 (Ginsburg, J., dissenting).

are."[192] Justice Ginsburg pointed out that the mere language of the Court's opinion demonstrated this, as it "constantly relates and relies on what 'typically,' or 'normally,' or 'probably' happens 'often.'"[193] Justice Breyer's dissent argued that the INA's distinctions between mothers and fathers "depend for their validity upon the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children."[194] In Justice Ginsburg's view, Congress could have achieved its purpose of "assuring close ties to the United States" without using gender as a classification method, and the plurality opinion did not explain why such "reliance on gender distinctions" was appropriate rather than gender-neutral methods.[195]

Before reaching the Supreme Court, the D.C. Circuit came to the same conclusion as the Supreme Court's plurality and drew similar disagreement from other members of the bench. Judge Wald wrote a separate concurrence[196] arguing that "there is a world of difference between noting that men and women often fill different roles in society and using these different roles as the justification for imposing inflexible legal restrictions on one sex and not the other."[197] In logic later echoed by Justice Ginsburg, Judge Wald did not object to any requirement that an American-citizen parent establish their parentage before the child turned eighteen years old, only to applying a one-gender requirement that "clearly derive[d] from the stereotyping assumption that mothers automatically will be close to their illegitimate children whereas fathers will not."[198]

Three years later, the Supreme Court heard a second challenge to the same gendered distinction, revisiting the question in the wake of even more appellate courts disagreeing as to whether the distinction was impermissibly reliant on gendered stereotypes.[199] Again, the case was brought by the child of an American-citizen father and a noncitizen

192. *Id.* at 469.

193. *Id.*

194. *Id.* at 482–83 (Breyer, J., dissenting).

195. *Id.* at 470 (Ginsburg, J., dissenting).

196. Judge Wald noted that she was bound to concur due to the binding precedent of *Fiallo*, discussed *supra* in notes 154–164, but called in her concurrence for the Supreme Court or Congress to overrule or abrogate *Fiallo*. Miller v. Christopher, 96 F.3d 1467, 1477 (D.C. Cir. 1996) (Wald, J., concurring).

197. *Id.* at 1475.

198. *Id.* at 1476.

199. Tuan Anh Nguyen v. INS, 533 U.S. 53, 58 (2001).

mother, born outside of the United States.[200] Tuan Anh Nguyen was born in Vietnam to his Vietnamese mother, but moved to Texas when he was five years old and was subsequently raised in America by his American-citizen father.[201] Although Nguyen became a lawful permanent resident, his father did not legally establish his parentage under the INA until Nguyen was twenty-eight years old, after deportation proceedings had begun to remove Nguyen to Vietnam.[202] In contrast to Lorena Penero Miller, who lived in the Philippines until she was at least twenty-one years old,[203] Nguyen thus spent the vast majority of his childhood years living with his American-citizen parent in the United States.

Because Nguyen's father had not established his parenthood before Nguyen's eighteenth birthday, however, he was deemed ineligible for transmission of citizenship through his father. Justice Kennedy, writing for a majority of the Court, held that the different statutory requirements for transmitting the citizenships of unwed mothers versus unwed fathers did not violate the Fifth Amendment's guarantee of equal protection.[204] The Court again justified the gendered requirements with the two familiar interests paralleling the unwed-father principles: ensuring that a biological relationship existed between the American-citizen parent and the child, and ensuring an opportunity for the American-citizen parent and child to create a relationship.[205]

Again, the Court declared that birth itself inherently demonstrated a biological connection between mother and child.[206] By contrast, the Court cited *Lehr* (itself quoting *Caban*) to support the proposition that the father might not be present at the birth, and even if he was, his physical presence did not demonstrate a biological connection to the child.[207] Justice Kennedy argued that fathers and mothers "are not similarly situated with regard to the proof of biological parenthood," and thus the additional requirement placed upon fathers "is neither surprising nor troublesome from a constitutional perspective."[208] To do otherwise "would be to insist on a hollow neutrality."[209]

200. *Id.* at 57.

201. *Id.*

202. *Id.*

203. Miller v. Albright, 523 U.S. 420, 425 (1998).

204. *Nguyen*, 533 U.S. at 56–59.

205. *Id.* at 62, 64–65.

206. *Id.* at 62, 64.

207. *Id.* at 62.

208. *Id.* at 63.

209. *Id.* at 64.

Similarly, the Court reiterated *Miller*'s focus on the opportunity for a relationship between American-citizen parent and child to develop and transmit "the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[210] Justice Kennedy focused on the mother's "initial point of contact" with the child at the time of birth, an opportunity that the father did not necessarily have.[211] Indeed, Justice Kennedy argued, there is no guarantee that father and child would ever meet at all.[212]

Both Justices Kennedy and Stevens had a particular type of American-citizen father in mind helping to animate this concern: U.S. servicemembers stationed abroad. In *Miller*, Justice Stevens wrote that Congress may have been motivated in part by concern "about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children."[213] Justice Kennedy reiterated this population in *Nguyen*, mentioning the "particular significance" of "young people, men for the most part, who are on duty with the Armed Forces in foreign countries."[214]

Justice O'Connor dissented in *Nguyen*, and argued explicitly that the majority opinion rested upon the same type of gendered stereotypes that had been found unconstitutional in other contexts.[215] Justice O'Connor focused upon the importance Justice Kennedy placed on the opportunity for an American-citizen parent and child to develop a relationship rather than an actual relationship, as existed between Nguyen and his father.[216] Justice O'Connor pointed out the obvious, that living in the United States and being raised by his American-citizen parent since the age of five certainly created the relationship that the majority opinion believed was Congress's goal.[217] This was not important simply as a dramatic point regarding the family in question: Justice O'Connor pointed out that "because we require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification."[218] She argued that it was "difficult to see how" focusing upon an opportunity to create a

210. *Id.* at 64–65.

211. *Id.* at 65.

212. *Id.* at 66.

213. Miller v. Albright, 523 U.S. 420, 439 (1998).

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

215. *Id.* at 74 (O'Connor, J., dissenting).

216. *Id.* at 84.

217. *Id.* at 85.

218. *Id.* at 78.

relationship and establishing that opportunity before the child's eighteenth birthday was significant for Congress's alleged purposes rather than showing that a parent-child relationship actually existed.[219] Further, this focus on the opportunity to develop a relationship, rather than a developed relationship itself, "would appear to rest only on an overbroad sex-based generalization"[220]:

> A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.[221]

Significantly, Justice O'Connor acknowledged that the descriptions in both *Miller* and *Nguyen* of what was typical or probable might be accurate as a descriptive matter yet still violate the Constitution.[222] The question, in O'Connor's analysis, was not the accuracy of a stereotype, or whether the stereotype demeaned the group it was applied to, but whether the stereotype used gender as a proxy for "more germane bases of classification."[223] If the goal of citizenship transmission was to grant citizenship only to children who had a relationship with the American-citizen parent that could transmit American culture and values, then courts should ask whether that relationship existed, rather than rely upon generalities and stereotypes about which gender of parent was more likely to create such a relationship.[224]

Justice Kennedy rejected such a summary, arguing that to do so would "fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be."[225] He believed that "[t]he distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class," and thus did not violate equal protection.[226]

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219. *Id.* at 84.

220. *Id.* at 86.

221. *Id.* at 86–87.

222. *Id.* at 89–90.

223. *Id.* at 90 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982)).

224. *Id.* at 84–85.

225. *Id.* at 73 (Kennedy, J., majority).

226. *Id.* at 73.

Multiple lessons can be drawn from this line of cases. First, it is worth noting that the Court's review of immigration statutes, including the transmission of citizenship, is complicated by the plenary power doctrine, instructing that the Court defer to Congress when it regulates immigration.[227] The Supreme Court in *Fiallo v. Bell* "emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[228] One of the reasons that the *Miller* opinion only drew the support of a plurality of the Court was that Justices disagreed about whether the topic was justiciable at all.[229] Although the *Nguyen* Court drew a majority of Justices,[230] the legacy of judicial deference in the area of immigration law is strong, if not controlling.

With that said, however, it is striking that the Court's logic rarely relies upon the plenary power or otherwise refuses to engage with substantive challenges to immigration laws in favor of simply deferring to Congress. Instead, the Court grapples with the questions at hand, imports the unwed-father principles from its family law doctrine, and often relies upon those cases explicitly.

This reliance upon family law doctrine and reasoning appears in modern cases despite the fact that societal and medical changes since the 1970s and 1980s weaken the assumptions upon which the Court's logic rests. As Kerry Abrams and R. Kent Piacenti have pointed out, the INA focuses on the "outdated and pernicious" reliance on "the indelibility of blood" rather than functional relationships between parents and children as the means of transmitting citizenship.[231] Because of this, "the INA creates a perverse system in which children of fathers who have been sued for child support are more likely to be U.S. citizens than children of fathers who voluntarily care for and support them."[232] Similarly, as discussed further below, the proxy of gender for biological or genetic relationship is no longer accurate given advances in medical technology, particularly international surrogacy

227. Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 32 (1998).

228. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

229. *See* Miller v. Albright, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in judgment) ("The complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.").

230. Tuan Anh Nguyen v. INS, 533 U.S. 53, 56 (2001).

231. Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 703 (2014).

232. *Id.* at 697.

and fertility tourism.[233] The factual assumptions of the Court's family law doctrine are by now outdated, yet the Court continues to rely upon them. Were the Court to acknowledge these changes, the repeated criticism in multiple dissents that the Court is using gender as a proxy for another fact would be even stronger.

Finally, it is difficult to agree with the majority opinions that the Court does not rely upon gendered stereotypes in immigration cases imported from family law.[234] The Court's opinions repeatedly discuss the perception that mothers are much more likely to be responsible for their children, as opposed to absentee unwed fathers who may not even be present at the birth. The Court even repeatedly cites the trope of the American soldier having a sexual relationship with a local woman while stationed abroad, then abandoning her and his child to return to America.[235]

It is worth noting, moreover, that it is not simply gender stereotypes that are embodied in immigration law. Kristin Collins has uncovered a deeply racist dimension to the law of transmitting citizenship that used gendered transmission to embody racial preferences and stereotypes as well.[236] As mentioned above, initially *only* men were able to transmit American citizenship to their children, a process consonant with coverture's assumption that a husband was the legal representation of both himself and the rest of his family.[237] (Indeed, historically American-citizen women could lose their citizenship if they married a noncitizen.[238]) As women gained some legal independence and, more importantly, as responsibility for unmarried children shifted to women, laws were changed to allow American mothers to similarly

233. *See* Kristine S. Knaplund, *Baby Without A Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. U. L. REV. 335 (2014); Scott Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47 (2010).

234. *See generally* Antognini, *supra* note 145, at 405 (discussing how the citizenship transmission cases fit into the Supreme Court's general treatment of unwed parents in equal protection jurisprudence).

235. As only one example, consider the well-known opera, *Madama Butterfly*, which depicts the suicide of the geisha Butterfly after Pinkerton, an American Navy servicemember, impregnates and then abandons her. GIACOMO PUCCINI, MADAMA BUTTERFLY (1904).

236. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2230 (2014).

237. *Id.* at 2230–31.

238. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

transmit citizenship.[239] As Congress adjusted which parents could transmit citizenship, however, the differential treatment of the children of American soldiers illustrates Collins's point:

> The disparate treatment of nonwhite children of servicemen renders the Court's formulation especially troubling. Congress and the military marshaled extraordinary political and material resources in order to bring the non-Asian brides and babies of World War II soldiers home to the United States. Meanwhile, military policies that prohibited and limited interracial marriage between U.S. soldiers stationed in Asia and local women frustrated the efforts of those servicemen who sought recognition of, and American citizenship for, their children. This sorry history calls into question the suggestion that a father's lack of an opportunity to bond with his child at birth can reasonably be understood as a "biological inevitability." Instead, it reveals the limitation of citizenship transmission between the American father and his nonmarital foreign-born child as the product of choices of officials charged with enforcing and developing the rules that governed membership in the polity—rules that were constructed and construed in ways that tended to exclude nonwhite children from citizenship.[240]

The tropes upon which the modern Court relies thus embody a legacy of stereotype and prejudice. The Court's opinions largely reject criticism that they rely on gender stereotypes by taking issue with what a gender stereotype is, arguing that stereotypes that are mostly accurate based upon perceived biological difference and do not explicitly demean one gender are constitutionally acceptable. The accuracy and neutrality of these claims are debatable, of course. But it is clear that the claims are fundamentally the same as the arguments first presented in the Court's family law cases.

The Court's analysis of issues arising out of transmission of citizenship is only one example of the impact of the Court's family law doctrine. The next section turns to another, in the context of inheritance.

B. Inheritance Law: Intestate Inheritance of Nonmarital Children

Inheritance law is a natural fit for some doctrinal crossover from family law. The most familiar form of inheritance is from parent to child, so establishing the link between parent and child is a central question in many inheritance issues,[241] and the influence from family

239. *Id.* at 2231–32.

240. *Id.* at 2232.

241. Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 858

law in assessing who is a parent (and how parentage is proven) is significant.[242]

As in family law and immigration law, a thorny issue for inheritance law has been the different treatment of legitimate and illegitimate children. Historically, having children outside of marriage was viewed as morally wrong, and the law reflected this condemnation by treating illegitimate children fundamentally differently than children of married parents.[243] The first question was thus whether *any* parent-child relationship between an unwed parent and his or her child would be recognized in *any* area of law. As American society evolved to be more accepting of the increasing number of children born to unmarried parents,[244] scholars such as Harry Krause argued (with considerable success) that the legal stigma of illegitimacy should be lessened.[245]

The earliest such cases did not arise in family law or inheritance law, but in tort. The earliest cases challenging the legal stigma of illegitimacy to be heard before the Supreme Court largely arose in the context of rights between illegitimate children and their mothers.[246] A series of cases, for example, dealt with whether nonmarital children could sue for the wrongful death of one of their parents, or whether statutes permitting only marital children to bring such claims were constitutional.[247] Beginning in the late 1960s, the Supreme Court found

(2008). *But see* Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835 (2014) (arguing that federal agencies and courts impose federal definitions of family upon states in order to privatize family dependency).

242. For example, after the Supreme Court established that the fundamental right to marry encompassed same-sex spouses in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015), the question was immediately posed whether the family law concept of the marital presumption would apply in the context of inheritance. *See* Paula A. Monopoli, *Inheritance Law and the Marital Presumption After* Obergefell, 8 EST. PLAN. & COMMUNITY PROP. L.J. 437 (2016).

243. *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 350 (2012).

244. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345, 347, 350 (2011).

245. *See, e.g.*, Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

246. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 70–72 (1968) (holding that Louisiana law barring illegitimate child from suing for the wrongful death of her mother was unconstitutional); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968) (holding that Louisiana statute barring mother from suing for the wrongful death of her illegitimate daughter was unconstitutional).

247. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that Texas statute establishing duty of biological father to support legitimate but not illegitimate children violated Equal Protection Clause); Weber v. Aetna

a series of such statutes unconstitutional, explaining that it was "illogical and unjust" to effectively punish children for the perceived immorality of their parents.[248]

Even after the starkest refusals to recognize the parent-child links if the parent was unmarried at the time of the child's birth were ended, the gendered dimensions of unwed parenthood continued to influence questions of inheritance. In other words, one major step was simply to say that nonmarital children should not be universally barred from benefits and rights that marital children held, such as the ability to bring a wrongful death suit upon the death of a parent. Once that line was crossed, and the relationship between illegitimate child and parent could be recognized, the obvious next question was who could be identified as a nonmarital child's parent (and how).

As is now familiar, nonmarital mothers were immediately identified as a legal parent, whereas unmarried fathers were not. Continuing to trace wrongful death claims, for example, the differential treatment has continued. Even relatively recently children have been barred from bringing wrongful death claims if the nonmarital father had not met certain burdens during his lifetime, such as publicly acknowledging his paternity.[249] Reversing the factual basis of the claim, nonmarital fathers are also often barred from bringing a wrongful death claim arising from their child's death if the father has not established his paternity under state law, such as by creating a relationship with the child.[250]

An even clearer example, however, occurs in the context of inheritance law asking when a nonmarital child may inherit from her parent if the parent did not have a will when he or she died. One aspect of statutes that have been repeatedly challenged is the same as in the context of family law and immigration law: whether imposing different burdens of proof of parentage upon fathers and mothers violates the Constitution.

Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (holding that Louisiana statute barring unacknowledged illegitimate children from recovering under worker's compensation laws for death of their fathers violated Equal Protection Clause); Labine v. Vincent, 401 U.S. 532, 533, 539–40 (1971) (holding that Louisiana statute establishing that any wife, ascendants, descendants, or other collateral relations inherited from intestate father to the exclusion of illegitimate children did not violate Equal Protection Clause). *See generally* Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL'Y & L. 437 (2012).

248. *See* Appleton, *supra* note 243, at 354.

249. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 85 (2003).

250. *See id.* at 85–86.

A second issue, however, is unique to inheritance law and introduces additional dimensions of gendered stereotypes. One of the principles of intestacy is to distribute the estate in the way that the deceased person would have wanted. Statutes establishing who can inherit from an intestate person, therefore, are a legislature's perception of the testator's intent as to such categories of people.[251]

As a general rule, children born to unmarried mothers inherit if the mother dies intestate—yet states impose additional requirements as to an unmarried father's actions during life to acknowledge or support his child before such a child may inherit if the father dies intestate.[252] Part of the justification for such additional requirements is to establish the nonmarital father's paternity, but another part is that such fathers would not want their children to inherit, logic that plays into the second-stereotype unwed-father principle's perception of unwed fathers as uncommitted unless proven otherwise.

What evidence is sufficient to prove paternity for the purpose of inheritance varies state by state. Some focus upon a prior legal recognition of paternity, such as adjudications of paternity or formal acknowledgments of paternity in something like a court filing.[253] Such adjudications sometimes, but not always, include agreements to provide child support.[254] A common requirement to establish nonmarital paternity is that the father publicly recognized the child as his own during the father's lifetime,[255] sometimes that the father acknowledged the child and did not refuse to support the child.[256]

The Supreme Court heard a handful of cases challenging such statutes under the Equal Protection Clause beginning in the late 1970s.[257] The cases are complicated as they simultaneously raise two potential equal protection concerns: one is the differential treatment of a child's relationship with unwed mothers versus fathers, but in addition, children of unmarried parents are subject to different

251. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 3 (2000).

252. Camille M. Davidson, *Mother's Baby, Father's Maybe—Intestate Succession: When Should a Child Born out of Wedlock Have a Right to Inherit from or Through His or Her Biological Father?*, 22 COLUM. J. GENDER & L. 531, 534–35, 547–48 (2011).

253. *See* Maldonado, *supra* note 244, at 357.

254. *Id.*

255. *Id.* at 358.

256. Linda Kelly Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance*, 13 WM. & MARY J. WOMEN & L. 129, 134–35 (2006).

257. *See id.* at 143.

inheritance requirements than the children of married parents.[258] Both classifications on the basis of sex and on the basis of legitimacy trigger heightened scrutiny under the Constitution, but the evaluation of what goal the state is pursuing and how related the classification is to that goal can vary considerably depending on whether the claim is framed as legitimacy or gender.[259] Regardless of the overlapping claims, the inheritance challenges echo the very same unwed-father principles discussed above: a concern for the proof of a biological relationship and the existence of a parent-child relationship. The second concern is magnified in the context of inheritance law by speculating as to the unwed father's intention for his child in a way that demonstrates the power of the stereotype of unengaged, uninvolved unmarried fathers.

The first case arose when a man named Sherman Gordon was murdered.[260] At the time of his death, Gordon had been living with Jessie Trimble for four years, along with their daughter Deta Mona Trimble.[261] Gordon acknowledged Deta as his daughter and was in compliance with a child support order and an accompanying paternity order concerning Deta.[262]

Had Gordon and Trimble been married, Gordon's estate would have passed to Deta.[263] Because the two were unmarried, however, Deta could not inherit: under Illinois law, illegitimate children inherited only from intestate mothers, not their fathers.[264] Deta argued that this distinction violated the Equal Protection Clause as unconstitutional classifications both on the basis of legitimacy and sex.[265]

The relevant provisions of the Illinois Probate Act had been challenged before in Illinois courts, and the state had previously explained the gender distinction by the fact that it was easy to establish maternity through the fact of birth, as compared to a more difficult and burdensome process of proving paternity.[266] Additionally, the Illinois Supreme Court had reasoned that the probate statute did not prevent nonmarital children from inheriting, as they would inherit so long as

258. *See id.* at 144.

259. *See id.* at 146.

260. Trimble v. Gordon, 430 U.S. 762, 764 (1977).

261. *Id.*

262. *Id.*

263. *Id.* at 764–65.

264. *Id.*

265. *Id.* at 765.

266. *Id.* at 770.

their father wrote a will.[267] Any inability to inherit was therefore due to the father's choices, and not the state's actions.

The Supreme Court struck down the Illinois law, primarily on the basis that it imposed an unconstitutionally unequal burden on illegitimate children who were effectively barred from inheriting from an intestate father.[268] Justice Powell, writing for the Court, also noted Illinois's argument regarding the intent of unwed fathers:

> [A]ppellees urge us to affirm the decision below on the theory that the Illinois Probate Act . . . mirrors the presumed intentions of the citizens of the State regarding the disposition of their property at death. Individualizing this theory, appellees argue that we must assume that Sherman Gordon knew the disposition of his estate under the Illinois Probate Act and that his failure to make a will shows his approval of that disposition.[269]

The position of the state of Illinois was therefore that a man who had lived with his child and helped raise her from her birth until his death, who had been officially adjudicated as her father and was meeting his child support obligation, who acknowledged her as his daughter publicly, nonetheless indicated through his failure to write a will that he intended to disinherit that same child.[270] The Court said it need not resolve whether such a presumed intent could justify discrimination against illegitimate children, as such an intent was not actually the goal of the Probate Act, but did not criticize the underlying assumption.[271]

One year later, another intestate inheritance case came before the court in *Lalli v. Lalli*.[272] The case was brought by Robert and Maureen Lalli, who claimed that they were the illegitimate children of Mario

267. *Id.* at 766 (citing *In re* Estate of Karas, 329 N.E.2d 234 (Ill. 1975)).

268. The Court declined to apply strict scrutiny; instead it held that the statute was invalid under the Fourteenth Amendment if it is not substantially related to permissible state interests. *Id.* at 766–67.

269. *Id.* at 774.

270. *Id.* Additionally, this assumes that the average Illinois father would be aware of the legal requirement that he write a will rather than the probably more realistic assumption that having been adjudicated as Deta's father, their relationship was clear and Deta would be able to inherit whether he wrote a will nor not. This is, of course, ignoring the even more basic question of how many Illinois parents have the resources or knowledge to write a will, particularly when their estates are meager—Gordon's entire estate was a car. *Id.* at 764.

271. *Id.* at 774–75.

272. 439 U.S. 259 (1978).

Lalli and an unnamed woman.[273] Their mother had died in 1968, and Mario Lalli died intestate in 1973.[274] Mario's widow Rosamond was the executor of the estate and opposed their claims.[275]

Under New York law, an illegitimate child was deemed "the legitimate child of his father so that he and his issue inherit from his father" if a court adjudicated the paternity of the father during the pregnancy or within two years' of the child's birth.[276] No such adjudication took place during Mario's lifetime, although Mario apparently acknowledged that Robert and Maureen were his children, including referring to Robert as "my son" in a notarized affidavit.[277] Because the New York law barred Robert from inheriting, he challenged the statute as discrimination against illegitimate children in violation of the Equal Protection Clause.[278]

Justice Powell again wrote for the Court to uphold New York's law. He argued that the New York law could be distinguished from the unconstitutional law in *Trimble v. Gordon*, which was too broad a bar against the inheritance of illegitimate children who were thus made subject to an "exceptional burden."[279] By contrast, the Court described the New York statute as an evidentiary requirement.[280]

The evidence required, of course, was a prescribed method of establishing paternity, here to ensure that property was fairly and efficiently distributed after someone's death.[281] In explaining why the additional evidentiary burden was necessary for unwed fathers, Justice Powell repeated the familiar explanation of the first unwed-father principle: maternity is immediately established, as birth is recorded by the state and generally takes place in front of witnesses.[282] By contrast, an unwed father might not be aware of and might not care about the child, "because of the absence of any ties to the mother."[283] Justice Powell noted that a father in a similar position as Mario Lalli, who willingly acknowledged his illegitimate children, could simply waive any

273. *Id.* at 261.

274. *Id.*

275. *Id.*

276. *Id.* at 261–62.

277. *Id.* at 262–63.

278. *Id.* at 262.

279. *Id.* at 266–67 (citations omitted).

280. *Id.* at 267.

281. *Id.* at 267–68.

282. *Id.* at 268 (citations omitted).

283. *Id.* at 269 (citations omitted).

defense to a paternity adjudication or begin the adjudication himself.[284] It was constitutional, in any case, for New York to choose an adjudication of paternity as the only method by which paternity could be established for the purposes of inheritance.

Justice Brennan, writing in dissent for the four Justices in minority, found this profoundly unrealistic. His dissent began pointing out that all of the interested parties in the case agreed that Robert Lalli was in fact Mario's son.[285] The only reason Robert would not inherit was because Mario, who had acknowledged and supported his son throughout his life, had not separately instituted a paternity adjudication against himself.[286] Brennan pointed out some of the many reasons that this expectation was particularly unrealistic for unwed fathers who had already acknowledged their children and assumed parental responsibilities:

> Social welfare agencies, busy as they are with errant fathers, are unlikely to bring paternity proceedings against fathers who support their children. Similarly, children who are acknowledged and supported by their fathers are unlikely to bring paternity proceedings against them. First, they are unlikely to see the need for such adversary proceedings. Second, even if aware of the rule requiring judicial filiation orders, they are likely to fear provoking disharmony by suing their fathers. For the same reasons, mothers of such illegitimates are unlikely to bring proceedings against the fathers. Finally, fathers who do not even bother to make out wills (and thus die intestate) are unlikely to take the time to bring formal filiation proceedings. Thus, as a practical matter, by requiring judicial filiation orders entered during the lifetime of the fathers, the New York statute makes it virtually impossible for acknowledged and freely supported illegitimate children to inherit intestate.[287]

Four members of the Court acknowledged that the children of fathers taking precisely the action deemed significant in the context of family law—acknowledging their paternity and voluntarily assuming roles as active fathers—were those most likely to be harmed by New York's requirement.[288] Yet because the statute was cast as an evidentiary requirement rather than as an absolute bar, it did not run afoul of the Equal Protection Clause.

284. *Id.* at 273 (citations omitted).

285. *Id.* at 277 (Brennan, J., dissenting).

286. *Id.*

287. *Id.* at 278.

288. *Id.* at 277–78.

Finally, in 1986 the Court decided *Reed v. Campbell*,[289] which largely retread *Trimble's* holding. Texas law instituted virtually the same requirement as the Illinois statute in *Trimble*: illegitimate children could not inherit from their father unless the father and mother later married each other.[290] This requirement was plainly unconstitutional after *Trimble*, but the deceased father in *Reed* died four months before *Trimble* was issued.[291] Texas argued that *Trimble* could not be applied retroactively, and thus the child could not inherit. The Supreme Court disagreed, as the child's inheritance claim was filed after *Trimble*, and thus the trial court had the case as precedent when evaluating her claim to her intestate father's estate.[292]

The Court's analysis in challenges to intestate inheritance claims brought by nonmarital children generally focuses upon the nonmarital element of the child's claim, that their inheritance right is significantly different than it would have been had the parents been married. This focus is certainly understandable, particularly since the effect of the typical statute is to punish a child for the choices of adults over whom the child has absolutely no control.[293] But the cases also hold the seeds of the unwed-father principles that the family law cases, arising nearly contemporaneous with the inheritance cases, developed into a full theory justifying differential treatment of unwed fathers and mothers. Moreover, because the first-order problem of inheritance cases has to do with legitimacy, the Court fails to interrogate the second-order problem of gender stereotypes, and instead leaves them as unquestioned assumptions.

The first biological unwed-father principle, that fathers are harder to identify than mothers who are present at birth, operated in the inheritance cases as justifying an efficient method of property distribution.[294] This might have been true in the 1970s, but is no longer so today—indeed, Paula Monopoli argues that a better intestacy regime would be to assume that if the child can prove a genetic link, then the child can inherit from that nonmarital parent, and any nonmarital parent who does not like that default may write a will.[295]

The second-stereotype unwed-father principle, that unwed fathers are generally unwilling and unlikely to take on responsibility for their

289. 476 U.S. 852 (1986).

290. *Id.* at 853 & n. 2.

291. *Id.* at 853.

292. *Id.* at 853, 856.

293. *See* Maldonado, *supra* note 244, at 358.

294. *See supra* Part II.B; Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting); Appleton, *supra* note 243, at 358.

295. Monopoli, *supra* note 241, at 875–76, 881–88.

children, motivated Illinois's argument that intestacy statutes excluding nonmarital children are simply expressing the presumed intent of the nonmarital fathers. The stricter requirements in Illinois and Texas reinforced another dimension of this assumption: the way an unmarried father could demonstrate his commitment to his child was not through supporting the child or developing a relationship with the child, but by marrying the mother.[296]

Immigration and inheritance law are hardly the only fields of law where gender stereotypes about fathers and mothers motivate gendered differences in the law. They are two of the clearest examples, however, of how and why the constitutional doctrine accepting such stereotypes as unproblematic reverberates throughout the law in ways that make that doctrine harmful even as state-level parentage statutes have moved beyond it. The next Part explains a methodology and substantive principles as to how the doctrine can and should change, through a modern reevaluation of the Equal Protection claims.

III. Constitutionalizing Fatherhood: Taking Equal Protection and Gendered Parenthood Seriously

The Court's approval of different treatment of unwed mothers and fathers may seem like a relatively narrow field with few real-world consequences, but the previous Part has illustrated two examples of how the assumptions underlying the Court's reasoning underlie other gendered distinctions in different areas of law. These assumptions should be revisited in the context of family law so that a beneficial conceptual impact can spread in the same fashion: a firm statement of gender-neutral parenting rules will undercut gendered distinctions in other fields of law. Parentage statutes should be reevaluated under the Equal Protection Clause and found unconstitutional to the extent that they treat unwed fathers and mothers differently.

One justification for revisiting the parentage cases could simply be that the assumptions have been proven inaccurate. The unwed-father principles are simply obsolete, given changes to modern society and medical developments. The first principle, that biological mothers are easy to identify at the moment of birth whereas fathers are not, is certainly no longer true given the rise of egg donation and surrogacy and the much easier process of genetic testing to identify a father.

Furthermore, the focus upon pregnancy as the moment that a biological mother is identified highlights the problem of pregnancy exceptionalism. Feminist scholars have roundly criticized the idea that some classifications based on sex are justified by benign biological

296. *See* Appleton, *supra* note 243, at 359; Murray, *supra* note 139, at 389–90.

differences and are thus unproblematic.[297] For too long, courts have treated pregnancy as synonymous with motherhood. This obscures adoptive parents, intended parents having children through surrogacy, female partners of pregnant women, and fathers as equal parents. The idea that the pregnant woman is the first parent, and any others might be added through additional rules, is both medically and socially no longer tenable.

The second unwed-father principle, the stereotype that men are reluctant to become fathers, is similarly harmful. Over and over the Court points to biological differences (pregnancy and the moment of birth) to justify stereotypes about fathers as unwilling parents who must be pressured or coerced into parenthood, as opposed to mothers who are constitutional mothers from the moment they give birth.

It is not enough, however, to simply revisit the question of unwed fathers' constitutional rights and find that the unwed-father principles are less accurate than previous Courts believed.[298] In order to treat fathers as equal constitutional parents—in order to constitutionalize fathers in a way they currently are not—the frame of analysis must be the Equal Protection Clause. Moreover, recent Supreme Court precedent indicates a path as to how to do so. The next Section outlines the theory of such a claim.

A. How to Constitutionalize Fathers

The constitutional status of a parent is, if taken in the abstract, a fundamental liberty right. Yet, to describe the problem of differential recognition of the constitutional status of unwed fathers and mothers as purely a fundamental rights question does not address the actual harm. Most obviously, unwed biological fathers have not been categorically excluded from parentage, so the problem is not a wholesale exclusion. Instead, legal parentage as a fundamental right is a bit of a catch-22: in order to be identified as a legal parent, a person must have a statute identifying them as such. But in order to challenge a state action as violating their rights as a parent, or not recognizing their rights as a parent, they must be a legal parent. This was the dilemma

297. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 39 (1995); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 270 (1992).

298. Nancy Dowd has pointed out the impact that societal conceptions of masculinity have upon caregiving responsibilities. *See* Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1052–59, 1062–66 (2012). Examining only the accuracy of stereotypes thus misses forces causing the stereotypes to play out in real life. *See* Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 526–30 (1996).

in which Michael H. found himself, when the Court rejected his assertion of a fundamental right:

> Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria.[299]

Justice Scalia then concluded that because men in Michael's position had not previously been statutorily identified as legal fathers, Michael could not plausibly claim a fundamental right as father.[300] Extending a fundamental right to people who have previously not been granted that right or status under statutes is an uphill battle, at least to those Justices who share Justice Scalia's view of fundamental rights.

Equal protection analysis, however, need not focus upon who has traditionally held fundamental rights, or even map out all of the dimensions of a fundamental right. In *Obergefell v. Hodges*, Justice Kennedy explained that previous cases "inquired about the right . . . in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."[301] Considering the importance of legal parentage, is there a sufficient justification for treating unwed biological fathers differently than unwed biological mothers?

This question more accurately addresses the harm caused by differential treatment of unwed fathers and mothers. Framing gendered treatment of parents as an equal protection problem addresses the gender stereotypes underlying the family law cases that impact other areas such as immigration and inheritance law. If the sole change to constitutional analysis is viewed as the fundamental right to the care of your children, then the change would echo only in family law. It is both more accurate and more effective, therefore, to focus on the equal protection claim.

Obergefell, the 2015 case establishing that the fundamental right to marry must be granted to same-sex couples,[302] demonstrates both the potential problem and the promise of choosing which claim leads when both fundamental rights and equal protection issues are implicated. Justice Kennedy's opinion begins by noting the "transcendent

299. Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

300. *Id.* at 123–24.

301. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

302. *Id.* at 2607.

importance of marriage,"[303] but immediately notes that marriage is characterized by both "continuity and change"[304] alongside societal evolution. Moreover, Justice Kennedy cites not simply changes in the legal definition and societal understanding of marriage, but also changes in legal and societal treatment of LGBTQ people.[305]

Justice Kennedy then turned fully to the right to marry, reading past cases describing marriage as a fundamental right to identify "essential attributes" of the right.[306] He outlined four principles and traditions of marriage that form the core of its importance as a fundamental right and reasoned that the four principles applied "with equal force to same-sex couples."[307]

Denying the fundamental right to marry had inescapable equality dimensions in the eyes of the Court: because marriage was such an important social institution, refusing to allow same-sex couples to marry signaled the inequality of those couples,[308] imposing "stigma and injury of the kind prohibited by our basic charter."[309] Justice Kennedy further explained the link between the fundamental right and equality:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[310]

Evolutions in societal understandings, Justice Kennedy argued, meant that the Equal Protection Clause could "reveal unjustified inequality within our most fundamental institutions that once passed

303. *Id.* at 2594.

304. *Id.* at 2595.

305. *Id.* at 2595–97.

306. *Id.* at 2598.

307. *Id.* at 2599–601.

308. *Id.* at 2601–02.

309. *Id.* at 2602.

310. *Id.* at 2602–03 (citations omitted).

unnoticed and unchallenged."[311] After giving several examples of past cases striking down sex-based classifications within marriage, which Justice Kennedy described as demonstrating the "interlocking nature of these constitutional safeguards,"[312] he argued:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.[313]

Justice Kennedy concluded by referencing both threads of constitutional analysis, finding that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[314] The sentence that arguably most clearly gives a holding for the decision, however, only says that "same-sex couples may exercise the fundamental right to marry."[315]

Many early reactions to *Obergefell* read the decision to rely solely on the Due Process Clause and marriage as a fundamental right. Some advocates criticized the narrowness of Justice Kennedy's focus, and advocates fighting for LGBTQ equality in other areas immediately attempted to cabin its application to marriage alone.[316] Even though Kennedy's opinion for the Court discussed the stigma of not allowing people to marry their same-sex partners and how this demeaned any deviation from heterosexual norms, some states felt empowered to argue that the case did not apply to statutes barring same-sex couples from adopting, reasoning that the involvement of children took that issue out of *Obergefell*'s ambit.[317] Notably, the Supreme Court apparently

311. *Id.* at 2603.

312. *Id.* at 2604.

313. *Id.*

314. *Id.*

315. *Id.* at 2604–05.

316. Collins, *supra* note 150, at 199–200.

317. Campaign for S. Equal. v. Miss. Dep't of Human Serv.'s, No. 3:15-cv-578-DPJ-FKB, 2015 WL 5925931 (S.D. Miss. Sept. 11, 2015) ("In contrast to the fundamental right to marriage at issue in *Obergefell*, it is well-settled that Mississippi's adoption laws confer a statutory privilege, not a

disagreed with such a narrow reading, citing *Obergefell* to find in a per curiam opinion that states could not apply the marital presumption only to opposite-sex spouses.[318]

If that limitation is *Obergefell*'s danger, the case also provides a methodological approach to cases involving unequal applications of fundamental rights. Justice Kennedy's opinion explicitly and repeatedly relies upon the Equal Protection Clause, the significance of the *unequal* availability of a fundamental right, and the message that denying a fundamental right to a specific group sends.

Justice Kennedy also draws significant support from how changing societal and broader legal norms can help to identify such unequal treatment of fundamental rights. This signals what Courtney Joslin has called "dynamic constitutionalism," reflecting "legal, cultural, and social developments."[319] Justice Kennedy embraced this dynamism, explaining that "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[320]

Some key questions to answer in the context of the constitutional rights of unwed biological fathers can thus be drawn from *Obergefell*'s method: has legal and societal understanding of parenting and the parent-child relationship changed in the last few decades in a way that reveals unjustified inequality? What about parenting makes it a fundamental right, and are any of those characteristics central only to mothers and married fathers? What messages does it send to treat unwed biological fathers so differently under the Due Process Clause?

Another more recent Supreme Court case helps to answer these questions. In 2017, the Court decided *Sessions v. Morales-Santana*, again addressing a dimension of citizenship transmission.[321] The lawsuit challenged a sub-issue: rather than facially challenging the greater burden placed upon unwed biological fathers to legitimate their children before a certain age, Luis Ramón Morales-Santana challenged residency requirements applied to American-citizen fathers.[322] At the time that the statute was applied to his father, an American-citizen father had to be physically present in the United States for ten years, five of which

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fundamental constitutional right to adopt protected by the Due Process or Equal Protection Clauses. . . . Section 93-17-3(5) likewise does not implicate any fundamental due process right to 'family integrity.'").

318. *See* Pavan v. Smith, 137 S. Ct. 2075 (2017).

319. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 454 (2017).

320. *Obergefell*, 135 S. Ct. 1039, 2598 (2015).

321. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

322. *Id.* at 1687.

had to be after the age of fourteen.[323] Americancitizen, unwed mothers, however, could transmit citizenship if they had lived in the United States for only one year.[324] The facts were particularly dramatic in the case: José Morales, Morales-Santana's father, had lived in Puerto Rico for his entire life, but moved to the Dominican Republic (and thus outside of the United States, although he moved to take a job with an American company) a mere twenty days before his nineteenth birthday.[325] Morales-Santana was born in the Dominican Republic to Morales and Yrma Santana Montilla, with whom Morales had been living for three years.[326] Morales and Montilla married when Morales-Santana was eight years old, and Morales-Santana's birth certificate was amended to list Morales as his father.[327] Morales-Santana moved to the United States when he was thirteen years old, and lived there for twenty-five years until he was placed in removal proceedings.[328] Had Morales moved from Puerto Rico to the Dominican Republic three weeks later, Morales-Santana would have been eligible to receive American citizenship through his father. Similarly, had Morales been the *mother*, instead of the father, Morales-Santana would have been eligible to receive American citizenship, as the statute required only one year of physical presence in the United States for a mother to be able to pass American citizenship on to her child.[329] Because of the gendered difference in the physical presence requirement, however, Morales-Santana was not eligible to receive American citizenship as the child of an American citizen and was ordered removed by an immigration judge to the Dominican Republic.[330]

The Second Circuit reversed the immigration judge's decision and held that the gendered physical presence requirements violated the Fifth Amendment's guarantee of equal protection.[331] This created a circuit split with the Ninth Circuit,[332] in a case that the Supreme Court

323. *Id.*

324. *Id.* at 1686.

325. *Id.* at 1687.

326. *Id.* at 1688.

327. *Id.*

328. *Id.*

329. *Id.* at 1687.

330. *Id.* at 1688.

331. Morales-Santana v. Lynch, 804 F.3d 520, 523–24 (2d Cir. 2015).

332. United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011).

heard but split evenly as to the result, thus affirming the Ninth Circuit's decision.[333]

Justice Ginsburg's opinion for the Court in *Morales-Santana*, immediately focuses on the heart of the substantive equality issue: that the gendered physical presence requirement and other such gendered differences "date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are."[334] She criticized the past justifications of such laws as reliant upon the "familiar stereotype" that unwed fathers "would care little about, and have scant contact with, their nonmarital children."[335] By contrast, the "unwed mother is the natural and sole guardian of a non-marital child."[336] Justice Ginsburg described such stereotypes as "stunningly anachronistic," particularly as compared with the modern equal protection doctrine applying heightened scrutiny to gender-based classifications.[337]

Notably, Justice Ginsburg's opinion does not address the gendered distinction at the heart of unwed parent cases.[338] The case deals only with the physical presence requirement,[339] and Justice Ginsburg contrasts the requirement for unwed mothers and "fathers *who have accepted parental responsibility*," not unwed fathers generally.[340] Further, although the Court found that the gendered physical presence requirement violated the Constitution,[341] Justice Ginsburg concluded that the Court could not prevent Morales-Santana's removal by

333. Flores-Villar v. United States, 564 U.S. 210 (2011) (Kagan, J., recused).

334. *Morales-Santana*, 137 S. Ct. at 1689.

335. *Id.* at 1692.

336. *Id.* at 1691.

337. *Id.* at 1693.

338. *Id.* at 1694 ("Unlike the paternal-acknowledgment requirement at issue in *Nguyen* and *Miller*, the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child.").

339. *Id.* Justice Ginsburg noted that Morales-Santana "does not renew the contest over [the] paternal-acknowledgment requirement . . . , and the Government does not dispute that Morales-Santana's father, by marrying Morales-Santana's mother, satisfied that requirement." *Id.* Note, however, Albertina Antonigni's perceptive interrogation of why fathers and mothers would need a different physical presence requirement, tying the residency requirement to a perception of mothers as present and fathers as absent. Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J. L. & GENDER 405, 447–49 (2013).

340. *Morales-Santana*, 137 S. Ct. at 1693 (emphasis added).

341. *Id.* at 1698.

granting him citizenship.[342] Instead, the Court "level[ed] down"[343] by declaring that the *longer* physical presence requirement must be applied to all American-citizen parents, rather than only to fathers.[344]

Despite the limited holding and relief, however, the Court's opinion gives considerable guidance to the evaluation of constitutional parental rights. Historical gendered treatment of fathers and mothers was referred to as "the once entrenched principle of male dominance in marriage,"[345] a legacy that has been formally eliminated through *Obergefell*'s grant of marriage equality to same-sex couples.[346] Justice Ginsburg cited her opinion in *United States v. Virginia*[347] to reiterate the Court's "suspicion" of "overbroad generalizations" about genders.[348] Generalization about domestic roles creates "a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver,"[349] and "disserve[s] men who exercise responsibility for raising their children."[350]

Even in a decision of limited scope, therefore, *Morales-Santana* provides some of the substance to fill out *Obergefell*'s methodology. *Obergefell* identifies a fundamental right and asks whether the classification in question has any relationship to the right that would justify limiting the right's availability consonant with the Equal Protection Clause. *Morales-Santana* points to the gendered stereotypes traditionally used to treat mothers and fathers differently and rejects them as illegitimate and violating equal protection. The principle is clear: differential treatment of unwed mothers and fathers is unconstitutional under the equal protection principles of the Fifth and Fourteenth Amendments. To treat unwed parents differently according to their sex is an impermissible use of stereotype as a proxy for unrelated government interests. Such different treatment, be it in family law, immigration law, inheritance law, or others, must be rejected.

342. *Id.*

343. *See* Collins, *supra* note 150, at 175.

344. *Morales-Santana*, 137 S. Ct. at 1701.

345. *Id.* at 1691.

346. *Morales-Santana* was the first case post-*Obergefell* addressing nonmarital families. *See* Collins, *supra* note 150, at 174, 199–200.

347. 518 U.S. 515 (1996).

348. *Morales-Santana*, 137 S. Ct. at 1692 (citing United States v. Virginia, 518 U.S. 515, 531 (1996)).

349. *Id.* at 1693 (quoting Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003)).

350. *Id.*

This approach acknowledges the fundamental right of the parent-child relationship but does not rely upon only the fundamental right to challenge differential treatment of unwed fathers and mothers. By explicitly framing the question under the Equal Protection Clause, the gendered stereotypes upon which the differential treatment rests can be addressed directly: the unequal treatment of unwed fathers and mothers reflects outdated legal and social understandings.

Obergefell's identification of the core of a right can also be performed as to parentage in a way that further flags the unequal treatment of unwed fathers and mothers. Statutory parental laws are surprisingly inconsistent in identifying what parents are good parents or why parents are important.[351] The Supreme Court gives some more guidance in its cases addressing the fundamental rights of parents, reinforcing a few different values.

A key thread is the importance of transmitting values and knowledge to one's children. A number of the earliest parental rights cases arose in the context of laws regulating schools, so it is unsurprising that the Court repeatedly discussed the importance of "the power of parents to control the education of their own,"[352] to "direct the upbringing and education of children under their control,"[353] and "give [their] children education suitable to their station in life."[354] The importance of educating children as to values was also emphasized, such as "the inculcation of moral standards, religious beliefs, and elements of good citizenship"[355] and "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief[.]"[356] Parents provide this education to equip their children for the "additional obligations"[357] of adulthood.

Another common concern is the ability of parents to establish a private home, seeing decisions made within the home about the family as an extension of the broader right to privacy. Raising children is seen

351. Purvis, *supra* note 4, at 217–22.

352. Meyer v. Nebraska, 262 U.S. 390, 401 (1923); *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

353. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925).

354. *Meyer*, 262 U.S. at 400.

355. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

356. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

357. *Pierce*, 268 U.S. at 535; *see also Prince*, 321 U.S. at 166.

as paired with "establish[ing] a home,"[358] and as part of the "freedom of personal choice in matters of family life."[359]

Interestingly, in the context of a potential termination of the parental right, the Court concluded that "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."[360] To some extent preventing the destruction of their family life underlies a number of the parental rights cases—for example, although a statute requiring the public schooling of Amish children longer than their parents wished primarily discussed the right of parents to control their children's education, the perceived danger of the additional years of public schooling included a sense that the state was replacing its own judgment for that of the parents and teaching the children values contrary to those their parents would choose.[361] Yet the relevance of strained blood relationships nonetheless generating a vital interest in preserving family relationships is particularly pointed when considering the constitutional rights of unwed biological fathers.[362]

The Court has summarized these principles as "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child,"[363] later slightly paraphrased as the "care, custody, and control of their children."[364] It is clear that these principles have nothing to do with the gender of the parent involved, nor with whether the parents are married. Nothing about the fundamental right justifies limiting the right to married parents and unwed mothers. The result of the differentiation is to underscore gendered stereotypes that men do not want to be fathers and do not want to be engaged parents. This is unconstitutionally unequal.

B. Implementation

Treating fathers and mothers equally results in a single principle when evaluating parentage statutes: they must be provided equal opportunity to assert and prove legal parentage. This does not mean that any single parentage rule must be used to the exclusion of other

358. *Meyer*, 262 U.S. at 399.

359. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

360. *Id.*

361. *See, e.g.*, *Yoder*, 406 U.S. at 212–15.

362. Note, however, that Katharine Baker has argued that progressive attempts to eliminate the legal stigma of illegitimacy unintentionally overemphasized biological connections between parents and children, in a manner that today can harm nontraditional families. *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1682 & n.192 (2015).

363. *Santosky*, 455 U.S. at 753.

364. Troxel v. Granville, 530 U.S. 57, 65 (2000).

rules. Indeed, equalizing parentage between fathers and mothers allows states to continue their statutory reform and enables states to be flexible in adapting parentage rules to new technologies and new family formation norms. The consequence of the principle equalizes rules between fathers and mothers and is not about prioritizing biology or function over others in defining the fundamental right of parentage.

Applying equal protection principles to parentage statutes also does not mean that *all* fathers must be treated the same as *all* mothers in all circumstances. For example, equal protection does not mean that giving birth to a child cannot be one method by which legal parentage might be established. It does, however, mean that the fact that most mothers give birth to their children cannot become a proxy rule applying to *all* mothers and *all* fathers. If pregnancy and giving birth is a relevant fact, then statutes must use that fact and not a sex or gender.

Furthermore, to the extent that pregnancy *is* used, the legislative body using pregnancy as a rule of parentage must be clear about why. If pregnancy is used as shorthand for a genetic connection to the child, then nonpregnant parents must be allowed an opportunity to show their own genetic connection and be treated as equal with the pregnant parent. If pregnancy is used as a proxy for an opportunity to have a relationship with the child, then the nonpregnant parent who is present at birth must be treated as equal with the pregnant parent.

Application of equal protection does not mean that one rule or theory of parentage must be applied above others, such as genetic connection outweighing functional theories. Changes to medical technologies, social realities, and laws affecting the regulation of families in other areas make identifying legal parents in a way that is helpful and progressing along with American families a moving target.

As mentioned earlier, rules of parentage such as the marital presumption can easily be applied in a gender-neutral manner, and progressive application of the marital presumption to same-sex couples has made it easier for female spouses of women who give birth to be identified as the second legal mother from the time of birth. Equalizing parentage rules between men and women would also provide more avenues for fathers in same-sex relationships, as well as all unwed partners.

There is one group of parents that could be negatively affected: adoptive parents, at least those who adopt with only the consent of an unmarried mother. This is a relatively small group for practical purposes, since unmarried fathers have more avenues to assert their legal parentage under state law than before. There are some circumstances, however, where an infant could be placed for adoption without the father's knowledge or consent, either because the father is unaware of the pregnancy or because the mother took advantage of a safe haven law. Such laws establish locations where infants can be safely abandoned into the custody of the state without the abandoning parent

being charged with neglect.[365] Crucially, however, the laws are gender neutral: they do not establish that only *mothers* may leave children in such safe havens, nor that the father's consent is unnecessary. Such laws thus do not necessarily present an equal protection problem, but rather a question of whether the ability of one parent to relinquish a child without identifying the other parent violates the fundamental right of the other parent.

The advantage of dynamic constitutionalism is that it allows courts to acknowledge application of core rights to novel and changing scenarios, and application of equal protection does nothing to change that. Application of equal protection also allows for experimentation between states as well as different policy goals to justify different rules at the state versus federal level. But whatever theories of parentage Congress or state legislatures apply, they must not use sex or gender stereotypes as a proxy for nongendered facts.

C. Potential Objections

As a first line response, there are many self-identified feminist scholars who argue that differential treatment of mothers and fathers is appropriate or desirable for the law. Mary Becker described "a conspiracy of silence [that] forbids discussion of what is common knowledge: mothers are usually emotionally closer to their children than fathers"[366] in the context of arguing that courts should defer to a mother's decision as to custody arrangements for children at divorce.[367] Katharine Silbaugh wrote of her concern that constitutionalizing a formal equality approach would prevent experimentation with parentage rules, potentially including maternalist perspectives and rules.[368] This perspective is obviously fundamentally at odds with this Article's thesis, that unwed fathers and mothers should be treated equally under the law in parentage determinations. The thesis, however, is a feminist one: to the extent that parentage laws underscore gender stereotypes, particularly the second-stereotype unwed-father principle that men are unwilling fathers, those gender stereotypes are also wielded against women. The argument that women are more natural or more skilled mothers, in other words, supports propositions that women be encouraged or coerced to take on more caregiving responsibilities, that women's economic activity is less important than their caregiving

365. Purvis, *supra* note 142, at 678.

366. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 137 (1992).

367. *Id.* at 139. Becker acknowledged that fathers could perform similar caregiving work and potentially form emotionally close relationships with their children but referred to those fathers as "mother[ing]." *Id.* at 150.

368. Katharine B. Silbaugh, Miller v. Albright*: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139, 1156 (1999).

activities, and that the historical division of labor pushing men towards the workforce and women towards the home has roots in truth rather than mere stereotype. In my previous work, I have identified myself as a social constructionist feminist scholar, and this argument continues my work in that vein.[369] This may not convince feminists who support differential gendered treatment, but at least the basis of our disagreement is clear.

A second vein of criticism is best represented by Jennifer Hendricks, who has criticized what she terms "genetic essentialism" in laws regulating parentage, meaning "an emphasis on genes as the essence of parenthood."[370] Hendricks argues that existing treatment of unwed biological fathers "already accommodates men's unique biology" more than women's, so equality between the sexes does not require incorporating a genetic relationship into the legal or constitutional definition of parentage.[371] As Hendricks explains, "[a]s a matter of formal sex equality, a genetic tie alone need not confer parental rights. As the Supreme Court has held, the man with a merely genetic tie is not similarly situated to the woman who has given birth."[372] As discussed above, however, Hendricks is factually correct: being pregnant and giving birth to a child, while usually occurring simultaneously with being the genetic mother of a child, is not necessarily the case. A gestational surrogate is clearly not similarly situated with a man whose sperm was used to create the fetus. To the extent that one is persuaded that genetic essentialism is a harm, that speaks to the *substance* of parentage laws and whether any genetic connection to a child should be included. It does not determine, however, whether existing laws treat men and women *equally*. I argue that it would be constitutional, in other words, for a state to create a parentage scheme that eliminated genetic ties entirely, as long as each substantive rule is not used as an imperfect proxy for gender.

Another concern argues that strengthening fathers' constitutional rights gives fathers increased power in custody fights in a way that will harm both women and children. Status as a legal parent does not guarantee that a parent receives custody or visitation rights with a child, but it allows the parent to ask (and potentially to fight) for custody or visitation rights. Attempts to constitutionalize the custody fight itself have been unsuccessful,[373] so at the moment status as a legal

369. Purvis, *supra* note 142, at 688–92.

370. Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 486 (2017).

371. *Id.* at 495.

372. *Id.* at 497.

373. *See* David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461 (2006).

parent effectively operates as a gatekeeper for further conflict: legal parentage act as standing to further pursue parental rights.[374] June Carbone and Naomi Cahn have argued that unmarried parents have potentially chosen not to marry because the mother recognizes the presumption that married parents are equal parents in the eyes of the law and wants to avoid it.[375] The rights of married parents tend to be one-size-fits-all,[376] whereas unmarried couples have a range of relationship models. Carbone and Cahn argue that:

> [C]ourts increasingly impose such shared parenting arrangements on couples who barely know each other, disagree fundamentally on how to parent, and often cannot stand to be in the same room together; or, even if they cooperate perfectly well, they have simply elected that their co-parenting relationship consist of different terms from those the law would ordinarily impose.[377]
>
> To the extent that recognizing more unwed biological fathers as legal fathers imposes those terms on more families, not only would the perceived choices of the mothers be disregarded, but such conflict would be magnified among parents with resources to fight over custody and visitation in court.[378]

Such concerns are significant, since there is no question that recognizing more legal parents at the very least opens the door to more custody fights and a prolonged legal relationship between two parents who may not want to have any relationship with each other. Acknowledging the breadth of the equality concern, however, indicates that the question of custody may be a narrower one. The solution may be reforms to how custody is determined, in other words, rather than continuing to grant more mothers than fathers constitutional rights. Several family law scholars in recent years have been questioning whether it makes sense to treat parental rights and responsibilities as a single, indivisible package, as opposed to a "bundle of sticks" that might be broken apart.[379]

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374. *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 74–79 (2016); *see also* Margaret Ryznar, *The Empirics of Child Custody*, 65 CLEV. ST. L. REV. 211, 227–28 (2017).

375. June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 UC IRVINE L. REV. 511, 543 (2017).

376. *See* Carbone & Cahn, *supra* note 374, at 107.

377. *Id.* at 58.

378. *Cf.* Carbone & Cahn, *supra* note 375, at 514 (describing the difference between traditional reproduction and assisted reproductive technologies as between "'elite' and 'non-elite' reproduction").

379. *See, e.g.*, Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 148–49 (2018); Melanie B. Jacobs, *Why Just Two? Disaggregating*

Another potential danger is that, by equalizing the treatment of unwed fathers and mothers, it will become more difficult for unwed mothers to be identified as legal parents rather than easier for unwed fathers to do so. This would have particularly harmful consequences in cases involving the transmission of citizenship and inheritance, where by the time a case arises the clock of parental identification has already run out. Such a remedy would be the leveling down seen in *Sessions v. Morales-Santana*,[380] rather than leveling up to recognize more parent-child links.

In *Morales-Santana*, however, Justice Ginsburg wrote that the Court could not impose a shorter physical presence requirement upon fathers because that would not have been the intent of Congress.[381] Such logic might similarly be imposed in the context of other transmission of citizenship cases, which would have to be addressed by Congress. Such an intent—to find *fewer* legal parents, leaving children with fewer sources of support and reliant on the public fix—seems much less plausible in the context of family law and inheritance law cases. If the differential treatment of unwed fathers and mothers rests upon stereotyped views of men as unwilling fathers, it is more logical for courts to reject the stereotype, rather than impose that stereotype upon mothers as well.

There are also broader criticisms of the expanding constitutionalization of family law. Scholars have argued that constitutionalizing family law disadvantages vulnerable family members[382] as well as unconventional family structures.[383] Others, however, have argued that family law is already constitutional—that, even in law school, famous constitutional law cases arising out of family

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Traditional Parental Rights and Responsibilities to Recognize Multiple Parents, 9 J. L. & FAM. STUD. 309, 313 (2007).

380. 137 S. Ct. 1678 (2017).

381. *Id.* at 1700.

382. Meyer, *supra* note 27, at 554.

383. *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 5–6 (2008); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242–43 (2006); Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–30 (2015); Joslin, *supra* note 319, at 440–43; Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 586 (2005); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1255 (2016)*; see generally* Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547 (2015) (focusing on United States v. Windsor, pre-*Obergefell*).

law questions are not viewed as family law.[384] The rich history of constitutional family law is cast as "establish[ing] boundaries or outer limits for permissible family laws,"[385] which contributes to devaluing family law itself,[386] when in fact family law is *already* constitutionalized. Family law is in a dialogic relationship with constitutional law, in which the evolution of family law helped to evolve constitutional law, not the reverse.[387]

CONCLUSION

The Supreme Court has yet to revisit its family law cases from the 1970s that established a starkly different constitutional status for unwed biological fathers as compared to unwed biological mothers. One reason may be that few such cases arise, after state legislatures amended their parentage statutes to eliminate some of the most explicit differentiations that sparked previous constitutional challenge.

The impact of the Court's family law doctrine, however, is still vibrant today. The unwed-father principles have significantly impacted immigration and inheritance law, among others. A core rejection of equality principles as applied to parents continues to operate within broader constitutional challenges to laws touching upon the family in all sorts of contexts, operating to treat unwed biological fathers as less significant under the Constitution.

If the broader impact of the Court's family law doctrine is the why, then recent cases demonstrate the how, illustrating how future courts should analyze questions that implicate both fundamental and equality rights. Only once courts revisit the equality claims of unwed biological fathers and reject the gendered views of the past will unwed biological fathers truly become constitutional fathers.

384. Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. F. 197, 206 (2016).

385. Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 963 (2016).

386. Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 636 (2014).

387. Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413, 416 (2017).