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The Nature of Parenthood

ABSTRACT. In the wake of *Obergefell v. Hodges*, courts and legislatures claim in principle to have repudiated the privileging of different-sex over same-sex couples and men over women in the legal regulation of the family. But as struggles over assisted reproductive technologies (ART) demonstrate, in the law of parental recognition such privileging remains. Those who break from traditional norms of gender and sexuality—women who separate motherhood from biological ties (for instance, through surrogacy), and women and men who form families with a same-sex partner—often find their parent-child relationships discounted.

This Article explores what it means to fully vindicate gender and sexual-orientation equality in the law of parental recognition. It does so by situating the treatment of families formed through ART within a longer history of parentage. Inequalities that persist in contemporary law are traceable to earlier eras. In initially defining parentage through marriage, the common law embedded parenthood within a gender-hierarchical, heterosexual order. Eventually, courts and legislatures repudiated the common-law regime and protected biological parent-child relationships formed outside marriage. While this effort to derive parental recognition from biological connection was animated by egalitarian impulses, it too operated within a gender-differentiated, heterosexual paradigm.

Today, the law increasingly accommodates families formed through ART, and, in doing so, recognizes parents on not only biological but also social grounds. Yet, as courts and legislatures approach the parental claims of women and same-sex couples within existing frameworks organized around marital and biological relationships, they reproduce some of the very gender- and sexuality-based asymmetries embedded in those frameworks. With biological connection continuing to anchor nonmarital parenthood, unmarried gays and lesbians face barriers to parental recognition. With the gender-differentiated, heterosexual family continuing to structure marital parenthood, the law organizes the legal family around a biological mother. Against this backdrop, nonbiological mothers in different-sex couples, as well as nonbiological fathers in same-sex couples, struggle for parental recognition.

To protect the parental interests of women and of gays and lesbians, this Article urges greater emphasis on parenthood's social dimensions. Of course, as our common law origins demonstrate, the law has long recognized parental relationships on social and not simply biological grounds. But today, commitments to equality require reorienting family law in ways that ground parental recognition more fully and evenhandedly in social contributions. While this Article focuses primarily on reform of family law at the state level, it also contemplates eventual constitutional oversight.

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INTRODUCTION

Those who form families through assisted reproductive technologies (ART)—donor insemination, *in vitro* fertilization, and gestational surrogacy—frequently establish parental relationships in the absence of gestational or genetic connections to their children.[1] In seeking legal parental recognition, they do not deny the importance of biological ties, but simply urge courts and legislatures to credit social contributions as well.[2] In other words, they ask for recognition that turns on factors such as intent to parent, parental conduct, and family formation.[3] Yet law fails to value parenthood's social dimensions adequately and consistently. This failure has significant and painful consequences in the lives of parents and children. Those who have been parenting their children for many years may find they are not *legal* parents. Some become legal parents only by engaging in the time-consuming, costly, and invasive process of adopting their children. Others, for whom adoption is impossible, remain legal strangers to their children. Indeed, some parents may not realize adoption

1. For early influential accounts of parentage in the context of ART, see JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); and Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297. For more recent interventions, see Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465 (2016); and Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

2. Social contributions capture parental performance and may include forming a family, committing to the parent-child relationship, and engaging in the work of parenting. These contributions can exist in the presence or absence of biological connections. For purposes of this Article, biological connections include genetic contribution, as well as gestation and birth. Law often labels women as biological mothers based on gestation and birth, genetics, or both. It is important to recognize that gestation includes a functional dimension that may blur distinctions between biological and social contributions.

3. Developments provoked by ART fit within the more widespread separation of "sexuality from procreation," which William Eskridge relates to "the decline of the natural law understanding of romantic relationships and its substantial displacement in public discourse by a utilitarian understanding." William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1898 (2012) (emphasis omitted).

is necessary until it is too late, perhaps when their relationship to the legally-recognized parent dissolves.[4]

Consider just a few examples. In Connecticut, a married different-sex couple had a child through surrogacy and raised the child together for fourteen years. When they divorced, the court deemed the mother, who had neither a gestational nor genetic connection to the child, a legal stranger to her child.[5] In Florida, an unmarried same-sex couple used the same donor sperm to have four children, with each woman giving birth to two children. They raised the children together until their relationship ended several years later, at which point the court left each woman with parental rights only to her two biological children.[6] In New Jersey, a male same-sex couple used a donor egg to have a child through a gestational surrogate.[7] The court recognized the gestational surrogate, rather than the biological father's husband (and the child's primary caretaker), as the second parent.[8]

Today, many courts and legislatures seek to promote gender and sexual-orientation equality in the family. Judges and lawmakers have repudiated gender-based distinctions in both spousal and parental regulation,[9] including gendered presumptions in child custody.[10] More recently, courts and legislatures have acknowledged same-sex couples' interest in family recognition. In extending marriage to same-sex couples in *Obergefell v. Hodges*, the United States Supreme Court sought to protect not only romantic bonds, but also parent-child relationships, formed by gays and lesbians.[11]

Courts and legislatures claim in principle to have repudiated the privileging of men over women and different-sex over same-sex couples in the legal regulation of the family. But in parentage law, such privileging remains. As the examples above suggest, those who break from traditional norms of gender and

4. Ordinarily, only legal parents have standing to seek custody. Nonetheless, to varying degrees across jurisdictions, nonparents may seek custody in exceptional circumstances.

5. *See* Doe v. Doe, 710 A.2d 1297 (Conn. 1998).

6. *See* Russell v. Pasik, 178 So. 3d 55, 59-60 (Fla. Dist. Ct. App. 2015).

7. While some statutes regulating gestational surrogacy use the term "gestational carrier," this Article uses the term "gestational surrogate."

8. *See* A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (Super. Ct. Ch. Div. Dec. 23, 2009).

9. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (striking down gender-based distinction in alimony); Reed v. Reed, 404 U.S. 71 (1971) (striking down gender-based distinction in estate administration).

10. *See, e.g.*, Devine v. Devine, 398 So. 2d 686 (Ala. 1981) (striking down presumption of maternal custody on sex-equality grounds).

11. Obergefell v. Hodges, 135 S. Ct. 2584, 2600-01 (2015).

sexuality—women who separate motherhood from biological ties (for instance, through surrogacy), and women and men who form families with a same-sex partner—often find their parent-child relationships discounted.[12] Accordingly, this Article explores what it means, in the world of marriage equality, to build a system of parental recognition that fully integrates families headed by same-sex couples in the ways that *Obergefell* contemplates. And it connects questions of sexual orientation to questions of gender, aspiring to parental recognition that allows women, in not only same-sex but also different-sex couples, to assume nontraditional parenting roles. It does so by situating the contemporary legal treatment of family formation through ART within a longer history of parental recognition.[13]

Biological and social factors have long shaped the law of parental recognition. The common law tied parenthood to marriage and thus made parentage a legal, rather than biological, determination. Pursuant to the marital presumption (also known as the presumption of legitimacy), when a married woman gave birth to a child, the law recognized her husband as the child's father. This presumption channeled intuitions about biological paternity, but it could also conceal deviations from biological facts—allowing men to avoid questions of paternity and ensuring the child's legitimacy. In contrast to the marital child, the "illegitimate" child traditionally existed outside a legal family.[14] The common law's organization of parentage through marriage reflected and enforced a gender-hierarchical, heterosexual order—giving men authority over women and children inside marriage and insulating men's property from claims to inheritance by children born outside marriage.

Slowly, American law departed from the harshest aspects of its common-law origins. Legislatures and courts began to recognize a legal relationship between a mother and her "illegitimate" child—granting the mother custody and bestowing on the child rights to support and eventually inheritance. In contrast, fathers of "illegitimate" children had financial obligations imposed on

12. Scholars have examined distinct aspects of ART, including donor insemination and surrogacy, but have rarely attended to the interlocking regulation of various forms of ART, particularly along lines of parental recognition. For an important account of families with "donor-conceived children," see NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES (2013). For the leading treatment of changes in approaches to surrogacy, primarily in the context of heterosexual family formation, see Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009).

13. A growing body of scholarship explores questions of ART, parental recognition, and same-sex family formation. For leading examples, see Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617 (2016); and Jacobs, *supra* note 1.

14. *See infra* Section I.A.

them less as a consequence of a legal family relationship and more as an effort to privatize support. Even as American law came to mitigate some of the effects of "illegitimacy," the government continued to place substantial legal impediments on nonmarital parents and children well into the twentieth century.

By the late 1960s and early 1970s, in the wake of increasing efforts to hold unmarried fathers financially accountable and to protect the rights of nonmarital children, the Court intervened by recognizing nonmarital parent-child relationships on constitutional grounds. Biological connection served as an explicit basis for constitutional protection, for both mother-child and father-child relationships.[15] Yet even as the Court renounced "illegitimacy" and dismantled legally enforced gender hierarchy within marriage, it produced a new form of gender differentiation in parenthood—which it justified by resort to reproductive biology. At the moment of birth, the nonmarital child—unlike the marital child—had one legal parent: the mother. Gestation and birth evidenced the biological fact of maternity and furnished a relationship to the child that justified legal recognition. An unmarried man, in contrast, needed to demonstrate commitment to the parent-child relationship, in addition to his genetic connection. Of course, gestation provides a unique relationship to the child that is not only biological but functional. But in a series of cases, the logic of reproductive biology authorized more far-reaching social and legal differences between mothers and fathers—situating women, but not men, as naturally responsible for nonmarital children. Judges and lawmakers liberalized a parentage regime that had been deliberately organized around the gender-hierarchical, heterosexual status of marriage, yet continued to approach parentage within a gender-differentiated, heterosexual paradigm.

Against this legal backdrop, courts and legislatures in the late twentieth and early twenty-first centuries began to address parent-child relationships formed through a range of reproductive technologies.[16] They determined parentage in ways that turned increasingly on social, and not simply biological, grounds—not only for men but for women, and not only for different-sex but for same-sex couples. Concepts of intentional and functional parenthood gained traction in both judicial and statutory reasoning addressing a range of family configurations.[17]

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15. *See infra* Section I.B.

16. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) (situating recognition for lesbian and gay parents within shifts toward both marriage equality and intentional and functional understandings of parentage across all families).

17. *See id.*

Yet even as courts and legislatures have acted to conform parentage law to more recent egalitarian commitments, their attempts have been partial and incomplete. By tracing the evolution of modern parentage law, this Article shows how judges and lawmakers reason about parenthood in ways that carry forward legacies of exclusion embedded in frameworks of parental recognition forged in earlier eras. The account presented here tracks parental recognition across jurisdictions, bodies of law, family configurations, and forms of ART, showing how courts and legislatures draw distinctions between motherhood and fatherhood, different-sex and same-sex couples, biological and nonbiological parents, and marital and nonmarital families. Mapping regulation in this way reveals how the recognition of some parents but not others on social grounds reflects and perpetuates inequality based on gender and sexual orientation.[18] With biological connection continuing to anchor nonmarital parenthood, unmarried gays and lesbians struggle for parental recognition. With the gender-differentiated, heterosexual family continuing to structure marital parenthood, the law assumes the presence of a biological mother in ways that burden nonbiological mothers in different-sex couples, as well as nonbiological fathers in same-sex couples.

To vindicate the parental interests of women and of gays and lesbians, this Article urges greater emphasis on parenthood's social dimensions. Same-sex family formation features a parent without a genetic or gestational connection to the child; therefore, treating same-sex parents as equals demands recognition on social grounds. An approach that simply provides for equal treatment based on biological criteria would continue to marginalize those who parent with a same-sex partner, as well as women who defy conventional gender norms by separating the biological fact of maternity from the social role of motherhood.[19] The law has traditionally connected women to motherhood as

18. While the precise relationships between gender and sexuality this Article uncovers have not been identified in existing scholarship, important work in family law attends to questions of gender and sexuality in the law of parental recognition and ART. *See, e.g.*, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183 (1995); Joslin, *supra* note 1; Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

19. For the leading account of the equal treatment position, see Garrison, *supra* note 1. Garrison's interpretive approach would apply "the law governing sexual conception and the implicit assumptions about parentage and family on which that law is based" to ART. *Id.* at 842. This approach, she argues, "treats all would-be parents equally, without regard to their choice of a method for becoming a parent. It does not depend on any particular vision of

biological destiny, and thus crediting the social aspects of motherhood is necessary to value the parenting work of women who break from conventional roles.

This Article's analysis suggests the desirability of social grounds for parental recognition from the perspective of not only parents but children. Nonetheless, it does not aim to articulate an ideal model of parental recognition, nor does it defend social grounds for parental recognition based on a best-interests-of-the-child standard.[20] Of course, courts and legislatures would rarely protect parental interests in ways they see as harmful to children. Yet unlike a custody determination, which turns on a child's best interests, parentage is generally guided by the parental interest.[21] There are compelling reasons to keep parentage from devolving purely into a question of best interests. Indeed, views about gender and sexuality have historically influenced custody determinations in ways that have frustrated not only children's interests in ongoing relationships with their parents, but also parents' expectations of nondiscriminatory treatment.[22]

After elaborating the meaning of equality in the context of parental recognition, this Article seeks to reorient family law in ways that protect the parent-child relationships of women and same-sex couples by grounding recognition more fully and evenhandedly in social contributions to parenting. Reform efforts will occur primarily at the state level. State legislatures can restructure parentage law in ways that credit parenthood's social dimensions, and state

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family life or parental prerogatives, except insofar as that vision has been accepted elsewhere within family law and policy." *Id.* at 920.

20. Moreover, this Article does not make an affirmative case for ART over other forms of family formation. Nonetheless, in seeking to reform family law so that parental recognition emerging out of existing practices of ART aligns with equality principles, this Article identifies a distinctive relationship between ART – specifically, the creation of nonbiological parent-child bonds – and the equal standing of women and of same-sex couples. While the emphasis on nonbiological bonds finds common ground with arguments for greater access to adoption, it is important to note that some scholars view liberal ART policies as undermining adoption. *See* Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction, and Child Welfare Policy*, 8 LAW & ETHICS HUM. RTS. 103, 111 (2014) (arguing that "reproduction policy worldwide encourages privileged people to create new children rather than consider adopting existing unparented children").

21. *See* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 857 (2006). For an approach that would more explicitly turn on children's interests, see Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 335-37 (2004).

22. *See* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009).

courts can apply parentage principles to recognize as legal parents those who have committed to the work of parenting.

Nonetheless, reform will likely require constitutional oversight. While scholars have addressed constitutional limitations on government regulation of family formation through ART,[23] the issues of parental recognition uncovered in this Article gesture toward a set of constitutional questions in both equal protection and due process that will take years to fully emerge and develop. Although constitutional claims will likely first arise in state courts under state law, federal courts may eventually revisit constitutional commitments to parental equality and liberty articulated in earlier eras.[24] This Article closes by considering the constitutional paths that might lead courts to recognize parents in ways that align with emergent equality principles and accordingly protect parental relationships on social, and not merely biological, grounds.

This Article proceeds in four Parts. While its focus is on developments beginning in the late twentieth century, Part I begins at a much earlier point to show parenthood's foundation in the institution of marriage. It then turns to the repudiation of "illegitimacy," focusing on the recognition of unmarried biological fathers who demonstrated a commitment to the parental relationship. Both approaches reflected and enforced gender differentiation and heterosexuality in parenthood.

Part II turns to the more recent – and ongoing – epoch of liberalization provoked by ART. It provides the first comprehensive account of contemporary regulation of parental recognition in the context of ART. It brings together multiple forms of ART, demonstrating how law treats parent-child relationships formed through donor insemination, IVF, and gestational surrogacy. This Part covers a range of family configurations, including both different-sex and

23. Constitutional attention has focused primarily on the right to procreate, rather than on the right to be a parent. *See, e.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 25 (2015); Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473 (1995) (reviewing ROBERTSON, *supra*). Recent constitutional work on parental recognition and ART has attended most extensively to same-sex parenting. *See, e.g.*, Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1256-57, 1260 (2014).

24. *See infra* Section IV.C. In fact, the path toward same-sex marriage suggests that developments at the state level ultimately may shape constitutional understandings of the family at the federal level. *See* William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

same-sex couples, marital and nonmarital families, and biological and nonbiological parents. And it surveys the law across jurisdictions, identifying positions that represent majority views or clear modern trends, rather than focusing on less common statutory and judicial approaches. Part II occasionally references Appendices to this Article that catalog the current state of the law with respect to parental recognition in the context of ART. Ultimately, Part II's detailed analysis of the contemporary law of parentage makes clear the unappreciated status-based effects of the current regime.

Part III uncovers the practical and expressive harms inflicted within this regime and shows that these harms are not evenly distributed. Instead, they recur in ways that exclude those who break from traditional norms of gender and sexuality that govern reproduction, parenting, and the family. Part IV considers ways to ameliorate these harms and promote equality based on gender and sexual orientation. It shows how emergent equality commitments lead law to value the social dimensions of parenthood more transparently, extensively, and consistently. It offers ways to reconstruct parentage, through both legislation and adjudication, primarily as a family law matter but also as a constitutional matter. Finally, the Conclusion shows how the reforms envisioned here may lead toward yet another shift in the law of parental recognition—a system of multiple-parent recognition.

I. MARRIAGE, BIOLOGY, AND PARENTHOOD

As this Part shows, the common law organized parenthood around marriage and, in doing so, enforced a gender-hierarchical, heterosexual order. Inside marriage, the marital presumption purported to channel biological paternity but could hide biological facts to maintain the husband's parental status and the child's legitimacy. Outside marriage, even as local authorities sought to extract support from parents of "illegitimate" children, parent-child relationships lacked legal recognition. Only slowly did the law come to regard the "illegitimate" child as part of a legal family. Reform efforts in the mid-twentieth century, aimed at both the rights of nonmarital children and the financial responsibilities of unmarried fathers, precipitated a wave of constitutional liberalization beginning in the late 1960s. The Court repudiated key elements of the common-law regime and protected the parental relationships of unmarried biological parents. Nonetheless, the Court preserved a gender-differentiated, heterosexual approach to parentage, justifying differences in the legal treatment of mothers and fathers by resort to sex-based differences in reproductive biology.

A. Parenthood, Marriage, and "Illegitimacy"

The Anglo-American legal system initially understood parentage as a relationship defined through marriage. The marital presumption, or presumption of legitimacy, recognized the mother's husband as the child's legal father.[25] At English common law, overcoming the presumption required showing that "the husband be out of the kingdom of England . . . for above nine months, so that no access to his wife can be presumed."[26] As this factual showing suggests, the presumption purported to reflect biological parenthood.[27]

Nonetheless, the law assumed, but did not in fact require, blood ties. Instead, the marital presumption both facilitated parental recognition that departed from biological facts and cut off claims to parental recognition based on biological facts. If the child was conceived through an extramarital relationship with another man, the marital presumption allowed the husband to pretend he was the biological and thus legal father.[28] Indeed, traditionally neither the husband nor wife were permitted to testify to the husband's "nonaccess," meaning that the couple themselves could not penetrate the presumption with inconsistent biological facts.[29] A jury "could not legally find against . . . legitimacy, except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father."[30] As a Massachusetts court observed more recently, "The effect of the common law presumption of legitimacy was, in many instances, to prevent the fact finder from reaching the true issue in the case."[31]

By allowing the marital presumption to hide situations in which the husband was not in fact the biological father, the law ensured the child's "legitimacy."[32] At common law, a child born outside a marital relationship was deemed

25. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *457.

26. *Id.*

27. *See* Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 720-21 (2016).

28. *See In re* Findlay, 170 N.E. 471, 473 (N.Y. 1930) ("At times the cases seemed to say that any possibility of access, no matter how violently improbable, would leave the presumption active as against neutralizing proof.").

29. Goodright v. Moss (1777) 98 Eng. Rep. 1257, 1257; 2 Cowp. 591, 592.

30. Phillips v. Allen, 84 Mass. (2 Allen) 453, 454 (1861).

31. C.C. v. A.B., 550 N.E.2d 365, 371 (Mass. 1990).

32. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 201-02 (1985).

the child and heir of no one (*filius nullius*).[33] Traditionally, the "illegitimate" child, as historian Michael Grossberg explains, "had no recognized legal relations with his or her parents, particularly not those of inheritance, maintenance, and custody."[34] Nonetheless, support for "illegitimate" children became a feature of the common-law system in both England and America, as poor laws empowered local government to force parents to financially support their "illegitimate" children.[35] Still, financial support and legal parentage remained distinct concepts, with officials able to "compel support but not family membership."[36]

The common-law system reflected and enforced a gender-hierarchical order.[37] Given the legal doctrine of coverture, marriage subordinated women to men in both the spousal and parenting relationship. The husband assumed authority over his wife,[38] and possessed "an almost unlimited right to the custody of their minor legitimate children."[39] The father's rights were rooted in a property-based understanding of parenthood. As Grossberg explains, children's "services, earnings, and the like became the property of their paternal masters

33. 1 BLACKSTONE, *supra* note 25, at *458; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *212; *see also* Kent v. Barker, 68 Mass. (2 Gray) 535, 536 (1854) ("It is well settled . . . that at common law the words 'child' and 'children' mean only legitimate child and children.").

34. GROSSBERG, *supra* note 32, at 197.

35. *See* R.H. HELMHOLZ, 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 561 (2004); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 283-84, 312 (1964). In England, this support duty originally arose under canon law, which imposed a natural-law duty on parents to support their children—a duty originally enforced in ecclesiastical courts. *See* HELMHOLZ, *supra*, at 560-61. Given difficulties proving paternity, determinations often flowed from "proof 'by presumptions and conjectures.'" *Id.* at 560. On evidentiary techniques in early paternity trials in America, see generally Kristin A. Olbertson, *"She Stedfastly Accused Him in the Time of Her Travail": Women's Words and Paternity Suits in 18th-Century Massachusetts*, 19 CARDOZO J.L. & GENDER 41 (2012).

36. GROSSBERG, *supra* note 32, at 198.

37. *See* HENDRIK HARTOG, MAN & WIFE IN AMERICA: A HISTORY 90 (2000) ("[A] father gained 'the unquestioned right to [children's] custody, control and obedience.' Meanwhile, the mother, as nothing but a wife, was left without any rights at all." (quoting Graham v. Bennet, 2 Cal. 503, 506-07 (1852))); *see also* GROSSBERG, *supra* note 32, at 196 (explaining how the law of legitimacy "had been constructed to protect family lineage and resources, and to promote matrimony").

38. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11-12 (2000).

39. GROSSBERG, *supra* note 32, at 235; *see also* State v. Paine, 23 Tenn. (4 Hum.) 523, 536 (1843) ("The wife, by the common law, has no right to the children against the husband.").

in exchange for life and maintenance."[40] And the system of marital parentage ensured transmission of wealth across generations of men.[41]

Outside marriage, women routinely cared for their "illegitimate" children, even as the parental relationship traditionally lacked legal status.[42] While the American system reflected its English roots,[43] early in the nation's history legislatures and courts began to extend limited legal protections to "illegitimate" children.[44] As Grossberg documents, law "turn[ed] the customary bonds between the bastard and its mother into a web of reciprocal legal rights and duties."[45] Mothers possessed legal custody of their "illegitimate" children, and "illegitimate" children gained legal rights to support—and eventually inheritance—from their mothers.[46] This nineteenth-century American innovation reflected not recognition of women's autonomy but rather the "cult of domesticity" that valued women's "maternal instinct."[47]

Fathers of "illegitimate" children occupied a different position. Whereas reforms relating to the mother-child relationship focused on legal rights and family recognition, paternity hearings endeavored to enforce financial obligations for the sake of protecting public funds.[48] With financial support seen as "a male obligation," local authorities sought to hold men liable for their non-

40. GROSSBERG, *supra* note 32, at 235.

41. The estate included the wife's earnings and property (in which the husband gained a devisable interest if the marriage produced children). *See* COTT, *supra* note 38, at 12; George L. Haskins, *Curtesy in the United States*, 100 U. PA. L. REV. 196, 196-97 (1951). The gradual adoption of Married Women's Property Acts in the nineteenth century altered this assumption. *See* FLETCHER W. BATTERSHALL, THE LAW OF DOMESTIC RELATIONS IN THE STATE OF NEW YORK 366-67 (1910).

42. Cooley v. Dewey, 21 Mass. (4 Pick.) 93, 98 (1826). The child could be taken from the mother and placed for adoption. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 257 (2005). Adoption itself constituted a nineteenth-century revolution in parenthood. Yet, into the twentieth century, courts prioritized "blood relations" over "adoptive ones" and thus maintained adoption "as a custody device more than a total transfer of family membership." *See* GROSSBERG, *supra* note 32, at 278.

43. GROSSBERG, *supra* note 32, at 197-98.

44. *See id.* at 201. American law also departed from strict English common law rules—and adopted rules with civil-law and ecclesiastical origins—in ways that expanded the space of legitimacy. Examples include recognition of common law marriage, legitimation by subsequent marriage, and preservation of legitimacy in cases of annulment. *See id.* at 201-04.

45. *See id.* at 207.

46. *See id.* at 207-12.

47. *Id.* at 209.

48. *See id.* at 215-18.

marital children.[49] Notably, in an age before reliable biological evidence, paternity often turned simply on the parties' testimony.[50]

Even with significant reform in favor of "illegitimate" children over the course of the nineteenth century, the importance of legitimacy remained. While many states provided mechanisms by which men could confer rights on their nonmarital children,[51] parity with marital children proved elusive.[52] Paternal inheritance in particular remained out of reach.[53] Well into the mid-twentieth century, some states required unmarried fathers to engage in elaborate proceedings simply to have legally protected relationships with their nonmarital children.[54] As a leading reformer of "illegitimacy" commented, the law remained "an uncertain mixture of old English common law tempered with occasional flashes of modern thought – limited, narrow statutes which are directed at only selected aspects of illegitimacy."[55]

B. Parenthood's Liberalization: The Rise of Biological Authority

In the second half of the twentieth century, reformers endeavored with greater success to protect the rights of nonmarital children to both care and support and, relatedly, to hold unmarried fathers financially responsible for their children. With these efforts gaining traction in the 1960s, the Court intervened to remedy some of the wrongs perpetrated by a common-law regime rooted in marital privilege. It made biological connection an explicit basis for paternal rights in ways that did not merely supplement, but in some circumstances rivaled, marriage.[56] Yet even as the Court eradicated longstanding inequalities, it preserved gender differentiation in parentage, appealing to differ-

49. *See id.* at 215.

50. *See id.* at 216.

51. *See, e.g.*, ALA. CODE § 27-11 (1940).

52. GROSSBERG, *supra* note 32, at 228-33.

53. *Id.* at 221.

54. *See In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970). As the government explained in *Stanley*, "Illinois requires the petitioner and others similarly situated to subject themselves to a legal proceeding . . . . [that] approximates an adoption or guardianship proceeding instituted by a person bearing no blood relationship to the child and in which the best interest showing is required." Brief for Respondent at 31, Stanley v. Illinois, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 133736, at *31.

55. Harry D. Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Illegitimacy*, 44 TEX. L. REV. 829, 831 (1966).

56. *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1649-50 (2015).

ences in reproductive biology to justify legal differences between mothers and fathers.

1. *Unmarried Fathers, Biological Connection, and Social Performance*

By the late 1960s, the Court assumed an important role in further dismantling the common-law system of "illegitimacy."[57] As the Court began to recognize the constitutional rights of unmarried fathers in the 1970s, the biological relationship provided its starting point.[58] The biological father was uniquely situated to claim the constitutional right to be a legal parent. Yet the Court emphasized social contribution as the means to achieve a protected liberty interest.[59] Only the unmarried biological father who "demonstrates a full commitment to the responsibilities of parenthood" gained constitutional protection.[60]

The Court's decisions bolstered legislative advocacy that sought to recognize, with greater consistency across states, both rights and obligations flowing from nonmarital parent-child relationships.[61] Pushed by these constitutional decisions, states reformed their family law systems. The 1973 Uniform Parentage Act (UPA), which many states adopted, endeavored to extend legal protection "equally to every child and to every parent, regardless of the marital status of the parents."[62] The UPA, and the state statutes that followed suit, provided a number of "presumption[s] of paternity" through which to recognize father-child relationships.[63] Marriage continued to provide a path to parentage.[64] Other presumptions applied to unmarried men, recognizing a man as a father if "he acknowledges his paternity of the child in a writing filed with the [government]" or if "he receives the child into his home and openly holds out the child as his natural child."[65] Based on the assumption that biological paternity generally produced legal fatherhood, these various paternity presumptions

57. Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

58. *See Stanley*, 405 U.S. 645.

59. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed 441 U.S. 380 (1979).

60. *Lehr*, 463 U.S. at 261.

61. Harry Krause, the leading figure in favor of national legislative efforts, proposed a uniform act in a 1966 publication. *See* Krause, *supra* note 55, at 832-41.

62. UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM'N 1973).

63. *Id.* § 4.

64. *Id.* § 4(a)(1)-(3).

65. *Id.* § 4(a)(4)-(5).

were rebuttable through blood test evidence.[66] Of course, biological evidence did not simply allow men to refute parental status; it also allowed the government to impose financial obligations on resistant fathers. While the law ordinarily required an unmarried man seeking to establish his parental status to take affirmative steps,[67] biological connection could provide the sole basis for imposing duties.[68] Referencing Congress's plans to establish "a national system of federally assisted child support enforcement," the UPA drafters expressed their expectation that "blood test evidence will go far toward stimulating voluntary settlements of actions to determine paternity."[69]

Biological claims to fatherhood eventually conflicted with marital claims. The unmarried father, armed with his biological connection, attempted to displace the mother's husband, who, even without a biological connection, claimed parenthood based on the marital presumption. When asked to intervene in ways that would disturb marriage's ability to hide biological facts, the Court resisted. In its 1989 decision in *Michael H. v. Gerald D.*, a fractured Court upheld application of California's conclusive marital presumption, thus preventing an unmarried biological father, with whom the mother had an extramarital relationship, from asserting parentage against the wishes of the mother and her husband.[70] After explaining that "California law, *like nature itself*, makes no provision for dual fatherhood,"[71] Justice Scalia's plurality opinion protected the *nonbiological* parent-child relationship formed by the husband.[72] By limiting the constitutional rights of unmarried biological fathers – including those, like Michael H., who had formed relationships with their biological children – the Court preserved the marital presumption's ability to conceal bio-

66. *Id.* §§ 4(b), 12.

67. *See* Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 624-26 (2009). Some states require strong showings of parental conduct when biological fathers challenge the child's placement for adoption by the mother. *See, e.g.*, *In re* Adoption of Anderson, 624 S.E.2d 626, 626 (N.C. 2006) (holding that because the biological father "merely offered support but did not provide the actual financial support mandated under [state law] . . . his consent to the adoption is not required").

68. *See* DOLGIN, *supra* note 1, at 110 (distinguishing "cases in which unwed biological fathers have been held responsible for supporting their biological offspring despite the absence of any social relationship between the father and his biological child").

69. UNIF. PARENTAGE ACT § 12 cmt. (UNIF. LAW COMM'N 1973).

70. 491 U.S. 110 (1989).

71. *Id.* at 118 (emphasis added).

72. *Id.* at 119 ("California declares it to be . . . *irrelevant* for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him.").

logical facts. Thus, the Court protected purely social forms of parenthood inside marriage.[73]

Nonetheless, the emphasis on biological paternity crept into marital parenthood. In contrast to California's conclusive marital presumption affirmed in *Michael H.*, many states, as well as the UPA, made the marital presumption rebuttable.[74] Eventually, across a number of states, husbands could disestablish paternity through biological evidence, wives could challenge their husband's parental status, and unmarried men could seek to rebut the marital presumption.[75] In many states, the reliability of biological evidence and the recognition of unmarried fathers rendered the marital presumption more explicitly biological in ways that departed from its common-law origins.[76]

By the late twentieth century, a range of demographic, scientific, and political developments had led family law to focus even more intently on ascertaining biological fatherhood.[77] With the rapid rise of nonmarital childbirth and the increased sophistication of paternity testing, the federal government engaged in far-reaching efforts to identify fathers of nonmarital children and impose financial obligations on them.[78] To comply with federal legislation aimed at increasing child support collection, states adopted a procedure to encourage unmarried fathers to identify themselves immediately upon the child's birth to not only attain rights but also undertake obligations. With voluntary acknowledgments of paternity (VAPs), a man (and the child's biological mother) attested to his status as the biological father.[79]

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73. Earlier decisions had also protected social bonds within marriage, as rejection of unmarried fathers' claims cleared the way for adoption by stepfathers. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978).

74. *See* UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 4 (UNIF. LAW COMM'N 1973).

75. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 571-85 (2000).

76. *See* June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 221-22 (2011).

77. *See* Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 97 B.U. L. REV. (forthcoming 2017) (manuscript at 15-16), http://ssrn.com/abstract=2755741 [http://perma.cc/R23W-MW9P].

78. *See* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 344-50 (2005); *see also* NANCY E. DOWD, REDEFINING FATHERHOOD 114-21 (2000).

79. *See, e.g.*, GA. DEP'T PUB. HEALTH, PATERNITY ACKNOWLEDGMENT–FORM 3940, 2 (June 2016), http://dph.georgia.gov/sites/dph.georgia.gov/files/Paternity%20Acknowledgement%20(Form%203940).pdf [http://perma.cc/VD8J-24JT] ("The father should not sign . . . unless he is confident that he is the biological father of this child.").

The revised UPA, promulgated in 2000 and amended in 2002, responded to "federal mandates" by building out a more elaborate system of paternity identification.[80] It maintained a number of paternity presumptions resembling those in the 1973 version,[81] but did even more than its predecessor to prioritize biological facts in paternity adjudication. As the drafters explained, "[n]owadays, genetic testing makes it possible in most cases to resolve competing claims to paternity."[82] The revised UPA dedicated an entire article to "genetic testing"[83] and sought to "establish[] the controlling supremacy of admissible genetic test results in the adjudication of paternity."[84]

The revised UPA also integrated the VAP procedure through an extensive set of provisions.[85] Going beyond federal regulations, which did not expressly "require that a man acknowledging paternity must assert genetic paternity of the child," the revised UPA sought "to prevent circumvention of adoption laws by requiring a sworn assertion of genetic parentage of the child."[86] Under the revised UPA's mechanism, "[t]he mother of a child and a man claiming to be the *genetic father* of the child may sign an acknowledgment of paternity with intent to establish the man's paternity."[87] VAPs are now the most common way that legal fatherhood is established for nonmarital children.[88]

2. *Gender Differentiation in Parenthood*

The developments charted up to this point revolved around *men's* parental status and disputes over *fatherhood*. At common law, married mothers were legal mothers to their children. Courts and legislatures eventually recognized le-

80. UNIF. PARENTAGE ACT prefatory n. at 2 (UNIF. LAW COMM'N 2002).

81. *Id.* § 204.

82. *Id.* § 204 cmt.

83. *Id.* art. 5.

84. *Id.* § 631 cmt. Earlier, the Court had held that indigent defendants in paternity actions were constitutionally entitled to blood tests at the expense of the government. *See* Little v. Streater, 452 U.S. 1 (1981).

85. UNIF. PARENTAGE ACT §§ 301-02, 304, 312.

86. *Id.* art. 3 cmt.

87. *Id.* § 301 (emphasis added).

88. *See* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 J. GENDER SOC. POL'Y & L. 467, 469 (2012). In 2015, 1,186,223 of 1,512,329 nonmarital children had parentage established by VAP. Office of Child Support Enf't, *Preliminary Report: FY 2015*, U.S. DEP'T HEALTH & HUM. SERVS. 77 (2016), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_preliminary.pdf [http://perma.cc/X8YL-RBFW].

gal bonds between mothers and their "illegitimate" children,[89] but continued to treat nonmarital mother-child relationships less favorably than their marital counterparts. In fact, the Court initiated its repudiation of "illegitimacy" in 1968 with two cases involving mother-child relationships.[90]

Still, the parental status of women was rarely in dispute. The mother-child relationship was established by proof of giving birth.[91] Maternity was understood as a conclusive fact[92]—not a disputed status that could be rebutted.[93] Generally, a mother's status could be divested only by her own relinquishment or an adjudication of unfitness.[94]

As Serena Mayeri's important historical work shows, as the Court forged constitutional sex-equality doctrine in the 1970s and 1980s, it generally resisted claims that the differential treatment of unmarried mothers and fathers constituted impermissible sex discrimination.[95] The Court repudiated the purposive forms of gender subordination embodied in the law of coverture and "illegitimacy," but turned to reproductive biology to authorize gender differentiation in parenthood. While the Court demanded social performance of parenthood from unmarried fathers claiming constitutional protection, for women the social aspects of parenthood were assumed to flow inevitably from the biological.[96] Because gestation established not merely a biological but also a social

89. *See* GROSSBERG, *supra* note 32, at 207-15.

90. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

91. *See, e.g.*, UNIF. PARENTAGE ACT § 3 (UNIF. LAW COMM'N 1973); John Lawrence Hill, *What Does It Mean To Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 370 (1991) ("[T]his principle reflects the ancient dictum *mater est quam gestation* [sic] *demonstrat* (by gestation the mother is demonstrated).").

92. *See, e.g.*, *In re* M.M.M., 428 S.W.3d 389 (Tex. App. 2014) (holding the maternity of the gestational mother to be unrebuttable by genetic testing).

93. *See In re* C.K.G., 173 S.W.3d 714, 723 (Tenn. 2005) (observing that "the parentage statutes generally fail to contemplate dispute over maternity" and that "the statute providing for an order of parentage is concerned solely with the establishment of paternity"); *In re M.M.M.*, 428 S.W.3d 389; *cf.* UNIF. PARENTAGE ACT § 4(b) (providing that a presumption of paternity may be rebutted).

94. *See, e.g.*, *In re* Baby, 447 S.W.3d 807, 829-30 (Tenn. 2014) (discussing how a mother's parental rights can only be terminated based on abuse and neglect, consent to adoption, or relinquishment); *see also* UNIF. PARENTAGE ACT § 25 (addressing the procedure for termination of parental rights if a mother relinquishes her child).

95. *See* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2372 (2016).

96. *See* June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1048 (2003).

connection to the child, the mother, unlike the father, had a relationship with the child at the moment of birth. The requirement that unmarried fathers "grasp[] [the] opportunity" to form a parent-child relationship to have a constitutionally protected interest appeared justified by men's lack of pre-birth connection to the child.[97] As the Court stated in *Lehr v. Robertson*: "The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."[98]

Nonetheless, the Court resorted to reproductive differences between women and men to authorize more far-reaching social and legal differences between mothers and fathers. Women became mothers automatically—and thus had child-rearing responsibilities imposed on them—while men often escaped parental obligations.[99] And for those men who desired parental rights, the Court relied on biological differences in ways that discounted their parental contributions after the child's birth.[100] As Sylvia Law argues, "[T]he facts of the cases reveal the inaccuracy of the stereotypes asserted by the various Justices as 'biological fact.'"[101]

Consider *Parham v. Hughes*, in which the Court upheld a Georgia statute that allowed the mother, but not the father, of an "illegitimate" child to sue for wrongful death of the child.[102] The father had not undertaken the procedures required to formally legitimate the child, but he had signed the child's birth certificate, contributed to the child's support, and regularly visited with the child.[103] The Court rejected the father's equal protection claim because "mothers and fathers of illegitimate children are not similarly situated. . . . Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."[104] For the Court, biological differences between women and men—differences that may be relevant to

97. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

98. *Id.* at 260 n.16 (quoting Caban v. Mohammed, 441 U. S. 380, 397 (1979)).

99. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 80-82 (2003). Marriage was imagined to tie fathers to their children, but no similar arrangement assured commitments from unmarried fathers. *See* Mayeri, *supra* note 95, at 2381.

100. *See* Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 410 (2013) (explaining that the Court's "decisions consistently reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child's life thereafter").

101. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 992 (1984).

102. 441 U.S. 347, 348-49, 359 (1979) (plurality opinion).

103. *Id.* at 349.

104. *Id.* at 355.

knowing the biological parent's identity—justified legal distinctions between mothers and fathers, even where the father's identity was clear and he had formed a parental relationship with the child.[105]

The gendered distinctions countenanced in the 1970s and 1980s reemerged with greater force in the immigration context in subsequent decades. By the start of the twenty-first century, the Court turned to reproductive biology to justify a gendered order of parentage with respect to citizenship status—specifically for nonmarital parent-child relationships. While marital children enjoyed rights to citizenship based on mother-child and father-child ties, nonmarital children's rights were restricted based on the sex of their citizen parent. This system reflected and enforced views about both the legitimacy of nonmarital family formation and the roles of women and men with respect to their nonmarital children.

First in *Miller v. Albright*[106] and then in *Nguyen v. INS*,[107] the Court considered the constitutionality of a statutory scheme making it more difficult for a nonmarital child born abroad to claim citizenship when the citizen parent is the father.[108] Where the citizen parent is the mother, the child acquires the mother's nationality status at birth.[109] But the citizen father, in addition to proving a biological connection, must take additional, post-birth steps—legitimation of the child, a written acknowledgement of paternity, or an adjudication of paternity—to evidence the social bonds of parenthood.[110]

In *Miller*, a deeply fractured Court refused to hold the statutory provisions unconstitutional.[111] Justice Stevens announced the Court's judgment but delivered an opinion joined only by Chief Justice Rehnquist.[112] The opinion reasoned that the anti-stereotyping principle implicated in the Court's leading sex-equality precedents, many of which involved family-based rights and responsi-

105. *Id.* at 353-57. The Court rejected the father's due process claim because the case involved a right to damages after a child's death, rather than "the freedom of a father to raise his own children." *Id.* at 358-59.

106. 523 U.S. 420 (1998).

107. 533 U.S. 53 (2001).

108. In *Fiallo v. Bell*, the Court had rejected an equal protection claim to an immigration scheme excluding nonmarital father-child relationships from preferential status. 430 U.S. 787, 799-800 (1977).

109. 8 U.S.C. § 1409(c) (2012). Section 1409(c) additionally requires that "the mother ha[s] previously been present in the United States or one of its outlying possessions for a continuous period of one year." *Id.*

110. *Id.* § 1409(a).

111. 523 U.S. at 424.

112. *Id.* at 423.

bilities, was "only indirectly involved in this case."[113] Instead, Justice Stevens relied on *Lehr*, which upheld the differential treatment of unmarried mothers and fathers,[114] and concluded that "biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."[115]

Resolving the constitutional issues left open in *Miller*, a sharply divided Court in *Nguyen* found no equal protection violation, largely because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood."[116] The Court explained: "Given the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers."[117] But the Court translated differences in the biological dimensions of parenthood into differences in the social dimensions: "The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship."[118] But for the father, "[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability . . . ."[119] In the earlier cases on unmarried fathers, a sex-based reproductive difference—gestation—could be understood to create a different parent-child relationship at birth. Now, that difference justified far-reaching distinctions in the post-birth relationships of unmarried mothers and fathers.

While the Court had warned that physiological differences cannot justify policies that reflect or perpetuate generalizations about the distinct capacities of women and men,[120] the *Nguyen* Court rejected the argument that the differential treatment of mothers and fathers reflected "a stereotype that women are more likely than men to actually establish a relationship with their children."[121] Over a strong dissent, the Court viewed the immigration regulations as simply reflecting biological facts.[122] Just as in earlier cases, the Court's gender-

113. *Id.* at 442.

114. *Id.* at 441.

115. *Id.* at 445. For criticism, see Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669 (2000).

116. Nguyen v. INS, 533 U.S. 53, 63 (2001).

117. *Id.* at 64.

118. *Id.* at 65.

119. *Id.*

120. United States v. Virginia, 518 U.S. 515, 533-34 (1996).

121. 533 U.S. at 69.

122. As Reva Siegel has shown, because the Court reasons about reproductive regulation "as a form of state action that concerns physical facts of sex rather than social questions of gen-

differentiated treatment of parent-child relationships discounted the social performance of biological fathers.[123] The father in *Nguyen*, after all, had parented his child for most of the child's life.[124] The decision relied on an approach to parenthood forged in previous decades,[125] but subjected unmarried biological fathers to even more demanding standards in the immigration context.[126]

Conflict over sex-based distinctions in immigration continues. This term, the Court is considering a challenge to a law that placed more onerous residency requirements on unmarried fathers.[127] Under the law at issue in *Morales-Santana v. Lynch*, a nonmarital child born abroad to a citizen mother enjoyed citizenship at birth if the mother resided in the United States (or U.S. possession) for at least one year at some point prior to the child's birth.[128] But if the citizen parent is the father, a child attained citizenship at birth only if the father resided in the United States (or U.S. possession) for a total of ten years, at least five of which must occur after age fourteen.[129] While the statute has been amended, a similar distinction persists in modern immigration law, though

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der," it often neglects "the possibility that such regulation may be animated by constitutionally illicit judgments about women." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264 (1992).

123. For criticism, see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 705-06 (2014); Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); and Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222 (2003).

124. 533 U.S. at 57 (explaining how the child came to the United States before he turned six and was raised by his father).

125. *See* Antognini, *supra* note 100, at 410, 435-40; Katharine B. Silbaugh, Comment, Miller v. Albright*: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139, 1153 (1999).

126. *See* Abrams & Piacenti, *supra* note 123, at 634 (finding that "as a descriptive matter . . . immigration and citizenship law generally use more stringent standards for determining parentage than state family law").

127. *See* Morales-Santana v. Lynch, 804 F.3d 520, 524, 532-33 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (No. 15-1191). *But see* Flores-Villar v. United States, 564 U.S. 210 (2011) (per curiam) (affirming, by an equally divided Court, the Ninth Circuit's determination that the differing residency requirements do not violate Equal Protection because the requirements are rationally related to the government's interest in establishing a link between the citizen father, illegitimate child, and the United States). At the time this Article was finalized, the Court had not issued its decision in *Morales-Santana*.

128. Immigration and Nationality Act of 1952 § 309(c), Pub. L. No. 414, 66 Stat. 163, 238-39 (codified at 8 U.S.C. § 1409(c) (1952)).

129. *Id.* § 301(a)(7), 66 Stat. 163, 236 (codified at 8 U.S.C. § 1401(a)(7) (1952)); *see also id.* § 309(a), 66 Stat. 163, 238-39 (codified at 8 U.S.C. § 1409(a)).

with a shorter physical-presence requirement for fathers.[130] The government has defended the law challenged in *Morales-Santana* based in part on a contention about parentage law: that, for a nonmarital child, the mother and not the father is "typically" the only legal parent at the moment of birth.[131] But that says nothing of the actual parent-child relationships that develop after birth. Here, the father legitimated the child by marrying the mother when the child was eight.[132] Yet that legitimation is insufficient to confer citizenship in light of the pre-birth residency requirements.

Of course, these immigration cases involve only *unmarried* parents, reflecting the law's continued division between marital and nonmarital parenthood.[133] The immigration system has perpetuated views not only about the gender-based roles of women and men with respect to their nonmarital children, but also about the place of nonmarital parents and children. Both the gender- and marriage-based forms of differentiation in the immigration cases reflect understandings that structured the Court's earlier cases with respect to family law. Yet the immigration cases have relied more extensively on gender differentiation in parenthood and have done so in ways that are more punitive to nonmarital parents and children.

II. ASSISTED REPRODUCTION AND PARENTHOOD'S MODERN LIBERALIZATION

For centuries, individuals who aspired to parenthood as a meaningful life project had their desires frustrated. Women who could not become pregnant or carry a pregnancy to term, as well as men who suffered from infertility, would live without the families they imagined. Adoption became widespread over the course of the twentieth century and offered a path to parenthood for some, but many either had their attempts rejected by restrictive adoption regimes or simply decided to forego parenting without the possibility of biological children.

In the late twentieth century, assisted reproductive technologies (ART) offered new hope to these individuals and, in the process, transformed practic-

130. *Compare* 8 U.S.C. § 1409(a) (2012), *with id.* § 1409(c).

131. *See* Petition for Writ of Certiorari at 14-15, Lynch v. Morales-Santana, 136 S. Ct. 2545 (2016) (No. 15-1191), 2016 WL 1157006, at *14-15.

132. *See Morales-Santana*, 804 F.3d at 524.

133. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012).

es of family formation.[134] Married heterosexual couples who in previous generations would have gone without children found opportunities for parenthood through ART.[135] Use of donor sperm had for decades allowed women with infertile husbands to have children—often without anyone but the doctor knowing that the child was not biologically related to the husband.[136] Now, women who themselves struggled with infertility found hope in a variety of new techniques. *In vitro* fertilization (IVF), in which fertilization occurs outside the woman's body, allowed many women to carry and bear their own genetic children.[137] By separating gestation from genetics, IVF also facilitated new practices of egg donation and gestational surrogacy.[138]

The use of ART soared in the first part of the twenty-first century.[139] Approximately sixty thousand live births resulted from IVF in 2014, a fifty percent jump over the previous decade.[140] The number of children born with donor

134. *See* Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 28 (2008). Research shows that women experiencing infertility exhibit significant psychological distress. *See* Tara M. Cousineau & Alice D. Domar, *Psychological Impact of Infertility*, 21 BEST PRAC. & RES. CLINICAL OBSTETRICS & GYNAECOLOGY 293, 293-94 (2007); A.D. Domar et al., *The Psychological Impact of Infertility: A Comparison with Patients with Other Medical Conditions*, 14 J. PSYCHOSOMATIC OBSTETRICS & GYNAECOLOGY 45, 49 (1993).

135. Recent estimates suggest that around six percent of married couples in the United States experience infertility. *See* Nat'l Ctr. for Health Statistics, *National Survey of Family Growth: Infertility*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nsfg/key_statistics/i.htm#infertility [http://perma.cc/V3WN-T2QW].

136. *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1072 (2002).

137. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 942-43 (1986). The first IVF child was born in 1978, but it took years before the procedure became more successful and accessible.

138. *See* SARAH FRANKLIN, BIOLOGICAL RELATIVES: IVF, STEM CELLS, AND THE FUTURE OF KINSHIP (2013); CHARIS THOMPSON, MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES (2005). With the assistance of an egg donor, infertile women could become mothers to children they carried and birthed. And women who could not carry a pregnancy but desired a child with a genetic link to themselves or their husbands found hope in gestational surrogacy. Unlike a traditional surrogate, a gestational surrogate carries a child genetically related to another woman—either the intended mother or an egg donor.

139. CTRS. FOR DISEASE CONTROL & PREVENTION, 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 61 fig.49 (Oct. 2007), http://www.cdc.gov/art/Archived-PDF-Reports/2005ART508.pdf [http://perma.cc/7NKM-EBSR].

140. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 139, at 11 (reporting 38,910 births resulting from ART cycles in 2005); NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, 2014 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 3 (Oct. 2016), http://www.cdc.gov/art/pdf/2014-report/art-2014-national-summary

gametes grew,[141] as did the number born to gestational surrogates.[142] While married different-sex couples were the first to use ART, others eventually turned to ART to form less traditional families. Single women used donor insemination to become mothers, while gays and lesbians engaged in donor insemination, IVF, and surrogacy to have children.[143] As the social meaning and

-report.pdf [http://perma.cc/RZ62-8BRS] (reporting 57,323 births resulting from ART cycles in 2014); *see also* NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, 2013 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 49 (Oct. 2015), http://www.cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf [http://perma.cc/MYU5-87Z5] (noting an upward trend in infants born using ART).

141. Between five thousand and ten thousand live births with donor eggs occur annually. *Compare* NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, 2012 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 47 (Nov. 2014), http://www.cdc.gov/art/pdf/2012-report/national-summary/art_2012_national_summary_report.pdf [http://perma.cc/SC7K-PN2C] (noting approximately 5,600 births based on data regarding only fresh donor-egg embryos), *with National Summary Report*, SOC'Y FOR ASSISTED REPROD. TECH. (2016), http://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx [http://perma.cc/4ZMP-87HU] (in an organization representing 90 percent of ART clinics in the U.S., estimating that its members started approximately 9,000 IVF cycles with fresh and frozen donor-egg and embryos, resulting in about 2,500 live births). Accurate data on children conceived with donor sperm are not available. One recent survey suggests approximately 4,000 to 5,000 births per year. *See Sperm Banking Background Fundamentals - Statistics & Limitations*, CRYOGENIC LABORATORIES (Sept. 22, 2014), http://www.cryolab.com/blog/?p=842 [http://perma.cc/WM3E-UEWL].

142. Reliable data on gestational surrogacy are not available, but the rise in the number of children born through the process is clear. *See* S. A. Grover et al., *Analysis of a Cohort of Gay Men Seeking Help with Third-Party Reproduction*, 98 FERTILITY & STERILITY (Supplement) S48, S48 (2012). Limited data from the Centers for Disease Control and the Society for Assisted Reproductive Technology indicate "an exploding market, one that nearly doubled from 2004 to 2008, producing a total of 5,238 babies over just four years." *See* Magdalina Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 7 (2010), http://www.councilforresponsiblegenetics.org/pagedocuments/KAeVeJoA1M.pdf [http://perma.cc/H537-QF9T].

143. *See* MAUREEN SULLIVAN, THE FAMILY OF WOMAN (2004); Dorothy A. Greenfeld & Emre Seli, *Gay Men Choosing Parenthood Through Assisted Reproduction: Medical and Psychosocial Considerations*, 95 FERTILITY & STERILITY 225, 225 (2011). While approximately twenty percent of same-sex-couple households include children, these children may be biological, stepchildren, or adopted. Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. 1 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf [http://perma.cc/86S6-R4KB]. ART has become more common as fewer same-sex couples raise children from previous different-sex relationships and more form "*intentional* or *planned* LGB-parent families." Abbie E. Goldberg et al., *Research Report on LGB-Parent Families*, WILLIAMS INST. 5 (July 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf [http://perma.cc/23Y7-2H44].

practical import of ART shifted, questions of parental recognition began to implicate emergent commitments to gender and sexual-orientation equality.[144]

This Part examines the law's response to parent-child relationships formed through ART, bringing together developments across jurisdictions and involving a range of family arrangements made possible by donor insemination, IVF, and gestational surrogacy. In some states, family law has aggressively attempted to adapt to developments in parenthood by broadly facilitating family formation through ART and legally recognizing a range of nonbiological parents.[145] But the focus here is on a wider swath of jurisdictions, where law has rendered some individuals legal parents to their children while leaving others legal strangers.[146] Accordingly, having surveyed the law across all jurisdictions,

144. Whereas different-sex couples often use ART to form biological parent-child relationships, same-sex couples often use ART to form less traditional family bonds, defying the heterosexual, gendered, and biological norms of parenting. In the 1980s and 1990s, powerful critiques of ART raised equality concerns with respect to sex, race, and class. *See, e.g.*, GENA COREA, THE MOTHER MACHINE 2-3 (1985); JANICE G. RAYMOND, WOMEN AS WOMBS 30-31 (1993); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 22-23 (1989); Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 210 (1995). Those critiques focused largely on heterosexual family formation and the prioritization of what Dorothy Roberts called "the genetic tie." *See id.* at 213 (exploring "how race, along with gender, continues to determine the meaning of the genetic tie"). Even as practices of ART emphasize biological connections, they also destabilize the importance of biological contributions – and do so most powerfully with single and same-sex parenting. Accordingly, an understanding of how ART has facilitated family formation that challenges traditional norms may suggest the need to qualify equality-inflected critiques of ART. Indeed, this Article's relatively affirmative treatment of ART finds common ground with Roberts's critique of ART specifically with respect to the call to "reconceive the genetic tie as a nonexclusive bond that forms the basis for a more important social relationship between parents and children." *Id.* at 214. Importantly, the point here is not to suggest that equality concerns no longer support critiques of ART, but rather to show how equality concerns also came to animate pro-ART efforts. For other work in this vein, see Cahill, *supra* note 13, at 683-85; Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 37 (2003) ("One important effect of new family forms is that they increase agency for women and gay people generally by undermining patriarchal understandings of family.").

145. *See* Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 226 (1998).

146. In the vast majority of situations involving ART, the various parties agree on who should parent the child. Courts need not decide on conflicting claims between those with biological and social claims to recognition. Instead, an individual who seeks parentage on social grounds does so in circumstances in which another individual with a biological connection does not seek parentage. In other words, the intended parent understands herself as a parent, and the gestational surrogate or gamete donor does not. Yet law may assign parentage in ways that diverge from these shared understandings.

In a relatively small number of cases, the parties disagree, or disagreement emerges over time. Law may then assign parentage in ways that match some of the parties' wishes

this Part attempts to capture approaches that are representative, focusing on majority positions and clear modern trends, rather than attending to less common statutory regimes and judicial decisions.[147]

The account presented here is structured around a set of related distinctions that shape legal recognition: marital and nonmarital parent-child relationships, biological and nonbiological parent-child relationships, motherhood and fatherhood, and different-sex and same-sex couples.[148] It shows how, even as principles of gender and sexual-orientation equality have animated shifts in parental recognition, parentage law continues to draw distinctions that carry forward legacies of inequality embedded in frameworks forged in earlier eras.

As Part I explained, the common law organized parentage around the gender-hierarchical relationship of marriage. The marital presumption historically facilitated the parental recognition of men who were not in fact biological fathers. When, in the second half of the twentieth century, the Court intervened to protect nonmarital parent-child relationships on constitutional grounds, it made biological connection necessary for legal recognition. Yet biological connection operated differently for mothers and fathers. For the Court, gestation and birth inevitably produced legal motherhood. Unmarried biological fathers, in contrast, were required to demonstrate the social bonds of parenthood to have legally protected rights. Inside marriage, men could achieve legal parenthood without biological parenthood. Outside marriage, men could assert biological parenthood but still lack legal parenthood. For women, in contrast, biological and legal parental ties traveled together, both inside and outside marriage.[149]

As this Part shows, the gender-differentiated logic of both the common-law approach and its constitutional repudiation have structured law's response to

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but not others. Given that this Part focuses substantially on litigated cases, it includes some cases involving disagreement; but these cases represent only a sliver of families formed through ART.

147. The legal landscape includes both legislation and adjudication. While statutes demonstrate developments in the law, cases provide a fuller picture of the reasoning that shapes the law of parental recognition. In addition, given that legislatures in most states have been slow to respond to ART, judicial decisions have been critical drivers of legal change in this area. Nonetheless, this Part does not include the kinds of parentage judgments that some trial courts have been willing to issue without explicit statutory or judicial authority.

148. To deliberately form legally recognized dual-parent families, same-sex couples engage in ART or adoption (either jointly or through adoption by one parent of the other parent's child). Accordingly, for same-sex couples, attention to ART encompasses the mode of family formation – nonadoptive parentage – that is the focus of this Article.

149. *See* DOLGIN, *supra* note 1, at 108 ("Biology, in short, gives men options . . . . Mothers, wed or unwed, do not have the same choices.").

ART. When the law accommodated the use of donor insemination by married different-sex couples, it openly acknowledged and expanded marriage's capacity to derive legal fatherhood purely from social arrangements. Courts and legislatures treated the man married to the biological mother as the child's father.

While legal fatherhood's nonbiological capacity inside marriage expanded, legal motherhood largely remained a biological status—even as ART complicated motherhood's biological basis. A woman who gives birth to a child conceived with a donor egg is a legal parent; the biological facts of gestation and birth, along with her intention to be the child's mother, render her the legal mother. Similarly, a woman who uses her own egg but engages a gestational surrogate to carry the child is a legal parent; the genetic contribution and her intention to be the child's mother render her the legal mother. Social aspects of parenthood now shape determinations of motherhood, but, unlike fatherhood, not in ways that dislodge parental recognition from biological connection. When a woman *both* engages a gestational surrogate *and* uses a donor egg, the law often fails to treat her as a legal mother. As this Part makes clear, men without biological ties attain parentage by virtue of marriage to the biological mother, but women without biological ties do not attain parentage by virtue of marriage to the biological father.

The common law organized parentage around a legal relationship—marriage—that was not only gender-hierarchical but also exclusively heterosexual. As Part I explained, when courts and legislatures endeavored to protect *nonmarital* parent-child relationships, they turned explicitly to biological connection as a basis for parental recognition. But tethering parenthood to biological ties perpetuates the exclusion of same-sex couples, who necessarily include a parent without a gestational or genetic connection to the child.

Marriage has intervened in ways imagined to remedy the struggles of same-sex couples.[150] Indeed, the Court in *Obergefell* focused on parenthood, specifically listing "birth . . . certificates; . . . and child custody, support, and visitation" as "aspects of marital status" that would now be open to same-sex couples.[151] Yet, as this Part shows, the law has accommodated same-sex parenting within a framework shaped by the gender-differentiated, heterosexual family—recognizing nonbiological parents in married same-sex couples to the extent they satisfy criteria used to identify legal *fathers*. *Women*, not men, in same-sex couples gain access to parentage through marriage. The *woman* mar-

150. *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 504 (N.Y. 2016) (Pigott, J., concurring) (claiming that with marriage equality, "[s]ame-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed").

151. Obergefell v. Hodges, 135 S.Ct. 2584, 2601 (2015).

ried to the biological mother can be recognized as the legal parent by virtue of her marriage. Men in same-sex couples find themselves in the same position as women in different-sex couples. Neither can attain parentage by virtue of marriage to the biological father, and both struggle for parental recognition in the absence of a biological connection to the child.

Ultimately, this Part's treatment of parental recognition and ART reveals a critical dynamic: courts and legislatures continue to structure the legal family around a biological mother. Biological fathers can be replaced—by either women or men who make purely social claims to parental recognition—yet biological mothers remain necessary. Within this regime, women who separate motherhood from biological ties and men who parent with a same-sex partner often go without legal recognition. To uncover this dynamic, this Part begins with donor insemination and then moves through family formation made possible by IVF, concluding with egg-donor gestational surrogacy.

A. Donor Insemination

The first and most basic form of assisted reproduction, donor insemination, forced law to confront situations in which the biological and social dimensions of parenthood point in different directions. While the identity of the biological and legal mother was clear, law struggled with determinations of who, if anyone, would be the child's second parent. Ultimately, courts and legislatures expanded the marital presumption's capacity to obscure biological facts in favor of social arrangements that privileged marriage. With donor insemination, law treated the man married to the biological mother as the child's father.

As this Section shows, same-sex family formation eventually injected contemporary questions of equality into the regulation of donor insemination, as women in same-sex couples sought legal recognition for the nonbiological mother. In the absence of adoption by the nonbiological mother, parental recognition largely emerged from presumptions of parentage applicable only to married couples; the birth mother's legal spouse could be recognized as a legal parent regardless of sex or sexual orientation. But outside marriage, same-sex couples continued to struggle for parental recognition; the nonbiological mother would rarely be recognized as the child's legal parent at the time of the child's birth. For those outside marriage, biological connections continued to structure parental recognition—rendering same-sex couples, who are not similarly situated to different-sex couples with respect to biological parenthood, especially vulnerable.

1. *Different-Sex Couples, Marriage, and Nonbiological Fathers*

Donor insemination, which law first confronted within the marital family, exposed the confused state of the marital presumption, which assumed biological paternity but could recognize relationships that deviated from biological facts. Donor insemination made such deviations deliberate, even if not plainly visible.

Courts and lawmakers initially responded by condemning donor insemination as a threat to the "natural" family and rejecting application of the marital presumption. Because the woman conceived with semen from another man, she was thought to have committed adultery, and the resulting child was considered "illegitimate."[152] This logic remained rooted in men's entitlements, and specifically concerns with "the possibility of introducing into the family of the husband a false strain of blood."[153]

Despite this hostile legal backdrop, the practice of donor insemination became more widespread. Beyond the couple and their doctor, few knew that a child was conceived with donor sperm. Judges and lawmakers eventually responded and, by the mid-1960s and early 1970s, began to expressly treat the husband of a woman who conceived with donor sperm as the child's "lawful" father.[154] Following the 1973 UPA, most states adopted statutory provisions providing that marriage to the mother and consent to assisted reproduction yielded parental recognition for the husband.[155] The husband's consent demonstrated his willingness to introduce another man's "blood" into his family line. At the same time, his recognition allowed the state to assure the child's support from private sources.[156]

Since most states, as well as the original UPA, limited donor-insemination provisions to married couples, those provisions merely replicated the marital presumption's logic.[157] In fact, in the many states that failed to enact donor-

152. *See* Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Ill. Super. Ct. 1954), *appeal denied*, 12 Ill. App. 2d 473 (1956); *see also* George P. Smith, II, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 136 (1968).

153. *See* Allen D. Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A. J. 1089, 1092 (1957).

154. *See* 1967 Okla. Sess. Laws 498 (codified at OKLA. STAT. tit. 10, §§ 551-53 (2014)); People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968).

155. *See, e.g.*, 1982 Idaho Sess. Laws 862 (codified at IDAHO CODE § 39-5405 (2016)).

156. *See Sorensen*, 437 P.2d 495 (finding criminal nonsupport).

157. *See* Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 94 (2015). Even Harry Krause, the leading proponent of removing marital-status distinctions in the regulation of parent-child relationships,

insemination statutes, the husband of a woman giving birth to a child conceived with donor sperm is presumed the child's legal father simply by virtue of the marital presumption.[158] Marriage had always served as an imperfect proxy for biological paternity. But by explicitly accepting donor insemination, law embraced social fatherhood in ways that rendered marriage not a proxy but a substitute for biological paternity.

2. *Same-Sex Couples, Marriage, and Nonbiological Mothers*

By the 1980s and 1990s, donor insemination furnished lesbian couples a relatively accessible path to child-rearing. Excluded from marriage, same-sex couples inhabited a nonmarital parentage regime that mostly turned on biological connections. Since only one of the women would have a biological connection to the child, the other found herself a legal stranger upon the child's birth. For many years, courts in most states refused to provide comprehensive legal recognition to the nonbiological mother.[159] Over time, in an effort to provide some protections to same-sex parents, some states furnished legal recognition to nonbiological mothers even in the absence of second-parent adoption.[160] Yet even in these states, legal recognition did not arise at the child's birth and instead required some period of parenting.[161]

By the 2000s, access to marriage became the chief test of equality for same-sex couples, and was understood to protect not only their romantic bonds but also their parent-child relationships. As same-sex couples gained entry to marriage—first on a state-by-state basis, and then nationwide with *Obergefell*—they began to press claims to parental recognition by virtue of their marital relationships. Marriage, of course, had shown the capacity to allow individuals to achieve parentage on social rather than biological grounds. While only men, not women, had received parental recognition without a biological connection, judges and lawmakers soon accommodated married women.

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favored limiting ART to married couples and opposed commercial surrogacy. *See* Harry D. Krause, *Artificial Conception: Legislative Approaches*, 19 FAM. L.Q. 185, 197-200 (1985).

158. *See* NeJaime, *supra* note 16, at 1245 n.354.

159. As Susan Dalton observed, courts in California, for instance, granted "legal parent status to non-biological fathers [in different-sex couples] while refusing similar status to non-biological mothers [in same-sex couples]." Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 262-63 (2003).

160. *See* NeJaime, *supra* note 24.

161. *See infra* note 182. *But see* Shineovich v. Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009) (applying donor-insemination statute to unmarried same-sex couples).

Courts and legislatures adapted donor-insemination regulations governing married different-sex couples to married same-sex couples. Provisions recognizing the mother's husband as the legal father can similarly treat the mother's wife as the "natural," and thus legal, parent.[162] While Appendix A shows that only about a third of states with donor-insemination statutes currently maintain gender-neutral provisions,[163] courts that have considered the issue in other states have, almost without exception, applied these statutes to married same-sex couples.[164]

In many states, such application has been aided by explicit gender-neutrality directives modeled on the UPA. The original UPA provides that in actions "to determine the existence or nonexistence of a mother and child relationship[,] [i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply."[165] The revised UPA includes a similar directive, stating that the provisions "relating to determination of paternity apply to determinations of maternity."[166] While the UPA drafters viewed "cases involving disputed maternity [as] extraordinarily rare,"[167] same-sex couples tested the reach of these gender-neutrality directives. With marriage equality, courts began to treat the nonbiological mother like a legal "father." Gender neutrality furthered principles of not only sex but also sexual-orientation equality.

Strikingly, specific donor-insemination statutes have become in some ways ancillary, as states have simply applied the marital presumption to lesbian couples.[168] A New York court, for instance, determined that common-law and statutory presumptions of parentage must be interpreted in a "gender-neutral" manner in light of the onset of marriage equality, and so concluded that "the child of either partner in a married same-sex couple will be presumed to be the child of both, even though the child is not genetically linked to both par-

162. *See* Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012); *see also* NeJaime, *supra* note 16, at 1244 n.353 (giving further examples of states extending parentage provisions to same-sex spouses of women).

163. *See infra* Appendix A (listing twelve gender-neutral donor insemination statutes); Appendix B (listing thirty-eight state donor-insemination statutes).

164. *See infra* Appendix A. *But see* Smith v. Pavan, 505 S.W.3d 169 (Ark. 2016) (declining to recognize same-sex spouses of women on Arkansas birth certificates).

165. UNIF. PARENTAGE ACT § 21 (UNIF. LAW COMM'N 1973).

166. UNIF. PARENTAGE ACT § 106 (UNIF. LAW COMM'N 2002).

167. *Id.* § 106 cmt.; *see also* UNIF. PARENTAGE ACT § 21 cmt. (UNIF. LAW COMM'N 1973) (declaring that "it is not believed that cases of this nature will arise frequently").

168. *See infra* Appendix A; *see also* NeJaime, *supra* note 16, at 1242-48 (describing states' different levels of receptivity to applying the marital presumption to same-sex spouses).

ents."[169] As Appendix A shows, some state legislatures have revised not only their donor-insemination provisions but also their marital presumptions to recognize that the *person* married to the "woman giving birth" or the "natural mother" is presumed to be the child's legal parent.[170] In these states, the marital presumption, long capable of hiding contrary biological facts, expressly embraces purely social aspects of parenthood.[171] If law is not pretending that the individual presumed to be the parent is the biological parent, it no longer seems necessary that that individual be a man. Now, parenthood for both men and women can derive from marriage to the biological mother.

While many of these developments emerged solely as a matter of family law, constitutional equality commitments also drove judicial decisions applying the marital presumption to same-sex couples. After *Obergefell*, courts have held that donor-insemination provisions must allow the biological mother's wife to be treated as the child's natural parent, just like a husband would be.[172] Several courts have also held that equal protection requires the general marital presumption to apply to lesbian couples.[173]

Nonetheless, the reach of the marital presumption is far from settled.[174] Even though courts considering the issue have largely required application of the marital presumption to lesbian couples, some state governments continue to defend parenthood as a biological fact and assert that the marital presumption serves as a proxy for biological parenthood. Yet these states have allowed married men in different-sex couples to use the presumption to derive legal fa-

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169. Wendy G-M v. Erin G-M, 985 N.Y.S.2d 845, 860-61 (Sup. Ct. 2014). Other New York courts have provided less clear guidance on the presumption's application. *See, e.g.*, Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014) ("It is this court's view that the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives . . . . Thus [the law] . . . does not preclude differentiation based on essential biology.").

170. Fewer than ten states have legislated explicitly in this way as a means of addressing same-sex couples. *See infra* Appendix A. While a few additional states maintain a statutory marital presumption that does not include gender-specific language, these provisions predate marriage for same-sex couples and were not enacted to address same-sex family formation.

171. *See* NeJaime, *supra* note 16, at 1240-49.

172. *See, e.g.*, Roe v. Patton, No. 2:15-cv-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015) (holding on federal constitutional grounds).

173. *See, e.g.*, Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645 (S.D. Ind. June 30, 2016) (holding on federal constitutional grounds); McLaughlin v. Jones, No. 2 CA-SA 2016-0035, 2016 WL 5929205 (Ariz. Ct. App. Oct. 11, 2016) (same); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) (holding on equal protection grounds based on Iowa's state constitution). *But see* Smith v. Pavan, 505 S.W.3d 169 (Ark. 2016).

174. *See* NeJaime, *supra* note 16, at 1245-46.

therhood of children conceived through donor insemination.[175] Now, when confronted with same-sex couples who make deviations from biology obvious, these states have struggled to frame this nonbiological application to different-sex couples as an exception to be minimized, rather than extended.

Courts generally have responded skeptically to these resistant states. For example, a federal district court in Indiana recently considered a number of cases in which state officials expressly told married same-sex couples they could not both be listed on the birth certificate and that the nonbiological mother would have to adopt her child.[176] Repudiating the state's actions, the court ruled that Indiana cannot offer mothers with different-sex spouses the "legal fiction" facilitated by the marital presumption but withhold that "legal fiction" from mothers with same-sex spouses.[177] The marital presumption had become a critical site for the promotion of sex and sexual-orientation equality.

3. *Donor Insemination Outside Marriage*

For married couples using donor insemination, the law has increasingly recognized their claims to parentage. Both nonbiological fathers in different-sex couples and nonbiological mothers in same-sex couples attain parentage by virtue of marriage to the biological mother. While parentage inside marriage has tracked individuals' expectations about their parent-child bonds, parentage outside marriage in the context of donor insemination often has not.

As Appendix B shows, most states draw marital-status distinctions in their treatment of donor insemination. Spouses, not unmarried partners, are recognized as legal parents of children conceived with donor sperm.[178] Further, under the original UPA and the laws of many states, sperm donors are divested of rights and responsibilities only if they donate sperm for use by a married woman.[179] The nonrecognition of unmarried nonbiological coparents and the legal recognition of sperm donors both complicate ART for unmarried individuals and threaten the stability of nonmarital families.

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175. *See, e.g.*, *Henderson*, 2016 WL 3548645 at *9.

176. *Id.* at *4.

177. *Id.* at *13.

178. Whether through explicit legislation or a lack of legislation, this is the case in more than forty states. *See infra* Appendix B. Fewer than ten states have explicit provisions allowing for the unmarried partner's recognition. (These are the states in Appendix B with a statute regulating donor insemination and no mark in the first column. *See infra* Appendix B.).

179. This remains the case in more than half the states, with only about fifteen states explicitly providing that a man who donates sperm to a woman who is not his wife is not the child's legal father. *See infra* Appendix B.

The nonrecognition of nonbiological unmarried parents is particularly problematic for same-sex couples, who are not similarly situated to different-sex couples as a matter of biological parenthood. Same-sex couples necessarily include a parent without a gestational or genetic tie to the child,[180] and thus are especially vulnerable in a parentage regime where recognition turns on biological connection. Yet courts have generally held that laws meet equality commitments as long as a nonbiological lesbian coparent in an unmarried same-sex couple is treated the same as a nonbiological father in an unmarried different-sex couple.[181] In most jurisdictions, neither of these individuals ordinarily enjoys parentage without adoption.[182]

Lacking statutory or equitable paths to recognition, the unmarried coparent, even after years of parenting, generally finds no relief in constitutional doctrine.[183] For instance, in *Russell v. Pasik*, a lesbian couple had four children with the same donor sperm, with each woman giving birth to two children.[184] They raised the children together for years, but after the couple's relationship dissolved, only the biological parent-child relationships enjoyed legal recognition. The Florida appellate court rejected the argument that each

180. To be clear, that parent may have a biological relationship because of a relative's gamete donation or gestational role, but does not have a legally cognizable gestational or genetic connection.

181. *See In re* Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015) (reasoning that because the donor-insemination statute "would not apply to an opposite-sex couple that made that choice [not to marry], it follows that the statute also should not apply to same-sex couples that make the same choice"); State *ex rel.* D.R.M., 34 P.3d 887, 892-93 (Wash. Ct. App. 2001) (reasoning that the nonbiological lesbian mother "is not being treated differently than an unmarried man under similar facts" and is therefore not being denied equal protection "based on . . . gender or sexual orientation"); *see also* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 504 (N.Y. 2016) (Pigott, J., concurring) (asserting that "an unmarried individual who lacks a biological or adoptive connection to a child [born outside marriage] does not have standing . . . regardless of gender or sexual orientation").

182. More than half of the states have mechanisms—equitable or statutory—that allow an unmarried nonbiological parent to obtain custody or visitation. *See infra* Appendix C. At times, these paths provide only some parental rights, or fail to treat the unmarried nonbiological parent as standing in parity with the legal parent. These state mechanisms also usually require an extensive period of parenting, thus leaving the unmarried nonbiological parent a stranger at the time of the child's birth and for some significant period afterwards. Further, they ordinarily require a judicial determination, leading unmarried nonbiological parents to rely on courts to obtain custody or visitation.

183. Once a nonbiological parent qualifies as a legal parent as a family law matter, she has constitutional parental rights, S.Y. v. S.B., 134 Cal. Rptr. 3d 1 (App. Dep't Super. Ct. 2011), but this is distinct from the idea that the nonbiological parent has a constitutional interest in being recognized as a parent.

184. Russell v. Pasik, 178 So. 3d 55, 55 (Fla. Dist. Ct. App. 2015).

woman had constitutionally protected rights with respect to each child.[185] The court acknowledged the significance of the social performance of parenthood, explaining that "the act of assuming parental responsibilities and actively caring for a child is sufficient to develop constitutional rights in favor of the parent."[186] But, recalling the earlier cases on unmarried fathers, it then explained that this path to parental rights springs only from biology: "[I]t is the *biological connection between parent and child* that 'gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right based on the actions of the parent.'"[187] Each woman enjoyed a legally protected relationship only with the children to whom she gave birth.

Equality for same-sex couples had been channeled through marriage and its ability to legally recognize nonbiological fathers. Most states grafted the two legal regimes that had formed to regulate parentage—marriage and biology—onto donor insemination and thus sharply differentiated between marital and nonmarital families. A man, and now a woman, can be a legal parent of a child conceived with donor sperm if that man or woman is married to the biological mother. In an effort to protect *nonmarital* parent-child relationships that had been excluded by the common law's marital order, courts and legislatures had turned explicitly to biological connection as a basis for parental recognition. But tethering parenthood to biological ties perpetuates same-sex couples' exclusion. The unmarried mother's partner, with neither a biological nor marital basis for parental recognition, will ordinarily be a legal stranger upon the child's birth, even if she intends to parent the child and does in fact parent the child.

B. In Vitro Fertilization, Egg Donation, and Gestational Surrogacy

While donor insemination challenged the relationship between the biological fact of paternity and the social role of fatherhood, IVF, in which the egg is fertilized outside the woman's body, challenged the relationship between the biological facts of maternity—gestation and genetics—and the social role of motherhood.[188] By separating gestation from genetics, IVF made biological connection itself a more complex marker of parenthood. The biological fact of

185. *See id.* at 60.

186. *Id.* (quoting D.M.T. v. T.M.H., 129 So. 3d 320, 338 (Fla. 2013)).

187. *Id.*

188. *See* DOLGIN, *supra* note 1, at 3 (arguing that "it is no longer possible to judge questions about the social dimensions of motherhood against the unchanging parameters of biological maternity").

motherhood had always followed seamlessly from birth, but now a woman could give birth to a child genetically related to another woman. Of course, many women used IVF in ways that allowed them to give birth to their own genetic children. But the technology also facilitated important new practices – egg (and embryo) donation, gestational surrogacy, and "co-maternity" – that divided biological maternity across two women.

Courts and legislatures, this Section shows, navigated these new situations in ways animated by commitments to gender and sexual-orientation equality. Women, they recognized, could attain legal motherhood based on birth *or* genetics, and, correspondingly, could separate the physical facts of pregnancy and birth from the social role of motherhood. The legal status of motherhood followed not simply from the biological fact of maternity but from the social performance of parenthood. Not only could women in different-sex couples achieve parental recognition based on birth *or* genetics, but women in same-sex couples could each achieve parental recognition by having one woman be the genetic mother and the other be the gestational mother. Nevertheless, even as social markers of parenthood became critical to legal determinations of motherhood, a biological connection – whether gestation or genetics – remained critical to legal motherhood. Law continued to ground motherhood, unlike fatherhood, in a biological tie.

1. *Donor Eggs and Birth Mothers*

The use of donor eggs or embryos did not ordinarily provoke controversy. Since the woman giving birth was the intended mother, others would rarely know she was not genetically related to the child. When disputes arose, they often occurred upon dissolution of a relationship, when the birth mother's husband or partner (and the child's biological father) attempted to use the mother's lack of genetic connection to deny her parental status.

As courts and legislatures approached these conflicts, social factors that had begun to shape legal fatherhood in the regulation of donor insemination provided guidance. Consider a representative case from Tennessee.[189] Cindy and Charles, an unmarried couple in their mid-forties, decided to have children together.[190] Cindy, who already had children, was concerned about the viability of her eggs and thus turned to donor eggs and IVF.[191] After Cindy gave birth to

189. *In re* C.K.G., 173 S.W.3d 714, 717 (Tenn. 2005).

190. *Id.*

191. *Id.*

triplets, she and Charles raised the children together.[192] When the couple later broke up, Charles attempted to use Cindy's lack of genetic connection to deprive her of parental rights.[193]

The Tennessee Supreme Court rejected his argument. In recognizing Cindy as the legal mother, the court focused on the fact that both she and Charles intended that she be the children's legal mother. The court looked to the state's donor-insemination statute to support its consideration of intent, explaining how that statute "confers parental status on a husband even though the child conceived in his wife via artificial insemination is not necessarily genetically related to him."[194] So too could Cindy, not genetically related to the children, be their legal mother. Other courts analogized egg (and embryo) donation to sperm donation,[195] and, as Appendix D shows, many states codified this result—divesting egg and embryo donors of parental rights and rendering the intended (birth) mother the legal mother.[196]

Nonetheless, there was an important difference between Cindy and a man whose wife conceives with donor sperm. The birth mother who uses donor eggs still claims a biological, even if not genetic, connection to the child. As the Tennessee court noted, Cindy claimed maternity based on the biological marker relied upon in the common law—birth. And that fact was critical to the court's judgment.[197] Indeed, parentage laws across the country continue to provide that maternity may be established by giving birth.[198] Unlike men whose wives use donor insemination, women using donor eggs turn to intent as a supplement to, rather than substitute for, biological markers of parenthood. For these women, gestation and birth constitute biological maternity, and thus form the basis of a claim to parentage. Intention—a social criterion—supports parental recognition that follows from this biological connection.[199]

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192. *Id.* at 718.

193. *Id.* at 718-19.

194. *Id.* at 728.

195. *See, e.g.*, Okoli v. Okoli, 963 N.E.2d 730, 734 (Mass. App. Ct. 2012).

196. *See infra* Appendix D.

197. *In re C.K.G.*, 173 S.W.3d at 729 (concluding that "gestation is an important factor for establishing legal maternity").

198. *See, e.g.*, OHIO REV. CODE ANN. § 3111.02 (LexisNexis 2015) ("The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child . . . .").

199. *See* McDonald v. McDonald, 608 N.Y.S.2d 477, 480-81 (App. Div. 1994) (holding that when genetics and gestation do not coincide in one woman, the intended mother should be the legal parent).

2. *Gestational Surrogacy and Genetic Mothers*

In contrast to the relatively few disputes involving donor eggs, the use of IVF in surrogacy provoked greater controversy by disturbing the foundational assumption that the woman giving birth is the child's mother. When surrogacy first attracted national attention with New Jersey's infamous *Baby M* case[200] in the 1980s, the focus was on *traditional* surrogacy, in which the surrogate is both the child's gestational *and* genetic mother. Courts and commentators attended to the rights of the surrogate, not the nonbiological intended mother.[201] The intended mother was simply a legal stranger who, even if surrogacy were accepted, would have to adopt the child.[202]

After the New Jersey Supreme Court repudiated surrogacy in *Baby M*, many state legislatures considered—and some passed—bans on the practice.[203] At that time, sex-equality arguments animated the rejection of surrogacy.[204] Judges and lawmakers, as well as scholars and activists, worried about the exploitation of women, the commodification of women's reproductive capacity, and the deprivation of biological mothers' rights.[205]

As Elizabeth Scott has shown, views on surrogacy shifted over time for several reasons. Some women's rights advocates pulled back after seeing arguments against surrogacy invoked to restrict women's reproductive rights more generally.[206] Empirical work presented a more complicated picture of surrogacy in the United States, one that bore little resemblance to predictions of coercion and exploitation.[207] And, most critically, the introduction of *gestational* surroga-

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

201. *See, e.g.*, *id.* at 1241; Anita L. Allen, *Privacy, Surrogacy, and the* Baby M *Case*, 76 GEO. L.J. 1759, 1764 (1988).

202. *See, e.g.*, *In re Baby M*, 537 A.2d at 1241-46 (focusing on the status of the surrogate mother and the biological father, and assuming that even if the surrogacy agreement were accepted, the intended mother would have to adopt the child).

203. *See* Scott, *supra* note 12, at 117-20.

204. *See* COREA, *supra* note 144; MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS (1996); ROTHMAN, *supra* note 144. *But see* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 179 (Larry Gostin ed., 1990).

205. *See* Doe v. Attorney General, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992); MARTHA A. FIELD, SURROGATE MOTHERHOOD 25-32 (1988); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1925-36 (1987).

206. *See* Scott, *supra* note 12, at 144 ("[I]t became clear that support for restrictions on surrogacy undermined pro-choice advocacy.").

207. *See* Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143 (2015); Olga B.A. van den Akker, *Psycho-*

cy, in which the woman giving birth is not genetically related to the child, dramatically reshaped the regulatory framework and social norms governing surrogacy.[208] Not only did the surrogate have no genetic connection to the child, but the intended mother could be the genetic mother. In response, courts soon drew distinctions between traditional and gestational surrogacy in ways that suggested that sex-equality commitments required *acceptance* of the practice.

In its landmark 1993 decision in *Johnson v. Calvert*,[209] the California Supreme Court recognized a child's genetic intended mother as the legal mother, over the objection of the gestational surrogate. The court articulated a doctrine of intentional parenthood that would reverberate across the country.[210] After concluding that "both genetic consanguinity and giving birth [are] means of establishing a mother and child relationship," the court reasoned that "when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[211] An intent-based rule, the court concluded, would "best promote certainty and stability for the child."[212]

In the years that followed, other states recognized intended mothers as legal mothers if they were also genetic mothers.[213] Consider a case from Massachusetts. Marla Culliton was "incapable of bearing and giving birth to a child without unreasonable risk to her health."[214] She and her husband, Steven, entered into an arrangement with Melissa Carroll, a single woman who agreed to serve as a gestational surrogate. The embryos gestated by Melissa were created from Steven's sperm and Marla's ova, thus allowing the Cullitons to have their own biological children.[215] All three parties sought the same relief in court, asking that Marla, and not Melissa, be recognized as the legal mother.[216]

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social Aspects of Surrogate Motherhood, 13 HUM. REPROD. UPDATE 53 (2006). Nonetheless, surrogacy in other countries may raise greater concerns. *See, e.g.*, AMRITA PANDE, WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA (2014).

208. *See* Scott, *supra* note 12, at 139-42.

209. 851 P.2d 776, 782 (Cal. 1993).

210. *Id.*

211. *Id.*

212. *Id.* at 783.

213. *See, e.g.*, Nolan v. LaBree, 52 A.3d 923 (Me. 2012); Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001).

214. *See Culliton*, 756 N.E.2d at 1135 (quoting the gestational surrogacy contract in this case).

215. *See id.*

216. *Id.* at 1136.

In an earlier case, the Massachusetts Supreme Judicial Court had required adoption by an intended mother in circumstances involving traditional surrogacy.[217] Yet with the new scenario presented by the Cullitons, the court ruled that adoption would not be required in circumstances of gestational surrogacy where the intended mother is the genetic mother.[218] Marla would be the legal mother, and Melissa would not.

Ordinarily, the child born to an unmarried woman—here, Melissa—would not be a child of a marriage. But Marla's genetic connection changed that calculus. "While the twins technically were born out of wedlock," the court explained, they "were conceived by a married couple [and] [i]n these circumstances the children should be presumed to be the children of marriage."[219] Marla did not attain parentage by virtue of her marriage to Steven, the biological father. Rather, Marla's genetic connection allowed her to claim legal motherhood, and thus to claim the children as children of the marriage. With gestational surrogacy, a child could qualify as a "child of the marriage" based on the mother's genetic connection, even if she did not give birth to the child.

Taken together, the emerging legal regulation of gestational surrogacy and egg donation made motherhood a contested biological, social, and legal status. Either gestation or genetics can be the basis of motherhood, and neither gestation nor genetics is itself necessary to motherhood. A woman can be a legal mother when she gives birth to a child genetically related to another woman (an egg donor), and a woman can be a legal mother when she is genetically related to a child carried by another woman (a gestational surrogate).[220]

With the expansion of women's reproductive and parental options, motherhood became contingent on social factors. Faced with two women who could claim a biological tie to the child—one gestational, the other genetic—courts turned to intent to determine which biological mother was the legal mother. While the role of intent in some ways mirrored determinations of legal fatherhood in the donor-insemination context, the legal mother still enacted parenthood biologically—either as a genetic progenitor or through pregnancy and birth.[221] Law could preserve motherhood as a biological status, even as it

217. *See* R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998).

218. *See Culliton*, 756 N.E.2d at 1137-38.

219. *Id.* at 1137.

220. Express statutory or appellate authority for the genetic intended mother's parental status exists in a majority of states. *See infra* Appendix E. In other states, trial-court decisions (not considered here) may also provide this result.

221. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 621 (2002).

resorted to social factors to determine its legal status. While social factors supplanted biological ties in the donor-insemination context, here they merely *supplemented* biological factors.

The shifts charted above occurred as a matter of state parentage law. But in those states that resisted shifts in maternity provoked by ART, courts turned to state and federal constitutional law to credit the claims of genetic intended mothers who had engaged a gestational surrogate. Sex equality, courts reasoned, required recognition of women who are genetic, but not gestational, mothers. In particular, parentage for *married genetic mothers* followed from the earlier recognition of *unmarried biological fathers*. In 1994, in *Soos v. Superior Court*, a woman "unable to have children because of a partial hysterectomy" had her eggs removed and fertilized with her husband's sperm and then engaged a gestational surrogate to carry the pregnancy.[222] The Arizona court accepted her challenge to the state's commercial-surrogacy prohibition, explaining that, unlike a man, "[a] woman who may be genetically related to a child has no opportunity to prove her maternity and is thereby denied the opportunity to develop the parent-child relationship."[223]

A similar result emerged in Utah in 2002. In *J.R. v. Utah*, a federal district court found that giving conclusive effect to the maternity presumption based on birth violated equal protection by treating "the genetic/biological father" differently than "the genetic/biological mother."[224] For the court, the genetic intended mother was analogous to the unmarried father protected constitutionally in the 1970s.[225] By denying her the opportunity to establish parentage based on her genetic tie and instead deeming the gestational surrogate the legal mother, Utah's surrogacy regulation violated the woman's fundamental parental rights.[226]

For some, not only recognition of the intended genetic mother, but also *nonrecognition* of the gestational surrogate, promoted sex equality. As a concurring opinion in *Soos* observed:

> [The gestational surrogate's] contract is to carry the child, not to nurture or raise it. The [anti-surrogacy] statute thrusts these burdens on her as a duty well beyond her contract . . . . [B]y automatically giving custody of the child to the surrogate, the statute ignores the very re-

222. 897 P.2d 1356, 1357-58 (Ariz. Ct. App. 1994).

223. *Id.* at 1360.

224. 261 F. Supp. 2d 1268, 1272 (D. Utah 2002).

225. *Id.* at 1285 (citing cases on unmarried fathers).

226. *Id.* at 1289.

> al possibility . . . that the gestational mother has probably no interest whatsoever in raising the child . . . .[227]

Resonating with equality concerns audible in abortion rights jurisprudence, the concurrence impugned the state's surrogacy ban for compelling a woman to assume the social role of motherhood based on the physical fact of pregnancy.[228]

Strikingly, the recognition of genetic mothers as legal mothers – and the corresponding nonrecognition of gestational surrogates – made reproductive biology less central to legal parenthood, and thus reduced the salience of a key justification for gender-differentiated parental recognition. As Part I showed, when the Court repudiated the common law of "illegitimacy," it placed a premium on biological connection *and* differentiated between mothers and fathers by resort to reproductive biology. Now, in the age of ART, the premium on biological connection aided the genetic intended mother, who claimed a constitutional interest in parenthood that sprung from her genetic connection to the child. Like the biological father from the 1970s, the genetic intended mother grasped the opportunity to be a parent that her biological connection afforded.

Yet, by focusing on the rights of genetic intended mothers, courts cleaved the biological process of reproduction from the legal status of motherhood, thus weakening the justification for differences between motherhood and fatherhood. The genetic intended mother was like the unmarried biological father. At the same time, the woman who gave birth – who had always been the legal mother – no longer necessarily attained that status. The law's accommodation of ART pulled back on the gender-differentiated understanding of parenthood that the constitutional repudiation of "illegitimacy" had authorized in the name of reproductive biology.

Developments in New York illustrate this point. In 1992, a court had rejected the idea that maternity could be adjudicated in the context of gestational surrogacy where the intended mother was the genetic mother; motherhood was a biological fact grounded in birth.[229] But courts in the state eventually allowed for maternity determinations for genetic intended mothers. They moved in this direction by applying sex-equality principles to questions of parental

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227. 897 P.2d at 1361 (Gerber, J., concurring).

228. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992); *see also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1051 (pointing to *Casey*'s "insistence that abortion regulation not enforce the gender-stereotypical understandings of the separate spheres tradition").

229. *See* Andres A. v. Judith N., 591 N.Y.S.2d 946, 950 (Fam. Ct. 1992).

recognition.[230] In 2011, a court explained: "The issue here is not . . . whether there is a distinction between males and females in the birth process, as there most assuredly is one. Rather, the issue . . . is whether there is an impermissible gender-based classification between parents *after* the birth of the child."[231] Gestational surrogacy's separation of gestation and genetics exposed the ways in which biological differences in *reproduction* had naturalized legal differences in *parenthood*. Now, sex-equality principles animated the rejection of reproductive biology as a justification for gender-differentiated parental recognition.

3. Co-Maternity and Same-Sex Couples

The parental recognition of women who separated gestation from genetics furthered commitments to equality based not only on sex but also on sexual orientation. Some lesbian couples used IVF to produce "co-maternity," in which one partner carries a child conceived with the other partner's egg. While co-maternity cases arose only in a handful of states, the courts that addressed the question found that the birth mother and genetic mother each qualified as legal parents, even if on different facts they would be surrogates or egg donors.

Each woman could make a statutory claim to motherhood based on a biological criterion, and each could point to social factors—such as intent, family formation, and parental conduct—to translate the biological fact of maternity into the legal status of parentage.[232] Even when courts ruled on statutory rather than constitutional grounds, they understood their decisions to promote the equal status of same-sex couples and their children.[233] Recognition of two mothers aligned both with gender-neutrality principles in state parentage

230. *See* Doe v. N.Y.C. Bd. of Health, 782 N.Y.S.2d 180 (Sup. Ct. 2004) (allowing postbirth relief without adoption, provided the intended mother demonstrates that she is the genetic mother).

231. T.V. v. N.Y. State Dep't of Health, 929 N.Y.S.2d 139, 152 (App. Div. 2011).

232. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005) (reasoning that though *Johnson* declared that a child can have "only one natural mother," a child can have two natural mothers in the context of same-sex couples); St. Mary v. Damon, 309 P.3d 1027, 1029, 1035 (Nev. 2013) (reversing the district court's ruling that the birth mother was a surrogate and instructing the district court to "consider the parentage statutes with respect to [women's] testimonies regarding their intent in creating the child and the nature of their relationship to one another").

233. *See St. Mary*, 309 P.3d at 1033.

codes and with commitments to sexual-orientation equality expressed in legislation recognizing the rights of same-sex couples.[234]

Constitutional principles also protected the genetic mother's parental interests. Courts found that preventing her from proving maternity constituted impermissible sex or sexual-orientation discrimination,[235] and deprived her of a protected liberty interest generated by her biological connection.[236] The genetic mother was like the unmarried biological father recognized by the Court in the 1970s. By virtue of her biological tie, she was uniquely situated "to grasp the opportunity" to be a parent.[237]

C. Egg-Donor Gestational Surrogacy

This Part has shown how courts and legislatures responded to ART in ways animated by emergent commitments to sex and sexual-orientation equality, yet did so by reasoning within frameworks of parental recognition organized around marital and biological relationships. With donor insemination, judges and lawmakers elaborated the capacity of legal fatherhood inside marriage to capture social parent-child relationships. Men, and eventually women, derived parentage by virtue of marriage to the biological mother. But outside marriage, intended parents found themselves excluded. Nonbiological coparents—a regular feature of same-sex-couple-headed families—struggled to gain parental rights.

With IVF, courts and legislatures again responded in ways that furthered equality principles. Women, in both different-sex and same-sex couples, could achieve parenthood without giving birth or in the absence of a genetic connection to the child. Yet even as judges and lawmakers muddied understandings of maternity in both marital and nonmarital families—looking to social factors to make legal determinations of parentage—they preserved biological under-

234. *See id.* at 1032-33 (noting that "the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents").

235. *See* D.M.T. v. T.M.H., 129 So. 3d 320, 343 (Fla. 2013) (holding that a statute defining "commissioning couple" as the intended "mother and father" impermissibly discriminated against same-sex couples based on sexual orientation); *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 688 (Sur. Ct. 2009) (finding that the court lacked jurisdiction to invalidate the law as unconstitutional but nonetheless explaining that "provisions permitting the biological ('putative') *father* of a child born out of wedlock to establish parental status while excluding the genetic *mother* from the same opportunity is a constitutionally prohibited gender-based classification").

236. *D.M.T.*, 129 So. 3d at 336-37.

237. *Id.* at 337-38 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

standings of motherhood. Intended mothers pointed to their own biological connection to the child, whether gestational or genetic, to claim maternity.

From this perspective, surrogacy's normalization had not resulted from a new perspective on the nonbiological intended mother, but rather from her disappearance. The intended mother from *Baby M* had been replaced by the *genetic* intended mother from *Johnson*—a woman who could combine parenthood's biological and social dimensions. As this Section shows, intended parents who engaged two women—an egg donor and a gestational surrogate—struggled to capitalize on the law's acceptance of gestational surrogacy. Accordingly, the remainder of this Part focuses on failed claims to parental recognition.

This Section first shows how, in situations involving different-sex couples, courts and legislatures failed to see the nonbiological intended mother, who lacked a genetic or gestational connection to the child, as a legal mother. The intended mother who could claim a genetic, but not gestational, tie to the child had successfully analogized herself to a genetic father. Now, the intended mother with neither a genetic nor gestational tie to the child attempted to analogize herself to the man whose wife gives birth to a child conceived with donor sperm. Within the gendered logic of the marital presumption, however, judges and lawmakers refused to allow her to derive parentage by virtue of marriage to the biological father or on the basis of her consent to assisted reproduction. And while reproductive biology no longer justified gender-differentiated parentage when courts and legislatures confronted genetic intended mothers who had engaged gestational surrogates, it reemerged as a basis on which to reject the sex-equality claims of nonbiological intended mothers denied parental recognition.

After addressing egg-donor gestational surrogacy involving different-sex couples, this Section turns to male same-sex couples, who increasingly relied on gestational surrogacy to have children. Nonbiological fathers in same-sex couples found themselves in a similar position to nonbiological mothers in different-sex couples. Female same-sex couples had seized on marriage as a pathway to recognition for the nonbiological mother, but male same-sex couples found little help in the rules of marital parentage. While the nonbiological mother in a same-sex couple derives parentage by virtue of marriage to the biological mother, the nonbiological father in a same-sex couple does not derive parentage by virtue of marriage to the biological father. In most states, nonbiological fathers in same-sex couples cannot establish parentage without adoption, even when they are married.

Observing the treatment of both nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples brings to the surface a key feature of the modern parentage regime: the law continues to organize the

family around a biological mother. This aspect of parentage law has troubling implications in terms of both gender and sexual orientation.

1. *Different-Sex Couples and Nonbiological Mothers*

As Appendix E shows, in a minority of states, surrogacy statutes and appellate decisions expressly recognize nonbiological mothers engaging in egg-donor gestational surrogacy as parents without requiring them to adopt their children.[238] The intended parents can be the legal parents at birth, and neither the surrogate nor the donor has parental rights. But family law regimes in most states have not developed in this way. Instead, while genetic mothers can attain parentage without adoption, women without a biological or genetic connection ordinarily cannot.[239] The gestational surrogate, who *is not* the legal mother when the intended mother is the genetic mother, *is* the legal mother when the intended mother uses a donor egg.

Compare two decisions from Indiana. In *In re Infant R.*, the court allowed the gestational surrogate to disestablish maternity when the intended mother was also the genetic mother.[240] Whereas the trial court had denied the request because "the birth mother is the legal . . . mother," the appellate court reversed in light of the state's "interest in correctly identifying a child's biological mother."[241] In a subsequent case, *In re Infant T.*, the court refused to disestablish a gestational surrogate's maternity when the biological father's wife—the intended mother—was not genetically related to the child and instead had used an egg donor.[242] The court concluded: "It would not be in the best interests of the child, and would be contrary to public policy, to allow the birth mother to have

238. Fifteen states have explicit statutory or appellate authority recognizing a nonbiological intended parent using egg-donor gestational surrogacy. *See infra* Appendix E. Some state statutes remain limited to different-sex couples. *See infra* Appendix E.

239. In at least eleven states, it is clear that the nonbiological intended parent must adopt the child, either because of a legislative directive, *see, e.g.*, IOWA ADMIN. CODE r. 641-99.15(144) (2016); LA. STAT. ANN. § 9:2718 (2016); NEB. STAT. ANN. § 25-21,200 (West 2016), or because of case law, *see, e.g.*, *In re* Paternity & Maternity of Infant T., 991 N.E.2d 596 (Ind. Ct. App. 2013); *In re* Parentage of a Child by T.J.S. & A.L.S., 54 A.3d 263 (N.J. 2012) (per curiam). In the remaining states without statutory guidance or negative case law, adoption would presumably be required because of the operation of the governing parentage rules. *See infra* Appendix E. Trial courts in some states, though, have provided parentage judgments to nonbiological intended parents. *See* Nicolas, *supra* note 23, at 1245 ("[S]urrogacy in these states occurs in the shadows . . . .").

240. *In re* Paternity & Maternity of Infant R., 922 N.E.2d 59 (Ind. Ct. App. 2010).

241. *Id.* at 60-61.

242. *In re Paternity & Maternity of Infant T.*, 991 N.E.2d at 600.

the child declared a child without a mother."[243] Of course, there was a mother to raise the child—but one without a gestational or genetic connection to the child.[244]

While the Indiana cases focused on the status of gestational surrogates, nonbiological intended mothers have joined surrogates to challenge this regime. Consider developments in New Jersey in the decades since *Baby M.* In the context of gestational surrogacy, New Jersey allows adjudication of parentage for genetic intended mothers but continues to require adoption by nonbiological intended mothers.[245] In *In re Parentage of a Child by T.J.S. & A.L.S.*, a married woman, "unable to carry a child to term[,] . . . turned to the process of in vitro fertilization," in which her husband's sperm fertilized the ova of an anonymous donor, and the resulting embryos were carried by a gestational surrogate.[246] The intended parents sought a declaration of parentage from the court, and were joined by the gestational surrogate. Neither the intended mother nor the surrogate wished to resort to adoption, and instead desired a timely assignment of rights and responsibilities in ways that reflected their expectations.[247]

In 2011, the New Jersey appellate court held in *T.J.S.* that the intended mother could not establish parentage because state law provides for a declaration of maternity only for a woman who is "biologically" or "gestationally" related to the child.[248] Unlike fathers, who would be presumed legal parents based on their marriage to the biological mother, mothers could not derive parentage from marriage to the biological father. Accordingly, the parentage law "requires adoption to render [the intended mother] the mother of [the child]."[249]

The *T.J.S.* appellate court rejected the nonbiological intended mother's constitutional challenge to her treatment based on reasoning that reflects the biological, gender-differentiated framework erected in the constitutional repudia-

243. *Id.*

244. *Id.* at 601; *see also In re* Adoption of Male Child A.F.C., 491 S.W.3d 316, 317 (Tenn. Ct. App. 2014) (holding that the mother entered on the birth certificate is the woman who delivers the child).

245. *See* N.J. CT. R. § 5:14-4 (2017) (allowing a parentage order without adoption by genetic intended parents); A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (issuing a parentage judgment, after a waiting period, to the genetic mother without adoption).

246. 54 A.3d 263, 270 (N.J. 2012) (Albin, J., dissenting).

247. *Id.* at 270-71.

248. *In re* Parentage of a Child by T.J.S. & A.L.S., 16 A.3d 386, 391 (N.J. Super. Ct. App. Div. 2011), *aff'd by an equally divided court*, 54 A.3d 263 (N.J. 2012) (per curiam).

249. *Id.*

tion of "illegitimacy." The court turned down the nonbiological mother's due process claim, explaining that she "does not have parental rights to the child . . . because of the absence of any biological or gestational connection to the child."[250] Rejecting her equal protection claim—which depended on her comparison to nonbiological fathers in the donor-insemination context—the court simply declared that "the complained of disparate treatment is not grounded in gendered constructions of parenthood but in actual reproductive and biological differences."[251] By collapsing the biological aspects of reproduction with the social aspects of parenting, the court situated the state's regulation of parenthood as an innocuous and natural response to the biological processes of reproduction.

The New Jersey Supreme Court affirmed the decision in a 2012 per curiam order.[252] A concurring opinion justified the denial of parental recognition by emphasizing the necessary relationship between motherhood and biology, reasoning that "the status of maternity is grounded on either a biological or genetic connection to the child, failing which the Legislature has decreed that the status can only be achieved through adoption."[253] This regime did not offend constitutional equality principles in the eyes of the concurring justice, who declared, without elaborating, that the distinction between nonbiological fathers (recognized by law) and nongenetic, nongestational mothers was justified by "actual physiological differences between men and women."[254]

While legal fatherhood's nonbiological capacity inside marriage had expanded, legal motherhood largely remained a biological status—albeit a more complicated one. When a woman engages a gestational surrogate and uses a donor egg, the law often fails to treat her as a legal mother. Unlike a married father of a child conceived with donor sperm, she does not derive parentage by virtue of consent to assisted reproduction or marriage to the biological father. At the same time, the gestational surrogate, who avoids legal motherhood when the intended mother is the genetic mother, now has legal motherhood imposed on her.

250. *Id.* at 392.

251. *Id.* at 398.

252. *In re* Parentage of a Child by T.J.S. & A.L.S., 54 A.3d 263, 263 (N.J. 2012) (per curiam).

253. *Id.* at 264 (Hoens, J., concurring) (citations omitted) (citing N.J. STAT. ANN. § 9:17-41(a)-41(c) (West 2012)).

254. *Id.* (citing *In re Parentage of a Child by T.J.S. & A.L.S.*, 16 A.3d at 393).

2. *Same-Sex Couples and Nonbiological Fathers*

Nonbiological mothers in different-sex couples are not the only ones who struggle to achieve parentage when they engage in egg-donor gestational surrogacy. Nonbiological fathers in same-sex couples do as well. Gay male couples engaging in gestational surrogacy necessarily include a nonbiological intended parent. Of course, the nonmarital parentage regime organized around biological connection disadvantages same-sex couples relative to different-sex couples. But, as this Part has shown, marriage offered relief to lesbian couples. Given the family-based equality that marriage equality is assumed to furnish – and given judicial statements that "the child of either partner in a married same-sex couple will be presumed to be the child of both"[255] – one might expect male same-sex couples to also gain dual parentage by virtue of marriage. Much follows simply from the determination that a child is "a child of the marriage." Parties to the marriage, even if not biologically related to the child, have standing to assert parental rights, including rights to custody.

Yet, without a biological mother in the marriage, male same-sex couples do not technically have marital children. Parentage presumptions applicable to same-sex couples replicate the gender-differentiated rules applicable to different-sex couples. Presumptions of parentage for the second parent, even when they apply to both women and men, relate to that person's marriage to "the woman giving birth"[256] or the "natural mother."[257] Accordingly, a woman can derive parentage by virtue of her marriage to the biological mother, as parental regulation in lesbian couples makes clear. But a man can only derive parentage by virtue of marriage to the biological mother, not the biological father. Without biological ties, men in same-sex couples and women in different-sex couples find themselves in the same position: neither can establish parentage without adoption.

The scant case law on the status of nonbiological fathers in same-sex couples affirms the gestational surrogate's legal parentage and authorizes the nonbiological father's nonrecognition. Around the same time that the New Jersey courts denied recognition to the nonbiological mother in *T.J.S.*, they also denied recognition to a nonbiological father in a same-sex couple who had en-

255. Wendy G-M v. Erin G-M, 985 N.Y.S.2d 845, 861 (Sup. Ct. 2014).

256. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1881(1) (2016).

257. *See, e.g.*, CAL. FAM. CODE § 7611(a) (West 2014). Of those states that have made the marital presumption gender-neutral, all but Washington have done so such that it applies to female but not male couples. *See, e.g.*, *id.*; 750 ILL. COMP. STAT. ANN. 46 / 204 (West 2016); N.H. REV. STAT. ANN. § 168-B:2(V) (2014).

gaged in egg-donor gestational surrogacy. In *A.G.R. v. D.R.H.*, a same-sex couple who were married under California law and registered domestic partners under New Jersey law sought to have biologically related children.[258] One man's sperm was used to fertilize donor eggs, and the other man's sister served as the gestational surrogate.[259] The surrogate sought parental rights after conflict developed with her brother and his partner. By the time the court was set to determine whether the gestational surrogate was a legal parent, the two men were parenting the children. In fact, the nonbiological father was the primary caretaker.[260] Yet the court treated the nonbiological intended father as a nonparent and instead credited the gestational surrogate's claim to parental recognition. Strikingly, the court found immaterial the distinction between traditional and gestational surrogacy—the very distinction that had reshaped the law in cases involving a genetic intended mother. After quoting the rejection of surrogacy in *Baby M*, a traditional surrogacy case, the court asked, "Would it really make any difference if the word 'gestational' was substituted for the word 'surrogacy' in the above quotation?"[261] It quickly answered, "I think not."[262]

In the contemporary regulatory landscape, it would be exceedingly difficult to maintain this position where the genetic mother is the intended mother. In that context, in most jurisdictions (including New Jersey[263]), the difference between gestational and traditional surrogacy marks the difference between parent and nonparent status. Yet, for the nonbiological gay father, the surrogate's gestation—increasingly immaterial where the intended mother is the genetic mother—produces legal motherhood and justifies the denial of his parental status. Like nonbiological intended mothers in different-sex couples, nonbiological intended fathers in same-sex couples cannot claim parentage by virtue of a relationship to the biological father. They must, if possible, adopt the child. As Appendix E suggests, the treatment of male same-sex couples in New Jersey is consistent with the approach of most other states.[264]

As with intended mothers in different-sex couples engaging in egg-donor gestational surrogacy, intended fathers in same-sex couples have not launched

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258. A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (Super. Ct. Ch. Div. Dec. 23, 2009).

259. *Id.* at *1-2.

260. A.G.R. v. D.R.H., No. FD-09-001838-07, at *13 (N.J. Super. Ct. Ch. Div. Dec. 13, 2011) (custody determination).

261. *A.G.R.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *12.

262. *Id.*

263. *See supra* text accompanying note 245.

264. *See infra* Appendix E; *see also supra* note 238 and accompanying text.

successful constitutional challenges to their treatment. The nonbiological father is not understood to possess a constitutionally protected liberty interest in parenthood. And, since women and different-sex couples face similar hurdles, the nonbiological father's treatment is not deemed to offend sex or sexual-orientation equality principles.[265]

Ultimately, male same-sex couples are excluded by a parentage regime that grounds parenthood in biological connection outside marriage and derives nonbiological parenthood inside marriage only from marriage to a biological mother. Ordinary parentage rules simply do not permit dual parentage for male same-sex couples absent adoption.[266] The few states that have allowed this result have done so through a separate set of rules regulating gestational surrogacy.[267]

3. *Biological Mothers and the Legal Family*

This Part's exhaustive examination of the law's regulation of parental relationships formed through ART reveals a critical dynamic: even in an age of sex and sexual-orientation equality, courts and legislatures continue to treat *biological mothers* as the parents from whom the *legal family* necessarily springs. This treatment is rooted in the marital presumption and is carried forward by the presumption's adaptation to ART. Traditionally, the woman giving birth is the legal mother, and, if she is married, her husband is the legal father. Law has adapted this reasoning to different-sex and same-sex couples using donor insemination. And this reasoning has reached different-sex and same-sex couples using donor eggs and embryos when the intended mother is the birth mother.

The gendered, heterosexual legacy of marital parentage—parentage by virtue of marriage to the woman giving birth—is justified by resort to the gendered, heterosexual logic of reproductive biology. But law's accommodation of ART reveals the instability of that very logic. Courts are willing to deviate from the gendered logic of reproductive biology to recognize the genetic mother who engages a gestational surrogate to carry her child. Within a regime that prioritizes biological ties, contemporary courts view the genetic mother like the bio-

265. *See, e.g.*, Oleski v. Hynes, No. KNLFA084008415, 2008 Conn. Super. LEXIS 1752, at *48 (Super. Ct. July 10, 2008) ("Since the gender . . . of the parent and the partner are immaterial, this is not a case raising issues of equal protection or invidious discrimination.").

266. *Cf.* A.L.S. v. E.A.G., No. A10-443, 2010 WL 4181449, at *4 (Minn. Ct. App. Oct. 26, 2010) (explaining that a nonbiological father, "after paternity has been adjudicated, [cannot] raise a presumption of paternity *as against the child's biological mother*").

267. *See infra* Appendix E. *But see* WASH. REV. CODE ANN. § 26.26.116 (West 2011) (establishing a gender-neutral marital presumption).

logical father protected by the Court in the 1970s. The differential treatment of genetic mothers and fathers poses an equality problem. Yet, in considering the claim of a nonbiological mother who engages in egg-donor gestational surrogacy, reproductive biology persists as a justification to reject her claim to parental recognition. Courts do not see an equality problem when law recognizes a nonbiological father as a legal parent but withholds recognition from a nonbiological mother.

In either of these cases, one could imagine courts invoking reproductive biology to justify the differential treatment of mothers and fathers. In fact, in some of the earliest gestational surrogacy cases, courts rejected the claims of genetic intended mothers based precisely on grounds of reproductive biology; motherhood resulted from the specific act of birth.[268] But today, courts disclaim reproductive biology as a basis to withhold recognition from a genetic mother. Indeed, recall that in accepting gestational surrogacy, the Massachusetts Supreme Judicial Court deemed the children of the genetic intended mother "children of [the] marriage."[269] The mother's genetic—not gestational—connection produced marital children. Yet a father's genetic connection does not produce marital children, and therefore does not offer a route to parentage to a nonbiological mother. Reproductive biology continues to justify treating the claims of nonbiological mothers differently than the claims of nonbiological fathers.

Same-sex couples, who are not similarly situated to different-sex couples with respect to biological parenthood, remain particularly vulnerable in a nonmarital parentage regime organized around biological connection. Marriage furnishes space for the legal recognition of nonbiological parents, but, with its gender-differentiated legacy, offers relief to only some same-sex parents. Nonbiological parents in female same-sex couples attain parentage by virtue of marriage to the biological parent, but this is not true in male same-sex couples. For a man or woman *married to a biological mother*, biological connection is not necessary for legal parenthood; that man or woman is deemed a legal parent by virtue of marriage. But for a man or woman *married to a biological father*, the lack of a biological connection excludes that individual from legal parenthood.

From this perspective, it becomes clear that the shift toward nonbiological parenthood has occurred along only one axis: legal "fatherhood" can capture nonbiological parenthood, but legal "motherhood" cannot. And the collapse of gendered parental statuses has occurred in only one direction: women can be

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268. *See* Andres A. v. Judith N., 591 N.Y.S.2d 946, 946 (Fam. Ct. 1992).

269. *See supra* text accompanying note 219 (quoting Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1137 (Mass. 2001)).

legal "fathers," but men cannot be legal "mothers." On this view, biological mothers are indispensable—essential to the legal family. In contrast, biological fathers are replaceable—by men or women who have no biological connection to the child.[270]

* * *

As this Part has shown, the law has traveled a great distance from the common-law regime that defined parentage through the gender-hierarchical and heterosexual institution of marriage. Yet even after waves of liberalization, troubling asymmetries persist. The law continues to anchor parental recognition in biological connection and to organize the legal family around a biological mother. This leads courts and legislatures to treat men's and women's claims to parental recognition differently and to privilege different-sex over same-sex couples.[271] The next Part focuses on the profound harms that this parentage regime inflicts on those who break from traditional norms of gender and sexuality.

III. SELECTIVE HARMS

Within the contemporary parentage regime, those who believe they are parents on social grounds, including those who have been parenting their children for many years, may be denied parental status. Of course, it is difficult to imagine a system that satisfies all those who make claims to parental recognition. But it is especially troubling that the law rejects claims in ways that preserve longstanding forms of inequality. This Part turns to the concrete burdens imposed by the current regime and shows how the uneven distribution of

270. *Cf.* Hollandsworth, *supra* note 18, at 214 ("[T]he legal system has created a paradigm for reproduction that statutorily excludes a significant number of children born through donor insemination from having a father. Yet, the same legal system will not allow the child to be born without a mother.").

271. The results seem inadvertent in many jurisdictions, as courts and legislatures aspire to inclusion and yet do so within frameworks that carry forward legacies of inequality. In other jurisdictions, the results appear more deliberate. This dynamic resonates with Reva Siegel's account of preservation through transformation. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); *see also* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2326 (1997) ("[S]tatus hierarchies can gain the support of legal norms either directly or indirectly. Legal categories can map status distinctions and even help constitute them . . . [or] status hierarchies can manipulate or work around other kinds of legal distinctions to reproduce themselves in ever new forms.").

those burdens reflects traditional judgments about gender, sexuality, and parenthood.

A. The Practical and Expressive Harms of Nonrecognition

As a practical matter, lack of parental recognition shifts individuals out of the ordinary parentage regime and into the adoption scheme.[272] While for some the adoption process may be relatively straightforward, for others it brings risk and uncertainty. The process can be "lengthy and costly"[273] and may be prohibitively expensive for some parents.[274] For those who can afford it, they may, as one court observed, "hav[e] to wait as long as six months" to gain custody of their child.[275] The process itself can be intrusive, subjecting those who have coparented for many years to invasive home studies.[276] As a federal court in Indiana observed in the context of same-sex parents, the nonbiological parent "is required to undergo fingerprinting and a criminal background check in addition to submitting her driving record [and] her financial profile."[277] The home study examining the couple's relationship "requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection."[278] The costs in Indiana can exceed $4,000.[279]

Resort to adoption harms not only parents but children. Given the timing of adoption, those who believe they are parents lack parental rights at a particularly critical point—the beginning of the child's life. As one nonbiological mother who had engaged in gestational surrogacy reported in legislative testi-

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272. *See generally* Polikoff, *supra* note 18.

273. *See* Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645, at *10 (S.D. Ind. June 30, 2016).

274. *See* Sara Randazzo, *Gay Custody Fights Redefine Legal Parenthood*, WALL. ST. J. (June 1, 2016), http://www.wsj.com/articles/gay-custody-fights-redefine-legal-parenthood-1464818297 [http://perma.cc/GQV2-EQCN].

275. *See* Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1138 (Mass. 2001). Of course, if they are coparenting with the biological parent, they would presumably reside with the child.

276. *See In re* Adoption of Doe, 326 P.3d 347, 349 (Idaho 2014) (noting that the nonbiological mother in a same-sex couple had to undergo a home study as she sought to adopt children she had been coparenting for more than ten years). This resonates with Bruce Ackerman's focus on humiliation. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 137-41 (2014).

277. *Henderson*, 2016 WL 3548645, at *2.

278. *Id.*

279. *Id.*

mony in Washington State: "I had no parental rights for the first five months of [my daughter's] life."[280] As the Massachusetts Supreme Judicial Court observed, "[I]n the event of medical complications arising during or shortly after birth," the intended parent would not have legal authority over the child's treatment.[281] "The duties and responsibilities of parenthood (for example, support and custody) would lie with the gestational carrier," who "could be free to surrender the [child] for adoption."[282] Young children may struggle when their parents' bonds are uncertain and insecure.[283] As intended parents and a gestational surrogate in New Jersey explained, adoption does not provide an adequate substitute for parentage by operation of law "because the extended legal process would place the legal status of the child in limbo."[284] Children may be harmed later in life as well. Older children whose parents must adopt them may question the status and stability of their family.[285]

Many of those who believe they are parents on social grounds but are denied legal recognition will successfully navigate the adoption process and emerge, eventually, with legal rights to their children. The harms of the adoption process, though, are not only material but also dignitary. Requiring adoption in this setting communicates to the parent and child that they are not family and, in this sense, "fails to account for the parent-child relationship that

280. *See* Jim Camden, *Surrogacy Bill Expands Rights for Same-Sex Couples*, SPOKESMAN-REV. (Mar. 16, 2011), http://www.spokesman.com/stories/2011/mar/16/surrogacy-bill-expands-rights-for-same-sex-couples [http://perma.cc/3BGY-Z4TX].

281. Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1139 (Mass. 2001).

282. *Id.* at 1138.

283. Attachment theory focuses on the importance of secure parent-child bonds in infancy. *See* 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 215-19 (1969). While the original focus was on mother-child relationships, attachment theory eventually included multiple caregivers. *See* JESSICA BENJAMIN, THE BONDS OF LOVE 209-10 (1988). Legal scholarship on the parent-child relationship tracked this shift. *See* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 354 (1996) (noting the "emergence of a consensus within the human sciences that a child's security comes not from a single, constant individual, but from a familiar milieu and a network of attachments"); *see also* Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1517 (1996) ("[A]nother school of thought suggests that a permanent caregiver may be less important than the family network surrounding the child.").

284. *In re* Parentage of a Child by T.J.S. & A.L.S., 16 A.3d 386, 389 (N.J. Super. Ct. App. Div. 2011).

285. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (stating that the Defense of Marriage Act, which in part defined marriage—for the purposes of federal law—as being only between different-sex couples, "makes it even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family").

already exists in fact."[286] Those parents with biological ties are seen as *real* parents. Those without biological ties – even those engaging in the same forms of ART – are cast as parental substitutes who must formally replace the biological parents through adoption. As a California court explained: "Parents are not screened for the procreation of their *own* children; they are screened for the adoption of *other* people's children."[287] Resort to adoption is based on the notion that "a child who is born as the result of artificial reproduction is somebody else's child from the beginning."[288]

Of course, it is not only those who believe they are parents on social grounds that are harmed. The law may recognize a gestational surrogate as a legal mother, even though she neither desires such recognition nor actually forms a parental relationship.[289] Law may also impose parental responsibilities on a sperm donor if he donates sperm for the insemination of an unmarried woman,[290] even if he and the mother agreed that he would not be a parent and even if he is not acting as a parent.[291] Just as the decision to form a parent-child relationship is enormously meaningful and consequential, so is the decision *not* to form a parent-child relationship.[292]

Adoption requirements thus intervene in ways that reproduce normative distinctions between biological and nonbiological parents.[293] As Elizabeth Bartholet has persuasively shown, the regulation of adoption expresses suspicion of nonbiological parents in ways that support traditional views about the biological family.[294] While Bartholet is skeptical of commercial surrogacy,[295] her insights on adoption shed light on contemporary approaches to gestational

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286. J.R. v. Utah, 261 F. Supp. 2d 1268, 1291 (D. Utah 2002).

287. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998).

288. *Id.*

289. *See* Soos v. Superior Court of Ariz., 897 P.2d 1356, 1361 (Ariz. Ct. App. 1995) (Gerber, J., concurring) (explaining how a statute prohibiting surrogacy "imposes the burden of motherhood on a surrogate mother who almost certainly does not wish it and did not contract for it").

290. *See supra* note 179 and accompanying text; *see also* Appendix B.

291. *See, e.g.*, *In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010).

292. *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 185-89 (2017).

293. Traditional adoption models have even shaped the emergence of "embryo adoption" programs. *See* I. Glenn Cohen, *Religion and Reproductive Technology*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES (Holly Fernandez Lynch et al. eds., forthcoming 2017) (on file with author).

294. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993).

295. *See* Bartholet, *supra* note 20, at 111.

surrogacy. In surrogacy cases featuring nonbiological intended parents, courts express concerns about "strangers" raising children unrelated to them.[296] They invoke adoption as a check on nonbiological parents' fitness[297]—even though fitness is not employed as a check on biological parents using ART. The point here is not that the government lacks an interest in children's welfare that justifies attention to parental fitness; instead, it is that the government deploys this interest selectively. The check on parental fitness does not apply whenever gestational surrogacy is involved—that is, whenever the woman giving birth surrenders the child—but rather only when the intended parent is not the genetic parent.

While adoption will ultimately yield legal parentage for some, it may be impossible for others, meaning that legal recognition remains out of reach. Terminating the rights of the individual presumed by law to be the parent may not be feasible.[298] Or, the relationship to the legal parent may end, leaving the nonbiological parent at the mercy of her former partner.[299] Or, the parents may not be married and may live in a state that allows only stepparent, and not second-parent, adoption.[300]

Some parents, ignorant of the need to adopt their own child, may not even pursue adoption. This is especially likely when both parents, whether married or not, are listed on the child's birth certificate, and thus mistakenly believe they have been definitively identified as legal parents.[301] It is also likely when the nonbiological parent is married to the biological parent and believes she attains parentage by virtue of the marriage.

For instance, a woman may believe that if her husband is the biological father, she would be the legal parent. Consider a traditional surrogacy case from Connecticut. In *Doe v. Doe*, when the couple divorced, the biological father claimed that his wife was not the child's legal mother because she never adopted the child, even though she raised the child for fourteen years and the surro-

296. *See* Oleski v. Hynes, No. KNLFA084008415, 2008 Conn. Super. LEXIS 1752, at *42 (Super. Ct. July 10, 2008) ("If the children here were one day old, and [the gestational surrogate] then [was] turning them over to a stranger, no court in the world would approve that transfer *solely* on the basis of her contract with that third party, and without any evidence as to whether such a transfer accommodated the children's interests.").

297. *See id.* at *41-42.

298. *See* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).

299. *See, e.g.*, Russell v. Pasik, 178 So. 3d 55, 60 (Fla. Dist. Ct. App. 2015).

300. *See, e.g.*, *In re* Adoption of Luke, 640 N.W.2d 374, 382-83 (Neb. 2002).

301. As Nancy Polikoff explains in her work on parental recognition in same-sex couples, while a birth certificate "is only evidence of parentage, not definitive proof, it is the one piece of commonly accepted evidence." Polikoff, *supra* note 18, at 238-39.

gate's rights had long been terminated.[302] The Connecticut Supreme Court—constrained by a biologically grounded, gender-specific marital presumption—held that even though the child was conceived and born during the marriage, she was not a "child of the marriage" because the wife was not the biological mother.[303] Lack of a biological tie would not have prevented the husband from making parental claims upon divorce if his wife were the biological mother, but the wife's lack of a biological tie—even when accompanied by years of parental conduct—placed her outside the bounds of the parentage regime.

Without legal recognition, parent-child relationships may be destroyed. Again, consider *Russell v. Pasik*, in which an unmarried lesbian couple used the same donor sperm to have four children, with each woman giving birth to two children.[304] Even though, as the court explained, "[t]he four children were raised by both women jointly as a family unit,"[305] Russell was able to unilaterally end the relationship between Pasik and the two children to whom Pasik did not have a biological connection.[306] The parent-child relationships were legally severed, left to the whims of Russell, the biological mother.

This approach undermines children's wellbeing.[307] In *Russell*, the children themselves were harmed by the loss of their parent and their siblings, since each woman would leave the relationship with rights to only her biological children. Law generally seeks to protect and promote stable and continuing parental relationships for children.[308] Yet here the law threatens such relationships.

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302. 710 A.2d 1297, 1300 (Conn. 1998).

303. *Id.* at 1315-16.

304. 178 So. 3d at 57.

305. *Id.*

306. *Id.* at 60-61.

307. As Anne Alstott's work emphasizes, law generally makes "parental exit" difficult so as to protect the interests of children. *See* ANNE L. ALSTOTT, NO EXIT 45 (2004). Yet here law knowingly severs existing bonds of willing parents.

308. Scholars have long recognized the importance of psychological parent-child bonds. Law has been heavily influenced by the foundational work on children's best interests and psychological parenthood elaborated by Joseph Goldstein, Albert Solnit, Anna Freud, and Sonja Goldstein. *See* JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD 11-12, 16, 19 (1996) (emphasizing the importance of the psychological parent regardless of biological connections and elaborating the concept of "common-law adoptive parent-child relationship[s]"). Psychological parent theory influenced Robert Mnookin's seminal work on custody. *See generally* Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975). While some scholars focused on a single parent-child relationship, others allowed for multiple bonds. *See* Davis, *supra* note 283, at 362.

Courts themselves appear to recognize the gravity of the problems encountered within the current regime and attempt to avoid the most immediate and severe consequences. The court in *Doe*, for instance, interpreted state statutes to allow the nonbiological mother to assert a third-party claim to custody based on the child's welfare.[309] The parental relationship could continue even as the mother was denied parental status.

In cases where the family remains intact, courts have resorted to custody determinations that in practice protect the nonbiological parent's bond.[310] For example, after recognizing the biological father and the gestational surrogate as the legal parents in *A.G.R.*, the New Jersey court vested primary custody in the biological father—and, therefore, his same-sex partner as well.[311] The nonbiological father, the court observed, "is essentially a stay at home dad."[312] The custody determination, rather than the parentage determination, allowed this arrangement to persist. The man who formed a parent-child relationship on social but not biological grounds lived in the house with the legal parent granted primary custody, but he received no legal recognition himself. His relationship was less secure, dependent on continued cohabitation with the biological father. Even then, his lack of recognition could, as other nonlegal parents report, pose ongoing practical problems, for instance when he had "to sign something for the kids from school or at the doctor's office."[313]

The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties "nonparents"[314]—casting them as third parties who are otherwise strangers to the family. As one gay father put it, "People always ask, 'Who are you? Are you his

309. Doe v. Doe, 710 A.2d 1297, 1318 (Conn. 1998).

310. In the earliest contested surrogacy case, *Baby M*, the New Jersey Supreme Court recognized the surrogate as the legal mother but granted primary custody to the father—and thus placed the child in the home of the intended parents. The custody determination rendered the nonbiological mother the child's mother in practice. *In re* Baby M, 537 A.2d 1227, 1260-61 (N.J. 1988). Once the child turned eighteen, she had her mother legally adopt her. Allison Pries, *Whatever Happened to Baby M?*, RECORD (Jan. 5, 2010, 7:57 AM), http://archive.northjersey.com/news/whatever-happened-to-baby-m-1.975840 [http://perma.cc/7SVL-8V22].

311. A.G.R. v. D.R.H., No. FD-09-001838-07, at *13 (N.J. Super. Ct. Ch. Div. Dec. 13, 2011).

312. *See id.*

313. GERALD P. MALLON, GAY MEN CHOOSING PARENTHOOD 65 (2004) (quoting an anonymous father); *see also* Henderson v. Adams, No. 1:15-cv-002200-TWP-MJD, 2016 WL 3548645, at *10 (S.D. Ind. June 30, 2016) ("[H]aving only one legal parent . . . affects many daily activities . . . .").

314. *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 503 (N.Y. 2016) (Pigott, J., concurring).

dad?' Legally, we are not family, but in reality we are."[315] Legal treatment may shape parental experiences. In qualitative studies of gay men parenting, those parents lacking legal status not only experienced "less validation and support from the outside world," but also reported feeling "insecure about [their] role in the family."[316] They found nonrecognition "demeaning"[317] and reported frustration with "being the invisible dad."[318]

B. Sexuality- and Gender-Based Judgments

As *Russell*, *Doe*, and *A.G.R.* suggest, the burdens imposed on social parent-child bonds are not distributed evenly. Those who break from traditional norms governing gender, sexuality, and family—by not marrying, by separating motherhood from biological ties, or by forming a family with a same-sex partner—are channeled into adoption or denied parental status in ways that others are not. Often, courts and legislatures engage in genuine but failed attempts to protect the rights of women and of same-sex couples. At times, though, the regulation of ART and the law of parental recognition serve as sites for active resistance to gender and sexual-orientation equality.

1. Biology, Marriage, and Sexual Orientation

As Part I explained, courts and legislatures expressly protected biological relationships to repair the wrongs perpetrated by a system of marital privilege. Unmarried parents could derive parental rights from their biological connection. But parenthood's liberalization protected parent-child relationships that came out of heterosexual family formation. While nonbiological parent-child relationships are legally vulnerable as a general matter, some families are more likely than others to experience this vulnerability. As New York's highest court recently acknowledged, "Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing [to seek custody], as only one can be biologically related to the child."[319] For same-sex couples, the focus on bio-

315. MALLON, *supra* note 313, at 78.

316. *Id.* at 77; *see also* ABBIE E. GOLDBERG, GAY DADS 83 (2012).

317. GOLDBERG, *supra* note 316, at 83 (quoting an anonymous father).

318. MALLON, *supra* note 313, at 78 (quoting an anonymous father); *see also* SUZANNE JOHNSON & ELIZABETH O'CONNOR, THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD 173-74 (2002).

319. *Brooke S.B.*, 61 N.E.3d at 498.

logical connection works in conjunction with marital privilege to marginalize their nonmarital families.

Even as marriage has offered space for some same-sex couples' nonbiological ties, biological ties retain importance within the gender-differentiated framework of marital parentage. And some seek to expand and entrench biological norms in ways that threaten same-sex parents both inside and outside marriage. Biological connection can present itself as a natural and innocuous parenting norm, but appeals to biological parenthood can both incorporate and mask judgments about same-sex family formation.

Consider advocacy against ART by the Institute for American Values (IAV), the organization headed by leading social conservative advocate David Blankenhorn.[320] Elizabeth Marquardt, the director of IAV's Center for Marriage and Families, argues that because "two persons in a same-sex couple cannot both be the biological parents," research demonstrating the benefits of children being raised by a "*biological mother and father*" is relevant to debates over "same-sex marriage and parenting."[321] For Marquardt, the biological and social dimensions of parenthood should be united. She opposes "family forms that even before conception intentionally deny children a relationship with their biological father or mother."[322] Importantly, Marquardt accepts ART to create families in which a mother and father raise a child biologically related to each of them—for instance, gestational surrogacy where the genetic mother is the intended mother. She carefully preserves ART deployed in service of the traditional family with a biological mother and father, while rejecting ART that disturbs that paradigm by facilitating families headed by same-sex couples.[323]

This view finds expression in the law. After *Obergefell*, for example, Louisiana authorized gestational surrogacy but only in limited circumstances—when "the parties who engage the gestational surrogate not only are married to each other, but also create the child using only their own gametes."[324] As the law ex-

320. *See* DAVID BLANKENHORN, FATHERLESS AMERICA 177 (1995) (opposing donor insemination and linking it to skepticism about lesbian parenting); *see also* Elizabeth Marquardt et al., *My Daddy's Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, INST. AM. VALUES (2010), http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf [http://perma.cc/X22N-GS33].

321. Elizabeth Marquardt, *One Parent or Five: A Global Look at Today's New Intentional Families*, INST. AM. VALUES 25-26 (2011), http://americanvalues.org/catalog/pdfs/one_parent_or_five.pdf [http://perma.cc/Y5D4-6HT2].

322. *Id.* at 6.

323. For a critique of the case against ART, see Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183 (2015).

324. LA. STAT. ANN. § 9:2718 (2016).

pressly states, only those "intended parents can bypass the current need to go through extended proceedings to adopt their own child."[325] The law authorizes gestational surrogacy—and its separation of pregnancy from motherhood—in ways that necessarily exclude same-sex couples, even when they are married. In this regime, it is not sex-based reproductive differences that matter but biological ties that allow for the maintenance of the gender-differentiated, heterosexual family.[326]

As the Louisiana legislation suggests, arguments from biological parenting can entail both a rejection of same-sex family formation and an appeal to dual-gender parenting.[327] Families headed by same-sex couples fail as "motherless" and "fatherless."[328] These views,[329] which were expressed but repudiated in the conflict over same-sex marriage, retain purchase in conflicts over parenting.[330] In fact, they have become a potent way to resist the implications of marriage equality.[331]

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325. *Id.*

326. The continued exclusion of same-sex couples resonates with Ackerman's account of "institutionalized humiliation." *See* ACKERMAN, *supra* note 276, at 140.

327. *See* Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 90-94 (2013). Notably, some arguments for greater ART regulation prioritize biological connection but embrace same-sex family formation. *See* CAHN, *supra* note 12, at 133, 159.

328. *See* Marquardt, *supra* note 321, at 17, 27; *see also* Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 453 (2006) (criticizing the "increasing use of ART to produce children to be raised deliberately without a mother and a father").

329. *See, e.g.*, Brief of 100 Scholars of Marriage as Amici Curiae Supporting Respondents at 28-30, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); *see also* Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUND. 3 (Mar. 11, 2013), http://www.heritage.org/marriage-and-family/report/marriage-what-it-why-it-matters-and-the-consequences-redefining-it [http://perma.cc/ZKS5-2H7U] ("There is no such thing as 'parenting.' There is mothering, and there is fathering, and children do best with both.").

330. *See* Cahill, *supra* note 13, at 642 n.117; NeJaime, *supra* note 16, at 1243-48.

331. *See* David Blankenhorn, Opinion, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html [http://perma.cc/CNM2-W4M9] (attempting to find common ground on same-sex marriage but urging "both gays and straight people" to agree that "children born through artificial reproductive technology [should have] the right to know and be known by their biological parents"). On this point, see Douglas NeJaime, Griswold's *Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. F. 340, 341 (2015).

2. *Marriage, Biology, and Gender*

Approaches to ART – and specifically gestational surrogacy – suggest that, even as courts and legislatures liberalized motherhood and recognized same-sex parenting, they sustained biologically grounded, gender-differentiated views of parenthood. Nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples struggle for parental recognition, *even when they are married to the biological parent*. If these parents fail to adopt their children, they may be deemed legal strangers even after raising the children. These dynamics may reflect judgments about women who separate motherhood from biological connection, as well as men who fill roles traditionally demanded of women.

Those who are invested in gender-based family roles *and* their biological basis often oppose surrogacy regardless of its form. Both traditional and gestational surrogacy challenge the connection between the physical fact of pregnancy and the social role of motherhood.[332] Through this lens, surrendering the child, even when the woman is not genetically related, "is contrary to the natural instincts of motherhood."[333] But most states have departed from this view and instead have increasingly accommodated gestational surrogacy where the intended mother is the genetic mother. That woman is the legal mother, and the gestational surrogate is not.

Gestation and birth – the sex-based reproductive features that licensed legal distinctions between motherhood and fatherhood – no longer inevitably produce the social role of motherhood. Genetics – itself not a sex-based reproductive difference – can ground legal motherhood. Yet in most states, the surrogate's nonrecognition occurs *only* when the intended mother is the genetic mother. With egg-donor gestational surrogacy, birth reemerges as necessarily producing legal motherhood – with no change in the surrogate's role or in the intentions of the parties.

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332. *See, e.g.*, Complaint ¶ 96, Cook v. Harding, No. 2:16-CV-00742 (C.D. Cal. Feb. 2, 2016), 2016 WL 424998 ("The bonding process between the pregnant mother and the children she carries during the nine months of pregnancy is the same physical process and experience, whether or not the mother is genetically related to the children."); Jennifer Lahl, *Commercial Surrogacy: Stop It or Just Regulate It?*, PUB. DISCOURSE (Oct. 14, 2015), http://www.thepublicdiscourse.com/2015/10/15801/ [http://perma.cc/7HM4-XR7P] (arguing for prohibitions on all forms of surrogacy based in part on the claim that "[s]urrogacy demands that mother and child *not bond*, a very important part of human reproduction that safeguards the physical and psychological well-being of both mother and child").

333. Complaint, *supra* note 332, ¶ 105.

Consider *Soos*, where the court required Arizona to recognize the genetic mother as the legal mother and ordered nonrecognition of the gestational surrogate.[334] Indeed, the concurring opinion pointed out how the surrogacy ban foisted motherhood on the gestational surrogate based solely on the physical fact of pregnancy.[335] Yet Arizona law continues to distinguish egg-donor gestational surrogacy. The absence of a genetic intended mother blocks the gestational surrogate's attempt to avoid legal motherhood, and the intended mother must adopt the child.[336]

Even in the face of legislation that appeared to authorize egg-donor gestational surrogacy, the state of Connecticut sought to require termination of a gestational surrogate's parental rights and subsequent adoption by the nonbiological intended parent.[337] In unsuccessfully defending its position at the Connecticut Supreme Court, the state made the uncontroversial observation that "a mother contributes to the development of the child in her womb."[338] But it then linked the physical contribution of the surrogate to an inevitable legal status of motherhood—because the gestational surrogate "form[s] a bond with [the child in her womb]," her "role in bringing the child into the world is sufficiently consequential to require her registration."[339] Connecticut defended its refusal to recognize nonbiological intended parents by appealing to the connection between pregnancy and motherhood. Yet, in that very litigation, the state admitted that it did not oppose parentage judgments when the intended parent was the genetic mother.[340]

If the biology of reproduction can be detached from the social role of motherhood, it is difficult to maintain distinctions between the two forms of gestational surrogacy. The law's differential treatment of genetic intended mothers and nonbiological intended mothers suggests that biological connection generally—whether gestation or genetics—creates maternal attachments. At stake is the maintenance of motherhood as a biological status—not the specific relationship between pregnancy and motherhood.

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334. Soos v. Superior Court, 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994).

335. *See id.* at 1361 (Gerber, J., concurring).

336. The surrogacy ban, which declares the surrogate the legal mother, remains in effect except to the extent deemed unconstitutional in *Soos*. ARIZ. REV. STAT. ANN. § 25-218 (2007).

337. *See* Reply Brief of Defendants-Appellants at 3-4, Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) (No. 18482).

338. *Id.* at 14.

339. *Id.*

340. *See id.* at 3-4. The State's position was rejected in *Raftopol*, 12 A.3d at 804, in which the Connecticut Supreme Court recognized a biological father's same-sex partner, and not the gestational surrogate, as a legal parent.

The act of surrogacy challenges the "maternal instinct," and instead suggests that a mother's attachment is constructed. The genetic intended mother, whom law recognizes, can maintain a connection between the biological and social aspects of motherhood, even if not through pregnancy. The nonbiological intended mother, in contrast, renders maternal attachment the product of social arrangements, rather than biology.[341] The surrogate and the nonbiological intended mother reveal the mother-child bond to be in important ways like the father-child bond—volitional and constructed.[342]

Through this lens, the law of parental recognition may reflect stereotypes that view the social role of motherhood as flowing naturally from biological ties.[343] A mother's biological tie to her child—established most often through gestation but also through genetics—both defines and limits her parental status.[344] While the legal status of motherhood derives solely from biological connections, biological connections may, but need not, determine the legal status of fatherhood.[345] One can be a father purely on social grounds if, for instance,

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341. The nonbiological intended mother also defies gender-based roles by separating motherhood from biological reproduction. Attorneys in *Baby M* portrayed the intended mother, despite her multiple sclerosis, as an ambitious, career-driven woman who delayed and avoided childbearing and thus produced her own dilemma. *See* Trial Brief on Behalf of Defendants Mary Beth and Richard Whitehead at 4, *In re* Baby M, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) (No. FM25314-86E) ("The Sterns by agreement did not even attempt to conceive a child until Mrs. Stern finished college, medical school and her residency. By the time she finished her residency in the year 1981, she was 36 years old. Thereafter, Mr. and Mrs. Stern have never attempted to conceive a child."). Such characterizations also appear in contemporary arguments against surrogacy. *See, e.g.*, Sharon Greenthal, *Social Surrogacy: A Scary Trend in Pregnancy*, HUFFINGTON POST (Apr. 21, 2014, 11:53 AM), http://www.huffingtonpost.com/sharon-greenthal/social-surrogacy-a-scary-_b_5179121.html [http://perma.cc/KUC4-RTGE] (expressing shock at "women who don't want pregnancy to interfere with their career trajectory" and wondering "what kind of mothers they'll be once they've been handed their surrogate-grown children" and whether they will "take a day off from their precious careers to tend to a baby that needs them").

342. *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 334 (1988) ("[S]urrogacy arrangements may help to dilute the stereotype of the woman in the nuclear family whose role is confined to that of mother and homemaker . . . .").

343. On the anti-stereotyping principle, see Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000); and Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

344. For an argument that "genetic essentialism," which prioritizes the genetic mother over the gestational surrogate, "traces its roots to patriarchal ideology," see Jennifer S. Hendricks, *Genetic Essentialism in Family Law*, 26 HEALTH MATRIX 109, 120 (2016).

345. As Karen Czapanskiy argues, men volunteer for parenthood, while women are drafted into it. *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16 (1991). Of course, when the government attempts to establish paterni-

he forms a family with the mother and the child.[346] On this view, the mother remains the parental figure who establishes the family, while the father is a secondary, optional parent, potentially supplementing but certainly not replacing the mother.[347]

The law's construction of parenthood situates women as biologically connected not only to reproduction but also to child-rearing[348]—itself a form of uncompensated labor that drastically shapes a woman's life opportunities.[349] While biological fathers can be displaced by men and women who lack biological ties, the law attempts to ensure the biological mother's presence. From this perspective, women—naturally, inevitably—bear the burdens of child-rearing.[350]

Views that tie motherhood to biology not only negatively affect women; they also harm men by viewing fatherhood as derivative of motherhood and secondary as a parental role.[351] While these stereotypes retain purchase within various domains of family law,[352] as well as outside of family law,[353] they have

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ty, it may impose fatherhood on men based on their biological connection. But even then, the government seeks to impose support obligations, rather than child-rearing responsibilities. *See id.* at 1418. This, too, may reflect stereotypes that situate women as caretakers and men as breadwinners. Moreover, the government does not in practice make paternity compulsory. *See* Cahill, *supra* note 13, at 687-88.

346. *See, e.g.*, *In re* Sabrina H. v. Bright, 266 Cal. Rptr. 274, 276 (Ct. App. 1990) (emphasizing the importance of identifying "fathers who have entered into some familial relationship with the mother and child").

347. *See* Appleton, *supra* note 18, at 282 (explaining that "fatherhood remains, in significant part, a 'secondary' or derivative relationship that requires an initial determination of the child's first or 'primary' parent, the mother"); Dalton, *supra* note 159, at 289 ("[T]he mother-child relationship is always seen as primary. The father-child relationships (whether based in biology or not) are always secondary.").

348. *See* Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57, 73 (2012).

349. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 788-89 (1989); Siegel, *supra* note 122, at 376.

350. *See* Hollandsworth, *supra* note 18, at 217-18.

351. Nancy Dowd urges a redefinition of fatherhood based on a "nurturing model," Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 532 (1996), and adopts the term "birthfathers" to capture social fatherhood, Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 917-19 (2006). *See also* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1749 (1993) (using the term "generism" to reimagine the legal norms of family and fathering as centered around nurturing).

352. *See* Holning Lau, *Shaping Expectations About Dads as Caregivers: Toward an Ecological Approach*, 45 HOFSTRA L. REV. 183 (2016).

specific effects on parentage in same-sex couples. Female same-sex couples may reaffirm gender stereotypes that see women as mothers and caretakers even as they challenge heterosexual norms,[354] but male same-sex couples disrupt norms of both heterosexuality and gender that have structured family relationships.[355] By forming a family that excludes a mother, these men position fathers as primary parents – assuming the social role traditionally demanded of women as a matter of biology.[356]

Gay men engaging in surrogacy challenge the centrality of the mother-child relationship in ways that different-sex couples engaging in surrogacy do not.[357] Their parental recognition, and the corresponding production of "motherless" families, threatens gender differentiation – not merely biological sex differentiation. Consider *A.G.R.*, the New Jersey decision recognizing the gestational surrogate, and not the nonbiological father, as a legal parent.[358] The court quoted *Baby M* to support the unique importance of the mother-child relationship, objecting that "[t]he surrogacy contract . . . guarantees the separation of a child from it[s] mother."[359] A mother, on this view, is a necessary part of a family. There was no other mother to fill the role left open by the surrogate. Genetic intended mothers had emerged since *Baby M*'s rejection of traditional surrogacy as viable candidates to supplant the surrogate.[360] But fathers engaging in egg-donor gestational surrogacy simply could not replace the mother.

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353. *See* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995 (2015) (showing how naturalized notions of sex difference harm women and men at work).

354. *See* Cynthia Godsoe, *Marriage Equality and the "New" Maternalism*, 6 CALIF. L. REV. CIR. 145 (2015).

355. *See* GOLDBERG, *supra* note 316, at 11; *cf.* E. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195, 216 (2005).

356. *See* GOLDBERG, *supra* note 316, at 70; MALLON, *supra* note 313, at 130; *cf.* Hollandsworth, *supra* note 18, at 192 ("[G]ay men . . . become the primary caretaker of the child, thereby assuming the role of the 'mother.'"); Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 1004 ("[G]ay stay-at-home fathers begin to break the link between caretaking and femininity."); Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J. L. & FEMINISM 207, 215 (2010) ("I don't feel like I'm about to become a father. I feel like I'm about to become a mother.").

357. *See* MALLON, *supra* note 313, at 99 ("The one subject that all the [gay] dads discussed at length was the multitude of questions from people in the community about their child's mother or lack thereof.").

358. A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (Super. Ct. Ch. Div. Dec. 23, 2009).

359. *Id.* at *11-12.

360. *See supra* text accompanying notes 209-210.

Similar concerns emerge in cases involving single fatherhood. While donor insemination and IVF have facilitated the creation of legally recognized single-parent families for women, men struggle to form single-parent families through ART. Like gay male couples, single fathers engaging in egg-donor gestational surrogacy seek to displace mothers. Texas, for instance, allows gestational surrogacy (including egg-donor gestational surrogacy) for married (different-sex) couples,[361] but closes paths to single fatherhood through gestational surrogacy.[362] A Texas appellate court refused to declare that the gestational surrogate with no genetic connection to the children is not a legal parent, even though Texas law readily allows this result when a married different-sex couple commissions a surrogate. The court noted that the biological father "seeks a declaration that he is the sole parent and the children have no mother."[363] Given that the egg donor was not seeking motherhood, the court expressed concern that "[t]here is no other woman claiming to be the mother."[364] Indeed, some courts have refused to allow women to relinquish parental rights if no other woman is seeking to adopt the child.[365]

These results are troubling. They make paths to parenthood more difficult and fraught for those who break from norms that have traditionally structured family life, and they reiterate views about motherhood and fatherhood that harm both women and men. To remedy these harms, the next Part considers how to forge a parentage regime that vindicates gender and sexual-orientation equality and thus more fully and consistently values the social bonds of parenthood.

IV. RECONSTRUCTING PARENTHOOD

Even as the law has grown to accommodate an increasingly diverse range of parental configurations, many who believe themselves to be parents on social grounds – because they are the intended parent, function as a parent, or are married to the biological parent at the time of the child's birth – discover that in

361. At the time of enactment, same-sex couples could not marry. It is unclear how Texas will handle same-sex couples, though its provisions requiring that the "intended mother is unable to carry a pregnancy to term" may be read to exclude male same-sex couples even when they are married. TEX. FAM. CODE ANN. § 160.756(b)(2) (West 2016).

362. *See In re* M.M.M., 428 S.W.3d 389, 398 (Tex. App. 2014).

363. *Id.* at 392.

364. *Id.* at 392 n.1. *But cf. In re* Roberto d.B., 923 A.2d 115, 126 (Md. 2007) (holding that it is "within a trial court's power to order the [Maryland Division of Vital Records] to issue a birth certificate that contains only the father's name").

365. *See* Hollandsworth, *supra* note 18, at 235-38.

the eyes of the law they are in fact strangers to their children. These problems cannot be wholly eliminated; courts and legislatures will continue to face difficult questions about when to recognize individuals as parents. Nonetheless, in working through questions of parental recognition, solutions can be devised so that the burdens do not fall systematically on those historically subject to exclusion. This Part suggests how the law might better realize egalitarian commitments in parentage, not only with respect to families formed through ART but across the wider swath of families in contemporary society.

First, this Part sets out the principles to guide reform. Then, it illustrates how such principles can shape family law reform, primarily through state legislative action but also through judicial decisions. Finally, this Part contemplates a future in which the parentage questions at the heart of this Article enter federal courts, and considers how courts might reason about those questions from a constitutional perspective.

Of course, the role of federal courts in the law of parental recognition is far from clear. Recent shifts in family law have featured federal courts playing a dialogic role. In the conflict over same-sex marriage, federal courts were critical but were not the primary actors for many years.[366] Instead, change occurred at the state level, as legislatures reformed family law regimes and courts applied state constitutional principles to strike down laws restricting same-sex family formation. Those developments shaped the constitutional stakes in conflicts that would enter federal courts.[367] So too in the domain of parentage may developments at the state level eventually produce and structure federal constitutional conflict.

A. Equality Commitments and Recognition of Parenthood's Social Dimensions

There is broad consensus that the law of parental recognition should conform with principles of equality, but critical differences over the meaning of equality in this setting persist. As this Article demonstrates, merely providing equal treatment under existing rules does not furnish equality based on gender and sexual orientation.[368] Instead, equality requires treating those traditionally excluded from the parentage regime as full participants.[369]

What does it mean in the law of parental recognition to treat those who break from conventional norms of gender and sexuality as belonging from the

366. *See* Eskridge, *supra* note 24, at 281-82.

367. *See* NeJaime, *supra* note 24, at 91-92.

368. For an illustration of an equal-treatment approach, see Garrison, *supra* note 1.

369. *See* Siegel, *supra* note 122, at 368-70.

outset? In practical terms, equality requires law to value social as well as biological contributions in recognizing parents—and to do so in more transparent and evenhanded ways. Proceeding in this way is necessary to ensure that women engaged in nontraditional acts of parenting and gays and lesbians forming families with children—both of whom ground parental claims in social contributions—have their parent-child relationships recognized and respected.[370]

Same-sex family formation ordinarily features nonbiological parent-child relationships. Accordingly, a parentage regime anchored in biological connection does not ensure equality for same-sex couples' families, even if it withholds legal recognition from nonbiological parents in both different-sex and same-sex couples.[371] Instead, a parentage regime that treats lesbian and gay parents as full participants opens social paths to recognition to both women and men, in both different-sex and same-sex couples, both inside and outside marriage.

A parentage regime rooted in the gender-differentiated frameworks of marriage and biology also makes outsiders of women who parent children to whom they are not biologically connected. Courts and legislatures often invoke reproductive biology to justify the differential treatment of nonbiological mothers and fathers—recognizing fathers, but not mothers, on social grounds. But this approach reflects and reiterates traditional understandings of motherhood as women's natural destiny, and it excludes women who break from conventional roles by separating the biological aspects of reproduction from the social aspects of parenting.[372] An approach to parentage driven by gender

370. *Cf.* Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 304 (1992) (challenging "state standardization and social stigma directed towards groups of people who depart from the state-sanctioned model of the family" and arguing that "stability, nurturance and care should be promoted wherever possible, and people committed to taking on these tasks should be encouraged to do so").

371. This resonates with Martha Minow's argument for "disentangling equality from its attachment to a norm that has the effect of unthinking exclusion." MARTHA MINOW, MAKING ALL THE DIFFERENCE 16 (1990).

372. *See* Law, *supra* note 101, at 1008-09; Siegel, *supra* note 122, at 370. Scholars have taken different views on gender neutrality in the regulation of parenthood. *Compare* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES 88-89 (1995) (objecting to the "popular gender-neutral fetish"), *with* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171-76 (2015) (arguing that more symmetrical treatment is necessary to challenge the relationship between gender and care). Outside of parenthood, scholars have taken different views on how law should take pregnancy into account. *Compare* Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 377 (1981) (arguing that the law should account for the "sex-unique aspects of procreation"), *with* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV.

equality acknowledges that women and men are not similarly situated with respect to reproductive biology, yet recognizes both women and men who parent children to whom they are not biologically connected.

Such an approach protects not only parents but also children.[373] The determination of legal parentage is generally driven by the parental interest, and is not a determination based on the best interests of the child.[374] Nonetheless, children's welfare is a foundational principle in family law and clearly animates approaches to parentage.[375] Of course, difficult questions about children's interests arise when the law allows individuals to make agreements about parental status, as it increasingly does in the context of ART. Nonetheless, vindicating equality commitments in the ways suggested here—and specifically through recognition of parenthood's social dimensions—significantly promotes the interests of children. In fact, courts that have made parentage determinations that conform to principles of gender and sexual-orientation equality have recognized how their decisions further "the state's interest in the welfare of the child and the integrity of the family."[376] Recognition of parents on social

L. & SOC. CHANGE 325, 325-28 (1985) (proposing a "rationale for the 'equal-treatment' approach to pregnancy"). Perspectives on sex equality that take contrasting views nonetheless take issue with the invocation of biological differences, and pregnancy specifically, to justify harmful gender-based judgments.

373. *See* Bartholet, *supra* note 21, at 335-39 (connecting protection of social parent-child bonds to children's welfare).

374. As Glenn Cohen persuasively argues, best-interest arguments for the regulation of *reproduction* can mask troubling justifications, but for the regulation of *parenthood*, children's interests remain critical. *Compare* I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1189 (2012) (arguing that best-interest justifications are "a way of talking about the regulation of reproduction that avoids confrontation with justificatory idioms that are disturbing, controversial, and illiberal"), *with* I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 426 (2011) ("[I]n countless . . . areas of family law, the protection of the best interests of *existing* children serves as a powerful organizing principle that justifies state intervention.").

375. While this Article's approach to parentage primarily involves determinations of adult recognition, it reorients that recognition in ways that align with children's well-being. On the ways in which American law continues to reason in terms of parental rights instead of children's interests, see Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 5 (2008), which describes the tendency in "constitutional law and state family law . . . [to] privilege parental rights and disclaim any affirmative state obligation to secure children's well-being."

376. *In re* Guardianship of Madelyn B., 98 A.3d 494, 500 (N.H. 2014); *see also, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005) (recognizing the nonbiological mother as a parent so as not to "deprive [the children] of the support of their second parent"); *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 587 (Colo. App. 2013) (recognizing the nonbiological mother based on "the compelling interest children have in the love, care, and support of two parents, rather than one, whenever possible"); Chatterjee v. King, 280 P.3d 283, 293

grounds allows courts to protect, rather than sever, "strongly formed bonds between children and adults with whom they have parental relationships."[377] Constitutional precedents on family recognition, including recent decisions on marriage equality, also emphasize children's interests in nonbiological parent-child relationships.[378]

In crediting parenthood's social dimensions, this approach does not suggest that the law jettison biological connection as a basis for parentage. The aim here is not to articulate an ideal model of parental recognition but rather to reform the law in ways that align with principles of equality. Moreover, this approach respects existing expectations about parental connections.[379] Given that both genetic contribution and birth play powerful roles in common understandings of parenthood, law may continue to reflect the salience of biological ties. Indeed, longing for biological parenthood leads many to engage in ART in the first place.[380] Even those who create nonbiological relationships often seek their own physical traits in sperm and egg donors.[381] The law need not deny the salience of biological bonds to incorporate other indicia of parenthood. Further, biological connections often lead individuals to form parent-child relationships. In this sense, biological ties – including not only gestation but genet-

(N.M. 2012) ("[T]he child's best interests are served when intending parents physically, emotionally, and financially support the child . . . ."). Of course, the state may also recognize parents on social grounds in order to privatize dependency. This policy decision could further an agenda that relieves the government of obligations to support its citizens. *See* Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1990 (2015) (noting that a "traditional function of the marital family [is] the privatization of support and care of children").

377. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016) (quoting Debra H. v. Janice R., 930 N.E.2d 184, 201 (N.Y. 2010) (Ciparick, J., concurring)). Equitable parent doctrines, which have been critical to parental recognition on social grounds, often focus on the child's interest. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1891(3) (2015) (allowing a court to "adjudicate a person to be a de facto parent if the court finds . . . that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life"); V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) ("[C]hildren have a strong interest in maintaining the ties that connect them to adults who love and provide for them.").

378. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600-01 (2015); United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

379. *See* Garrison, *supra* note 1, at 842.

380. *See* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065; Roberts, *supra* note 144.

381. *See* LAURA MAMO, QUEERING REPRODUCTION 191-92 (2007); DEAN A. MURPHY, GAY MEN PURSUING PARENTHOOD THROUGH SURROGACY 152-53 (2015); Petra Nordqvist, *Out of Sight, Out of Mind: Family Resemblances in Lesbian Donor Conception*, 44 SOCIOLOGY 1128, 1133 (2010).

ics—may provoke commitments of care and support that align with the vindication of social factors.

This approach suggests a continued role for marriage as well.[382] Individuals commonly understand parental relationships to coincide with marital bonds, and marriage has long captured social, and not simply biological, parent-child relationships.[383] Marriage historically recognized social parent-child relationships in service of a gender-hierarchical, heterosexual order, but today, marriage may channel social parental ties in service of a more egalitarian society. Much of the shift toward marriage equality was driven by the relationship between marriage and parenting advanced by same-sex couples themselves. Now, same-sex couples assert compelling demands to parental recognition linked to marriage.[384] Still, even as marriage persists as a pathway to parentage, law must ensure equality for nonmarital parents and children.[385] This requires social paths to parental recognition for unmarried parents.

Significant authority from family law and constitutional law supports the equality principle articulated here. For example, lawmakers in states such as California and Maine recently revised their parentage codes to ensure equality for lesbian and gay parents and their children and to implement explicit and consistent gender-neutral constructions.[386] These reforms required more than merely applying existing parentage rules on a facially neutral basis; they required reorienting parentage rules in ways that reflect the realities of same-sex family formation and that value contributions of women who assume nontraditional parental roles.[387] In these states, lawmakers added paths to parentage

382. Of course, other scholars have made powerful arguments that marriage should not play a role in parentage law. *See, e.g.*, Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722-23 (2012).

383. *See* Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 266 (2006) (arguing for the continued utility of the marital presumption in protecting nonbiological relationships).

384. *See* NeJaime, *supra* note 16, at 1242-46.

385. The purpose of the parentage statute, as the Massachusetts high court recently recognized in allowing an unmarried, nonbiological mother to establish parentage, "is to provide all '[c]hildren born to parents who are not married to each other . . . the same rights and protections of the law as all other children.'" Partanen v. Gallagher, 59 N.E.3d 1133, 1138 (Mass. 2016) (quoting MASS. GEN. LAWS ch. 209C, § 1 (2016)).

386. *See* NeJaime, *supra* note 16, at 1261-63; Nancy D. Polikoff, *Marriage as Blindspot: What Children with LGBT Parents Need Now*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 127, 150 (Carlos A. Ball ed., 2016).

387. *See* NeJaime, *supra* note 16, at 1261-63.

that turned on social factors and opened those paths to women and men, in different-sex and same-sex couples, in marital and nonmarital families.[388]

Constitutional precedents also support this approach to equality. The Court's injunction against gender stereotyping in *United States v. Virginia*,[389] as well as its protection of same-sex couples' marriage and parenting relationships in *United States v. Windsor*[390] and *Obergefell*,[391] require treating women and gays and lesbians as equally valued participants. Nonetheless, these precedents do not definitively establish the implications of an equality principle in the parenting context. In fact, it is not clear that courts would require the types of reforms envisioned here under constitutional doctrine in its current form. Yet, as the trajectory toward marriage equality illustrates, courts may work out the meaning of equality over the course of many years and in dialogue with developments at the state level.

Accordingly, the next Section explores state-based family law reform, suggesting how law might concretely address parentage when guided by commitments to equality that require greater recognition of parenthood's social dimensions. These reforms are meant to be illustrative and not exhaustive. The last Section then points toward constitutional developments that may follow from family law reform. The constitutional discussion draws on the case of marriage equality to consider how courts might come to understand the requirements of equal protection and due process so as to protect the social contributions of parents, including women and same-sex couples.

B. Reorienting Parentage in Family Law

Statutory parentage regimes in most states remain rooted, to varying degrees, in distinct approaches to motherhood and fatherhood. While law has increasingly allowed both men and women—with and without biological connections—to satisfy traditional presumptions of paternity, maternity remains limited to women with a biological connection to the child. Accordingly, law facilitates families without biological fathers but restricts families without biological mothers. Parentage law could move away from separate regulations of

388. *See, e.g.*, CAL. FAM. CODE § 7613 (West 2016); ME. REV. STAT. ANN. tit. 19-A, § 1923 (2015).

389. 518 U.S. 515, 533 (1996).

390. 133 S. Ct. 2675, 2693-95 (2013).

391. 135 S. Ct. 2584, 2602 (2015). State courts also have reasoned about marriage and parenting in ways that reflect the importance of regarding women and same-sex couples as full participants. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431-32 (Conn. 2008); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 351 (Iowa 2013); Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009).

maternity and paternity and instead work toward general regulation of *parentage*.[392] This would permit a fuller recognition of the social bonds of parenthood, for both men and women, in both different-sex and same-sex couples, both inside and outside marriage.[393]

Biological connections—birth and genetics—would continue to demonstrate parentage, but social factors would as well. Some obvious candidates include intent (especially relevant before conception and birth),[394] function (relevant in post-birth and longer-term scenarios), and family formation (including, but not limited to, marriage).[395] Any approach to parental recognition will credit the claims of some while rejecting the claims of others. When biological and social factors point in different directions, the approach elaborated here would recognize the social claim in some cases in which under current law it would fail and would reject the biological claim in some cases in which under current law it would prevail.

Some might object that the move toward social parenthood pushes law away from administrable rules and toward individualized and contested deter-

392. As the following discussion suggests, some states provide models for this shift. For a thoughtful perspective rejecting thoroughly gender-neutral parentage rules, see Appleton, *supra* note 18, at 237-40.

393. While this Article does not explore changes to the adoption regime as a potential avenue of reform, one could imagine making adoption less burdensome, at least in the circumstances addressed here. *Cf.* BARTHOLET, *supra* note 294, at 187. One could also imagine making adoption a more general requirement for all parents. The latter approach would challenge the notion that some individuals, but not others, have natural rights to parent particular children. *Cf.* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 126 (1980) ("Infertile citizens . . . are no less entitled to fulfill their good than others who are differently endowed by the genetic lottery.").

394. In cases involving ART, even those decisions reached on grounds other than intent often align with an intent-based rule. *See* Mary Patricia Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test To Determine Parentage in Assisted Reproductive Technology Cases*, 50 HOUS. L. REV. 1295, 1316-17 (2013). While devised first in the context of ART, intent-based principles, perhaps surprisingly, might aid more vulnerable families. *See* Jacobs, *supra* note 1, at 467.

395. Ideally, law would reward the work of parenting and thus prioritize functional criteria; such criteria would align with this Article's focus on parenthood as a performative concept. But parents and children have interests in establishing legal relationships at birth, and thus social factors must vary based on timing. Moreover, requiring parental conduct in the absence of biological ties disadvantages same-sex couples, who have critical interests in establishing the nonbiological parent's status at birth. *See* Nancy D. Polikoff, *And Baby Makes . . . How Many? Using* In re M.C. *To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015, 2033 (2012). At that point, intent—evidenced through consent to ART, written acknowledgment of parentage, or marriage to the biological parent—may provide the best indication of a commitment to the work of parenting.

minations. Yet there are relatively clear and predictable ways of protecting social parenthood, ordinarily without delay or judicial involvement. This Part suggests reforms that aim for relative certainty and predictability. Nonetheless, to the extent that crediting parenthood's social dimensions leads law toward more fine-grained, fact-specific assessments, this is not new.[396] Courts have long looked at social attachments and functional criteria in determining de facto parental status.[397]

1. *The Marital Presumption*

Presently all but one state maintain a marital presumption that derives a spouse's parentage from marriage to "the woman giving birth"[398] or "the natural mother."[399] While most states continue to refer to the man married to the mother, a handful of states have revised their statutory marital presumptions to recognize the *person* married to the mother.[400] In these states, the marital presumption expressly applies to men in different-sex couples and women in same-sex couples. Yet, only one state—Washington—has a marital presumption that would also apply to women in different-sex couples and men in same-sex couples. Washington's presumption provides that "a person is presumed to be the parent of a child if . . . [t]he person and the *mother or father* of the child are married to each other . . . and the child is born during the marriage . . . ."[401] Guided by principles of equality, states could reform the marital presumption

396. Intentional and functional parenthood principles have been used by courts for many years and have been extensively elaborated by scholars. For foundational contributions, see Hill, *supra* note 91; Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269 (1991); Polikoff, *supra* note 1; and Shultz, *supra* note 1. For synthesis of intentional and functional principles, see Storrow, *supra* note 221.

397. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005). Indeed, some de facto parent statutes instruct courts to make assessments about the quality and significance of the parent-child relationship. *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (West 2015); D.C. CODE § 16-831.01 *et seq.* (2012). Courts also have distinguished between those serving in parent and nonparent roles. *See, e.g.*, Argenio v. Fenton, 703 A.2d 1042 (Pa. Super. Ct. 1997) (denying in loco parentis standing to a grandparent who did not play a parental role). Nonetheless, there is a way in which the assessment of parenting for purposes of parental recognition can reiterate gender stereotypes about the roles of mothers and fathers, and specifically the caretaking norms associated with motherhood. On the normalizing power of performative aspects of family law, see Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589 (2013).

398. ME. REV. STAT. ANN. tit. 19-A, § 1881(1) (2015).

399. WIS. STAT. ANN. § 891.41 (West 2016).

400. *See infra* Appendix A.

401. WASH. REV. CODE ANN. § 26.26.116 (West 2016) (emphasis added).

to apply in a fully gender-neutral manner. Washington's statutory language provides a model – though one that could be altered in some ways.

Historically, the marital presumption could furnish parental recognition in the absence of a biological relationship and deny recognition to those with biological ties. Law exploited and elaborated this feature of the marital presumption as it accommodated ART. In an age of marriage equality and ART, the marital presumption is not based on gendered, heterosexual, and biological assumptions about reproduction and parenthood, but instead on social grounds for parental recognition.[402] On this understanding, it is not clear why male same-sex couples cannot benefit from the presumption. Nor is it clear why women without biological ties cannot attain parentage by virtue of marriage to the biological father, just as men can attain parentage by virtue of marriage to the biological mother.

Animated by equality principles that lead law to value the social bonds of parenthood, the marital presumption could provide that the *person* married to the *biological parent* at the time of the child's birth is the child's presumed parent. While this type of provision would be relatively straightforward, it may insufficiently protect the rights of women who give birth.[403] That is, by automatically furnishing a presumption to the wife of a biological father, it calls into question the parental rights of the birth mother. Accordingly, lawmakers might account for the interests of birth mothers by implementing a two-tiered system of marital presumptions: first, the person married to the woman giving birth at the time of the child's birth would be presumed the child's legal parent; second, the person married to the genetic parent at the time of the child's birth would be presumed to be the child's legal parent, if that person accepts the child into his or her home and openly holds the child out as his or her child. This approach would respect the gestational bonds of women, but at the same time account for the parental bonds of women who separate motherhood from biological connection. And male same-sex couples who have children together would enjoy a nonadoptive path to dual parentage through marriage. Importantly, such an approach would not necessarily render a nonbiological mother in a different-sex couple or a nonbiological father in a same-sex couple

402. *See* NeJaime, *supra* note 16, at 1190, 1240-41.

403. Washington's presumption appears to be limited by the state's unchanged regulation of maternity. Washington law provides that the woman who gives birth *is* a legal parent. WASH. REV. CODE ANN. § 26.26.101 (West 2016). In contrast, many other states provide merely that the mother-child relationship *may* be established by proof of giving birth. Accordingly, in Washington, the gender-neutral marital presumption might have significance for nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples only when the birth mother has already relinquished her rights or had them terminated.

a legal parent, but would merely make that result possible by virtue of a system of rebuttable presumptions.[404] For the vast majority of parents, these changes would be irrelevant.

Revisiting *Doe*, the Connecticut decision discussed in Part III, illustrates the paradigmatic case in which this gender-neutral application of the marital presumption would matter. The mother there had parented her child for fourteen years before the dissolution of her marriage. While the surrogate's rights had long been terminated, the biological father—the mother's husband—pointed to Connecticut's regulation of marital parentage to preclude his wife's legal status. If she were the biological mother—whether gestational or genetic—she could have claimed the child as a child of the marriage; her husband would have been able to claim parental status even without a biological connection. But since she was a nonbiological mother, the child was not a child of the marriage. A gender-neutral marital presumption could resolve this problem and provide a way to recognize the mother's status on social, rather than biological, grounds.

A gender-neutral marital presumption would promote not only sex but also sexual-orientation equality. Notably, when Washington became the only state to alter its marital presumption in this way,[405] it did so as part of a broader effort to protect the families formed by same-sex couples. The bill to amend the parentage statutes followed from legal recognition of same-sex relationships and sought to conform parentage law to such recognition.[406] The bill was sponsored by a legislator who had engaged in gestational surrogacy in Califor-

404. The circumstances in which biological evidence would rebut parentage presumptions must be limited. *See* Polikoff, *supra* note 395, at 2027. For instance, where the parent is recognized on nonbiological grounds, the court may decide that it is not appropriate to allow biological evidence as grounds for rebuttal. *See* Partanen v. Gallagher, 59 N.E.3d 1133, 1140 (Mass. 2016). Some provisions already allow courts to exclude biological evidence based on the child's best interests. *See* D.C. CODE § 16-909(b) (2012); UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM'N 2002).

405. A Connecticut court suggested the connection between marriage equality and dual parentage for male same-sex couples engaging in gestational surrogacy. *See* Cunningham v. Tardiff, No. FA08-4009629, 2008 WL 4779641, at *5 (Conn. Super. Ct. Oct. 14, 2008) ("[A]ny children born as a result of these procedures acquire in all respects the status of a legitimate child; which means that the plaintiffs do not have to terminate the parental rights of the surrogate and her husband, nor do they have to adopt their own children." (citation omitted)); *cf. Partanen*, 59 N.E.3d at 1138 n.12 (suggesting that a nonbiological reading of the "holding out" presumption "may apply not only to a child born to two women, but also to a child born to two men through a surrogacy arrangement").

406. *See* WASH. REV. CODE ANN. § 26.26.903 (West 2016); *see also* H.B. Rep. No. E2SHB 1267, at 3 (Wash. 2011), http://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Bill%20Reports/House/1267-S2.E%20HBR%20PL%2011.pdf [http://perma.cc/NX3D-AGPR].

nia to have children with his same-sex partner.[407] As part of the same bill, he had attempted to repeal the state's ban on compensated surrogacy and instead to facilitate gestational surrogacy.[408] Despite support from both LGBT and women's rights organizations in the state, the surrogacy provisions were dropped.[409] Yet with the revised marital presumption, women in different-sex couples and men in same-sex couples may in some circumstances be able to engage in egg-donor gestational surrogacy and turn to the marital presumption to claim parentage.

Ideally, legislators would accept primary responsibility for reforming parentage law, as they did in Washington. But lawmakers in many states have been slow to respond to shifts in family formation made possible by ART—even when urged to do so by judges.[410] Consequently, courts are routinely asked to apply existing parentage principles to new and unforeseen situations. In many states, courts can rely on existing family law principles to apply the marital presumption in ways that promote equality and recognize parents on social grounds.

Following the UPA, parentage codes in many jurisdictions expressly provide that, where possible, provisions governing the father-child relationship apply to the mother-child relationship.[411] Courts have appealed to this gender-neutrality principle to recognize women in same-sex couples, in both marital and nonmarital families, on purely social grounds. Going forward, courts could apply this principle in more far-reaching ways, so as to recognize women in different-sex couples and men in same-sex couples on social grounds.[412]

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407. *See* Associated Press, *Surrogate Mothers Bill Debated*, LEWISTON MORNING TRIB. (Mar. 16, 2011), http://lmtribune.com/northwest/surrogate-mothers-bill-debated/article_941a8d57-09c5-5f9d-b9bb-6ecf830077c9.html [http://perma.cc/QK52-4DJ5].

408. *See* H.R. 1267, 62d Leg., Reg. Sess. §§ 56-57 (Wash. 2011).

409. *See* WASH. REV. CODE ANN. § 26.26.210 (West 2016).

410. *See, e.g.*, Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1139 (Mass. 2001).

411. *See supra* notes 165-166 and accompanying text. About half the states have adopted either the original or revised UPA. *See Parentage Act Enactment Status Map*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act [http://perma.cc/FL79-A6BM]; *Parentage Act (1973) Enactment Status Map*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(1973) [http://perma.cc/62EC-4WYD].

412. More general rules of statutory construction may also aid this move, but they vary in critical ways across jurisdictions. While some states have absolute gender-neutral rules of construction, others limit gender-neutrality such that the masculine includes the feminine but the feminine does not include the masculine. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 370 (2010). In addition, use of specifically gendered

Consider *S.N.V.*, a case from Colorado in which a husband and wife had been raising a child from the husband's extramarital relationship.[413] When, two years after the child's birth, the birth mother sought custody, the husband and wife claimed to be the child's legal parents to the birth mother's exclusion. Colorado's statutory marital presumption provided that "[a] man is presumed to be the natural father of a child if . . . [h]e and the child's natural mother are . . . married to each other and the child is born during the marriage."[414] Relying on the parentage code's gender-neutrality principle, the court found that even though "on its face, [the provision] applies only to paternity determinations," it "extended to maternity determinations."[415] The biological father's wife, the court determined, could "bring an action to establish her legal maternity, even though she [was] not the biological mother."[416] The court recognized a social path to parentage by virtue of "[a] woman's proof of marriage to the child's father."[417] This is not to say that the nonbiological mother prevails over the birth mother, but rather that she simply has standing to assert parentage. Within a legal regime that limits parentage to two individuals, the decision authorizes a result that would prioritize the social bonds of the biological father's wife over the claims of the birth mother.

S.N.V.'s application of the marital presumption is an outlier. If its logic were accepted more widely, parentage could be derived in the first instance from the biological father—a transformative shift in the law of parenthood. Critically, though, this shift would be consistent with equality commitments that already have reshaped other aspects of family law, and it would eradicate some of the asymmetries that continue to pervade parentage law.

2. *Voluntary Acknowledgments of Parentage*

While the marital presumption addresses children born inside marriage, states maintain statutory frameworks to recognize the parents of nonmarital

terms like mother, father, husband, and wife may be seen to carry their gendered connotations. *See* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 349 (Iowa 2013).

413. *In re* S.N.V., 284 P.3d 147, 148 (Colo. App. 2011). They contended, against the allegation of the birth mother, that they had arranged for the birth mother to act as a surrogate. *Id.*

414. COLO. REV. STAT. ANN. § 19-4-105 (West 2016).

415. *In re S.N.V.*, 284 P.3d at 151.

416. *Id.* at 148.

417. *Id.* at 151. The parentage code provides that the mother-child relationship *may* be established "by proof of her having given birth to the child or by any other proof specified in [the code]." COLO. REV. STAT. ANN. § 19-4-104. The same result could be reached through a gender-neutral and nonbiological "holding out" presumption. *See In re S.N.V.*, 284 P.3d at 151.

children. Every state uses a procedure, commonly termed a Voluntary Acknowledgment of Paternity (VAP), to identify a nonmarital child's father.[418] VAPs purport to identify the child's *biological* father. The identification of a second legal parent alleviates some of the burdens experienced by nonmarital children. But because same-sex couples ordinarily include a nonbiological parent, the biological foundation of VAPs does not repair—but instead exacerbates—burdens experienced by the nonmarital children of same-sex couples. The equality principles guiding reform would lead states to open VAPs to same-sex couples in ways that render VAPs explicitly capable of capturing social, and not only biological, grounds for parenthood.

As the revised UPA sets out the VAP mechanism, "The mother of a child and a man *claiming to be the genetic father* of the child may sign an acknowledgment of paternity with intent to establish the man's paternity."[419] After sixty days, VAPs have the force of an adjudication.[420] VAPs assume biological paternity but do not formally require paternity testing.[421] Accordingly, they effectively facilitate parental recognition on purely social grounds. In fact, courts in many states have rejected subsequent challenges to VAPs based on the father's lack of genetic connection to the child.[422]

Yet VAPs emphasize biological paternity in ways that obscure their nonbiological capacity. This means that VAPs capture nonbiological parenthood only for different-sex couples who, unlike their same-sex counterparts, can *pretend* they are the child's biological parents. So long as the signatories are an unmarried man and woman, the VAP can have the force of an adjudication of paternity regardless of biological facts. An unmarried lesbian couple, in contrast, cannot sign a VAP. Accordingly, in most states, the nonbiological mother cannot establish parentage upon the child's birth. Nonbiological fathers can deploy their heterosexual relationship to achieve parentage, while nonbiological mothers are excluded.

A more egalitarian system would expressly allow VAPs to recognize parents not only on biological but also on social grounds.[423] Voluntary acknowledg-

418. *See* Harris, *supra* note 88, at 469.

419. UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2002) (emphasis added). "[T]he man and the mother acknowledge his paternity, under penalty of perjury," but are not required to prove paternity. *Id.* § 301 cmt.

420. 42 U.S.C. § 666(a)(5)(C)-(D) (2012); UNIF. PARENTAGE ACT §§ 305, 307, 308.

421. *See* UNIF. PARENTAGE ACT § 302.

422. *See* J.A.I. v. B.R., 160 So.3d 473, 474 (Fla. Dist. Ct. App. 2015); *In re* Parentage of G.E.M., 890 N.E.2d 944, 955 (Ill. App. Ct. 2008); *In re* Paternity of Cheryl, 746 N.E.2d 488, 490-91 & n.2 (Mass. 2001).

423. *Cf.* Harris, *supra* note 88, at 478-88; Jacobs, *supra* note 1, at 497-98.

ments of *paternity* could become voluntary acknowledgments of *parentage* and apply to both biological and nonbiological parents, including both men and women.[424] Drafters of revisions to the UPA have proposed this type of reform. The January 2017 discussion draft included a VAP procedure in which "[t]he woman who gave birth to a child and an individual claiming to be the alleged genetic father, *intended parent*, or presumed parent of the child may sign an acknowledgment of parentage with intent to establish the child's parentage."[425]

3. *The Regulation of ART*

The marital presumption and VAP procedure envisioned above would accommodate some forms of ART through generally applicable regulations of parental recognition. Same-sex couples who engaged in donor insemination, for example, could sign a VAP to establish parentage for the nonbiological mother. Still, legislatures have compelling reasons to regulate ART through specific statutory provisions. In fact, states with the most extensive recognition of parentage through ART have enacted elaborate regulations aimed solely at assisted reproduction.

Lawmakers in these states have used the concept of consent to build statutory frameworks that open paths to nonadoptive parentage based on social, and not simply biological, grounds. The concept of consent already structures approaches to at least some forms of ART in practically every state. A more comprehensive and evenhanded use of consent in the regulation of ART can promote equality, based on gender, sexual orientation, and marital status.[426] Approaches to both donor insemination and gestational surrogacy illustrate this point.

In every state, the man married to a woman who conceives with donor sperm is treated as the legal father. Under relevant statutes, his consent to as-

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424. As the Massachusetts high court recently suggested in dictum, if "a father validly may execute [a VAP] absent a genetic relationship," a VAP also "may be executed by a same-sex couple, even if one member of the couple is not biologically related to the children." Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016).

425. *See* UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N, Discussion Draft Mar. 17-18, 2017) (emphasis added), http://www.uniformlaws.org/shared/docs/parentage/2017mar_RUPA_Mtg%20Draft_No%20add'l%20comments.pdf [http://perma.cc/A3ZS-DQ6A].

426. *See* Joslin, *supra* note 1, at 1222 ("[T]he most appropriate solution is to extend the consent = legal parent rule to all children born through assisted reproduction, regardless of the marital status, gender, or sexual orientation of the intended parents." (citation omitted)); *see also* Polikoff, *supra* note 18, at 233 (addressing donor insemination). The current draft version of the UPA takes an approach that applies the concept of consent broadly to ART. *See* UNIF. PARENTAGE ACT, *supra* note 425, § 704.

sisted reproduction authorizes his recognition.[427] In most states, though, his consent would be legally unavailing if he were not married to the child's mother.[428] While this presents obstacles to different-sex couples, its greatest impact has been on same-sex couples, who rely more heavily on donor insemination to have children and historically were excluded from marriage. In a regime animated by equality commitments, an unmarried partner, like a mother's spouse, would derive parentage from intention—operationalized through written consent to the mother's use of ART with the intent to be a parent. For example, as Maine's newly enacted parentage code provides, "a person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child."[429] Not only would this remedy some of the inequalities that the biological framework governing nonmarital parenthood imposes specifically on same-sex couples, it would also help unmarried different-sex couples who engage in ART.

Even as states open various forms of assisted reproduction on equal terms, they might still devise specific regulations for particular practices. Because surrogacy raises concerns with the exploitation of low-income women and the commodification of children and women's reproductive labor, lawmakers may continue to treat surrogacy with special caution. Those states that have authorized gestational surrogacy for both different-sex and same-sex couples have done so through specific regulatory frameworks that seek to protect intended parents, surrogates, and children. Regulating in ways that attend to the interests of surrogates does not mean that surrogates possess parental rights. Instead, these states cut off claims to parental recognition and recognize the intended parents at the child's birth.

Maine's recent reform exemplifies this pattern. The state's parentage code separately regulates gestational surrogacy by providing that, if certain conditions relating to protection of the surrogate's interests are met,[430] intended parents "are by operation of law the . . . parents of the resulting child immediately upon the birth of the child."[431] This regime allows both biological and nonbiological intended parents, in both different-sex and same-sex couples, both inside and outside of marriage, to attain parentage upon the child's birth.[432] In

427. *See* Polikoff, *supra* note 18, at 234.

428. *See infra* Appendix B.

429. *See* ME. STAT. tit. 19-A, § 1923 (2016).

430. *See id.* § 1931.

431. *See id.* § 1933.

432. The current version of the UPA now being drafted and considered also takes this approach. *See* UNIF. PARENTAGE ACT, *supra* note 425, § 809.

doing so, it recognizes the importance of social contributions for those engaging in ART, and it applies mechanisms that capture those social contributions in ways that promote equality along lines of gender, sexuality, and marital status.

C. Reorienting Constitutional Law on Parenthood

Attention to family law's treatment of parent-child relationships makes visible emergent constitutional questions. These questions may first arise in state courts under state law but will likely confront federal courts eventually. Constitutional precedents on the rights of women and gays and lesbians, including with respect to family and parenting relationships, demonstrate a strong commitment to including as full participants those who have been traditionally excluded. Nonetheless, courts have not determined what these precedents mean for purposes of the specific relationships addressed in this Article. This Section explores how, in response to significant state-level reform, shifting patterns of family formation, and evolving norms of gender and sexuality, federal constitutional law may develop in ways that expand the space of parental recognition.

1. Equal Protection and Parental Recognition

Today, parental recognition implicates questions of equality – including on grounds of gender, sexuality, and marital status. But equal protection doctrine, as currently constituted, may struggle to adequately address issues arising in parenthood. The following discussion considers doctrinal features that present obstacles to effective constitutional oversight in the law of parental recognition, looks to marriage equality as a site in which these features did not prevent meaningful constitutional review, and then considers how law might develop on questions of parental recognition.

a. Contested Sites of Equality Law

Some features of current equal protection doctrine may constrain developments that promote gender and sexual-orientation equality in the law of parental recognition. As Part I showed, the Court has permitted gender differentiation in the legal regulation of parenthood, justifying such differentiation by resort to reproductive biology. Reasoning first articulated at the dawn of modern sex-equality doctrine continues to supply authority for the differential treatment of mothers and fathers. The failure to see gender differentiation in parenthood as a sex-equality problem led law to devalue the social contributions of unmarried biological fathers. In the contemporary regulation of par-

entage, this failure also leads law to discount the social contributions of women who separate parenthood from biological ties.

Other features of equal protection doctrine also pose obstacles. The Court has focused on questions of classification and discriminatory purpose in ways that mask inequality. For example, the Court has resisted an approach to sex equality that understands "legislative classification[s] concerning pregnancy [as] . . . sex-based classification[s]."[433] And it has required a particularly demanding showing of "discriminatory purpose"[434] in challenges to laws "neutral on [their] face"[435]—that state actors took "a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[436]

In the law of parental recognition, courts might fail to see how a legal regime that privileges biological over social connections discriminates against lesbian and gay parents. Courts might conclude that so long as the government treats nonbiological unmarried parents the same (closing paths to their parental recognition), it acts in accordance with principles of equal protection. Compounding the problem, courts might view access to marriage as curing discrimination against same-sex couples and thus may give the government wide latitude in drawing distinctions that harm same-sex couples' nonmarital families.[437]

Certainly, these doctrinal features complicate effective constitutional oversight in the law of parental recognition. Yet, critically, these features did not prove dispositive in judicial approaches to marriage equality. Instead, courts considered social meaning in ways that led them to repudiate forms of exclusion that had long been taken for granted.[438] The *Windsor* Court did not appear to view the question of whether DOMA classified on the basis of sexual orien-

433. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003) (upholding the Family and Medical Leave Act and treating laws regulating pregnancy leave as implicating questions of sex equality).

434. Washington v. Davis, 426 U.S. 229, 237 (1976).

435. *Id.* at 241.

436. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979).

437. Scholars have pointed out how *Obergefell* may authorize discrimination against nonmarital family bonds. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016). *But see* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 96 B.U. L. REV. (forthcoming 2017) (arguing that *Obergefell* can support constitutional protection of nonmarital families).

438. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015) ("[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

tation as central, and thus neither addressed nor resolved it.[439] Instead, the Court focused on DOMA's purpose and effect. "The avowed purpose and practical effect of the law," the Court explained, "are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[440] The harm the Court sought to remedy was not merely that the law differentiated but that it excluded and disrespected same-sex couples' family relationships—"tell[ing] [same-sex] couples, and all the world, that their . . . marriages are unworthy of federal recognition."[441] Without legal recognition, "same-sex . . . couples ha[d] their lives burdened . . . in visible and public ways."[442]

In striking down state marriage bans in *Obergefell*, the Court concluded that "the marriage laws . . . are in essence unequal."[443] While the Court reasoned primarily in terms of due process, its equality analysis focused not on questions of discriminatory purpose but instead on the impact of marriage bans on same-sex couples. The Court condemned the laws because they "serve[d] to disrespect and subordinate" gays and lesbians.[444] "Especially against a long history of disapproval of their relationships," the exclusion of same-sex couples "work[ed] a grave and continuing harm."[445] The Court required the government to make insiders of same-sex couples, declaring that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."[446]

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439. *See generally* Zachary Herz, *The Marrying Kind*, 83 TENN. L. REV. 83 (2015). Of course, there are strong arguments that laws prohibiting same-sex marriage classify on the basis of sexual orientation. *See* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1195-99 (2012); Douglas NeJaime & Reva B. Siegel, *Concurring Opinion*, *in* WHAT *OBERGEFELL V. HODGES* SHOULD HAVE SAID (Jack Balkin ed., forthcoming 2017).

440. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

441. *Id.* at 2694; *see also* Reva B. Siegel, *The Supreme Court 2012 Term, Foreword: Equality Divided*, 127 HARV. L. REV. 1, 90 (2013) ("[T]he Court emphasizes the message the law's enforcement communicates to people, what it 'tells' them . . . . This is an account of how people understand and experience the law.").

442. *Windsor*, 133 S. Ct. at 2694. As Ackerman argues, the reasoning in *Windsor* focused on "*social meaning*," "moving beyond the law world to the lifeworld." ACKERMAN, *supra* note 276, at 308.

443. *Obergefell*, 135 S. Ct. at 2604.

444. *Id.*

445. *Id.*

446. *Id.* at 2602.

b. Sexual-Orientation Equality and Parental Recognition

The approach to equality that guided resolution of the marriage question could shape approaches to questions of parental recognition. Disputes emerging in state courts under state constitutional law are illustrative. In ordering the state to apply its marital presumption to lesbian couples, the Iowa Supreme Court relied on its earlier decision holding the state's marriage law unconstitutional.[447] Even though the law referred to "mothers" and "fathers"—just as the marriage law referred to women and men—the court rejected the argument that it classified only on the basis of sex, and not sexual orientation. Instead, the court concluded that "the refusal to list the nonbirthing lesbian spouse on the child's birth certificate 'differentiates implicitly on the basis of sexual orientation.'"[448] As in its earlier marriage decision, the court addressed the issue as one of discrimination against gays and lesbians. For the court, the effect of the law on same-sex couples appeared more important than a formal approach to questions of classification.

The concern with social meaning in marriage equality jurisprudence extends to parent-child relationships. In fact, *Windsor* and *Obergefell* each focused on the impact on children. The exclusion of same-sex couples, the *Windsor* Court explained, not only "demeans the couple," but also "humiliates tens of thousands of children now being raised by same-sex couples."[449] The Court emphasized the difficulty that children would experience in "understand[ing] the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[450] Again, in *Obergefell*, the Court declared that for those "gays and lesbians [who] . . . create loving, supportive families," the legal exclusion "harm[s] and humiliate[s] [their] children."[451] The Court observed that "[w]ithout the recognition, stability, and predictability marriage offers, children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser."[452]

In this sense, marriage equality precedents push courts to reevaluate whether existing parentage regimes furnish equality to gays and lesbians and their children. As New York's highest court recently acknowledged in repudiat-

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447. Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 341 (Iowa 2013).

448. *Id.* at 352 (quoting Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009)).

449. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

450. *Id.*

451. *Obergefell*, 135 S. Ct. at 2600-01.

452. *Id.* at 2600. Even the Court's earlier cases on unmarried fathers were driven by concern for children's welfare. *See* Caban v. Mohammed, 441 U.S. 380, 391 (1979).

ing a twenty-five-year precedent that excluded unmarried nonbiological parents from parentage, the "foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage . . . and the . . . holding in *Obergefell v. Hodges*, which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples."[453] *Obergefell* may reshape legal regulation even in traditionally resistant jurisdictions. Indeed, a Louisiana appellate court recently reevaluated the state's treatment of unmarried nonbiological parents based on *Obergefell*, which the court read to protect not only marriage but also "the decision to start a family."[454]

Guided by marriage equality precedents, courts would focus on the meaning and impact of the law, rather than simply on whether the law classifies based on sexual orientation.[455] Unlike different-sex family formation, same-sex family formation ordinarily—almost necessarily—features nonbiological parental ties. Accordingly, treating same-sex couples like different-sex couples is an empty promise so long as biological connection remains parenthood's animating logic.

The harms documented in Part III would become relevant to an examination of the constitutionality of the state's regulation of parentage. Nonrecognition and resort to adoption are concrete harms inflicted on same-sex parents and their children. The regime that imposes these burdens treats same-sex couples' families as less deserving of respect and recognition. As the New York court reasoned, an approach to parenthood that does not turn on biological connection is necessary to "ensure[] equality for same-sex parents and provide[] the opportunity for their children to have the love and support of two

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453. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016) (citation omitted). Today's treatment of lesbian and gay parents occurs against the backdrop of a long history of disapproval of lesbian and gay parental bonds. *See* Rosky, *supra* note 22.

454. Ferrand v. Ferrand, No. 16-CA-7, 2016 BL 285753, at *7 (La. Ct. App. Aug. 31, 2016); *see also* McGaw v. McGaw, 468 S.W.3d 435, 453-54 (Mo. Ct. App. 2015) (Clayton, J., concurring in part and dissenting in part).

455. The marriage decisions' approach to equality loosely maps onto antisubordination reasoning. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing that under the "group-disadvantaging principle," "what is critical . . . is that the . . . law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group"); *see also* Balkin, *supra* note 271, at 2343 ("The Constitution has an egalitarian demand, . . . which . . . is a demand for equality of social status . . . ."); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003) (describing antisubordination reasoning as envisioning "reform [of] institutions and practices that enforce the secondary social status of historically oppressed groups").

committed parents."[456] Social paths to parental recognition, courts might conclude, are necessary to treat gays and lesbians as fully belonging in the institution of parenthood.

c. *Sex Equality and Parental Recognition*

While the constitutional treatment of gays and lesbians has evolved dramatically in recent years, the law of sex equality has received less attention. Yet issues of gender differentiation in parenthood continue to arise in both family law and immigration law. While cases in both settings illustrate how law has insufficiently credited the social contributions of biological fathers, the contemporary treatment of ART shows that law also insufficiently credits the social contributions of nonbiological mothers.

Constitutional precedents have permitted this system by citing biological differences between women and men to authorize the differential treatment of mothers and fathers. In rejecting the claims of unmarried fathers in the 1970s and 1980s,[457] the Court justified the state's treatment in terms of reproductive differences – even in the face of facts that evidenced actual father-child relationships. This dynamic arose even more powerfully in immigration cases. In *Nguyen*, the Court upheld regulations making it more difficult for fathers to confer citizenship on nonmarital children. The Court connected a woman's biological role in reproduction to the "opportunity for mother and child to develop a real, meaningful relationship."[458] Yet it dismissed the claim of the father, who had in fact developed a "real, meaningful relationship," because "[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability."[459]

Other sex-equality precedents, however, take a different approach to sex-based classifications that implicate physiological differences between women and men. In holding the exclusion of women from the Virginia Military Institute (VMI) unconstitutional, the Court in *United States v. Virginia* recognized the persistence of "inherent differences" between women and men, but explained that such differences cannot form the basis "for denigration of the members of either sex or for artificial constraints on an individual's opportuni-

456. *Brooke S.B.*, 61 N.E.3d at 498-99.

457. *See* Lehr v. Robertson, 463 U.S. 248 (1983) (blocking a claim to parental recognition); Parham v. Hughes, 441 U.S. 347 (1979) (rejecting a claim to recovery under a wrongful death statute).

458. Nguyen v. INS, 533 U.S. 53, 65 (2001).

459. *Id.*

ty."[460] Sex-based classifications, the Court declared, "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[461] The Court rested its decision on an equality principle premised on inclusion and participation, impugning laws that deny to women "full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[462]

Virginia and *Nguyen* share some common themes. They treat sex-based classifications as presumptively unconstitutional and subject such classifications to heightened scrutiny regardless of whether they implicate physiological differences between women and men.[463] They recognize that in some circumstances, sex-based classifications can be justified in light of physiological differences.[464] But they diverge in their approach to those circumstances. The tension between *Virginia* and *Nguyen* manifests itself most clearly in the law of parental recognition. If courts were to reason about parenthood from *Virginia*, rather than *Nguyen*, they would likely exhibit less tolerance for gender differentiation.

This term, the Court has before it another case challenging the differential treatment of unmarried mothers and fathers in the immigration context.[465] The law imposed longer residency requirements on unmarried fathers who wished to transmit citizenship to their children. In 2011, an equally divided Court affirmed per curiam a Ninth Circuit decision upholding these regulations.[466]

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460. 518 U.S. 515, 533 (1996). As Reva Siegel shows, even when the Court reasons in what many consider to be an anticlassification framework, it often vindicates antisubordination values. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472-73 (2004).

461. *Virginia*, 518 U.S. at 534 (internal citation omitted). As Cary Franklin argues, the Court's reasoning suggests that "equal protection law should be particularly alert to the possibility of sex stereotyping in contexts where 'real' differences are involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality." Franklin, *supra* note 343, at 146.

462. *Virginia*, 518 U.S. at 532. This resonates with Akhil Amar's discussion of how to address, as a constitutional matter, the historical exclusion of women from the country's decision-making community. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 279 (2012) (asking how, after the Nineteenth Amendment's adoption, "should faithful constitutional interpretation make amends for the retrospectively problematic exclusions that defined the American constitutional order prior to 1920?").

463. *Nguyen*, 533 U.S. at 61; *Virginia*, 518 U.S. at 531.

464. *Nguyen*, 533 U.S. at 68; *Virginia*, 518 U.S. at 532.

465. Morales-Santana v. Lynch, 136 S. Ct. 2545 (2016) (No. 15-1191); *see* sources cited *supra* note 123.

466. *See* Flores-Villar v. United States, 564 U.S. 210 (2011) (per curiam).

The Ninth Circuit had relied heavily on *Nguyen*, which involved a different set of sex-based regulations.[467]

In rejecting the regulations now before the Court, the Second Circuit refused to extend *Nguyen*. Instead, *Virginia* guided the court's analysis.[468] The court found that, despite differences between women and men with respect to reproduction, the sex-differentiated residence requirements were "not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States."[469] The Second Circuit explained that the sex-based distinction in the immigration regulations "arguably reflect[s] gender-based generalizations concerning who would care for and be associated with a child born out of wedlock."[470] By imposing more onerous requirements on biological fathers, the regulations not only enforced views that inevitably imposed child rearing on women but also failed to adequately credit the father-child relationship at stake. Indeed, the father had legitimated the child by marrying the mother when the child was eight.[471]

Decisions on questions of parenthood in immigration may shape decisions in family law, just as earlier decisions relating to family law underwrote subsequent decisions regarding citizenship status. If the Court affirms the Second Circuit's decision regarding parenthood in immigration law, it may also begin to question the wisdom of relying on biological justifications to distinguish between motherhood and fatherhood for purposes of family law.[472] State court reasoning that relies on *Nguyen* to justify the nonrecognition of nonbiological mothers for purposes of parentage law could become suspect.

Consider *Amy G. v. M.W.*,[473] a California case with facts reminiscent of *S.N.V.*,[474] the Colorado marital presumption case discussed earlier. The biological father and his wife had been raising the child, who at the time of the deci-

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467. *See* Flores-Villar v. United States, 536 F.3d 990, 996 (9th Cir. 2008), *aff'd*, 564 U.S. 210.

468. *See* Morales-Santana v. Lynch, 804 F.3d 520, 528-31 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (No. 15-1191).

469. *Id.* at 531.

470. *Id.* at 533-34.

471. *Id.* at 524.

472. *See* Siegel, *supra* note 122, at 264-65 (discussing how questions of gender equality are obscured by physiological reasoning about reproduction in the legal regulation of abortion). On the confused treatment of parentage through ART in citizenship law, see Abrams & Piacenti, *supra* note 123, at 699-700.

473. 142 Cal. App. 4th 1 (2006), *cert. denied*, 550 U.S. 934 (2007), *superseded by statute in part*, 2008 Cal. Stat. 233, *as recognized in In re* Bryan D., 199 Cal. App. 4th 127, 139 (2011).

474. *In re* S.N.V., 284 P.3d 147, 148 (Colo. App. 2011).

sion was three, since he was one month old.[475] The birth mother had surrendered the one-month-old child to the father and had signed an agreement consenting to adoption by the father's wife, but months later filed a petition to establish a parental relationship.[476] Unlike in Colorado, the California court held that the father's wife did not have standing to establish parentage pursuant to the marital presumption.[477] Rejecting her equal protection argument, the court explicitly resorted to the Court's reasoning in *Nguyen*:

> While a biological father's genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man.[478]

Of course, men and women are not similarly situated with respect to reproductive biology. But, guided by *Nguyen*, the court translated biological differences between women and men into social and legal differences between mothers and fathers. The point here is not to suggest that the birth mother should not have prevailed. Rather, it is that the court relied on biological differences to justify a system that denies standing to assert parentage to a woman who had formed a parent-child relationship on social grounds.

In contrast, an approach guided by *Virginia* would have asked whether, notwithstanding biological differences between women and men, the gender-differentiated parentage law is substantially related to an important governmental objective.[479] Parentage laws, as many courts have recognized, are driven by the state's interests in identifying those individuals responsible for the support of the child, protecting the integrity of the family, and safeguarding the child's interest in continuity of care.[480] The differentiation between men and women who step forward to parent children—that is, the recognition of nonbi-

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475. *Amy G.*, 142 Cal. App. 4th at 4.

476. *Id.* at 5-6.

477. *Id.* at 13. Like Colorado, California's marital presumption referred to the "natural mother," and the parentage law included a gender-neutrality directive. CAL. FAM. CODE. §§ 7611(a), 7650(a) (West 2013).

478. *Amy G.*, 142 Cal. App. 4th at 17.

479. United States v. Virginia, 518 U.S. 515, 545 (1996).

480. *See* sources cited and accompanying text *supra* note 376; *see also* ALSTOTT, *supra* note 307, at 5 (stating that "continuity of care helps define what a parent is").

ological fathers but not mothers—may not advance those interests but instead may undermine them.[481] A sex-neutral alternative could promote the government's interests as effectively.[482] Again, such an approach would not mean that the biological father's wife in a case like *Amy G.* would prevail but that she merely would have standing to assert parentage.

Here, again, the principles animating the Court's recent marriage decisions provide guidance. If courts were to reason in the tradition of *Windsor* and *Obergefell*, they might focus the constitutional inquiry not simply on means-ends analysis but also on the law's social meaning.[483] A court might ask whether the parentage law devalues women's social bonds in the absence of biological ties and thereby denigrates important relationships of care and support formed between parents and children. Again, the harms documented in Part III would be relevant to the constitutional inquiry. Courts would view with skepticism a legal regime that forces nonbiological mothers, but not nonbiological fathers, to adopt their children. A court might ask whether the parentage law reflects views that tie women to child rearing as a matter of biology. As Part III showed, the nonrecognition of nonbiological mothers—as seen specifically in approaches to surrogacy—perpetuates the notion that the social role of motherhood flows inevitably from the biological fact of maternity. Guided by an equality-inflected approach, the *Amy G.* court, for instance, might have repudiated the trial court's reasoning, which suggested that the nonbiological mother was "[no] different from a live-in nanny"[484]—presumably also a woman who cares for a child not biologically her own.

Rather than insulate gender differentiation in parenthood from scrutiny based on biological differences between women and men, courts might provide constitutional oversight in ways that detect gender stereotypes and require sex-neutral alternatives. This may furnish greater recognition of unmarried biological fathers—like those in *Parham* and *Nguyen*—who commit to the social work of parenting. It may also dislodge motherhood from biological ties in ways that recognize women—like those in *Doe* and *S.N.V.*—who parent children to

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481. *Cf.* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 353 (Iowa 2013) ("When a lesbian couple is married, it is just as important to establish who is financially responsible for the child and the legal rights of the nonbirthing spouse.").

482. *See* Morales-Santana v. Lynch, 804 F.3d 520, 529 (2d Cir. 2015) ("In assessing the validity of the gender-based classification, . . . we consider the existence of gender-neutral alternatives to the classification."), *cert. granted*, 136 S. Ct. 2545 (2016) (No. 15-1191).

483. *Cf.* AMAR, *supra* note 462, at 302 (noting that "social meaning becomes especially important with regard to certain issues of gender equality," including those that implicate "biological differences between the sexes").

484. Amy G. v. M.W., 142 Cal. App. 4th 1, 8 (2006).

whom they have neither a gestational nor genetic connection. Both of these developments would value parenthood's social dimensions in ways that promote children's interests in continuing and stable relationships.

2. *Equality and Parental Liberty*

Given that equality concerns have structured the protection of liberty in the realm of family relationships, the law of parental recognition might also evolve as a matter of due process, which this Section only briefly considers.[485] As Part I showed, the Court's efforts in the 1970s to protect the parental rights of unmarried fathers grew out of concerns with the inequalities experienced by nonmarital parents and children. At that time, the Court announced that unmarried fathers have a due process interest in parenthood that springs from their biological connection to the child.[486] Even though the Court required social performance from biological fathers, biological connection continued to ground the claim to constitutional protection.[487] Since then, challenges to the biological limitation on constitutional protection have largely failed.[488]

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485. *See* NeJaime & Siegel, *supra* note 439. Liberty and equality are entwined in what Laurence Tribe identifies as "a legal double helix." Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); *see also* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011).

486. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972).

487. *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("[T]he biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."). The biological basis of parental liberty trades on a negative-liberty understanding of constitutional rights, rather than a due process doctrine that confers affirmative recognition. For competing accounts of this negative-positive distinction in constitutional approaches to family law, compare Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25 (2014), with Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 OHIO ST. L.J. 919 (2016). For an approach that grounds rights to parental *recognition* in due process, see NeJaime & Siegel, *supra* note 439.

488. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844-45 (1977) (rejecting the claims of foster parents and affirming the importance of "natural" parent-child bonds, but leaving unsettled when, if ever, foster parents might have constitutional liberty interests). *But see* Elwell v. Byers, 699 F.3d 1208, 1216 (10th Cir. 2012) (extending constitutional protection to "preadoptive parents [who] have a more significant relationship than foster care because of the possibility of developing a permanent adoptive relationship" (quotation marks omitted)). Notably, in *Prince v. Massachusetts*, the Court assumed the litigant, who was the *legal guardian* of her niece, could claim constitutional parental rights vis-à-vis

But with new appreciation for the equal status of gay and lesbian parents, courts might eventually recognize the social bonds of parenthood as a matter of due process.[489] Again, marriage equality jurisprudence provides support for this approach, suggesting how emergent understandings of equality can reshape understandings of liberty.[490] In *Obergefell*, the Court observed that the exclusion of same-sex couples from marriage "may long have seemed natural and just . . . ."[491] But, it reasoned, new understandings of the equal status of gays and lesbians made clear that the exclusion impermissibly "impose[s] stigma and injury . . . ."[492] Echoing the emphasis in *Windsor*'s equal protection analysis, the *Obergefell* Court's due process analysis focused on how the "exclusion [from marriage] has the effect of teaching that gays and lesbians are unequal in important respects."[493] Explaining how the lack of recognition "consigned [same-sex couples] to an instability many opposite-sex couples would deem intolerable in their own lives,"[494] the Court, as a matter of due process, required the government to treat gays and lesbians as insiders.

If *Obergefell* were to guide approaches to parental recognition, courts might extend due process protection to social bonds in the absence of biological connection. Indeed, this development would build on and elaborate commitments that animated the Court's earlier precedents. Decisions on unmarried fathers emphasized men's social contributions, even as constitutional protection was rooted in the biological tie. And when the Court articulated the due process interest in parental recognition, it did so to promote equality for nonmarital par-

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her niece, even though it ultimately upheld the governmental intervention. 321 U.S. 158, 161 (1944).

489. A federal district court recently recognized a nonbiological same-sex spouse's "right to be a parent" as a matter of due process. Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645, at *15 (S.D. Ind. June 30, 2016). At least one court has suggested that an *unmarried* nonbiological mother *may* have a constitutional liberty interest to maintain the parental relationship. *See In re* Parentage of L.B., 122 P.3d 161, 177 n.27 (Wash. 2005) (noting that the nonbiological mother "persuasively argue[s] that [she and the child] . . . have constitutionally protected rights to maintain their parent-child relationship," but concluding that "granting *de facto* parental standing to [nonbiological mother] renders these additional constitutional concerns moot").

490. *See* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014); *see also* Lawrence v. Texas, 539 U.S. 558, 575 (2003) (striking down sodomy prohibitions by stressing how protection for same-sex sexuality is necessary to shield gays and lesbians from stigma and discrimination).

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

492. *Id.*

493. *Id.*

494. *Id.* at 2601.

ents and children. Since then, it has become clear that the biological lines drawn to vindicate unmarried parents and children have resulted in the exclusion of same-sex couples' families. Now, due process protection for the social dimensions of parenthood would remedy harms imposed on the nonmarital families formed by gays and lesbians.

Further, due process protections for social bonds of parenthood would more broadly protect nonbiological mothers.[495] The woman who commits to the difficult task of parenting—even without biological connections—would have the importance of her parental work and the significance of her relationship with the child recognized as a matter of liberty. Due process protection of this kind would also affirm values that the Court has articulated in protecting women's liberty interests in reproductive decision making. The Court has explained that women's ability to separate pregnancy from motherhood and thereby break from traditional norms that tie them naturally to child rearing is critical to women's equal standing.[496] In the regulation of ART, this insight has implications for intended mothers and surrogates, both of whom separate the biological fact of maternity from the social role of motherhood. Law would not only protect the intended mother's social contributions, but also the surrogate's decision to carry and give birth to a child she does not wish to parent. Women who occupy unconventional gender roles—both those who seek to parent and those who do not—would have their decisions respected.

At this point, it is unclear what doctrinal form constitutional oversight of parental recognition might take. Both equal protection and due process might contribute to developments in the law of parental recognition. In either area, though, meaningful constitutional interventions are likely to arise only after a number of states have reckoned with the burdens placed on women and same-sex couples whose parent-child relationships the government fails to respect and recognize.

CONCLUSION

This Article uncovers the harms countenanced by a legal regime rooted in marital and biological frameworks of parental recognition. Because those frameworks were designed around the gender-differentiated, heterosexual fam-

495. While this discussion focuses on parental rights, there may be plausible arguments regarding a "child's liberty interest in preserving established familial or family-like bonds." Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Nonetheless, little constitutional authority currently supports this child-centered approach.

496. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992); *see also* Siegel, *supra* note 122.

ily, gender- and sexuality-based asymmetries remain embedded in the law of parental recognition. Even as courts and legislatures seek to conform parentage law with more recent egalitarian commitments, their progress remains partial.

To repair the problems that exist in current approaches to parental recognition, this Article proposes reforms that continue to use marital and biological ties as markers of parentage. Perhaps this reform project holds more transformative potential than one might assume. The shifts in legal parenthood envisioned here may ultimately destabilize both marital and biological logics by transcending the two-parent limit on which both are premised.[497] Indeed, a subsequent phase of liberalization focused on recognition of multiple parents may have just begun.[498]

In *Michael H.*, the seminal case on the conflict between unmarried biological fathers and married nonbiological fathers, Justice Scalia declared that "California law, *like nature itself*, makes no provision for dual fatherhood."[499] Yet his plurality opinion protected the nonbiological father—the mother's husband who claimed parenthood by virtue of the marital presumption—by rejecting the *natural* father's constitutional claim. Marriage, in that case, did not simply vindicate social understandings of parenthood; it also cabined reproduction and parenting within the two-parent unit.[500] The child emerged with only one legal mother and father.

Since *Michael H.*, California law has changed. The state allows biological fathers to challenge the parentage of husbands;[501] recognizes unmarried nonbiological fathers,[502] even over their biological counterparts;[503] and protects the parental rights of same-sex couples.[504] The state regulates ART, for both married and unmarried couples and different-sex and same-sex couples, in ways that furnish a range of paths to nonbiological parentage.[505]

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497. Marquardt, *supra* note 321, at 36-37. It is worth noting, though, the recent birth of a child with three genetic parents. *See* Gina Kolata, *Birth of Baby with Three Parents' DNA Marks Success for Banned Technique*, N.Y. TIMES (Sept. 27, 2016), http://www.nytimes.com/2016/09/28/health/birth-of-3-parent-baby-a-success-for-controversial-procedure.html [http://perma.cc/K8SN-5UWQ].

498. *See* Eskridge, *supra* note 3, at 1975; NeJaime, *supra* note 16, at 1263-65.

499. Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (emphasis added).

500. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 649-50 (1993).

501. CAL. FAM. CODE § 7541 (West 2016).

502. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

503. Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535 (Ct. App. 1995).

504. *See, e.g.*, CAL. FAM. CODE § 7611.

505. *Id.* § 7613.

Eventually, when confronted with the many types of parental configurations that California law could produce,[506] California legislators decided to allow recognition of more than two legal parents.[507] Without marriage, biology, gender, and sexual orientation as constraints on parenthood, the two-parent rule seemed neither doctrinally sound nor normatively desirable. Now, marital and biological bonds need not define nor limit parentage. Legal parental ties can spill out of both the biological and marital units, making each less meaningful to parentage.[508]

Ironically, pushing beyond the two-parent limit might in some ways vindicate biological ties—but in ways that reflect the changes wrought by ART.[509] Recognition of more than two parents may accommodate situations in which parents seek to have gamete donors or surrogates maintain a relationship to the child, even if not as a primary parent.[510] Recognition of multiple parents may also address objections to a less biologically oriented parentage regime.[511] If the marital presumption were thoroughly gender-neutral, concerns about the rights of birth mothers could be addressed by recognizing a nonbiological parent's interest in addition to, rather than in place of, the birth mother's interest. In fact, recognition of multiple parents might address potential constitutional objections to a system that would otherwise allow the birth mother's parental rights to be rebutted.[512] In the end, law might adapt to many kinds of families forming today, recognizing the continued attraction of biological parenthood

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506. *See, e.g.*, *In re* M.C., 123 Cal. Rptr. 3d 856, 861 (Ct. App. 2011) (describing a case involving a birth mother, her same-sex spouse, and the biological father who stepped forward to parent).

507. 2013 Cal. Legis. Serv. ch. 564 (West).

508. This result is now also possible under parentage codes in other jurisdictions. *See* D.C. CODE § 16-831.01 (2013); ME. STAT. tit. 19-A, § 1853(2) (2016).

509. *See* CAL. FAM. CODE § 7613.

510. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 426 (2008); Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57, 81-86 (2000). For work conceptualizing the legal relationships that may flow from donor arrangements, see Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012).

511. For example, recognizing nonbiological fathers of nonmarital children would not prevent imposing obligations on biological fathers.

512. *See* E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 100 (2006) (identifying the gestational mother as "the initial constitutional parent"); *see also* Frank G. v. Renee P.-F., 37 N.Y.S.3d 155, 156 (App. Div. 2016) (granting custody to the nonbiological father in a same-sex couple while preserving the surrogate's parental status).

while accommodating the growing number of nonbiological bonds that are possible.

Of course, this approach is not without costs. In facilitating additional claims, law might change the very meaning of parenthood – divesting the power to exclude that has historically been central to parental status.[513] Moreover, it is not clear when exactly recognition of multiple parents serves, and when it undermines, children's interests. Further, as we have already seen, efforts at liberalization may fail to eradicate inequalities. Those with nonbiological bonds – including same-sex couples and women engaging in egg-donor gestational surrogacy – may have valid objections to a system of parentage that exposes their families to biological claims, even if the claimants seek to supplement rather than supplant the nonbiological parents. Within this regime, inequalities based on gender and sexuality may persist. These concerns do not counsel in favor of abandoning current efforts to reform parentage. Rather, they suggest the importance of learning from the past – moving forward with an appreciation for how inequalities may endure even as legal regimes are transformed.[514]

513. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 944 (1984).

514. *See* Siegel, *supra* note 271.

APPENDIX A

GENDER NEUTRALITY IN DONOR-INSEMINATION REGULATION AND MARITAL PRESUMPTIONS

This Appendix documents jurisdictions in which donor-insemination statutes and marital presumptions apply to not only different-sex but also same-sex couples. With respect to the marital presumption, except in the case of Washington State, the gender-neutral presumption applies to female same-sex couples – recognizing the woman married to the birth mother as the legal parent – but not to male same-sex couples.

State	Gender-Neutral Donor-Insemination Regulation	Authority	Gender-Neutral Marital Presumption	Authority
Alabama				
Alaska	X	ALASKA STAT. § 25.20.045 (2014)		
Arizona	X[515]	ARIZ. REV. STAT. ANN. § 25-501 (2016)	X	McLaughlin v. Jones, 382 P.3d 118 (Ariz. Ct. App. 2016)
Arkansas[516]				
California	X	CAL. FAM. CODE § 7613 (West 2016)	X	CAL. FAM. CODE § 7611 (West 2016)
Colorado			X	*In re* S.N.V., 284 P.3d 147 (Colo. App. 2011)
Connecticut	X[517]	Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973 (Conn. Super. Ct. Jan. 16, 2015)	X[518]	Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973 (Conn. Super. Ct. Jan. 16, 2015)
Delaware	X	DEL. CODE ANN. tit. 13, §8-201 (West 2014)		

515. The statute refers to support obligations and not parental recognition.

516. After *Obergefell*, the Arkansas Supreme Court upheld the state's refusal to issue birth certificates for children of married female couples listing the nonbiological mother as the second parent. *See* Smith v. Pavan, 505 S.W.3d 169 (Ark. 2016).

517. The case is an unreported trial-court decision.

518. The case is an unreported trial-court decision.

State	Gender-Neutral Donor-Insemination Regulation	Authority	Gender-Neutral Marital Presumption	Authority
District of Columbia	X	D.C. CODE § 16-909 (2016)	X	D.C. CODE § 16-909 (2016)
Florida				
Georgia	X	GA. CODE ANN. § 19-7-21 (2015)	X	GA. CODE ANN. § 19-7-20 (2015)
Hawaii				
Idaho				
Illinois	X	750 ILL. COMP. STAT. 46/703 (2015)	X	750 ILL. COMP. STAT. 46/204 (2015)
Indiana			X	Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645 (S.D. Ind. June 30, 2016)
Iowa			X	Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013)
Kansas	X	Marie v. Mosier, No. 14-cv-02518-DDC-TJJ, 2016 WL 3951744 (D. Kan. July 22, 2016)		
Kentucky				
Louisiana				
Maine	X	ME. REV. STAT. ANN. tit. 19-A, § 1923 (2015)	X	ME. REV. STAT. ANN. tit. 19-A, § 1881 (2015)
Maryland				
Massachusetts	X	Della Corte v. Ramirez, 961 N.E.2d 601 (Mass. App. Ct. 2012)	X[519]	Hunter v. Rose, 975 N.E.2d 857 (Mass. 2012)
Michigan				
Minnesota				
Mississippi				
Missouri				
Montana				
Nebraska			X	NEB. STAT. ANN. § 42-377 (1997)[520]

519. The reach of authority on the question of the marital presumption, as distinct from donor-insemination provisions, is unclear.

520. The statute's gender-neutral language was not aimed at same-sex couples and thus its application is unclear.

State	Gender-Neutral Donor-Insemination Regulation	Authority	Gender-Neutral Marital Presumption	Authority
Nevada	X	NEV. REV. STAT. ANN. § 126.041 (West 2013)		
New Hampshire	X	N.H. REV. STAT. ANN. § 168-B:2 (2016)	X	N.H. REV. STAT. ANN. § 168-B:2 (2016)
New Jersey	X[521]	N.J. STAT. ANN. § 37:1-31 (West 2006)	X	N.J. STAT. ANN. § 37:1-31 (West 2006)
New Mexico	X	N.M. STAT. ANN. § 40-11A-703 (2009)		
New York	X	Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (Sup. Ct. 2014)	X[522]	N.Y. DOM. REL. LAW § 24 (McKinney 2008); Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (Sup. Ct. 2014)
North Carolina				
North Dakota				
Ohio				
Oklahoma				
Oregon	X	Shineovich v. Kemp, 214 P.3d 29, 39 (Or. Ct. App. 2009)		
Pennsylvania				
Rhode Island				
South Carolina				
South Dakota			X	S.D. CODIFIED LAWS § 25-8-57 (2016)
Tennessee				
Texas				
Utah	X	Roe v. Patton, No. 2:15-cv-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015)		
Vermont			X	VT. CODE § 15-308 (2010)
Virginia				

521. Although statutes regulating marital parentage have not been updated, presumably civil union statutes treating same-sex partners like spouses for parentage would extend to same-sex spouses in the era of marriage equality.

522. Case law in New York remains mixed over the extent to which marital presumptions of parentage apply to same-sex spouses.

State	Gender-Neutral Donor-Insemination Regulation	Authority	Gender-Neutral Marital Presumption	Authority
Washington	X	WASH. REV. CODE ANN. § 26.26.710 (West 2016)	X	WASH. REV. CODE ANN. § 26.26.116 (West 2016)
West Virginia				
Wisconsin	X	Torres v. Seemeyer, No. 15-cv-288-bbc, 2016 WL 4919978, at *6 (W.D. Wis. Sept. 14, 2016)		
Wyoming				

APPENDIX B

MARITAL STATUS IN DONOR-INSEMINATION STATUTES

This Appendix lists statutes for those jurisdictions that maintain provisions specifically governing parentage in the context of donor insemination. It then addresses the role of marital status in these statutes—first, whether the statute recognizes only a woman's spouse as a legal parent, and second, whether the statute divests sperm donors of parental rights only when the donee is a married woman.

State	Relevant Authority	Donor-Insemination Statute	Statute Recognizes Only Spouse As Legal Parent	Statute Divests Sperm Donor Only With Married Donee
Alabama	X	ALA. CODE §§ 26-17-702 to -703 (LexisNexis 2009)	X	X
Alaska	X	ALASKA STAT. § 25.20.045 (2014)	X	X
Arizona	X	ARIZ. REV. STAT. ANN. § 25-501 (2016)[523]	X	X
Arkansas	X	ARK. CODE ANN. § 9-10-201 (2015)	X	X
California	X	CAL. FAM. CODE § 7613 (West 2016)		
Colorado	X	COLO. REV. STAT. § 19-4-106 (2016)	X	
Connecticut	X	CONN. GEN. STAT. §§ 45a-774 to -775 (2015)	X	
Delaware	X	DEL. CODE ANN. tit. 13, §§ 8-201, -702 to -703 (2014)		
District of Columbia	X	D.C. CODE § 16-909 (2016)		
Florida	X	FLA. STAT. ANN. §§ 742.11, 742.14 (West 2016)	X	
Georgia	X	GA. CODE ANN. § 19-7-21 (2015)	X	X
Hawaii				

523. The statute refers to support obligations and not parental recognition.

State	Relevant Authority	Donor-Insemination Statute	Statute Recognizes Only Spouse As Legal Parent	Statute Divests Sperm Donor Only With Married Donee
Idaho	X	IDAHO CODE § 39-5405 (2011)	X	
Illinois	X	750 ILL. COMP. STAT. 46/702, 46/703 (2015)		
Indiana				
Iowa				
Kansas	X	KAN. STAT. ANN. §§ 23-2302, 23-2208 (2015)	X	
Kentucky				
Louisiana				
Maine	X	ME. REV. STAT. ANN. tit. 19-A, §§ 1922-1923 (2015)		
Maryland	X	MD. CODE ANN., EST. & TRUSTS § 1-206 (West 1974)	X	X
Massachusetts	X	MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1981)	X	X
Michigan	X	MICH. COMP. LAWS § 333.2824 (1996)	X	X
Minnesota	X	MINN. STAT. § 257.56 (1987)	X	X
Mississippi				
Missouri	X	MO. ANN. STAT. § 210.824 (West 1987)	X	X
Montana	X	MONT. CODE ANN. § 40-6-106 (1995)	X	X
Nebraska				
Nevada	X	NEV. REV. STAT. ANN. §§ 126.660, 126.670, 126.041 (West 2013)		
New Hampshire	X	N.H. REV. STAT. ANN. § 168-B:2 (2016)		
New Jersey	X	N.J. STAT. ANN. § 9:17-44 (West 1983)	X	
New Mexico	X	N.M. STAT. ANN. §§ 40-11A-702, -703 (2009)		
New York	X	N.Y. DOM. REL. LAW § 73 (McKinney 2008).	X	X
North Carolina	X	N.C. GEN. STAT. § 49A-1 (2015)	X	X

State	Relevant Authority	Donor-Insemination Statute	Statute Recognizes Only Spouse As Legal Parent	Statute Divests Sperm Donor Only With Married Donee
North Dakota	X	N.D. CENT. CODE §§ 14-20-60, -61 (2009)		
Ohio	X	OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2015)	X	
Oklahoma	X	OKLA. STAT. ANN. tit. 10, § 552 (West 2009)	X	X
Oregon	X	OR. REV. STAT. ANN. §§ 109.239, .243 (West 2016)	X	
Pennsylvania				
Rhode Island				
South Carolina				
South Dakota				
Tennessee	X	TENN. CODE ANN. § 68-3-306 (2016)	X	X
Texas	X	TEX. FAM. CODE §§ 160.702 to 703 (West 2016)	X	
Utah	X	UTAH CODE ANN. §§ 78B-15-702 to -703 (LexisNexis 2016)	X	
Vermont				
Virginia	X	VA. CODE ANN. § 20-158 (2016)	X	
Washington	X	WASH. REV. CODE ANN. §§ 26.26.705, 26.26.710 (West 2016)		
West Virginia				
Wisconsin	X	WIS. STAT. ANN. § 891.40 (West 2015)	X	
Wyoming	X	WYO. STAT. ANN. §§ 14-2-902 to -903 (2015)		

APPENDIX C

AVAILABILITY OF PATHS TO PARENTAL RECOGNITION FOR UNMARRIED, NONBIOLOGICAL PARENTS

This Appendix documents jurisdictions in which unmarried, nonbiological parents may attain some form of parental recognition without having adopted the child. It provides relevant authority both for jurisdictions in which parental recognition is available and for jurisdictions in which parental recognition is unavailable.

State	Available Path	Authority
Alabama		*Ex parte* N.B., 66 So. 3d 249 (Ala. 2010)
Alaska		Osterkamp v. Stiles, 235 P.3d 178 (Alaska 2010)
Arizona		Egan v. Fridlund-Horne, 211 P.3d 1213 (Ariz. Ct. App. 2009)
Arkansas	X	Bethany v. Jones, 378 S.W.3d 731 (Ark. 2011). *But see* Foust v. Montez-Torres, 456 S.W.3d 736 (Ark. 2015) (finding no standing for a nonparent, who did not stand in loco parentis with the child at the time of filing her complaint)
California	X	Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005)
Colorado	X	*In re* Parental Responsibilities of A.R.L., 318 P.3d 581 (Colo. App. 2013)
Connecticut		
Delaware	X	DEL. CODE ANN. tit. 13, § 8-201(c) (2014)
District of Columbia	X	D.C. CODE §§ 16-831.01-.03 (2016)
Florida		Russell v. Pasik, 178 So. 3d 55 (Fla. Dist. Ct. App. 2015); Wakeman v. Dixon, 921 So. 2d 669 (Fla. Dist. Ct. App.), *appeal denied*, 931 So. 2d 902 (Fla. 2006)
Georgia		
Hawaii	X	A.A. v. B.B., No. SCAP-15-0000022, 2016 WL 6954096 (Haw. Nov. 3, 2016)
Idaho		
Illinois		*In re* T.P.S. & K.M.S., 978 N.E.2d 1070 (Ill. App. Ct. 2012)[524]

524. The Illinois court decision is limited to common-law contract and promissory estoppel claims arising from agreements to conceive a child through donor insemination.

State	Available Path	Authority
Indiana	X[525]	A.C. v. N.J., 1 N.E.3d 685 (Ind. Ct. App. 2013). *But see* Brown v. Lunsford, 63 N.E.3d 1057 (Ind. Ct. App. 2016)
Iowa		
Kansas	X	Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013); Downs v. Gilmore, 296 P.3d 1140 (Table) (Kan. Ct. App. 2013)
Kentucky	X	KY. REV. STAT. ANN. § 403.800 (West 2010), *as interpreted by* Mullins v. Picklesimer, 317 S.W.3d 569 (Ky.), *as modified on denial of reh'g* (2010)
Louisiana		
Maine	X	ME. STAT. tit. 19-A, § 1891 (2015); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004)
Maryland	X	Conover v. Conover, 141 A.3d 31 (Md. 2016)
Massachusetts	X	Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999)
Michigan		Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999); Lake v. Putnam, No. 330955, 2016 WL 3606081 (Mich. Ct. App. July 5, 2016)
Minnesota	X	MINN. STAT. ANN. § 257C.08 (West 2007), *as interpreted by* Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); *see also* LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000)
Mississippi		
Missouri	X	MO. ANN. STAT § 452.375.5(5) (West 2015), *as interpreted by* McGaw v. McGaw, 468 S.W.3d 435 (Mo. Ct. App. 2015)
Montana	X	MONT. CODE ANN. § 40-4-228(2)(a)-(b) (2009), *as interpreted by* Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009)
Nebraska	X	Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011)
Nevada		
New Hampshire	X	*In re* Guardianship of Madelyn B., 98 A.3d 494 (N.H. 2014)
New Jersey	X	V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000)
New Mexico	X	Chatterjee v. King, 280 P.3d 283 (N.M. 2012)
New York	X	Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016)
North Carolina	X	Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008)
North Dakota	X	McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010)
Ohio	X	*In re* Bonfield, 780 N.E.2d 241 (Ohio 2002)

525. The Indiana cases apply to visitation only and not full parental rights.

State	Available Path	Authority
Oklahoma	X[526]	Ramey v. Sutton, 362 P.3d 217 (Okla. 2015)
Oregon		OR. REV. STAT. ANN. § 109.243 (West 2016), *as interpreted by In re* Madrone, 350 P.3d 495 (Or. Ct. App. 2015)[527]
Pennsylvania	X	T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); S.A. v. C.G.R., 856 A.2d 1248 (Pa. Super. Ct. 2004)
Rhode Island	X	Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000)
South Carolina	X	Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006)
South Dakota		D.G. v. D.M.K., 557 N.W.2d 235 (S.D. 1996)
Tennessee		*In re* Hayden C.G-J., No. M2012-02701-COA-R3-CV, 2013 WL 6040348 (Tenn. Ct. App. Nov. 12, 2013)
Texas		
Utah		Jones v. Barlow, 154 P.3d 808 (Utah 2007)
Vermont		
Virginia		Stadter v. Siperko, 661 S.E.2d 494 (Va. Ct. App. 2008)
Washington	X	*In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005)
West Virginia	X	*In re* Clifford K., 619 S.E.2d 138 (W. Va. 2005)
Wisconsin	X[528]	*In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995)
Wyoming		LP v. LF, 338 P.3d 908 (Wyo. 2014)

526. Parental recognition is afforded only upon showing that the couple was unable to legally marry, that they engaged in intentional family planning to have a child and to coparent, and that the biological parent consented.

527. Parental recognition is afforded only upon showing that the couple would have chosen to marry had the choice been available to them (rather than merely that they were unable to marry).

528. The Wisconsin case applies to visitation only and not full parental rights.

APPENDIX D

STATUTES EXPRESSLY REGULATING DONOR STATUS AND INTENDED-PARENT STATUS IN THE CONTEXT OF EGG AND EMBRYO DONATION

This Appendix lists statutes for those jurisdictions that maintain provisions specifically governing parentage in the context of egg and/or embryo donation. It then addresses two specific aspects of these statutes – first, whether the statute provides that egg or embryo donors are not legal parents, and second, whether the statute recognizes as legal parents those who use donor eggs or embryos with the intent to be a parent.

State	Relevant Authority	Egg/Embryo Donor Statute	Statute Divests Egg/Embryo Donor of Parental Rights	Statute Recognizes Intended Parent as Legal Parent
Alabama	X	ALA. CODE § 26-17-702 (LexisNexis 2015)	X	X
Alaska				
Arizona				
Arkansas				
California	X	CAL. FAM. CODE § 7613 (West 2016)	X	X
Colorado	X	COLO. REV. STAT. ANN. § 19-4-106 (West 2016)	X	X
Connecticut	X	CONN. GEN. STAT. §§ 45a-771a to -775 (2015)	X	X
Delaware				
District of Columbia				
Florida	X	FLA. STAT. ANN. §§ 742.11, 742.14 (West 2016)	X	X
Georgia	X	GA. CODE ANN. § 19-8-41 (2015)	X	X
Hawaii				
Idaho				
Illinois	X	750 ILL. COMP. STAT. 46 / 702, 46 / 703 (2015)	X	X
Indiana				
Iowa				

State	Relevant Authority	Egg/Embryo Donor Statute	Statute Divests Egg/Embryo Donor of Parental Rights	Statute Recognizes Intended Parent as Legal Parent
Kansas				
Kentucky				
Louisiana	X	LA. STAT. ANN. §§ 9:121-130 (2016);[529] LA. CIV. CODE ANN. art. 188 (2016)	X	X
Maine	X	ME. REV. STAT. ANN. tit. 19-A, §§ 1922-1923 (2015)	X	X
Maryland				
Massachusetts				
Michigan				
Minnesota				
Mississippi				
Missouri				
Montana				
Nebraska				
Nevada	X	NEV. REV. STAT. ANN. §§ 126.510, 126.660, 126.670, 126.690 (West 2013)	X	X
New Hampshire	X	N.H. REV. STAT. ANN. §§ 168-B:1, 168-B:2 (2016)	X	X
New Jersey				
New Mexico	X	N.M. STAT. ANN. §§ 40-11A-702, -703, -705 (2009)	X	X
New York				
North Carolina				
North Dakota				

529. Statutory provisions define an "in vitro fertilized human ovum [as] a juridical person." LA. STAT. ANN. § 9:130 (2016).

State	Relevant Authority	Egg/Embryo Donor Statute	Statute Divests Egg/Embryo Donor of Parental Rights	Statute Recognizes Intended Parent as Legal Parent
Ohio	X	OHIO REV. CODE ANN. § 3111.97 (LexisNexis 2015)	X	X
Oklahoma	X	OKLA. STAT. ANN. tit. 10, §§ 554-556 (West 2009)	X	X
Oregon				
Pennsylvania				
Rhode Island				
South Carolina				
South Dakota				
Tennessee	X	TENN. CODE ANN. § 36-2-403 (2016)	X	X
Texas				
Utah				
Vermont				
Virginia	X	VA. CODE ANN. § 20-158 (2016)	X	X
Washington	X	WASH. REV. CODE ANN. §§ 26.26.705, 26.26.710, 26.26.720 (West 2016)	X	X
West Virginia				
Wisconsin				
Wyoming				

APPENDIX E

STATUTES AND APPELLATE CASES REGARDING PARENTAGE IN GESTATIONAL SURROGACY

This Appendix documents relevant statutory and judicial authority on gestational surrogacy. It first lists jurisdictions that explicitly restrict gestational surrogacy and then lists jurisdictions that explicitly permit gestational surrogacy. It then covers jurisdictions extending parental recognition to intended mothers who use their own egg but engage a gestational surrogate. Finally, it covers jurisdictions extending parental recognition to intended parents who engage a gestational surrogate and do not have a genetic connection to the child.

State	Gestational Surrogacy Expressly Restricted by Statute	Gestational Surrogacy Expressly Permitted by Statute	Authority Recognizing Genetic Intended Mother as Legal Mother	Authority Recognizing Nonbiological Intended Parent as Legal Parent
Alabama				
Alaska				
Arizona	ARIZ. REV. STAT. ANN. § 25-218 (2016)		Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994)	
Arkansas		ARK. CODE ANN. § 9-10-201 (2015)	ARK. CODE ANN. § 9-10-201 (2015)	ARK. CODE ANN. § 9-10-201 (2015)[530]
California		CAL. FAM. CODE § 7962 (West 2017)	CAL. FAM. CODE §§ 7606, 7960, 7962 (West 2013 & Supp. 2017)	CAL. FAM. CODE §§ 7606, 7960, 7962 (West 2013 & Supp. 2017)
Colorado[531]				
Connecticut		CONN. GEN. STAT. §§ 7-36, 7-48a (2016)	CONN. GEN. STAT. §§ 7-36, 7-48a (2016)	CONN. GEN. STAT. §§ 7-36, 7-48a (2016)

530. The statute is expressly limited to different-sex couples and single individuals.

531. For a trial-court order recognizing a genetic mother as a legal mother, see *In re Babies S*, No. 06CV4323, 2006 WL 5502456 (Colo. Dist. Ct. 2006).

State	Gestational Surrogacy Expressly Restricted by Statute	Gestational Surrogacy Expressly Permitted by Statute	Authority Recognizing Genetic Intended Mother as Legal Mother	Authority Recognizing Nonbiological Intended Parent as Legal Parent
Delaware		DEL. CODE ANN. tit. 13, § 8-802 (2015)	DEL. CODE ANN. tit. 13, §§ 8-805, 8-807 (2015)	DEL. CODE ANN. tit. 13, §§ 8-805, 8-806, 8-807 (2015)
District of Columbia		D.C. CODE § 16-404 (2017)	D.C. CODE §§ 16-403, 16-407 (2017)	D.C. CODE §§ 16-403, 16-407 (2017)
Florida		FLA. STAT. ANN. § 742.15 (West 2016)	FLA. STAT. ANN. § 742.15 (West 2016)	FLA. STAT. ANN. § 742.15 (West 2016)[532]
Georgia				
Hawaii				
Idaho				
Illinois		750 ILL. COMP. STAT. ANN. 47/20, 25 (West 2009)	750 ILL. COMP. STAT. ANN. 47/25 (West 2009)	750 ILL. COMP. STAT. ANN. 47/20, 25 (West 2009)
Indiana	IND. CODE ANN. § 31-20-1-1 (LexisNexis 2013)		*In re* Infant R., 922 N.E.2d 59 (Ind. Ct. App. 2010)	
Iowa		IOWA ADMIN. CODE r. 641-99.15 (2016)	IOWA ADMIN. CODE r. 641-99.15 (2016)	
Kansas				
Kentucky				
Louisiana		LA. STAT. ANN § 9:2718 (2016)[533]	LA. STAT. ANN § 9:2718 (2016)	
Maine		ME. REV. STAT. ANN. tit. 19-A, § 1932 (2015)	ME. REV. STAT. ANN. tit. 19-A, § 1933 (2015)	ME. REV. STAT. ANN. tit. 19-A, § 1933 (2015)

532. The statute is limited to different-sex couples and female same-sex couples by the requirement that there be a "commissioning mother." FLA. STAT. ANN. § 742.15 (West 2016).

533. The statute is limited to different-sex couples by the requirement that the couple "create the child using only their own gametes." LA. STAT. ANN. § 9:2718 (2016).

State	Gestational Surrogacy Expressly Restricted by Statute	Gestational Surrogacy Expressly Permitted by Statute	Authority Recognizing Genetic Intended Mother as Legal Mother	Authority Recognizing Nonbiological Intended Parent as Legal Parent
Maryland			*In re* Roberto d.B., 923 A.2d 115 (Md. 2007)[534]	
Massachusetts			Culliton v. Beth Israel Deaconess Medical Center, 756 N.E.2d 1133 (Mass. 2001)	
Michigan	MICH. COMP. LAWS ANN. § 722.855 (West 2016)			
Minnesota			*In re* Paternity and Custody of Baby Boy A, No. A07-452, 2007 WL 4304448 (Minn. Ct. App. Dec. 11, 2007)[535]	
Mississippi				
Missouri				
Montana				
Nebraska	NEB. STAT. ANN. § 25-21,200 (2015)			
Nevada		NEV. REV. STAT. ANN. §§ 126.750, 126.790 (West 2015)	NEV. REV. STAT. ANN. § 126.750 (West 2015)	NEV. REV. STAT. ANN. § 126.750 (West 2015)
New Hampshire		N.H. REV. STAT. ANN. § 168-B:10 (2016)	N.H. REV. STAT. ANN. § 168-B:1, 7 (2016)	N.H. REV. STAT. ANN. § 168-B:1, 7 (2016)

534. This case did not involve a genetic intended mother. Nevertheless, the Maryland court ordered disestablishment of the gestational surrogate's maternity, such that the intended father became the sole legal parent.

535. Applying Illinois law per the terms of the agreement, the court ordered disestablishment of the gestational surrogate's maternity.

State	Gestational Surrogacy Expressly Restricted by Statute	Gestational Surrogacy Expressly Permitted by Statute	Authority Recognizing Genetic Intended Mother as Legal Mother	Authority Recognizing Nonbiological Intended Parent as Legal Parent
New Jersey			N.J. St. Ct. Rules, Rule 5:14-4 (2015); A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000)[536]	
New Mexico	N.M. ADMIN. CODE 8.26.3.47(B) (2016)[537]			
New York	N.Y. DOM. REL. LAW § 123 (McKinney 2016)		T.V. v. N.Y. State Dep't of Health, 88 A.3d 290, 309 (N.Y. App. Div. 2011)[538]	
North Carolina				
North Dakota		N.D. CENT. CODE §§ 14-18-01, 14-18-08 (2009)[539]	N.D. CENT. CODE §§ 14-18-01, 14-18-08 (2009)	
Ohio			J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007)[540]	
Oklahoma				
Oregon				

536. The authority applies to noncompensated surrogacy and includes a waiting period.

537. New Mexico prohibits compensated surrogacy.

538. The authority applies to noncompensated surrogacy and includes a waiting period.

539. The statute is limited to different-sex couples by the requirement that "the embryo is conceived by using the egg and sperm of the intended parents." N.D. CENT. CODE § 14-18-01 (2009).

540. The Ohio case enforced a contract so as to preclude the gestational surrogate from being designated a legal parent.

State	Gestational Surrogacy Expressly Restricted by Statute	Gestational Surrogacy Expressly Permitted by Statute	Authority Recognizing Genetic Intended Mother as Legal Mother	Authority Recognizing Nonbiological Intended Parent as Legal Parent
Pennsylvania			*In re* Baby S, 128 A.3d 296 (Pa. Super. Ct. 2015)	*In re* Baby S, 128 A.3d 296 (Pa. Super. Ct. 2015)
Rhode Island				
South Carolina				
South Dakota				
Tennessee[541]				
Texas		TEX. FAM. CODE ANN. § 160.754 (West 2016)	TEX. FAM. CODE ANN. §§ 160.754, .760 (West 2016)	TEX. FAM. CODE ANN. § 160.754 (West 2016)[542]
Utah		UTAH CODE ANN. § 78B-15-801 (LexisNexis 2016)	UTAH CODE ANN. §§ 78B-15-801, 78B-15-807 (LexisNexis 2016)	UTAH CODE ANN. § 78B-15-801 (LexisNexis 2016)
Vermont				
Virginia		VA. CODE ANN. § 20-160 (2016)	VA. CODE ANN. § 20-158 (2016)	VA. CODE ANN. § 20-158 (2016)[543]
Washington	WASH. REV. CODE ANN. § 26.26.240 (West 2016)[544]		WASH. REV. CODE ANN. § 26.26.710 (West 2016)[545]	WASH. REV. CODE ANN. § 26.26.101 (West 2016)[546]
West Virginia				

541. The statute contemplates gestational surrogacy in which the embryo results from the "wife's egg and husband's sperm," but nonetheless provides that nothing in the statute "shall be construed to expressly authorize the surrogate birth process." TENN. CODE ANN. § 36-1-102(48) (2016).

542. The statute may be limited to different-sex couples and female same-sex couples given provisions that "the intended mother [show she] is unable to carry a pregnancy to term . . . ." TEX. FAM. CODE § 160.756(b)(2) (West 2016).

543. The application to same-sex couples is unclear.

544. The statute restricts compensated surrogacy.

545. The statute is limited to cases of noncompensated surrogacy.

546. The statute is limited to cases of noncompensated surrogacy.

State	Gestational Surrogacy Expressly Restricted by Statute	Gestational Surrogacy Expressly Permitted by Statute	Authority Recognizing Genetic Intended Mother as Legal Mother	Authority Recognizing Nonbiological Intended Parent as Legal Parent
Wisconsin				
Wyoming				