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Parental Rights: In Search of Coherence

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PARENTAL RIGHTS: IN SEARCH OF COHERENCE

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INTRODUCTION: CONTEMPORARY CONFLICTS OVER PARENTAL RIGHTS

The Supreme Court has referred to parental rights as "the oldest of the fundamental liberty interests recognized by this Court."[1] Yet, disagreements about the nature and scope of parental rights have proliferated in recent years. A few examples will set the stage.

Parents have brought lawsuits related to school policies on gender, including the social transition of children,[2] the maintenance of secret files on gender-dysphoric children,[3] and the requirement that school employees address students by preferred pronouns,[4] in nearly all cases without the parents' knowledge or consent.[5] In response, school officials and advocates assert that such policies "strike the right balance with respect to ensuring a student's privacy and ensuring that they feel safe and supported."[6]

Virginia Democratic delegate Elizabeth Guzman promised to introduce legislation to hold parents criminally liable for refusing to affirm a child's expressed transgender identity.[7] In contrast, at the federal level, Republican Representative Virginia Foxx introduced the Parental Right to Protect Act, which would prevent Child Protective Services from penalizing parents who oppose their children undergoing social or medical "gender-transition intervention[s]."[8]

1. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

2. *See* Complaint at 33, Foote v. Ludlow Sch. Comm., No. 22-cv-30041 (D. Mass. Apr. 12, 2022) (alleging that the school promoted the idea of gender transition without the knowledge or consent of parents).

3. *See* Verified Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Judgment and Damages at 2, Littlejohn v. Sch. Bd. of Leon Cnty. Sch. Bd., No. 21-cv-00415 (N.D. Fla. Oct. 18, 2021) (alleging that the school concealed from parents information regarding their children's assertion of a discordant identity).

4. *See* Ricard v. USD 475 Geary Cnty. Sch. Bd., No. 22-cv-04015, 2022 WL 1471372, at *2 (D. Kan. May 9, 2022) (detailing a school policy amendment regarding pronouns and the subsequent decision not to communicate this information to the parents).

5. *See* Verified Complaint at 46, Parents' Choice Tenn. v. Golden, No. 22CV-51642 (Tenn. Ch. Ct. July 8, 2022) (alleging that the school co-opted parents into discussions of gender and sexual themes without their consent).

6. Eesha Pendharker, *Guidelines Supporting Trans Students Don't Violate Parents' Rights, A Federal Judge Rules*, EDUCATIONWEEK (Aug. 31, 2022), https://www.edweek.org/policy-politics/guidelines-supporting-trans-students-dont-violate-parents-rights-a-federal-judge-rules/2022/08 [https://perma.cc/P4HU-5S2G] (quoting Paul Castillo, senior counsel for Lambda Legal, an organization which defends LGBTQ interests).

7. Ari Blaff, *Virginia Democrat to Introduce Bill to Prosecute Parents Who Refuse to Treat Child as Opposite Sex*, YAHOO! (Oct. 4, 2022), https://www.yahoo.com/video/virginia-democrat-introduce-bill-prosecute-122822973.html [https://perma.cc/P6MA-8JR4].

8. Parental Right to Protect Act, H.R. 9507, 117th Cong. § 115 (2022).

In a decision he later reversed, a Cook County judge ordered that a mother be denied all visitation time with her son until she received a COVID-19 vaccination.[9] In another case, when his parents refused to allow him to receive the COVID-19 vaccine, a sixteen-year-old Pennsylvania boy traveled to Philadelphia where a city regulation permits children aged eleven or older to be vaccinated without parental consent.[10]

As these handful of examples demonstrate, there are myriad contexts in which the rights of parents, the good of children, and the interests of the state intersect and potentially collide. Yet, the current legal landscape is more complicated than these disputes indicate and does not provide a coherent backdrop against which to predict consistent outcomes. In a case involving the state's treatment of minors in the juvenile justice context, Justice Thomas put it this way:

> The Court's language in this line of precedents is notable. When addressing juvenile murderers, this Court has stated that children are different and that courts must consider a child's lesser culpability. And yet, when assessing the Court-created right of an individual of the same age to seek an abortion, Members of this Court take pains to emphasize a young woman's right to choose. It is curious how the Court's view of the maturity of minors ebbs and flows depending on the issue.[11]

The view of the maturity of minors ebbs and flows, as does the scope of parental authority. This Essay identifies complexities symptomatic of the disintegrated approach to parental rights that call for resolution. Throughout, a clear jurisprudential disagreement is evident: are parental rights natural and pre-political or derived from the state?[12] This disagreement has given

9. Bob Chiarito, *Judge Rules Pilsen Mom Can't See Her Son Because She's Not Vaccinated Against COVID-19*, CHI. SUN TIMES (Aug. 29, 2021, 1:25 PM), https://chicago.suntimes.com/2021/8/29/22647262/judge-rules-pilsen-mom-custody-covid-19-vaccination [https://perma.cc/CM37-4867].

10. Nina Feldman, *This 16-Year-Old Wanted to Get the COVID Vaccine. He Had to Hide It from His Parents*, NPR (Feb. 16, 2022, 5:08 AM), https://www.npr.org/sections/health-shots/2022/02/16/1074191656/this-16-year-old-wanted-to-get-the-covid-vaccine-he-had-to-hide-it-from-his-pare [https://perma.cc/KXS6-2MK8]; DEP'T OF PUB. HEALTH, CITY OF PHILA., REGULATIONS GOVERNING THE IMMUNIZATION AND TREATMENT OF NEWBORNS, CHILDREN AND ADOLESCENTS 6 (2019).

11. Jones v. Mississippi, 141 S. Ct. 1307, 1327 n.2 (2021) (Thomas, J., concurring) (cleaned up).

12. *Compare, e.g.*, Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 401 (2023) (arguing that parental rights are pre-political), *with* JEFFREY SHULMAN, THE CONSTITUTIONAL

rise to a confused application of parental rights in discrete contexts, as this critical jurisprudential question regarding the origin of parental rights frames and determines the scope of parental authority and its limits.

Ultimately, in order to aid legislatures and courts, an integrated, comprehensive taxonomy of parental rights is necessary in order for their protection to be both coherent and robust. This Essay sets forth a preliminary research agenda toward such a taxonomy, which should include the philosophical, historical, and legal origins of parental rights, their appropriate and reasonable limits, and coherent applications in a variety of contexts.

CLARIFICATIONS REQUIRED FOR AN INTEGRATED APPROACH TO PARENTAL RIGHTS

A. The Source and Standard of Constitutional Protection

First, it is necessary to articulate the proper origins of parental rights, the basis for their legal recognition and protection, and (if those rights are judicially enforceable) the proper standard of review. Nearly a century ago, the Supreme Court recognized the natural family and the obligations and rights flowing therefrom as pre-political: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[13] In other words, the fundamental rights of parents (deriving from their natural duties) are protected by, but not created by, the Constitution.[14] Although parental rights are not explicitly enumerated in the Constitution, for a century, the Court has reaffirmed the understanding that is now axiomatic:

PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 7 (2014) (arguing that the government grants parental rights).

13. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). *See also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that liberty includes "not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

14. Numerous states have recognized parental rights as fundamental and require a heightened standard of review. *See Protecting Parental Rights at the State Level*, PARENTAL RTS., https://parentalrights.org/states/ [https://perma.cc/6V7H-YHUW] (summarizing state laws). An amendment to the U.S. Constitution has also been proposed. *See* H.J. Res. 99, 117th Cong. (2022) (proposing an amendment to protect parental rights).

"the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions regarding the care, custody, and control of their children."[15]

Nevertheless, the split opinion in the most recent examination of parental rights by the Supreme Court is emblematic of the confusion that exists in this area. In *Troxel v. Granville*,[16] a non-binding plurality of the Court affirmed a "fundamental right" formulation, stating that "it cannot now be doubted" that parental rights are protected by the Due Process Clause of the Fourteenth Amendment.[17] However, Justice Thomas, concurring, noted that the parties had not challenged this prevailing substantive due process jurisprudence, including whether "the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights" or whether parental rights might implicate the Privileges and Immunities Clause.[18] Justice Scalia dissented, arguing that while parental rights are among the "unalienable Rights" of the Declaration of Independence and those retained by the people under the Ninth Amendment, they are not judicially enforceable.[19]

Adding to this confusion about the source of parental rights, the Court failed to delineate their scope. Specifically, the Court declined to resolve whether a finding of unfitness or demonstrated harm to the child should be required before overruling a fit parent's wishes.[20] Nor did it require the application of strict scrutiny, the ordinary standard of review

15. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) (collecting cases); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); Moore v. City of East Cleveland, 431 U.S. 494, 503–04 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.").

16. 530 U.S. 57 (2000).

17. *Id.* at 66 (plurality opinion).

18. *Id.* at 80 (Thomas, J., concurring).

19. *Id.* at 91 (Scalia, J., dissenting).

20. *Id.* at 73. *Compare, e.g.*, Owenby v. Young, 579 S.E.2d 264, 266–67 (N.C. 2003) ("[U]nless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard . . . offends the Due Process Clause . . . ."), *with* Walker v. Blair, 382 S.W.3d 862 , 874–75 (Ky. 2012) ("[A] court must presume that a parent is acting in the child's best interest. The grandparent petitioning for visitation may rebut this presumption with clear and convincing evidence that visitation with the grandparent is in the child's best interest.").

applicable to fundamental rights.[21] Instead, the Court found a sweeping visitation statute unconstitutional, as applied in the context of grandparent visitation, because the state courts failed to give "deference" to the fit mother, who is presumed to make decisions in the best interests of her child.[22] The problem, the Court said, "is not that the Superior Court intervened, but that when it did so, it gave no special weight to [the mother's] determination of her daughters' best interests."[23] "Special weight" falls far short of heightened scrutiny and in any case does not adequately guide courts as to the requisite degree of deference that must be afforded to a fit parent.

The fractured, incomplete decision resulted in "'an avalanche of state court litigation over the constitutionality of child custody and visitation laws,' yielding unpredictability and inconsistency in this area of family law."[24] Beyond the visitation context, the Court's failure to address and resolve the constitutional foundation of parental rights, and the applicable standard of review, continues to generate confusion throughout the law. While the Court's rhetorical language throughout the last century provides lofty language to support parental claims to control the education and upbringing of their children, such matters as parental objection to curricular materials are often decided in the state's favor.[25]

The Supreme Court's recent emphasis on text, history, and

21. Whether tiers of scrutiny, or a categorical analysis, is the proper mode of constitutional analysis for parental rights is beyond the scope of this Essay. *See* New York State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2127 (2022) (rejecting a means–end scrutiny in the context of the Second Amendment). For a discussion of whether the tiered scrutiny framework is proper to American constitutional interpretation, see generally Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFS. (Fall 2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny [https://perma.cc/9262-EYDV] (arguing that the framework of tiers of scrutiny ought to be abandoned entirely as they have no basis in the Constitution).

22. *Troxel*, 530 U.S. at 75 (plurality opinion); *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) ("More important, historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

23. *Troxel*, 530 U.S. at 69 (plurality opinion).

24. Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 129–30 (2018) (quoting Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 864 n.324 (2006)).

25. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 106–07 (1st Cir. 2008) (affirming the lower court holding that the school did not engage in indoctrination by requiring students to read books affirming gay marriage). *See also* Helen M. Alvaré, Families, Schools, and Religious Freedom 1–2 (Liberty & L. Ctr., Research Paper No. 22-05, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119844 [https://perma.cc/VQ66-HQ2F] (arguing that lower courts have erred in properly judging the balance of authority between parents and schools).

tradition in constitutional interpretation provides a timely moment to analyze more closely the nature and scope of parental rights. For example, in *Dobbs v. Jackson Women's Health Organization*,[26] the Court gave new life to the *Washington v. Glucksberg*[27] methodology by emphasizing that constitutionally protected unenumerated rights "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[28] Despite its description of parental authority as "beyond debate,"[29] the Supreme Court has never undertaken such a comprehensive historical analysis of the origin and scope of parental rights. The early cases were decided on the basis of now-discredited economic substantive due process theories and often depended on the assertion of additional rights, such as the First Amendment.[30] Other suggested constitutional bases for parental rights include the "private realm" (into which the state is powerless (or nearly so) to intervene),[31] as a subspecies of conscience rights,[32] or as an aspect of *procedural* due process.[33] A robust historical recovery of the foundations of parental rights would be instructive as to the scope of the doctrine. This would aid legislatures and courts in the meaningful and predictable application of parental rights in a variety of legal contexts, such as those outlined in the next subpart.[34]

B. Allocation and Deprivation of Parental Rights in Various Contexts

For example, the law grants autonomy to minors in many ways,

26. 142 S. Ct. 2228 (2021).

27. 521 U.S. 702 (1997).

28. *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

29. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

30. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (asserting fundamental liberties to prevent state compulsion); *Yoder*, 406 U.S. at 234 (applying both the First and Fourteenth Amendments to prevent state compulsion).

31. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

32. MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG? PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY 50 (2016).

33. *See, e.g.*, People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 284–85 (1870) (holding that constitutional due process prohibited state deprivation of parental custody absent a finding of "gross misconduct or almost total unfitness"); *see also* David R. Upham, *Substantive Due Process and the Original Meaning of the Fourteenth Amendment's Due Process Clause*, 11 FAULKNER L. REV. 35, 57 (2019) (noting that at the time of the Fourteenth Amendment's adoption, courts acknowledged that due process was required to determine whether a person lacked capacity to govern his person, including one's child)).

34. Even so, questions may remain about the application of parental rights to new circumstances. *See, e.g.*, Frances Williamson, *The Meaning of "Public Meaning": An Originalist Dilemma Embodied by* Mahanoy Area School District, 46 HARV. J.L. & PUB. POL'Y 257 (2023) (analyzing two differing applications of the historical doctrine of *in loco parentis* by Justices Thomas and Alito in contemporary public school speech regulation cases).

eroding parental authority, especially during adolescence. The Constitution, after all, applies to minors as well.[35] In *Tinker v. Des Moines Independent Community School District*,[36] for example, the Court famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[37] In the abortion context, many states do not require parental involvement, whether notice or consent.[38] Indeed, the Supreme Court has struck down laws which seek to ensure parental involvement without a judicial bypass.[39] Given the Supreme Court's overturning of *Roe v. Wade*,[40] this might be the occasion for a renewed examination of the appropriate parental role in such cases. In the absence of a constitutional right to abortion, does a robust theory of parental rights *require* some parental involvement? If not, why not? Or if so, what limits pertain? For example, it seems unlikely that a parent could *compel* a minor child to have an abortion, but a coherent doctrine should explain such a limit on parental authority.

Beyond the context of constitutional rights, states have granted minors liberty from parental control in certain contexts by statute or application of the common law "mature minor" doctrine. For example, until recently enjoined, a Washington, D.C. law permitted minors as young as eleven to consent to vaccines without the knowledge or consent of their parents,[41] and seven states permit a minor as young as fourteen to consent to *any* medical treatment without the consent of his or her parents.[42] Do

35. *See In re* Gault, 387 U.S. 1, 13 (1967) (holding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

36. 393 U.S. 503 (1969).

37. *Id.* at 506.

38. *See Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Mar. 1, 2023), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/6RW3-G5BF] (summarizing state laws; only thirty-six states require parental involvement).

39. *See* Bellotti v. Baird, 443 U.S. 622, 651 (1979) (affirming the lower court's invalidation of a statute that would require parental consultation or notification for an abortion).

40. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

41. *See* D.C. Code § 23-193 (2021), *enjoined by* Booth v. Bowser, 597 F. Supp. 3d 1, 29 (D.D.C. 2022) (granting preliminary injunctive relief on grounds that the Minor Consent for Vaccination Act Amendment, allowing minors as young as eleven to consent to vaccination, is likely preempted by the National Childhood Vaccine Injury Act and likely violates the plaintiff's Free Exercise rights).

42. See ALA. CODE §§ 22-8-4, 22-8-7 (2022); HAW. REV. STAT. §§ 577D-1, 577D-2 (2022); 410 ILL. COMP. STAT. 210 / 1.5 (2023); IND. CODE § 16-36-1-3 (2022); N.M. STAT. ANN. § 24-

such laws infringe impermissibly on parental rights or do concerns for public health constitute a sufficient "compelling interest"? At what point is parental authority altered or eliminated by the autonomy of the maturing child? Relatedly, should the doctrine of parental rights take cognizance of developments in neuroscience which suggest that even the young adult does not possess mature judgment?[43]

A coherent theory of parental rights also ought to address whether due process requires an engaged parental role throughout the juvenile justice system.[44] Short of cases in which the physical incarceration of a minor is necessary for the protection of society or where the parents are also implicated in wrongdoing, why should the state interfere with the authority of parents by restricting a minor's liberty? On the other hand, should a robust parental rights doctrine mean that the parent of a child adjudicated as a delinquent bears responsibility as well?

A robust articulation of parental rights ought also to afford parents meaningful due process throughout the child welfare system, from reporting of suspected abuse and neglect, to removal of a child from parental custody, to rehabilitation and reunification efforts, to the termination of parental rights. Such cases are paradigmatic of the forfeiture of parental rights and the granting of authority to the state, as *parens patriae*, to step in to protect (or even take custody of) the child. And yet, to take one

7A-6.2 (2022); N.D. CENT. CODE § 14-10-20 (2021), for state laws permitting a minor as young as fourteen years old to consent to medical treatment. See Cal. Fam. Code § 6922(a)(1) (West 2022); OR. REV. STAT. § 109.640 (2022); UTAH CODE ANN. § 78B-3-406(6)(k) (LexisNexis 2022); COLO. REV. STAT. § 13-22-103 (2022), for state laws permitting a minor as young as fifteen years old to consent to medical treatment). See FLA. STAT. § 743.067 (2022); KAN. STAT. ANN. § 38-123b (2022); MO. REV. STAT. § 431.056 (2022); R.I. GEN. LAWS § 23-4.6-1 (2022); TEX. FAM. CODE ANN. § 32.003 (West 2021), for state laws permitting a minor as young as sixteen years old to consent to medical treatment.

43. *See* Alexandra O. Cohen, Richard J. Bonnie, Kim Taylor-Thompson & BJ Carey, *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 787 (2016) (suggesting that young adults experience diminished cognitive abilities within prefrontal regions of the brain, leading to immature judgment "relating to risk-taking, accountability, and punishment").

44. *See* Barbara Fedders, *The Anti-Parent Juvenile Court*, 69 UCLA L. REV. 746, 789–90 (2022) (noting courts' recognition of due process protections for parental autonomy and family integrity); Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 88–89 (2018) (examining the proper level of parental involvement in the juvenile delinquent system); Hillela B. Simpson, *Parents Not* Parens*: Parental Rights Versus the State in the Pre-Trial Detention of Youth*, 41 N.Y.U. REV. L. & SOC. CHANGE 477, 477 (2017) (arguing that detention of children "implicates parental due process rights," requiring judicial inquiry); Note, *Juvenile* Miranda *Waiver and Parental Rights*, 126 HARV. L. REV. 2359, 2360 (2013) (noting the lack of "safeguards for juvenile suspects" which leads minors to "waive their rights and make incriminating statements").

example, while the Supreme Court has stated that due process requires that grounds for termination of parental rights be established by "clear and convincing evidence" (still notably less than the burden required for a deprivation of life or liberty in the criminal law setting),[45] there is no minimum constitutional substantive standard.[46] Federal law requires the state, with some exceptions, to initiate termination proceedings if a child has been in foster care for fifteen of the most recent twenty-two months.[47] Does this infringe impermissibly on the parent–child relationship, or does it adequately balance the child's need for stability? Certain circumstances, such as parental incarceration, illegal immigrant status, or the impact of substance abuse, may call for special examination. Without clear and objective substantive standards, the state risks substituting its own judgment for what is "best" for a child, often most heavily impacting vulnerable populations or families with culturally unpopular lifestyles.[48]

A coherent theory of parental rights should similarly articulate the nature and limit of a state's authority to adjudicate custody disputes between fit parents when a marriage dissolves (or never occurs). Except by reference to jurisdictional statutes, courts rarely articulate the basis for the State's authority to limit the full expression of parental rights without evidence of wrongdoing.[49] In *Stanley v. Illinois*,[50] in determining the custody rights of an unmarried father after the mother's death, the Court held: "We have concluded that all . . . parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."[51] And yet, given no-fault divorce and the rise of

45. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

46. *See* HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 592 (8th ed. 2018) ("The Supreme Court has not yet ruled on the minimum circumstances that justify termination of parental rights, although it has ruled on a variety of procedural issues.").

47. 42 U.S.C. § 675(5)(E).

48. *See In re* F.C., 482 P.3d 1137, 1149 (Kan. 2021) (Stegall, J., dissenting) (summarizing scholarly literature on judicial bias in child welfare cases).

49. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 236–37 (G. Edward White ed., 1985) (describing the evolution of the doctrine of *parens patriae* from use in governing feudal relations to the custody rights of a child's natural parents); HOMER H CLARK, JR. & SANFORD N. KATZ, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 885 (3d ed. 2021) ("When the family breaks up . . . all of the rights and obligations formerly subsisting between parents and child must be separately allocated by the courts to one parent or the other, or on occasion to non-parents or even to the representatives of the state.").

50. 405 U.S. 645 (1972).

51. *Id.* at 658.

nonmarital childbearing, every day in every state throughout the country, courts adjudicate questions of physical and legal custody and visitation, often without any allegation or evidence of parental unfitness. Instead, although there is no standard definition of the term, courts universally employ the "best interests of the child" standard to adjudicate such disputes.[52] Even in cases where the parents are in agreement about custody arrangements, courts assert authority to review such agreements to ensure they are in the child's best interests.[53] Would a vigorous parental rights doctrine call for greater restraint?[54] If the state declines to adjudicate such matters in the absence of wrongdoing, as it declines to adjudicate disputes in intact marital families, perhaps divorcing or unmarried parents would be obliged to reach an internal settlement that preserves some semblance of familial integrity, much as married parents must do.[55]

Also, a comprehensive theory of parental rights would need to grapple with the ways in which fathers are afforded fewer parental rights vis-à-vis the mother's autonomy interests. For example, presently, fathers are excluded altogether from the abortion decision. As the Supreme Court explained in *Planned Parenthood of Missouri v. Danforth*[56] when striking down a spousal consent law, "[I]t is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, [and therefore] as between the two, the balance weighs in her favor."[57] Nor may states constitutionally require spousal notification.[58] This is so even though in many states, a father risks forfeiting parental

52. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [https://perma.cc/Z66B-CT3G].

53. 1 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-50 (2d ed. 2022).

54. *See, e.g.*, *In re* Marriage of Coulter, 976 N.E.2d 337, 342 (Ill. 2012) (noting that the presumption that fit parents decide what is in their child's best interest is of "constitutional magnitude" and is not weakened by divorce; therefore, custody agreements are entitled to great deference).

55. *See* Kimberly C. Emery & Robert E. Emery, *Who Knows What Is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 LAW & CONTEMP. PROBS., no. 1, 2014, at 151, 152 (noting how courts paradoxically decline to adjudicate disputes for married couples while often stepping in on behalf of divorced couples). *See also* Kilgrow v. Kilgrow, 107 So. 2d 885, 888–89 (Ala. 1958) (concluding that a court of equity should not settle a dispute between parents about what is best for their child if the parents are not divorcing).

56. 428 U.S. 52 (1976).

57. *Id.* at 71.

58. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

rights to nonmarital children if he fails to support the child's mother during her pregnancy.[59] Now that abortion is no longer a constitutionally protected right, however, states may consider whether to revisit the extent of the parental rights of fathers in this context.

Fathers also have similarly diminished parental rights vis-à-vis mothers in the context of placing a nonmarital child for adoption. The "mere existence of a biological link" does not trigger constitutional protection for an unwed father, but rather, it only gives him the "opportunity" to develop a relationship with his child.[60] If the father "grasps that opportunity and accepts some measure of responsibility," then he may receive constitutional protection of his parental rights.[61] This asymmetry creates the conditions for an interested father to be thwarted, deceived, or prevented from taking the necessary steps to obtain constitutional protection.[62] Similar due process concerns are present in the context of safe haven laws, which allow an infant to be anonymously placed in a secure location (such as an emergency room or a fire station) where the baby will be safe until cared for ultimately by an adoptive family.[63]

C. Determining Parentage: By Nature or State Imprimatur?

Finally, an increasingly important question pertaining to parental rights doctrine is an intelligible account for how parentage is determined in the first place.[64] The Supreme Court has "never systematically addressed the basic question of how parenthood should be defined for purposes of the Fourteenth

59. Mary M. Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirty-Four States*, 24 MICH. J. GENDER & L. 53, 55 (2017). *But see In re* Adoption of Baby Girl G., 466 P.3d 1207, 1216 (Kan. 2020) (Stegall, J. dissenting) (suggesting that conditioning the parental rights of unwed biological fathers on prenatal support may be a violation of the Equal Protection Clause).

60. Lehr v. Robertson, 463 U.S. 248, 261–62 (1983).

61. *Id.* at 262.

62. *See, e.g.*, *In re* Adoption of A.A.T., 196 P.3d 1180, 1188–89 (Kan. 2008) (denying the father relief despite the mother deceiving the father about the birth of the child); Brumbelow v. Mathenia, 855 S.E.2d 425, 425 (Ga. Ct. App. 2021) (Dillard. J., concurring) (noting that unwed biological fathers have great difficulty "preserv[ing] their opportunity interest in a natural parent-child relationship").

63. *See* Dayna R. Cooper, *Fathers Are Parents Too: Challenging Safe Haven Laws with Procedural Due Process*, 31 HOFSTRA L. REV. 877, 878 (2003) (noting that "[i]t is unclear how the safe haven laws constitutionally account for the fundamental rights of one parent, the father, when the baby's mother abandons their child").

64. *See* Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 307 (2017) (positing the question of legal parentage given the emergence of gay and lesbian co-parenting).

Amendment."[65] Traditionally, the parent–child relationship was one determined by nature, although full juridical rights were determined by reference to marriage. And, in the American tradition of statutorily authorized adoption, the state could create a parent–child relationship for a child who lacks one.

The increased use of artificial reproductive technologies has complicated questions of parentage, giving rise to case law and statutory regimes which define parenthood on the basis of intention (whether expressed in contract or through one's actions). Traditional evidentiary presumptions of parentage based on marriage or biology are increasingly irrelevant.[66] Complementary genders[67] or duality are no longer necessary features of parenthood.[68] Some call for the state to facilitate a fundamental right *to be* a parent (rather than to recognize the fundamental rights of those who are, by nature, parents).[69] Thus, all "parenthood" is being (re)defined according to the state's imprimatur.

To date, the Supreme Court has stopped short of redefining the nature of parenthood in its articulation of parental rights. In a 1977 case dealing with the rights of foster parents, the Court stated:

> [I]t is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship,

65. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1492 (2018).

66. *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (recommending a reorientation of parentage based on social dimensions, rather biology or marriage).

67. *See, e.g.*, *In re* Guardianship of Madelyn B., 98 A.3d 495, 498 (N.H. 2014) (interpreting the state's parentage statute in a gender-neutral manner).

68. *See, e.g.*, CONN. GEN. STAT. § 46b-475 (2022) (permitting a court to recognize more than two parents for a given child); Courtney G. Joslin & Douglas NeJaime, *The Next Normal: States Will Recognize Multiparent Families*, WASH. POST: OUTLOOK (Jan. 28, 2022, 9:12 AM), https://www.washingtonpost.com/outlook/2022/01/28/next-normal-family-law/ [https://perma.cc/XDF2-WZLV] (noting that six states have enacted laws permitting a court to recognize more than two parents for a child).

69. *See, e.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 143 (1994) (questioning whether biological connection should be the normal prerequisite for the parent-child relationship). *See also* Right to Build Families Act of 2022, S. 5276, 117th Cong. (2022) (creating a statutory right to assisted reproductive technology).

state-law sanction, and *basic human right* . . . .[70]

But the case law predates the refashioning of state law of parentage by technology and, in the contemporary context of determining parentage, the ultimate question—whether parental rights are essentially natural and pre-political or a creature of the positive law—is increasingly answered in favor of positive law.[71] That answer reflects a culture that exalts both technology and autonomy and deems the individual and his will as sovereign over nature, which has profound implications for the family in general and parental rights in particular.[72]

CONCLUSION

The current jurisprudence of parental rights—from their origins to applications—is weak, chaotic, and inconsistent. Yet, there are certain given realities: that minor children are immature and vulnerable, that they require care and education, that in most instances *some adult* must decide for them or act on their behalf, and that parents enjoy a unique relationship with and responsibility for their children. Parental rights arise out of obligations ordered toward the good of the child,[73] but in individual circumstances parents fall short. The child's unique, individual interests or existential rights are often at stake.[74] Adolescents occupy a developmental space which requires the exercise of some freedom and independence. The state may have a role, whether to support or to restrict parental rights. Parental rights arise in a variety of legal contexts, but throughout them one question frames and determines everything: who bears original responsibility for the child? The parent or the state? The answer to this question will begin the process of providing a coherent application of parental rights throughout the law.

70. Smith v. Org. of Foster Fams. for Equality & Reform, 431 U.S. 816, 846 (1977) (emphasis added).

71. *See* Adam MacLeod, *Rights, Privileges, and the Future of Marriage Law*, 28 REGENT U. L. REV. 71 (2015) (examining implications of the extension of marital privileges in *Obergefell v. Hodges*, 576 U.S. 644 (2015), for the rights and duties of natural parentage).

72. *Id.* at 100.

73. *See, e.g.*, HELEN M. ALVARÉ, PUTTING CHILDREN'S INTERESTS FIRST IN U.S. FAMILY LAW AND POLICY 104–08 (2018) (drawing on the work of philosopher Hans Jonas to argue that parents owe a duty of care to their children, based on their vulnerability and because they have caused their existence).

74. *See* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1115 (1992) ("[C]onstitutionalizing [the presumption that parents speak for the child] . . . has led to its being too often invoked in situations in which it is, at best, unnecessary or, at worst, oppressive.").