

# THE CONSTITUTIONAL FUNCTION OF BIOLOGICAL PATERNITY: EVIDENCE OF THE BIOLOGICAL MOTHER'S CONSENT TO THE BIOLOGICAL FATHER'S CO-PARENTING OF HER CHILD

E. Gary Spitko\*

## INTRODUCTION

Consider a pregnant woman who has decided in advance to place her baby up for adoption at birth. When she informs the biological father of her pregnancy and her decision, he objects and asks a court to enjoin any adoption and to award him custody of the child whom he wishes to parent. To what extent does the United States Constitution confer a right on the biological father to veto any adoption and to raise his child?<sup>1</sup>

It would be helpful in answering this question to understand the constitutional significance of biological paternity. The theory of protection necessarily informs our understanding of the scope of protection. This Article focuses on that predicate issue—why would the United States Constitution protect the right of a biological father to establish a relationship with his child or protect his established relationship with his child?

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\* Professor of Law, Santa Clara University School of Law; A.B., Cornell University; J.D., Duke University School of Law. I am grateful to Susan Frelich Appleton, June Carbone, Ron Krotoszynski, Kerry Macintosh, Marc Spindelman, and participants in a faculty workshop at the University of North Carolina School of Law for their helpful comments on earlier drafts of this Article.

1. See, e.g., *John S. v. Mark K. (Adoption of Michael H.)*, 898 P.2d 891 (Cal. 1995) (addressing the constitutional claims of a biological father who sought to block the adoption of his biological child at birth); *Steven A. v. Rickie M. (Adoption of Kelsey S.)*, 823 P.2d 1216 (Cal. 1992) (same); *C.F. v. D.D. (In re Adoption of B.B.D.)*, 984 P.2d 967 (Utah 1999) (same); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 75 (1995) (reviewing the Supreme Court's unwed father jurisprudence and noting "[t]he unsettled nature of constitutional doctrine concerning an unwed biological father's rights when an unwed mother wishes to place their [newborn] child for adoption").

In a line of United States Supreme Court cases, the Court has established that:

The significance of the biological connection [between father and child] is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.<sup>2</sup>

The Court never has adequately explained, however, why this is so. A result of this undertheorization is uncertainty as to the parameters of constitutional protection for biological fathers. Indeed, this undertheorization also contributes to the uncertainty regarding the constitutional parental rights of others who are not a biological parent but who function in a parenting role or who seek to do so.<sup>3</sup>

This Article explores why biological paternity has this constitutional significance. One explanation with some appeal is that the natural bonds of affection between biological father and child make it likely that in the typical case a biological father will seek to promote the child's best interests.<sup>4</sup> Thus, we protect the child by protecting her relationship with her biological father.<sup>5</sup> Although this is a sound prudential or consequentialist reason for deference to the rights of the biological father, the constitutional significance of biological paternity lays

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2. Lehr v. Robertson, 463 U.S. 248, 262 (1983) (footnote omitted).

3. An example of the latter is the intended parent who arranges for a sperm donor and an egg donor to contribute to the creation of an embryo and arranges for a gestational surrogate to gestate and deliver the child, all with the intention and hope that she, the intended parent, will raise the resulting child. See, e.g., *Buzzanca v. Buzzanca* (*In re Marriage of Buzzanca*), 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998); see also *infra* notes 170-184 and accompanying text (discussing the constitutional rights of intended parents who utilize assisted-reproduction technology). For an argument in favor of recognizing the parental claims of intentional parents who utilize assisted reproduction techniques, see Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 343 (basing her argument in part on the notion that "[t]here is a correlation between choosing something and being motivated to do it consistently and well"). See also Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 678-79 (2002) (arguing that "parental intent is in essence an aspect of parental function supporting recognition of parentage wholly apart from genetic or gestational contributions or marital presumptions").

4. See, e.g., James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 867 (2003) ("As with mothers, a state's decision to make the biological connection determinative where a man seeks paternity might be based in part on an empirical assumption that a biological connection predisposes an adult to care for a child.").

5. 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, 1011, 1013, 1022 (2003) (arguing that the law best protects a child by protecting that child's relationships with those adults most likely to have the child's best interests at heart, and by then allowing those adults the freedom to make the important decisions affecting the child).

principally elsewhere. The example of a father who begets a child by rape of the mother supports this conclusion.<sup>6</sup> The failure of the natural-bonds-of-affection justification to account for constitutional protection for adoptive families also supports this conclusion.<sup>7</sup>

This Article argues that a father's biological connection to a child is constitutionally significant principally because typically it evidences the consent of the biological mother to the father's parental relationship with the child. The Article further argues that the biological mother's consent is critical because she is the initial "constitutional parent." The Supreme Court has consistently coupled constitutional parental rights with the performance of parental responsibilities.<sup>8</sup> The biological mother's constitutional parental rights arise, therefore, from her role nourishing the child in her womb and enduring the pain and danger of childbirth. This labor gives her a constitutionally protected voice in the child's upbringing, including a right to decide generally who else shall be allowed to develop a parental relationship with the child.

When the biological father himself sufficiently labors in developing a relationship with the child prior to the mother's withdrawal of her consent to his co-parenting the child, the Constitution will protect his relationship with the child.<sup>9</sup> I label this theory the labor-with-consent theory of constitutional protection for parental rights. Biological paternity is not critical in its own right to the labor-with-consent theory. Rather, the function of biological paternity is to shift the burden of proof with respect to an element that is critical for the enjoyment of constitutional parental rights—the consent of the initial constitutional parent to allow another to co-parent her child.

This Article also explores some of the important implications of this thesis. The labor-with-consent theory of the constitutional function of biological paternity makes clearer the boundaries of constitutional protections for biological fathers.<sup>10</sup> It also informs an analysis of claimed constitutional protections for participants in assisted reproduction, such as egg donors, gestational surrogate

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6. See *infra* notes 84–86 and 93–104 and accompanying text (discussing how the instance of conception by forcible rape supports this Article's theory of the constitutional function of biological paternity and discussing but rejecting the theory that biological paternity is constitutionally relevant because it is a proxy for the likelihood of providing good care for the child).

7. See *infra* notes 100–02 and accompanying text (discussing the great weight of authority holding that the constitutional protection from state intrusion into the family that is afforded to adoptive parents is the same as that which is afforded to biological parents and arguing that the natural-bonds-of-affection justification devalues adoptive parents and families and contributes to their stigmatization as second-best families).

8. See *infra* notes 37–45 and accompanying text.

9. See *infra* notes 32–69 and accompanying text (arguing that biological paternity is constitutionally significant to the extent it signifies consent of the biological mother to the father's parenting of the child and discussing the central role that consent of the existing constitutional parent, if any, and parental labor play in giving rise to constitutional protection for a parent–child relationship).

10. See *infra* notes 109–32 and 159–65 and accompanying text (discussing the implications of this Article's theory of the constitutional function of biological paternity for the constitutional claims of biological fathers who seek to block placement of their biological child for adoption at birth and for the constitutional claims of sperm donors).

mothers, and intended parents.<sup>11</sup> The labor-with-consent theory also has great relevance to claims for constitutional protection by functional parents (such as a stepparent or a lesbian co-parent) who parent a child after the constitutional parent invites them to do so.<sup>12</sup>

Indeed, the labor-with-consent theory subsumes the biological approach to parentage determination within the functional approach to parentage determination. Pursuant to the labor-with-consent theory, a woman's genetic or gestational connection to a child is evidence of her having sufficiently functioned as a mother to that child to enjoy constitutional parental rights with respect to the child. Moreover, pursuant to this theory, a man's biological connection to a child is *prima facie* evidence that the child's initial constitutional parent has consented to the man's co-parenting of her child.

In sum, this Article argues that constitutional protection for a father-child relationship depends upon (1) consent of any existing constitutional parent to the creation of an additional parent-child relationship, and (2) the father's performance of parental labor that is sustained and has a positive and profound impact on the development of the child. Thus, the biological connection between a father and child is not in itself a critical factor. Rather, the constitutional function of biological paternity is merely to help courts reach correct conclusions with respect to whether an existing constitutional parent consented to allow the biological father to co-parent her child. Biological paternity is helpful in this respect in that it usually signifies the implicit consent of the biological mother to allow the biological father to co-parent her child. Testimony from the mother, evidence relating to the circumstances of the child's conception, or other evidence concerning the nature of the relationship between the mother and father might rebut the presumption of consent arising from biological paternity.

Part I discusses the Supreme Court's unwed father jurisprudence and concludes that the Court's undertheorization of the constitutional relevance of biological paternity gives rise to uncertainty generally with respect to claims for constitutional protection of parental rights. Part II explicates a theory of the constitutional function of biological paternity. This Part argues that parental labor is a prerequisite to constitutional protection for a parent-child relationship. Moreover, Part II argues, the biological mother's gestation and delivery of the child constitutes sufficient parental labor to earn her constitutional protection as the initial constitutional parent. This Part then argues that as the initial constitutional parent, the biological mother enjoys the right to determine who else shall be allowed to parent the child. Part II next reexamines the Supreme Court's unwed father jurisprudence and concludes that this body of case law supports the conclusion that biological paternity is constitutionally relevant only as evidence that a child's biological mother has consented to allow the biological father to co-parent her child. Finally, Part II ends with a critique of an alternate theory of the constitutional function of biological paternity. Part III discusses some of the more

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11. See *infra* notes 159–208 and accompanying text (discussing the implications of this Article's theory for the constitutional claims of participants in assisted-reproduction technologies).

12. See *infra* notes 133–58 and accompanying text (discussing the implications of this Article's theory for the constitutional claims of functional parents).

important implications of the labor-with-consent theory of constitutional parental rights. Specifically, this Part considers the claims for constitutional protection of parental rights by a biological father who seeks to block placement of his child for adoption at birth, a functional parent such as a stepparent or a same-sex partner of a legal parent, a sperm donor, a genetic–gestational surrogate mother, a gestational surrogate mother, a parent by pure intention, an egg donor, and the gamete providers with respect to a frozen embryo.

### I. BACKGROUND: CONSTITUTIONAL PROTECTION FOR PARENTAL RIGHTS

The Due Process Clause of the Fourteenth Amendment protects to a great degree a parent’s right to the care, custody, and control of his child.<sup>13</sup> Biological fatherhood alone, however, does not give rise to such constitutional protections.<sup>14</sup> The Supreme Court’s unwed father jurisprudence is expressly clear on that point.

The United States Supreme Court has considered the claims of a biological father for constitutional protection of his parental rights with respect to his nonmarital child in a series of five cases—*Stanley v. Illinois*,<sup>15</sup> *Quilloin v. Walcott*,<sup>16</sup> *Caban v. Mohammed*,<sup>17</sup> *Lehr v. Robertson*,<sup>18</sup> and *Michael H. v. Gerald*

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13. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (“[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *id.* at 66 (“In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); *id.* at 95 (Kennedy, J., dissenting) (“As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.”); *Bellotti v. Baird*, 443 U.S. 622, 639 n.18 (1979) (plurality opinion) (“The Court’s opinions . . . have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also* 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, 884–85 (1984) (asserting that “[p]arental rights are comprehensive, and they operate against the state, against third parties, and against the child” and listing among parental rights the right to make decisions concerning the child’s discipline, education, medical treatment, religious upbringing, living conditions, and visitation with others).

In general, when I speak in this Article about constitutional protection for a parent’s relationship with his child or for a claimed right to establish or maintain a parental relationship with a child, I am referring to protections arising from the Fourteenth Amendment’s Due Process Clause.

14. *See infra* notes 15–21 and accompanying text.  
15. 405 U.S. 645 (1972).  
16. 434 U.S. 246 (1978).  
17. 441 U.S. 380 (1979).  
18. 463 U.S. 248 (1983).

D.<sup>19</sup> In *Lehr v. Robertson*, the Court summarized the jurisprudence of the first four of these cases:

The difference between the developed parent–child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he acts as a father toward his children. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children as well as from the fact of blood relationship.<sup>20</sup>

Thus, the *Stanley* through *Lehr* line of cases distill to the principle that biological paternity alone does not give rise to a constitutional claim for protection, but biological paternity coupled with some “developed parent–child relationship” does merit some degree of constitutional protection.<sup>21</sup>

The Supreme Court’s fifth unwed father case refines, or arguably only confuses, this principle. In *Michael H. v. Gerald D.*, Michael H. claimed that because he had established a parental relationship with his biological daughter, the Fourteenth Amendment protected his fundamental liberty interest in his relationship with her.<sup>22</sup> The evidence in the case supported Michael H.’s claim to be the biological father of the child<sup>23</sup> and demonstrated that Michael H. had developed a more than casual relationship with his daughter with the consent of

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19. 491 U.S. 110 (1989).

20. *Lehr*, 463 U.S. at 261 (internal quotations omitted).

21. *See id.* at 262; *Quilloin*, 434 U.S. at 256 (noting the relevance of “the extent of commitment to the welfare of the child” and rejecting the equal protection argument of an unwed father who had “never exercised actual or legal custody over his child, and thus ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”).

22. 491 U.S. at 121 (plurality opinion).

23. Blood evidence demonstrated a 98.07% probability that Michael H. was the biological father of the child. *Id.* at 114.

her mother.<sup>24</sup> Indeed, neither Michael H.'s biological paternity nor his established relationship with the child was in dispute in the case.<sup>25</sup>

Still, a plurality of the Justices concluded that California did not infringe on Michael H.'s fundamental liberty interest when it conclusively presumed that the husband of the child's mother, who was cohabiting with her at the time of the child's conception and birth, was the legal father of the child.<sup>26</sup> Indeed, the plurality concluded that Michael H. had no constitutionally protected liberty interest in his relationship with his biological child.<sup>27</sup> The plurality noted that the Supreme Court in *Lehr* "observed that '[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring,' and [that the Court in *Lehr*] assumed that the Constitution might require some protection of that opportunity."<sup>28</sup> Nevertheless, the plurality refused to accept that Michael H. enjoyed a constitutionally protected relationship with his biological child given that Michael H. and the child's mother adulterously had conceived the child. The plurality reasoned that "[w]here . . . the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."<sup>29</sup>

Thus, *Michael H.* seems to refine the rule of constitutional protection for an unwed biological father; such a father is entitled to constitutional protection for his developed relationship with his biological child only if his rights do not

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24. Whether Michael's H.'s relationship with the child was "parental" is arguable. The record reflected that the child and her mother "visited" with Michael H. in St. Thomas for a two-to-three month period when the child was less than one-year-old. *Id.* Moreover, beginning some seventeen months later, Michael H. lived with the child and her mother in California, when he was not away on business, for an eight-month period. *Id.* He also financially supported his daughter. *Id.* at 143 (Brennan, J., dissenting).

25. *See id.* at 123 (plurality opinion) ("[B]iological fatherhood plus an established parental relationship . . . exist in the present case as well.").

26. The California statute challenged in *Michael H.* provided in relevant part that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.* at 117. The presumption could be rebutted only in limited circumstances and only by the husband or the wife. *Id.* at 118. For a discussion of the purposes and evolution of the presumption of legitimacy, recognizing the mother's husband as the father of the child, as well as a discussion of the presumption's application to same-sex couples, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. — (forthcoming 2006).

27. *Michael H.*, 491 U.S. at 124, 129–30 (plurality opinion).

28. *Id.* at 128–29 (quoting *Lehr v. Robertson*, 463 U.S. 248, 262 (1983)).

29. *Id.* at 129. Justice Stevens concurred in the judgment of the plurality, providing the necessary fifth vote for the result in the case. He assumed for the purpose of deciding the case that Michael H.'s relationship with his biological child was such that it gave rise to a constitutional right to petition for visitation rights with respect to the child. *Id.* at 133 (Stevens, J., concurring). Justice Stevens concluded, however, that the California statute at issue did provide Michael H. with such a chance to seek visitation and, therefore, it did not violate his constitutional right to due process. *Id.* at 133–36.

conflict with those of the husband of the marriage into which the child was born.<sup>30</sup> The Supreme Court's failure to articulate clearly why biological paternity has constitutional significance and when it is subservient to other interests makes dubious any effort at trying to make sense of *Michael H.*<sup>31</sup> Even if we could be certain how *Michael H.* refines the law on unwed biological fathers, we are left to wonder why the Constitution compels such a result.

The Supreme Court has failed to explain adequately why biological paternity is constitutionally relevant. This undertheorization increases uncertainty as to how courts will resolve specific claims for constitutional protection of parental rights and leaves us unable to articulate why such constitutional claims should be resolved in a particular way. Part II of this Article explicates the constitutional function of biological paternity.

## II. THE LABOR-WITH-CONSENT THEORY: BIOLOGICAL PATERNITY IS CONSTITUTIONALLY RELEVANT TO THE EXTENT THAT IT SIGNIFIES CONSENT OF THE BIOLOGICAL MOTHER TO THE FATHER'S CO-PARENTING OF THE CHILD

My theory of the constitutional significance of biological paternity starts with the premise that constitutional protection for an individual's parental relationship with a child does not arise until the individual has performed sufficient parental labor with respect to the child. The biological mother's<sup>32</sup> gestational labor is sufficient to give rise to her status as the child's initial constitutional parent.<sup>33</sup> As such, she enjoys the right to determine who shall be allowed to become the child's second constitutional parent.<sup>34</sup> Thus, the second prerequisite for a constitutionally protected parent-child relationship is the consent of any existing constitutional parent to the claimant's co-parenting of the child. When an individual sufficiently labors<sup>35</sup> as a parent to a child with the consent of any existing constitutional parent of the child, she earns the status of constitutional parent.

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30. See David M. Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1182 ("Thus, the combined teaching of *Caban*, *Lehr*, and *Michael H.* seems to be that the unwed biological father has constitutionally-protected parental rights if, but only if, he has established a paternal relationship with the child *and* no marital unit exists with which such rights would conflict.").

31. See Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 977 (1994) ("The Supreme Court's definition of fatherhood after *Michael H.* is far from clear . . ."); Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 345, 360 (2000) ("The Court has not well described the constitutionally compelled guidelines on the opportunities that must be afforded unwed natural fathers to step forth to parental prerogatives.").

32. I use the term "biological mother" herein to signify a woman who is both the genetic and gestational mother of a child.

33. See *infra* Part II.A.

34. See *infra* Part II.B.

35. For a discussion of the quality of labor that is sufficient to give rise to constitutional parent status, see *infra* notes 46-57 and 120-32 and accompanying text.



The constitutional significance of biological paternity is that it serves as a proxy for the consent of the biological mother to allow the biological father to co-parent her child.<sup>36</sup> Sexual intercourse in circumstances that result in the birth of a child implicitly indicates the mother's willingness to have the biological father's continued presence in her life as a co-parent. Biological paternity merely gives rise to a presumption of consent to co-parent. The strength of the presumption should vary with the circumstances surrounding conception. For example, if the biological mother and the biological father had been involved together in a long-term intimate relationship at the time of conception, the presumption of consent to co-parent would be a relatively strong one, and, correspondingly, the mother's burden to demonstrate that she did not consent or that she timely withdrew her consent would be relatively greater. Conversely, if the biological mother and father had no significant relationship with one another but merely engaged in a casual sexual encounter, the presumption would be of no moment.

Moreover, pursuant to the labor-with-consent theory, the biological mother retains the right to withdraw her consent to co-parent or make explicit (if the circumstances do not otherwise sufficiently indicate) that she never intended to give such consent, provided that she expressly does so prior to constitutional rights vesting in the biological father. Such constitutional protection vests in the father when he himself has labored sufficiently to establish a functional father-child relationship with respect to the child. Thus, parental labor is a critical factor giving rise to constitutional protection for a parental relationship. Parental labor alone is sufficient to give rise to the initial constitutional parental rights vested in the biological mother. Parental labor is necessary but must be coupled with consent of the mother to give rise to constitutional parental rights for the biological father.

#### ***A. Maternal Labor Gives Rise to the Initial Constitutionally Protected Parental Relationship***

The Supreme Court's parental rights jurisprudence supports the premise that constitutional protection for a parent-child relationship arises from the parental labor that the parent performs with respect to the child. The Court has long and repeatedly coupled constitutional protection for parental rights with performance of parental duties.<sup>37</sup> Indeed, in *Lehr v. Robertson*, the Court expressly acknowledged and relied upon this coupling:

In those cases [in which the Court has held that the Due Process Clause protects a certain family relationship], the Court has emphasized the paramount interest in the welfare of children and

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36. See *infra* Part II.C.

37. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("[T]hose who nurture [a child] and direct [the child's] destiny have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . ."); see also *Bartlett*, *supra* note 13, at 885 (noting some of the many ways in which "[p]arents' duties correspond to their rights").

has noted that the rights of the parent are a counterpart of the responsibilities they have assumed. Thus, the “liberty” of parents to control the education of their children that was vindicated in *Meyer v. Nebraska* . . . and *Pierce v. Society of Sisters* . . . was described as a “right, coupled with a high duty, to recognize and prepare [the child] for additional obligations.” The linkage between parental duty and parental right was stressed again in *Prince v. Massachusetts* . . . when the Court declared it a cardinal principle “that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.<sup>38</sup>

I do not read this case law as supporting a notion that parental rights are a reward for parental labor or that through her labor a parent earns an interest akin to a property interest in her child.<sup>39</sup> Rather, the Court’s emphasis on the “paramount interest in the welfare of children” suggests that parental labor gives rise to constitutional protection for a parent–child relationship because such protection promotes the child’s interests. Coupling constitutional parental rights with the performance of parental labor serves the child’s interests in several ways. First, those responsible for taking care of a child will have an easier time carrying out their responsibilities when the state respects and protects their authority to make caretaking decisions.<sup>40</sup> Moreover, a parent’s past efforts laboring to care for her child are an excellent predictor (arguably, the best predictor) that the parent will continue to labor to promote the welfare of the child.<sup>41</sup> Finally, protecting the constitutional right of one who has labored as a parent to a child to maintain a relationship with the child serves the child’s interest in stability with respect to this important relationship.<sup>42</sup>

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38. 463 U.S. 248, 257–58 (1983) (citations omitted).

39. Cf. Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 206 (1997) (relating, with respect to classifying a frozen embryo, the theory that “those who first expend capital or effort to produce the good have rights paramount to all others claiming an interest therein” to the notion that the frozen embryo is property). For a discussion applying John Locke’s natural rights–labor theory of property to claims for control over a frozen embryo, see Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 181–83 (2005).

40. Cf. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2456 (1995) (arguing that state deference to parents in the intact family is “the necessary quid pro quo[] for parents undertaking the responsibilities of parenthood”).

41. See *Troxel v. Granville*, 530 U.S. 57, 99 (2000) (Kennedy, J., dissenting) (arguing that an individual’s pre-existing relationship with a child may evidence the individual’s strong attachment to the child and motivation to promote the child’s best interests).

42. See generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979) (discussing the importance to a child’s healthy development of permanency of relationship with a caregiver).

The Supreme Court's jurisprudence relating to the constitutional rights of unwed fathers with respect to their biological children, discussed above,<sup>43</sup> evidences the importance of parental labor in giving rise to constitutional protections for a parent-child relationship. The paternal labor that the biological fathers in *Stanley v. Illinois* and *Caban v. Mohammed* invested in their children was critical to the success of their constitutional claims.<sup>44</sup> Conversely, the failure of the biological fathers in *Quilloin v. Walcott* and *Lehr v. Robertson* to invest paternal labor in their children doomed the constitutional claims of those biological fathers.<sup>45</sup>

Thus, the unwed father cases support significantly the argument that the biological mother enjoys a constitutionally protected relationship with her child by the time of the child's birth because of the labor she performs in carrying and delivering the unborn child. A biological mother necessarily develops a constitutionally meaningful relationship with her child by the time of the child's birth.<sup>46</sup> Given that parental labor gives rise to constitutional parental rights, the acts of carrying and delivering the child should qualify the biological mother-child relationship for constitutional protection.<sup>47</sup> During her pregnancy and the birth of

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43. See *supra* notes 15–31 and accompanying text.

44. See *Caban v. Mohammed*, 441 U.S. 380, 382 (1979) (noting that Caban had been listed as the father on the birth certificates of his two children, had lived with his children as their father during the first few years of the children's lives, had contributed to the financial support of his children, and, even after he separated from their mother, had continued to see the children on a regular basis); *Stanley v. Illinois*, 405 U.S. 645, 655 (1972) (“[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children.”); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 142–43 (1989) (Brennan, J., dissenting) (“This commitment [to the responsibilities of parenthood] is why Mr. Stanley and Mr. Caban won; why Mr. Quilloin and Mr. Lehr lost; and why Michael H. should prevail today.”).

45. See *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (“Because appellant, like the father in *Quilloin*, has never established a substantial relationship with his daughter, the New York statutes at issue in this case did not operate to deny appellant equal protection.” (internal citation omitted)); *id.* at 262 (“In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. Appellant has never had any significant custodial, personal, or financial relationship with Jessica [the daughter] . . . .”); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (noting, with respect to a claim for constitutional protection of parental relationship, the relevance of the parent's “extent of commitment to the welfare of the child” and rejecting the equal protection argument of an unwed father who “has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child”).

46. See *In re Baby M.*, 537 A.2d 1227, 1261 (N.J. 1988) (“When father and mother are separated and disagree, at birth, on custody . . . [t]he probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father—all counsel against temporary custody in the father.”).

47. See *Caban*, 441 U.S. at 398–99 (Stewart, J., dissenting) (noting that common law and statutory rights in favor of the biological mother with respect to child custody and consent necessary for adoption placement “reflect the physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child—until or unless the

the child, the mother endures physical stresses and changes to her body, a significant possibility of health complications, and the pains of pregnancy and childbirth to give life to the child.<sup>48</sup> Moreover, the constant physical proximity of mother and fetus and their interaction during gestation necessarily gives rise to an everyday actual relationship, allowing for bonding between mother and child even before birth.<sup>49</sup> Thus, the biological mother enjoys the initial constitutionally protected relationship with the child.<sup>50</sup> She becomes the child's initial "constitutional parent."<sup>51</sup>

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State intervenes"); *id.* at 404–06 (Stevens, J., dissenting) ("Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock. . . . In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems."); *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting) (noting the significant parent–child relationship that develops from the "biological role of the mother in carrying and nursing an infant"); *cf.* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 47 (2004) (arguing that the gestational mother's greater efforts in carrying and giving birth to the child, in contrast to the efforts of the biological father, "make it appropriate to vest the gestational mother with sole parental status").

48. See, e.g., *Baby M.*, 537 A.2d at 1248 (noting that a surrogate mother puts her life at risk to gestate and deliver the child); see also 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, 408 (1991) ("The birth mother risks sickness and inconvenience during her pregnancy. She faces the certain prospect of painful labor. She even risks the small but qualitatively infinite possibility of death."). *But see id.* (rejecting the argument that a surrogate mother's physical involvement in gestating and giving birth to the child entitles her to parental rights).

49. See *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 26 (App. Div. 2000) (acknowledging "that a bond may well develop between a gestational mother and the infant she carried, before, during and immediately after the birth" yet rejecting gestational mother's claims for visitation with respect to child genetically unrelated to her and then being parented by his genetic parents); *cf.* *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 64–65 (2001) (rejecting equal protection challenge to differential treatment for acquisition of United States citizenship by nonmarital child born overseas to one U.S. citizen parent and one noncitizen parent, finding that "[i]n the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth," while holding that imposition of more onerous requirements when the father is the citizen parent is justified by government interest in "ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent").

50. *Cf.* Appleton, *supra* note 26 (equating "gestation as the performance of parental functions" and arguing that the woman who gestates and gives birth to a child "must always be recognized as an original or 'primary' parent—not because traditional rules or gendered stereotypes so regard her but rather because a modern, functional approach makes nurturing definitive").

One might posit a "bad" mother who during her pregnancy abuses drugs, consumes alcohol, smokes cigarettes, and generally is indifferent to the health of her unborn child. The hypothetical raises the issue of whether such a mother would nevertheless become a constitutional parent by virtue of her having gestated and delivered the baby. I would think

The biological father is situated dramatically differently from the biological mother with respect to the labor necessary for the child's birth.<sup>52</sup> The biological father's role in conceiving the child is constitutionally insignificant as labor.<sup>53</sup> He has no role, of course, in physically carrying and giving birth to the child. He does not qualify, therefore, for automatic constitutional protection under the labor-with-consent theory of constitutional parental rights.<sup>54</sup>

Constitutional protection for the biological father's right to develop or maintain a relationship with his child arises only after he has performed sufficient paternal labor.<sup>55</sup> There can be no objective formula for determining whether a

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it preferable to credit the mother's gestational labor, declare her the initial constitutional parent, and thereby place upon the state the burden to demonstrate that the mother's abuse of the child is sufficient grounds for termination of her parental rights under an abuse or neglect standard.

51. I use the term "constitutional parent" in this Article to signify a person for whom the Constitution will protect the right to develop or maintain a parental relationship with a particular child.

52. See *Caban*, 441 U.S. at 397 (Stewart, J., dissenting) ("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."); *id.* at 398–99 ("With respect to a large group of adoptions—those of newborn children and infants—unwed mothers and unwed fathers are simply not similarly situated . . . . Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested."); *id.* at 404 (Stevens, J., dissenting) ("Both parents are equally responsible for the conception of the child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child: it is she who has the constitutional right to decide whether to bear it or not."); *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting) ("I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter."); see also *Baker*, *supra* note 47, at 63 ("[M]en simply cannot invest what women must invest in pregnancy, and what women must invest is huge. Rewarding that investment with superior rights simply reflects a principle basic to the common law and to more recent trends in family law rewarding investment with rights." (footnote omitted)).

53. See *Baby M.*, 537 A.2d at 1254 (noting the "difference . . . between the time it takes to provide sperm for artificial insemination and the time invested in a nine-month pregnancy" and concluding that "[a] sperm donor simply cannot be equated with a surrogate mother").

54. See *Pena v. Mattox*, 84 F.3d 894, 901 (7th Cir. 1996) (commenting on "the traditional, and still widely accepted, view that the unmarried mother has greater rights than the man who impregnated her because the burdens of pregnancy always and of parenting usually are greater for the mother than for the father"); cf. *Tuan Anh Nguyen*, 533 U.S. at 73 ("The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem [of acquisition of United States citizenship by a foreign-born nonmarital child born to one U.S. citizen and one noncitizen] in a manner specific to each gender.").

55. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause." (internal quotations omitted)); *Caban*,

biological father has labored sufficiently such that the Constitution should protect his relationship with his biological child. In general, however, such labor should not be found constitutionally sufficient until it is of a quality at least comparable to the effort invested by the biological mother gestating and giving birth to the child. Such labor should be sustained, and it should have a positive and profound impact on the development of the child. For example, a father who has become a “psychological parent” to his child through continuing interaction with her should be found to have engaged in sufficient parental labor.<sup>56</sup> As discussed more fully below,<sup>57</sup> however, the father will generally not be able to engage in such qualifying parental labor until after the birth of his biological child.

***B. The Initial Constitutional Parent Enjoys the Right to Control Access to Her Child, Including the Right to Decide Who Shall Be a Co-Parent***

As noted above, the Constitution protects a constitutional parent’s right to the care, custody, and control of her child.<sup>58</sup> Related to this right, a constitutional parent is charged with the responsibility and enjoys the privilege of imparting a set of moral principles or values to her child.<sup>59</sup> In support of the existence of this right is the notion that the development of the next generation of responsible and productive citizens requires that children be taught appropriate ethical and moral values.<sup>60</sup> Moreover, the dominant American belief is that the family is the best means to inculcate these values in children and will better perform this responsibility than would the state.<sup>61</sup> As Justice Powell has written:

This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens. We have believed in this country that this process, in large part, is beyond the competence of

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441 U.S. at 389 (commenting that “[e]ven if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent–child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased” and rejecting, “therefore, the claim that the broad, gender-based distinction of [the challenged statute] is required by any universal difference between maternal and paternal relations at every phase of a child’s development” (emphasis added)); *id.* at 397 (Stewart, J., dissenting) (“In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.”).

56. *Cf.* GOLDSTEIN ET AL., *supra* note 42, at 98 (“A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.”).

57. *See infra* notes 120–32 and accompanying text.

58. *See supra* note 13 and accompanying text.

59. *Bellotti v. Baird*, 443 U.S. 622, 637–38 (1979) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (“The duty to prepare the child for ‘additional obligations’ . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.”).

60. *Bellotti*, 443 U.S. at 638 (plurality opinion).

61. *Id.*; *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”).

impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.<sup>62</sup>

As part of the constitutional parent's right to impart a set of moral principles or values to her child, the constitutional parent enjoys the right to determine who else shall be allowed to interact with and influence the moral development of her child.<sup>63</sup> The latter necessarily is included within the former. Were the constitutional parent not able to control access to her child, the constitutional parent's influence over the moral development of her child would be greatly lessened.

Such a right of inclusion and exclusion necessarily should include the power of the constitutional parent to decide whether one who is not a constitutional parent shall become a second parent to her child. Generally, the second parent would then gain the unsurpassed authority and opportunity to influence the child's development in myriad ways.<sup>64</sup> Therefore, the existing constitutional parent's constitutional right to direct the moral upbringing of her child should include the power to invite another to become a co-parent to her child and even more certainly should include the power to prevent another from becoming a parent to her child.<sup>65</sup>

The right of the mother to control access to her child exists, at least for a time, even with respect to the claims of the biological father of the child.<sup>66</sup> As discussed above, the biological mother's status as initial constitutional parent

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62. *Bellotti*, 443 U.S. at 638 (plurality opinion).

63. *See Troxel v. Granville*, 530 U.S. 57, 72 (2000) (plurality opinion) (holding that, given the facts of the case, an order granting grandparents visitation rights with respect to their grandchildren over the objection of a parent unconstitutionally infringed upon the parent's "fundamental right to make decisions concerning the care, custody, and control of her two daughters"); *id.* at 78 (Souter, J., concurring) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character.").

64. *See Bartlett*, *supra* note 13, at 884–85 (listing as among parental rights the authority to make decisions respecting a child's discipline, education, religious upbringing, and visitation with others).

65. *Cf. Baker*, *supra* note 47, at 5 n.8 ("The thesis here is . . . presenting contract as the appropriate construct to conceptualize the origins and obligations of parental status.").

66. *Cf. id.* at 34 (arguing that the Supreme Court's unwed father cases "suggest[] that the most important factor in determining whether a genetic father will be entitled to constitutional protection of his parental rights is his relationship with the mother"); *id.* at 34–35 ("When the biological father's relationship with the mother is strong enough, and more particularly, when the mother manifests her intent and desire for the biological father to assume the role of father, he receives constitutional protection for his paternal rights."); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 649–50 (1993) (theorizing that the Supreme Court's unwed father cases should be read to mean "that legal paternity depends on the father's development of a relationship, not with his children, but with their mother"); *id.* at 659 ("[T]he choice that gives an unwed father paternal rights is the choice to relate to his children's mother as much as the choice to relate to the children themselves.").

necessarily vests prior to any possible vesting of constitutional rights in the biological father.<sup>67</sup> As discussed below, in all but the most extraordinary circumstances, the biological father is unable to perform sufficient labor to become a constitutional parent by the time of the child's birth.<sup>68</sup> By that time, however, the biological mother is already the initial constitutional parent. Thus, the biological mother possesses, at least for a time, the right to withdraw her consent to the biological father's co-parenting of her child. In this way, she can prevent the biological father from becoming a constitutional parent. The mother's authority to exclude the biological father from the child's life terminates if, prior to her revocation of consent, the biological father accepts her extant offer to act as co-parent by performing sufficient parental labor such that his rights as a constitutional parent vest.<sup>69</sup> If the biological father accepts that invitation prior to its revocation and acts as a father to his child, the Constitution will protect his parental relationship with his child.

***C. Biological Paternity as Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child: Application to the Supreme Court's Unwed Father Cases***

In light of the linkage between the actual performance of parental duties and any enjoyment of constitutional parental rights and given the constitutional respect for a recognized constitutional parent to decide who else shall be allowed to co-parent her child, the constitutional function of biological paternity becomes clearer. Biological paternity merely serves as a proxy for the consent of the biological mother—the initial constitutional parent—to allow the biological father to co-parent her child. That is, the biological connection between father and child is prima facie evidence of the biological mother's consent to allow the biological father to co-parent the child. Thus, the practical significance of biological paternity is that it shifts the burden of proof to the biological mother to demonstrate that she did not consent to the biological father's co-parenting of her child or, if she did consent at the time of conception, that she revoked her consent prior to the biological father's sufficient functioning as a father and thereby prevented him

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67. See *supra* notes 46–57 and accompanying text.

68. See *infra* notes 120–32 and accompanying text.

69. The labor-with-consent theory of constitutional parental rights would not preclude a court from holding a biological mother to be estopped from cutting off the biological father's status as a constitutional parent in a case in which the biological mother is not able to support the child adequately and in which she has not chosen to replace the biological father with a second constitutional parent who will help her to support the child adequately. Having chosen to act in a way that might bring a child into the world, the mother should not be protected in her choice to impoverish the child when the biological father is available to support the child. *But cf.* Baker, *supra* note 47, at 5 (proposing a contract regime to determine parental rights and obligations and allowing for the possibility that “biological fathers could be held accountable for their reproductive activity without necessarily becoming legal fathers”); Naomi Cahn, *Perfect Substitutes Or the Real Thing?*, 52 DUKE L.J. 1077, 1160–61 (2003) (“Children do not necessarily need two parents to thrive, and the imposition of a second parent not only infringes on the single parent's rights as a parent, but, as a practical matter, may not benefit the child. . . . Children benefit from increased resources, not from coerced parenthood.”).



from earning constitutional protection of his right to maintain a parental relationship with his child.

The labor-with-consent theory is consistent with and helps explain the Supreme Court's unwed father cases. The fathers in *Stanley* and *Caban* enjoyed constitutional protection for their relationships with their children because each labored as a father to his children prior to any withdrawal by the respective biological mother of her consent to the father's acting as co-parent.<sup>70</sup> Their status as constitutional parents had vested, therefore, prior to the death of the mother in *Stanley*<sup>71</sup> and prior to the attempt by the mother to withdraw her consent to the biological father's co-parenting of their children in *Caban*.<sup>72</sup> Neither the father in *Quilloin* nor the father in *Lehr*, by contrast, enjoyed constitutional protection for his relationship with his child because the biological mother in each case withdrew her consent to the biological father's parenting of her child prior to his acting as father.<sup>73</sup> Indeed, in *Lehr*, the Supreme Court rejected the biological father's claims for constitutional protection despite the father's argument that he had failed to develop a relationship with his child through no fault of his own; the biological father claimed that his daughter's mother had hidden the child from him and that he made substantial efforts to locate the child.<sup>74</sup> The only factor that appeared to matter was that, prior to the vesting of any constitutional rights in the biological father, the existing constitutional parent opposed the biological father's efforts to establish a relationship with his child.<sup>75</sup>

Moreover, the labor-with-consent theory allows for integration of the plurality opinion in *Michael H. v. Gerald D.* into the Supreme Court's greater unwed father jurisprudence. Recall that, in that case, Michael H. had fathered a child with a woman who was married to another man at the time of the child's conception and birth.<sup>76</sup> Michael H. later developed a relationship with his biological child seemingly with the consent of the child's mother.<sup>77</sup> Nevertheless, the Supreme Court refused to recognize his right to be declared the child's father and maintain the parental relationship when the mother and her husband later

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70. See *supra* note 44 (citing to the Supreme Court's discussion of the record of parenting by Mr. Stanley and Mr. Caban).

71. Illinois declared Stanley's three children wards of the state upon the death of their mother, with whom Stanley had lived intermittently for eighteen years. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

72. *Caban v. Mohammed*, 441 U.S. 380, 382 (1979).

73. See *Lehr v. Robertson*, 463 U.S. 248, 249–50 (1983) (referring to *Lehr*'s "inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth"); *Quilloin v. Walcott*, 434 U.S. 246, 251, 256 (1978) (noting that the trial court had found that Quilloin "had provided support [for his child] only on an irregular basis" and further noting that Quilloin "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child").

74. *Lehr*, 463 U.S. at 269 (White, J., dissenting).

75. See *id.* at 249–50 (majority opinion) (noting that the biological mother and her husband (who was not the biological father and who the mother married after the birth of the child) sought to have the husband adopt the child, and noting also that the biological father had "never supported and rarely seen [the child] in the two years since her birth").

76. *Michael H. v. Gerald D.*, 491 U.S. 110, 113–14 (1989) (plurality opinion).

77. *Id.* at 114–15.

sought to exclude him.<sup>78</sup> The result in *Michael H.* seems inconsistent with the Court's earlier unwed father cases, which seemed to establish the principle that when a biological father had exercised his opportunity to participate in the child's life as a parent, the Constitution would protect that father-child relationship.<sup>79</sup>

An understanding that biological paternity is merely a proxy for the consent of the biological mother to the biological father's parenting of their child provides a way to reconcile *Michael H.* with the *Stanley* through *Lehr* line of cases. *Michael H.* can be seen as a case in which the biological mother did not effectively consent to the participation by the biological father as a parent in the child's life. The mother did encourage and participate in building the relationship between Michael H. and his biological child. The facts of the case, however, allow for the conclusion that the mother did not have the right to give effective consent to Michael H. to participate as a parent in the child's life.

When the mother married her husband, she implicitly contracted to allow that man to act as father to any child born of her during their marriage.<sup>80</sup> Thus, similar to biological paternity, the mother's marriage is a proxy for consent, in this case implicitly signifying her consent to allow her husband to co-parent any child born during the marriage. Just as with biological paternity, marriage alone does not give rise to constitutional parental rights in the husband under the labor-with-consent theory. Rather, the husband must first labor sufficiently as a father before his constitutional parental rights vest.

Moreover, just as in the case of the proxy of biological paternity, the biological mother maintains the right to revoke her implicit consent arising from her marriage at any time prior to the vesting of constitutional parental rights in her husband. In *Michael H.*, pursuant to the labor-with-consent theory, the husband acted as a father,<sup>81</sup> and his constitutional parental rights vested without the mother having revoked her consent to allow her husband to co-parent any child born to her during their marriage. *Michael H.* suggests that to revoke her consent to her husband's co-parenting the child born during their marriage, the mother must do more than engage in an adulterous relationship. Indeed, *Michael H.* supports an argument that the state may constitutionally require that, as a condition of marriage, a biological mother of a child born during the marriage refrain from

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78. See *supra* notes 26–29 and accompanying text.

79. See *supra* notes 15–21 and accompanying text (describing the principle set out in the *Stanley* though *Lehr* line of Supreme Court unwed father cases).

80. See *Stanley v. Illinois*, 405 U.S. 645, 663 (1972) (Burger, C.J., dissenting) (arguing that marriage “is in law an essentially contractual relationship” which gives rise to “legally enforceable rights and duties, with respect both to [the parties to the marriage] and to any children born to them” and concluding that “the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings”); see also *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (noting that “[b]y tradition, the primary measure [of the validity of a father's parental rights claim] has been the legitimate familial relationship he creates with the child by marriage with the mother”); Baker, *supra* note 47, at 25 (“Traditionally, by agreeing to enter into that [marital] status, husband and wife were agreeing to support and raise any children born to the marriage.”).

81. See *Michael H.*, 491 U.S. at 113–14 (plurality opinion).

entering into co-parenting arrangements with others aside from her spouse without her spouse's consent. Additionally, *Michael H.* indicates at a minimum that the married biological mother does not enjoy the right to have multiple offers outstanding to co-parent a child of the marriage.

Thus, in *Michael H.*, the biological mother's marriage made her incapable of consenting to allow Michael H. to act as her child's father because her marriage was a preexisting and extant invitation to her husband to co-parent any child born to her during their marriage, provided that the husband accepted that invitation to parent.<sup>82</sup> Her husband did accept the invitation by acting as a father to the child born during their marriage.<sup>83</sup> *Michael H.*, therefore, is simply a case of the mother being unable to impair the existing constitutional right of another—the right of her husband to be the father to a child born during their marriage. In sum, the mother of Michael H.'s biological child did not have the right to invite Michael H. to act as father, since her husband already enjoyed that privilege.

#### *D. The Instances of Conception by Forcible and Statutory Rape*

The scenario of conception by forcible rape of the mother also supports the theory that the importance of biological paternity is that it usually signifies the consent of the mother to allow the biological father to co-parent her child. The labor-with-consent theory leads directly to the common sense result that the Constitution will not protect the parental rights of a man who impregnates a woman by means of forcible rape.<sup>84</sup> Despite his biological paternity, the Constitution will not confer on him a right to insist on being allowed to develop or maintain a relationship with his offspring.

In the case of forcible rape, biological paternity does not signify consent of the mother to allow the rapist to co-parent her child. Therefore, the mother would retain the right to exclude the rapist from her child's life. This would be so even if the rapist somehow were to develop a relationship with the child, perhaps

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82. Cf. Dolgin, *supra* note 66, at 664 n.118 (“The biological father in *Michael H.* did not establish a familial relationship with the child's mother because he legally could not [in light of the fact that t]he mother was married to another man.”).

83. *Michael H.*, 491 U.S. at 113–14 (plurality opinion) (“Gerald [the husband of the mother] was listed as father on the birth certificate and has always held Victoria [the child] out to the world as his daughter.”); *id.* at 114 (detailing the husband's contact with the child).

84. See *Steven A. v. Rickie M. (Adoption of Kelsey S.)*, 823 P.2d 1216, 1237 n.14 (Cal. 1992) (“At the risk of stating the obvious, we caution that our decision affords no protection, constitutional or otherwise, to a male who impregnates a female as a result of nonconsensual sexual intercourse. We find nothing in the relevant high court decisions that provides such a father a right to due process in connection with the custody and adoption of his biological child. Such a father also is not entitled to equal protection, i.e., the same rights as the mother, because the father and mother are clearly not similarly situated. The sexual intercourse was voluntary only for the father. Nor is such a father entitled to be treated similarly to those males who become fathers as a result of consensual sexual intercourse.”); see also *Michael H.*, 491 U.S. at 124 n.4 (plurality opinion) (implicitly rejecting the conclusion that a biological father who had begotten a child by rape could possess a liberty interest in his relationship with the child); Hill, *supra* note 48, at 388 (“Though the assailant may be the genetic progenitor of the child, he cannot be deemed to have exercised his right to procreate in the course of the act of rape.”).

by paying forced child support, provided that the mother did not at a time postconception invite him into the child's life as a parent.

Beyond comporting with common sense, this result is good public policy. Were the rapist to have a protected interest in developing or maintaining a relationship with his biological child, the mother in effect would be forced to maintain a relationship with her rapist. Such forced continuing contact with her attacker reasonably could be expected to cause the mother additional psychological harm<sup>85</sup> as well as cause psychological harm to the child.<sup>86</sup>

The scenario of nonforcible rape, also known as statutory rape, requires a more nuanced analysis. The analysis should examine the circumstances surrounding the minor mother's actual consent to sexual intercourse. Depending on the nature and reality of the minor mother's consent, the biological father's relationship with his child may qualify for constitutional protection, provided that the biological father labored sufficiently as a father prior to the mother revoking her consent to the father's co-parenting of her child.

The theory behind statutory rape is that a minor cannot legally consent to sex because of her young age.<sup>87</sup> Among the important purposes of statutory rape laws is the prevention of teenage pregnancy.<sup>88</sup> In reality, however, a minor teenage

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85. See *Cote v. Henderson*, 267 Cal. Rptr. 274, 280 (Ct. App. 1990) (holding that a rape victim owes a rapist no duty to inform him of his biological paternity so that he may assert parental rights); *id.* ("It seems to me that it would be terribly inappropriate for a woman to have been molested, abused, raped . . . and then to give birth to a child, and then that the courts or society demands that she share that child with the person that treated her with total disregard of herself as a person. I can't imagine that any court . . . would allow a relationship to persist where somebody has been so totally violated.") (quoting a court from a prior civil action filed by the father to establish his parental rights); *Ann M.M. v. Rob S. (In re SueAnn A.M.)*, 500 N.W.2d 649, 651 n.1 (Wis. 1993) (interpreting a Wisconsin statute which provided that "[n]otice is not required to be given to a person who may be the father of a child conceived as a result of a sexual assault if a physician attests to his or her belief that a sexual assault has occurred" as denying perpetrators of sexual assault not only right to notice but also standing to contest termination of their parental rights); *id.* at 653 ("If sexual assault was merely a ground for termination, victims of sexual assault would have to face their assailants at contested termination hearings. To avoid this confrontation, the legislature denied perpetrators of sexual assault standing to contest termination of their parental rights.").

86. See Cynthia R. Mabrey, *Who is the Baby's Daddy (and Why is it Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 215 (2004) (positing that a "mother may not identify the child's father out of shame if the child was born as a result of a rape or an incestuous assault" and that identifying the father in such a situation may risk harm to both the mother and the child); Pauline Quirion et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 507-08 (1997) (discussing and citing to studies that conclude that "[c]hildren suffer deeply from exposure to violence against their mothers").

87. John J. v. Garrett S. (*In re Kyle F.*), 5 Cal. Rptr. 3d 190, 194 (Ct. App. 2003); Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 477 n.72 (2000) (stating that "statutory rape laws presuppose the inability of minors to legally consent to sex").

88. Oliveri, *supra* note 87, at 472-74. A primary purpose of early statutory rape laws was to protect the chastity of young girls. *Id.* at 466.

girl may be mature enough to consent to and voluntarily participate in sex.<sup>89</sup> A court evaluating the claim of a biological father for constitutional protection of his relationship with his child conceived during statutory rape should look at a variety of factors to determine whether the minor mother actually (as opposed to legally) consented to sex resulting in conception.<sup>90</sup> The most important of these factors would relate to the maturity of the minor (including her decisionmaking abilities) and the nature of her relationship with her paramour (such as whether the couple is close in age and whether any emotional or physical coercion or abuse was involved).<sup>91</sup> Where a court finds that the circumstances surrounding the sexual intercourse suggest the minor mother in reality consented to sex, the labor-with-consent theory of biological paternity would call for constitutional protection of the biological father's relationship with his child, provided the father labored sufficiently as a parent before the biological mother revoked her consent to his acting as co-parent.<sup>92</sup>

***E. Critique of an Alternate Theory: Biological Paternity as a Proxy for the Likelihood of Providing Good Care for the Child***

This Subpart considers and rejects an alternate theory of the constitutional significance of biological paternity that arguably has some basis in the Supreme

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89. See *Kyle F.*, 5 Cal. Rptr. 3d at 194 (“If the mother is a minor, the act may be deemed unlawful sexual intercourse despite the mother’s voluntary participation.”); *County of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843, 843–45 (Ct. App. 1996) (holding that a biological father who was fifteen at the time he and a thirty-four-year-old woman conceived a child could be held liable for child support and noting that the father was “not an innocent victim”); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 289 (1997) (arguing that “simple per se age restrictions obfuscate any meaningful inquiry into consent” and that “it is far too simplistic to suggest that adolescent girls are incapable of making consensual sexual choices in all instances”); Oliveri, *supra* note 87, at 477 n.72 (recognizing that “statutory rape laws presuppose the inability of minors to legally consent to sex” yet proposing a “consent-based approach to statutory rape enforcement”); *id.* at 483 (“The fact remains that meaningful consent is possible for teens, and that this profoundly influences the nature of the statutory rape relationship.”).

90. See *Kyle F.*, 5 Cal. Rptr. 3d at 192, 194–95 (holding that the Constitution may protect the biological father’s relationship with his child despite the fact that the child was conceived by voluntary, unlawful, sexual intercourse).

91. See Oliveri, *supra* note 87, at 479 (listing these factors as relevant to whether a sexual relationship is likely to be injurious to a teenage girl); see also CAL. FAM. CODE § 7611.5(b) (West 2006) (stating that “a man shall not be presumed to be the natural father of a child” where certain other statutory presumptions do not apply, the biological father is convicted of statutory rape, and “the mother was under the age of 15 years and the father was 21 years of age or older at the time of conception”).

92. See Oliveri, *supra* note 87, at 492 (“[T]here are very few judicial pronouncements that a man should lose parental rights automatically based on the fact that the child was conceived as the result of a statutory rape.”). *But see* *Pena v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996) (holding that the Constitution did not protect the right of a biological father of a child conceived during “consensual” statutory rape to develop a relationship with that child and reasoning that statutory rape “is not of a technical, trivial nature” and a statutory rapist should not enjoy parental rights “as the fruit of his crime”).

Court's parental rights jurisprudence. A constitutional right that favors a biological father establishing or maintaining a relationship with his biological child could be justified as reflective of the belief "that natural bonds of affection lead parents to act in the best interests of their children."<sup>93</sup> The law then would promote the child's interests by protecting the biological parent's ties with and authority over the child. Thus, in *Troxel v. Granville*, for example, a plurality of the Supreme Court held that a court order granting grandparents visitation rights with respect to two of their grandchildren and against the wishes of the children's parent unconstitutionally infringed the parent's "fundamental right to make decisions concerning the care, custody, and control of her two daughters" where the trial court did not accord "material weight" to the fit parent's decision with respect to grandparent visitation concerning the best interests of her daughters.<sup>94</sup> Justice O'Connor's plurality opinion explicitly found fault with "[t]he decisional framework employed by the Superior Court [that] directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child."<sup>95</sup> The plurality expressly relied on the notion that, historically, the legal concept of family "has recognized that natural bonds of affection lead parents to act in the best interests of their children."<sup>96</sup>

This natural-bonds-of-affection justification for constitutional protection of paternal rights is less compelling than is the labor-with-consent justification. First, an individual's past performance of parental labor that has had a positive and profound impact on the development of the child is a better predictor of future caretaking behavior than is a mere biological connection between father and child. Second, unlike the labor-with-consent theory of parental rights, the natural-bonds-of-affection theory fails to account for constitutional protection for adoptive parents and devalues and stigmatizes adoptive families. Finally, the natural-bonds-of-affection theory is less certain to lead to a sensible result in the case of conception by forcible rape than is the labor-with-consent theory.

An individual's history functioning as caretaker in the best interests of a child is a better predictor that the individual will continue to act in the best interests of the child than is a mere biological connection to the child.<sup>97</sup> It is a

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93. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing WILLIAM BLACKSTONE, 1 COMMENTARIES \*447; JAMES KENT, COMMENTARIES ON AMERICAN LAW \*190); *see also id.* at 602–03 (referring to "those pages of human experience that teach that parents generally do act in the child's best interests"); Sidney Callahan, *Gays, Lesbians, and the Use of Alternate Reproductive Technologies*, in FEMINISM AND FAMILIES 188, 191 (Hilde Lindemann Nelson ed., 1997) ("The biological links in a family create powerful bonds because they are particular, specific, unique, and most important, irreversible connections. While one can divorce a spouse, the genetic tie between parent and child or between siblings can never be undone."); Carbone & Cahn, *supra* note 5, at 1026–37 (discussing the theory in sociobiology that genes that influence behaviors making it more likely that one's offspring will survive are more likely to continue to be reflected in the gene pool).

94. 530 U.S. 57, 72 (2000) (plurality opinion).

95. *Id.* at 69.

96. *Id.* at 68 (quoting *Parham*, 442 U.S. at 602).

97. *See Bellotti v. Baird*, 443 U.S. 622, 648 (1979) (plurality opinion) ("[P]arents naturally take an interest in the welfare of their children—an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents.").

truism that one of the best predictors of future behavior is past behavior.<sup>98</sup> Thus, when the Constitution protects the interest of one who has already functioned as a caretaker in her relationship with the child, the Constitution simultaneously protects the child's relationship with someone likely to continue to act in the best interests of the child. As Justice Kennedy has argued, "[s]ome pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare."<sup>99</sup>

Moreover, the natural-bonds-of-affection justification would fail to afford constitutional protection to adoptive families. The great weight of authority holds that the constitutional protection from state intrusion into the family that is afforded to adoptive parents is the same as that which is afforded to biological parents.<sup>100</sup> This is also sound policy as adoptive families have the same need for autonomy from state intrusion as do biological families. Unlike the natural-bonds-

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98. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 771 (1988) (commenting that the primary caretaker presumption in child custody decisionmaking "implicitly recognizes that no one can confidently predict the future and that the past may in fact be the best indication we have of future care and concern"); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 733-34 (referring to "the psychological principle that past behavior is the best predictor of future behavior" and social science evidence that "the number of contacts [a juvenile has] with the juvenile justice system is a far better predictor of [criminal] recidivism than is the seriousness of the [juvenile's] first offense").

99. *Troxel*, 530 U.S. at 99 (Kennedy, J., dissenting).

100. See *Adoption of Vito*, 728 N.E.2d 292, 302 (Mass. 2000) ("Constitutional considerations also guide the exercise of this equitable power [to order postadoption contact between biological parent and adoptive child]. Adoptive parents have the same legal rights toward their children that biological parents do."); *In re Nelson*, 825 A.2d 501, 504 (N.H. 2003) (holding, in a case involving the parental rights of an adoptive parent, "that it would violate the fit natural or adoptive parent's State constitutional rights to grant custodial rights to an unrelated third person over the express objection of that parent"); *Simmons v. Simmons*, 900 S.W.2d 682, 684 (Tenn. 1995) (rejecting the argument that the constitutional right to privacy enjoyed by an adoptive parent is less than that enjoyed by a biological parent and commenting that "[t]he relationship between an adoptive parent and child is no less sacred than the relationship between a natural parent and child, and that relationship is entitled to the same legal protection"); see also *Carla R. v. Tim H. (In re Guardianship of D.J.)*, 682 N.W.2d 238, 244 (Neb. 2004) ("A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship."); cf. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 824, 845-46 (1977) (rejecting the due process claims of foster parents while noting that a foster placement is designed to be temporary and expected by the state and the foster parents to be temporary, "unlike adoptive placement, which implies a permanent substitution of one home for another"); *id.* at 843, 844 n.51 (noting that "biological relationships are not [the] exclusive determination of the existence of a family" and that "[a]doption, for example, is recognized as the legal equivalent of biological parenthood").

of-affection justification, the labor-with-consent theory of constitutional parental rights would afford full protection to the privacy rights of adoptive families.<sup>101</sup>

Indeed, the natural-bonds-of-affection justification devalues adoptive parents and families and contributes to their stigmatization as second-best families.<sup>102</sup> This stigmatization that adoptive families are not “real” families has obvious potential to negatively impact the welfare of adoptive parents and also, perhaps more especially, of adoptive children. Conversely, the labor-with-consent justification encourages and rewards such adoptive parents and others who function as parents. By conditioning parental rights upon the performance of substantial parental labor, the law expresses that our society highly values parental labor, placing laboring adoptive parents on the same level as laboring biological parents.

Finally, the natural-bonds-of-affection justification might lead to an unfortunate result in cases of conception by forcible rape. On its face, the natural-bonds-of-affection justification might require constitutional protection of the rapist’s right to develop or maintain a relationship with his biological child conceived as a result of the rape. Such a child is no less the rapist’s “natural” child because of the circumstances of his conception. A rule against granting constitutional protection to the claimed right of a rapist to be allowed to develop or maintain a relationship with his child conceived by rape could be justified simply by the policy of not allowing anyone to profit from his own bad acts.<sup>103</sup> Such a rule, however, leads less certainly and less directly to the correct result in cases of

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101. Under the labor-with-consent theory of constitutional parental rights, if a person were to become an adoptive parent pursuant to a final adoption decree without first having labored as a parent, he would be the legal (statutory) parent but would not be the constitutional parent until he actually functioned sufficiently as a parent to the child.

102. See ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 164–86 (1993) (discussing the stigma of adoption and the cultural preference for families based on blood relationships); Susan Ayres, *The Hand that Rocks the Cradle: How Children’s Literature Reflects Motherhood, Identity, and International Adoption*, 10 TEX. WESLEYAN L. REV. 315, 321 (2004) (“Adoption is considered second best or a ‘last resort,’ and recent surveys indicate that as a culture, Americans continue to stigmatize adoption.”); *id.* at 330 (“The failure narrative also assumes that the birth bond is stronger, so adoptive parents are not the ‘real’ parents.”); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1173 (1991) (positing that racial matching policies in adoption law reflect “widespread and powerful feelings that parent–child relationships can only work, or at least will work best, between biologic likes” and “widespread and powerful fears that parents will not be able to truly love and nurture biologic unlikes”); Cahn, *supra* note 69, at 1152 (“The notion that blood families trump adopted families remains deeply embedded in American culture.”); *id.* at 1153 (reporting survey data on public attitudes toward adoption and concluding “[t]here is, then, continuing ambivalence with respect to families formed through adoption, a belief that blood ties are stronger and more desirable than adoptive ties, and a belief that adoptees are less healthy than biological children”).

103. See *Pena v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996) (insisting that a rapist “should not be rewarded . . . by receiving parental rights which he may be able to swap for the agreement of the victim’s family not to press criminal charges”); *id.* at 901 (“[A statutory rapist] does not have a right to create such a [parent–child] relationship by blocking the adoption of the child. To recognize a blocking right would be to allow the wrongdoer to benefit from his wrongdoing.”).



conception by forcible rape than does the labor-with-consent theory of paternal rights.<sup>104</sup>

### III. APPLICATION OF THE LABOR-WITH-CONSENT THEORY: IMPLICATIONS FOR THE CONSTITUTIONAL CLAIMS OF BIOLOGICAL FATHERS, FUNCTIONAL PARENTS, INTENDED PARENTS, AND OTHER PARTIES TO ASSISTED-REPRODUCTION TECHNOLOGY

The labor-with-consent theory—that biological paternity is merely a proxy for the consent of the biological mother to the father’s co-parenting of her child and must be coupled with paternal labor to give rise to constitutional protection—allows us to predict with greater certainty how a particular claim by a biological father for constitutional protection of his parental rights should and will be resolved. This theory also allows us to better predict the resolution of claims for constitutional protection of parental rights asserted by persons other than the biological father, including functional parents and parties to assisted-reproduction technology.

A larger principle reflected in the labor-with-consent theory and something critical to keep in mind in resolving claims for constitutional protection of parental rights under this theory relates to the importance of function in family law. The labor-with-consent theory is consistent with the belief that function (not status or genetics) should be the primary consideration in assigning responsibilities and rights in family law.<sup>105</sup> Primary rationales grounding this principle are the beliefs that the protection of functional relationships promotes stability with respect to those relationships,<sup>106</sup> that the state should encourage and reward caretaking behaviors,<sup>107</sup> and that the transmission of values is far more important to society than is the transmission of genes.<sup>108</sup>

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104. See *supra* notes 84–86 and accompanying text (discussing how the instance of conception by forcible rape supports the labor-with-consent theory of paternal rights).

105. See Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 40 (2003) (arguing that among the “positive theoretical implications” of assisted-reproduction technologies is their ability to “contribute to the replacement of status-based understandings of family with contractual models”); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002) [hereinafter Spitko, *Accrual/Multi-Factor Approach*] (setting forth a functional approach to determining qualification as a surviving committed partner for purposes of distribution of an intestate estate). See generally Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000) (setting forth a functional approach to qualification of a parent–child relationship for purposes of distribution of an intestate estate); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461 (arguing against basing legal paternity on biology and arguing for greater protection of functional parents).

106. See Harris, *supra* note 105, at 461 (asserting that proposals to protect the functional parent–child relationship “are based on the belief that a child’s greatest need is for a close, stable relationship with an adult committed to the child’s welfare”).

107. See *id.* at 485 (“[E]mphasis on biology minimizes and devalues acts of caretaking and assumption of responsibility by adults not biologically related to children.”);

*A. The Biological Father's Right to Block Placement of His Child for Adoption at Birth*

The labor-with-consent theory allows for a more reasoned and certain resolution of the hypothetical raised in the introduction to this Article.<sup>109</sup> Assume once more there is a pregnant woman who decides that she will place her baby up for adoption at her birth. May the biological father block the placement of the child for adoption and preserve his own opportunity to parent the child himself?<sup>110</sup>

One common approach found in the case law to resolving this issue is to focus on whether the biological father, once he learned or should have learned of the pregnancy, promptly expressed a willingness to accept his responsibilities as father and thereafter acted accordingly.<sup>111</sup> I dub this the “prompt expression” approach. As one court postulated:

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Spitko, *Accrual/Multi-Factor Approach*, *supra* note 105 (setting forth an intestacy scheme designed to reward and promote caretaking behaviors).

108. See *Bellotti v. Baird*, 443 U.S. 622, 637–38 (1979) (plurality opinion) (noting the essential role that parents perform in guiding children to become responsible adult citizens); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (referring to the parental duty to teach children morals and the “elements of good citizenship”).

109. See *supra* note 1 and accompanying text.

110. See generally Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUD. 223 (2003); Shanley, *supra* note 1.

111. See, e.g., *John S. v. Mark K. (Adoption of Michael H.)*, 898 P.2d 891, 896–97 (Cal. 1995); *Steven A. v. Rickie M. (Adoption of Kelsey S.)*, 823 P.2d 1216, 1236–37 (Cal. 1992); *In re Kailee “CC”*, 579 N.Y.S.2d 191, 192 (App. Div. 1992) (focusing, while adjudicating whether a biological father had a constitutional right to block the adoption of his biological child, on the biological father’s failure to promptly assert an ability and willingness to assume custody of his biological child “during the critical period prior to birth and placement”); *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1068 (Okla. 1985) (rejecting claims for constitutional protection of parental rights by biological father who “in effect abandoned the support and care of the mother and child during pregnancy and at birth”), *overruled on other grounds*, *Leatherman v. Yancey (In re Baby Boy L.)*, 103 P.3d 1099, 1101 (Okla. 2004) (recognizing preemption by federal Indian Child Welfare Act); *In re Adoption of Baby Girl M.*, 942 P.2d 235, 242–43 (Okla. Civ. App. 1997) (focusing on the extent to which a biological father attempted to support the mother during her pregnancy in evaluating whether the biological father’s consent to adoption was necessary as a matter of constitutional and statutory law); see also *In re Adoption of D.M.M.*, 955 P.2d 618, 621 (Kan. Ct. App. 1997) (commenting that it is “a self-evident truth that it is not unreasonable to require substantial efforts by an unwed father to maintain contact with the mother and participate in the pregnancy and birth”); *Whitney v. Pinney (In re Carron)*, 956 P.2d 785, 788 (Nev. 1998) (“The holding we articulate here is consistent with case authority from other jurisdictions pursuant to which consideration of a father’s pre-birth conduct appears to be the general trend.”), *overruled in part by Sam Z. v. Hikmet J. (In re Termination of Parental Rights as to N.J.)*, 8 P.3d 126, 132 n.4 (Nev. 2000) (abandoning the previous dispositional analysis for parental rights that first required parental fault before examining the best interests of the child in favor of a new best interests of the child standard that includes parental conduct among its factors); *C.F. v. D.D. (In re Adoption of B.B.D.)*, 984 P.2d 967, 970 (Utah 1999) (noting that under Utah law, “an unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a

Once [the father] knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate “a willingness himself to assume full custody of the child—not merely to block adoption by others.”<sup>112</sup>

This line of case law holds that where the biological father had promptly demonstrated his willingness to act as father to the child, the Due Process Clause of the Fourteenth Amendment prevents termination of his parental rights and placement of the child for adoption absent a showing that he would be an unfit parent.<sup>113</sup>

A virtue of the prompt expression approach is that it encourages and rewards a biological father’s early assumption of or willingness to assume paternal responsibilities. The biological mother likely will have financial and emotional needs during her pregnancy, and the extent to which these needs are met will impact the development of the child.<sup>114</sup> The father’s emotional and financial support of the mother during pregnancy, therefore, arguably should be credited as support of the child. Support activities that a father might engage in prenatally include paying pregnancy- and birth-related expenses, such as for prenatal medical care, attending birthing classes with the mother, and preparing a home for the child.<sup>115</sup> The biological father’s prenatal performance of support activities, in particular his financial support of the mother, not only promotes the interests of the mother and the child but also helps to ensure the burden of providing prenatal care, and the consequences of poor prenatal care will not fall upon society and the

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timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child’s birth” (quoting UTAH CODE ANN. § 78-30-4.12(2)(e) (1996)).

112. *Kelsey S.*, 823 P.2d at 1236–37 (quoting *In re Raquel Marie X.*, 559 N.E.2d 418, 428 (N.Y. 1990)).

113. *See, e.g., Adoption of Michael H.*, 898 P.2d at 897; *Kelsey S.*, 823 P.2d at 1236; *Raquel Marie X.*, 559 N.E.2d at 424 (holding that as a matter of federal constitutional law, “in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child”); *Abernathy v. Baby Boy*, 437 S.E.2d 25, 29 (S.C. 1993) (holding that “an unwed father is entitled to constitutional protection . . . when he undertakes sufficient prompt and good faith efforts to assume parental responsibility” even if the biological mother successfully frustrates the biological father’s efforts to support her and the child and affirming that the biological father’s consent was needed for valid adoption after he had endeavored to support the mother and the unborn child).

114. *See Adoption of Michael H.*, 898 P.2d at 898 (“It can scarcely be disputed that prenatal care is critically important to both the mother and the child.”).

115. *See Raquel Marie X.*, 559 N.E.2d at 428 (asserting the relevance of an unwed father’s “payment of pregnancy and birth expenses” to a judicial evaluation of the unwed father’s constitutional right to establish or maintain a relationship with his child).

state.<sup>116</sup> The state has an interest, therefore, in rewarding and, thus, encouraging such prenatal supportive behavior.

A shortcoming of this approach is that it rewards mere prompt willingness to assume paternal responsibilities, even in the absence of any actual paternal labor and even in cases in which the mother does not want the biological father to assume such responsibilities. Moreover, it rewards even relatively insignificant or trivial support by the father with the conferral of constitutional parent status. This approach undervalues parental labor actually performed and reinforces the notion that biological paternity alone confers an entitlement with respect to the child.

The labor-with-consent theory suggests a different focus for resolution of the biological father's attempt to block placement of his biological child for adoption at birth. Under the labor-with-consent theory, constitutional protection for the biological father's right to develop a relationship with his child arises only after he has *performed* sufficient paternal labor and done so *at the invitation* (perhaps implicit) *of the mother* to act as co-parent. In cases in which the mother makes clear to the father when she communicates the fact of her pregnancy to him that she intends to place the child for adoption, the biological father would not be able to block the placement.<sup>117</sup> Whereas much existing case law addressing the biological father's claims for constitutional protection focuses on whether the biological father "demonstrated as full a commitment to his parental responsibilities as the biological mother allowed,"<sup>118</sup> the labor-with-consent theory would make the biological mother's disallowance of the biological father's parenting dispositive over the biological father's claimed constitutional parental rights.<sup>119</sup>

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116. See *Adoption of Michael H.*, 898 P.2d at 898 ("[I]f unwed fathers are not encouraged to provide prenatal assistance when they are able to do so, the burden will often shift to the state and therefore to society generally.").

117. Indeed, in cases in which the mother never communicates the fact of her pregnancy to the father and the child is placed for adoption without the father ever knowing of the pregnancy or birth of the child, the father still would not be able to veto or undo the adoption. *But see In re* Petition of Kirchner, 649 N.E.2d 324, 326, 332 (Ill. 1995) (issuing a writ of habeas corpus for a child and denying a custody hearing for adoptive parents after the adoption had been invalidated because the biological father, who had been misinformed by the mother that his child had died at birth, had a right to veto adoption), *abrogated by* Timmons *ex rel.* R.L.S. v. L.S. (*In re* R.L.S.), No. 100081, 2006 Ill. LEXIS 312, at \*24–30 (Ill. Feb. 2, 2006); *In re* B.G.C., 496 N.W.2d 239, 246 (Iowa 1992) (holding that the biological father, who did not know of his paternity at the time of his biological child's placement for adoption, had the right to veto the adoption).

118. *Adoption of Michael H.*, 898 P.2d at 901.

119. *Lehr v. Robertson*, 463 U.S. 248 (1983), can be read to support my approach. In *Lehr*, the Supreme Court rejected the due process and equal protection claims of a biological father who sought to block the adoption of his daughter. *Id.* at 266–68. The biological father had alleged that "but for the actions of the child's mother" he would have had a significant relationship with the child. *Id.* at 271 (White, J., dissenting). The dissent in *Lehr* recited the following facts:

According to Lehr, from the time [the biological mother] was discharged from the hospital until August 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate [the

Moreover, where the biological father has provided prenatal support with the implicit or express consent of the mother that he act as co-parent, the labor-with-consent theory would still allow the mother to change her mind and place the child for adoption at birth, even over the father's objections, unless the father's prenatal support met a high standard necessary to obtain the status of a constitutional parent.<sup>120</sup> As argued above,<sup>121</sup> such paternal labor should be of a quality at least comparable to the labor invested by the mother in gestating and delivering the child before it will give rise to constitutional protections.<sup>122</sup> Such labor should be sustained, and it should have a positive and profound impact on the development of the child.<sup>123</sup>

I am skeptical that under the standard this Article sets out a biological father could become a constitutional parent by the time of the birth of his child in any but the most extraordinary of circumstances. The Supreme Court's decision and reasoning in *Quilloin v. Walcott* supports this conclusion.<sup>124</sup> In *Quilloin*, the

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mother and child] and achieved sporadic success until August 1977, after which time he was unable to locate them at all. . . . When Lehr, with the aid of a detective agency, located [the mother and child] in August 1978, [the mother] was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and set up a trust fund for [the child], but that [the mother] refused. [The mother] threatened Lehr with arrest unless he stayed away and refused to permit him to see [the child]. Thereafter Lehr retained counsel who wrote to [the mother] in early December, 1978, requesting that she permit Lehr to visit [the child] and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here.

*Id.* at 269. The majority in *Lehr* did not address these allegations in rejecting the biological father's claims for constitutional protection.

120. Regardless of whether the biological father has performed sufficient prenatal parental labor with the consent of the biological mother to attain the status of a constitutional parent, the labor-with-consent theory would not impede the mother's constitutional right to terminate the pregnancy in light of the mother's constitutional interest in her physical autonomy. *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992) (recognizing "the inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's" and holding that the decision as to whether or not to continue the pregnancy rests with the mother and not the father); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (same).

121. *See supra* notes 55–57 and accompanying text.

122. *Cf.* Karen Czapanskiy, *Volunteers and Draftees: The Struggles for Parental Equality*, 38 UCLA L. REV. 1415, 1477–81 (1991) (calling for law reform that would "meet equality-based parenting with positive legal consequences and meet gendered second-shift parenting with negative legal consequences" but allowing for the possibility that a biological father would be able to block placement of his biological child for adoption at birth where, *inter alia*, the father has acted responsibly toward the mother—for example, has adequately supported the mother through her pregnancy).

123. *Cf.* Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 134 (2003) (arguing "that fatherhood should be defined by doing (action) instead of being (status), with the critical component being acts of nurturing").

124. 434 U.S. 246 (1978).

biological father consented to be named the father on his son's birth certificate.<sup>125</sup> He supported his biological child "on an irregular basis" and "from time to time" gave his son toys and other gifts.<sup>126</sup> The child visited with his biological father on "many occasions."<sup>127</sup> Over the biological father's objection, a judge granted a petition by the child's stepfather to adopt the boy and terminate the biological father's parental rights, finding that such an adoption would be in the child's best interests.<sup>128</sup> Before the United States Supreme Court, the biological father argued "that he was entitled as a matter of due process and equal protection to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent."<sup>129</sup> The Court rejected his arguments and upheld the granting of the adoption petition.<sup>130</sup> The Court found it critical that the biological father "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>131</sup> In short, he had no constitutional right to maintain a relationship with his biological child over the objection of the mother—the constitutional parent—because his parenting activities had been trivial, particularly in contrast to the mother's parenting labors.

Thus, neither a biological father's mere prenatal expression of his willingness to assume the obligations of father after the birth of the child nor his trivial support activities, such as purchasing baby clothes and painting the nursery, should give rise to constitutional protection.<sup>132</sup> The biological father's financial support of the biological mother during her pregnancy also seems to be generally insufficient in comparison to the biological mother's prenatal efforts.

Perhaps the strongest case for constitutional protection of the biological father's opportunity to develop a relationship with his child arising from his prenatal actions would be in circumstances in which the biological mother is in such a financial or emotional condition that, absent the father's sustained and intense prenatal support, the child would not otherwise have received adequate prenatal care. In such a case, it can be argued, the father's sustained actions have had a profound impact on the development of the child. In general, however, to become a constitutional parent, a biological father must await the birth of his child and develop a functional father-child relationship with sustained social interactions sufficient to affect the development of the child. In all but the most extraordinary of cases, therefore, the biological father should not enjoy the right to override the mother's decision to place their biological child for adoption at birth.

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125. *Id.* at 250 n.6.

126. *Id.* at 251.

127. *Id.*

128. *Id.* at 247.

129. *Id.* at 253.

130. *Id.* at 256.

131. *Id.*

132. *See* Randy A.J. v. Norma I.J., 677 N.W.2d 630, 636, 638 (Wis. 2004) (holding that biological father who "occasionally [purchased] formula and diapers" for his biological daughter did not "demonstrate[] a constitutionally protected liberty interest in his putative paternity because he has failed to establish a substantial relationship with [his daughter]").

*B. Constitutional Parental Rights of Functional Co-Parents*

A common variant of the contemporary American family consists of a legal parent raising a child or children with a functional co-parent who is neither the biological nor adoptive parent of those children.<sup>133</sup> Examples include families with a stepparent co-parenting a spouse's child and families with a gay man or lesbian co-parenting the child of his or her nonmarital partner. Although these caretakers function as parents to their children, they generally lack the legal status of a parent with all of the legal rights and responsibilities that parental status entails.<sup>134</sup>

For example, the law tends to disadvantage these functional parents when their relationship with the legal parent fractures, either because of difficulties with the relationship or the death of the partner.<sup>135</sup> In most cases, the functional parent

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133. See, e.g., Gary, *supra* note 105, at 29–31 (discussing the unreliable nature of statistics regarding the prevalence of families that include a child being raised in a household with a stepparent or a parent's same-sex partner, reviewing evidence suggesting that the number of such families is increasing, and concluding "the limited data available for stepfamilies and for gay and lesbian families support the general perception that the structure of American families has changed from the nuclear norm and will continue to change in the future"); Harris, *supra* note 105, at 464–65 (asserting that "blended families or stepfamilies are increasingly common").

134. See, e.g., Harris, *supra* note 105, at 465–66, 472 (noting ways in which the law ignores the economic contributions of stepparents to their stepchildren and further noting that the law in most states does not afford custodial rights to stepparents or impose legal support duties on stepparents, and where such duties exist, they are rarely enforced); Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 227–28 (2002) ("Overall, there is a lack of legal recognition of the stepparent/stepchild relationship. . . . With few exceptions, stepparents have no obligation during the marriage to support their stepchildren . . . . Nor do stepparents have any right of custody or control. If the marriage terminates through divorce or death, they most often have no rights of custody or visitation, no matter how longstanding their stepparent role." (footnotes omitted)); Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 285–86 (2001) (speaking broadly of stepparents to include an unmarried adult living in an intimate relationship with another adult who has a child from a previous relationship and commenting that "[o]f those considered 'parents,' stepparents frequently fall outside this [nuclear family] template and in disputes about children are put on the scrap heap labeled third party claimants"). *But see* Storrow, *supra* note 3, at 665 (asserting that "[t]he concept of functional parenthood has been gaining increasing currency in American legal scholarship and in the courts").

135. See, e.g., Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1769 (1998) ("Except in the atypical case of successful joint or second-parent adoption, the nonbiological parent in a lesbian or gay family (or non-adoptive parent, as the case may be) is unlikely to have any legal claim for continued access to the child when the couple's relationship has ended."); Scott & Scott, *supra* note 40, at 2409 ("[N]on-custodial biological parents often win custody contests with stepparents and other third parties who have functioned in a parental role. To the consternation of critics, traditional law gives little legal protection to the relationship between the faithful stepparent and the child if the biological parent is fit."); E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for*

will be at a substantive legal disadvantage when competing with the former partner or other legal family members of the former partner for custody and visitation rights with respect to the functional child.<sup>136</sup> Indeed, the functional parent may even lack standing to petition for such custody or visitation rights.<sup>137</sup>

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*Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1144–52 (2000) [hereinafter Spitko, *Contracting for Child Custody Decisionmaking*] (discussing the ways in which the law might disadvantage a functional parent at fracture of her relationship with the legal parent and suggesting that a binding predispute arbitration agreement with respect to any future child custody dispute might enable the functional parent and the legal parent to contract around this dysfunctional law).

136. See Spitko, *Contracting for Child Custody Decisionmaking*, *supra* note 135, at 1148–49 (citing cases utilizing substantive rules for custody and visitation decisionmaking that disadvantage the functional parent relative to the legal parent); see also LESLIE JOAN HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, FAMILY LAW 631 n.2 (3d ed. 2005) (discussing the presumption in favor of granting custody to a child’s parent when a nonparent is the competing claimant and noting that court decisions subsequent to *Troxel v. Granville* “have added real teeth to the presumption in favor of parents’ custody and visitation preferences, and a number of courts require either a showing of parental unfitness or detriment to the child to overcome the presumption that parents will act in their children’s best interests”); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18, reporter’s notes, cmt. b (2002) (discussing “[t]he traditional parental-preference rule[, which] precludes an award of rights or responsibilities to a nonparent unless the parents are unfit or unable to care for the child” as well as more liberal versions of the rule).

137. See Spitko, *Contracting for Child Custody Decisionmaking*, *supra* note 135, at 1145–47 (citing cases holding that the functional parent lacked standing to petition for visitation or custody rights with respect to the child she had helped parent).

The American Law Institute’s *Principles of the Law of Family Dissolution* grant to a “parent by estoppel” and to a qualifying “de facto parent” the standing to bring an action for custodial or decisionmaking responsibility with respect to a child. A de facto parent qualifies only if she has lived with the child within the six-month period immediately preceding the filing of the action or consistently has maintained or attempted to maintain a parental relationship with the child since residing with the child. AMERICAN LAW INSTITUTE, *supra* note 136, § 2.04(1)(b), (c). Under the *Principles*, a parent by estoppel is an individual who, though not a legal parent, has lived with the child since the child’s birth or for at least two years and, as part of an agreement with the child’s parent or parents, has held herself out as a parent and accepted full and permanent parental responsibilities. *Id.* § 2.03(1)(b)(iii)–(iv). In addition, the court must find that treating such a person as a parent by estoppel is in the child’s best interests. *Id.* A de facto parent is an individual who, though not a legal parent or a parent by estoppel, for a period of at least two years has lived with the child and for primarily nonfinancial reasons has regularly performed either a majority of the caretaking functions for the child or at least as great a share of those functions as the parent with whom the child primarily lived performed. In addition, for an individual to qualify as a de facto parent, the individual must have so acted either with the agreement of the child’s legal parent or as a result of the legal parent’s complete failure or inability to perform caretaking functions for the child. *Id.* § 2.03(1)(c).

Moreover, the *Principles of the Law of Family Dissolution* treat a parent by estoppel the same as a legal parent with respect to the allocation of custodial and decisionmaking responsibilities. *Id.* §§ 2.08(1)(a), 2.09(2), 2.18. The *Principles* give preference to a legal parent or a parent by estoppel over a de facto parent in a disputed custody matter. *Id.* § 2.18(1)(a). Specifically:



The functional co-parent is not the only person disadvantaged by the denial of legal recognition for the functional parent. This denial of legal recognition concurrently has great potential to harm the children of these families because it ignores the child's interest in the continuity of a parent-child relationship.<sup>138</sup> Recognition of these harms has led to calls for law reform.

Professor Nancy Polikoff was an early proponent of statutory reform to extend parental rights to some functional parents.<sup>139</sup> She argues that “[a]lthough biology coupled with a relationship and legal adoption currently confer parenthood and should continue to do so, such status should also derive from proof of a parent-child relationship that has developed through the cooperation and consent of someone already possessing the status of a legal parent.”<sup>140</sup> Professor Polikoff, therefore, “proposes expanding the [legal] definition of parenthood to include anyone who maintains a functional parental relationship with a child when a

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(a) [A court] should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless

(i) the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions . . . , or

(ii) the available alternatives would cause harm to the child[.]

*Id.* In such circumstances, a de facto parent still may obtain an allocation of custodial or decisionmaking authority, but such an allocation must not be greater than the allocation to the legal parent or parent by estoppel. *Id.* Also, the *Principles* call for a court to deny an allocation of custodial or decisionmaking authority to a de facto parent if, in light of the number of other adults to be allocated such authority, an allocation to the de facto parent would be “impractical.” *Id.* § 2.18(1)(b). Finally, the *Principles* provide that a legal parent and a parent by estoppel, but not a de facto parent, ordinarily are entitled to a presumptive allocation of decisionmaking responsibility. *Id.* § 209(2).

138. 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, 573 (1990) [hereinafter Polikoff, *Redefining Parenthood*] (“The law’s unwillingness to recognize and preserve parent-child relationships in nontraditional families sacrifices the best interests of children in those families. Rather than emphasizing the children’s interests in the continuity and stability of their parental relationships, current definitions of parenthood emphasize the state’s interest in preserving the fiction of family homogeneity.”); see also *In re J.C. v. C.T.*, 711 N.Y.S.2d 295, 298 (Fam. Ct. Westchester Co. 2000) (“In this matter . . . in which [the biological mother] . . . took affirmative actions to encourage a parent-child relationship between [the functional parent] and the children, it would be unconscionable to allow the [biological mother] to unilaterally terminate that relationship without the opportunity for a Court to make a determination as to what is in the best interests of the children.”), *rev’d*, 742 N.Y.S.2d 381 (App. Div. 2002); Holtzman v. Knott (*In re Custody of H.S.H.-K.*), 533 N.W.2d 419, 436 (Wis. 1995) (noting that a court’s equitable power to award visitation rights to a functional parent “protects a child’s best interest by preserving the child’s relationship with an adult who has been like a parent”).

139. See generally Polikoff, *Redefining Parenthood*, *supra* note 138.

140. *Id.* at 471.

legally recognized parent created that relationship with the intent that the relationship be parental in nature.”<sup>141</sup>

The Polikoff Principle is respectful of parental autonomy.<sup>142</sup> Even a functional parent would not gain parental rights under her proposed statutory reform unless the existing legal parent invited the functional parent into the child’s life to act as a parent to the child. Thus, consent of the parent with existing legal rights to creation of an additional parent–child relationship is central to Polikoff’s proposed statutory and common law reform.<sup>143</sup>

The Polikoff Principle also values the labor of the functional parent. Under the Principle, a legal parent’s invitation to a nonparent to act as a parent is not sufficient to confer parental rights on the invitee. Rather, the invitee may gain parental rights only by accepting that invitation through labor that develops a functional parent–child relationship.<sup>144</sup>

Finally, the Polikoff Principle emphasizes and promotes continuity and stability for children through protection of their parental relationships.<sup>145</sup> As Professor Polikoff argues, legislatures and courts defining parenthood “would best serve the interests of children by focusing on two criteria: the legally unrelated adult’s performance of parenting functions and the child’s view of that adult as a parent.”<sup>146</sup>

Professor Polikoff’s approach has found some favor in several courts. These courts have held that a court may grant visitation rights to a functional parent where the legal parent consented to the functional parent developing a parental relationship with the child, the functional parent labored as a parent to the child (generally including the requirement that the functional parent shared a household with the child) without expectation of financial compensation for her parenting labor, and the child bonded with the functional parent.<sup>147</sup> Some courts

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141. *Id.* at 464.

142. *Id.* at 573 (“Limiting the protection to those relationships that a legally recognized parent intended serves the rights of parents to autonomy in structuring their families.”); *see also Holtzman*, 533 N.W.2d at 436 (“[Granting visitation rights to a functional parent] protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent.”).

143. Polikoff, *Redefining Parenthood*, *supra* note 138, at 490–91 (“Courts would also protect the interests of legal parents in parental autonomy by focusing on the actions and intent of those parents in creating additional parental relationships.”).

144. *Id.* at 471.

145. *Id.* at 573 (“Protection of functional parental relationships serves children’s needs for continuity and stability.”).

146. *Id.* at 490–91.

147. *See, e.g., Holtzman*, 533 N.W.2d at 435–36 (holding that a court may consider a functional parent’s petition for visitation rights with respect to the child she has parented when the functional parent demonstrates: “(1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have

have held that a court may award not just visitation rights but also custody rights to a functional parent if these elements exist.<sup>148</sup> Several of these courts emphasized that because the legal parent originally consented to the functional parent developing a parent-child relationship with the child, the state's granting of rights with respect to the child to the functional parent does not infringe upon the legal parent's constitutional right to direct the upbringing of her child without undue interference by the state.<sup>149</sup>

The labor-with-consent theory constitutionalizes the Polikoff Principle. Professor Polikoff argues that the biological or adoptive mother may waive her exclusive right to legal parenthood by inviting a co-parent into the child's life to

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established with the child a bonded, dependent relationship parental in nature"); *id.* at 437 (citing Polikoff, *Redefining Parenthood*, *supra* note 138, at 464); *see also* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (stating that a court may grant visitation rights to "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family"; who "resides with the child[;] and[ who], with the consent and encouragement of the legal parent, performs a share of the caretaking functions at least as great as the legal parent"); V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000) (adopting the four-factor test from *Holtzman* to determine whether a court may award a functional parent visitation rights).

148. *See, e.g.*, T.B. v. L.R.M., 786 A.2d 913, 920 (Pa. 2001) (holding that "as [the functional parent] has established that she assumed a parental status and discharged parental duties with the consent of [the legal parent], the lower courts properly found that she stood *in loco parentis* to [the child] and therefore had standing to seek partial custody for purposes of visitation"); J.A.L. v. E.P.H., 682 A.2d 1314, 1320-21 (Pa. Super. Ct. 1996) (citing to Professor Polikoff's work and holding that "the fact that the petitioner lived with the child and the natural parent in a family setting, whether a traditional family or a nontraditional one, and developed a relationship with the child as a result of the participation and acquiescence of the natural parent must be an important factor in determining whether the petitioner has standing" to seek partial custody); Carvin v. Britain (*In re* Parentage of L.B.), 89 P.3d 271, 285 (Wash. Ct. App. 2004) (holding that functional parent may be awarded "shared parentage or visitation" rights with respect to child if she demonstrates that "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature"), *aff'd in part and rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005); *see also* C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004) (holding, without addressing the standard by which the determination that a de facto parent exists should be made, that a court may award a de facto parent "parental rights and responsibilities").

149. *See, e.g.*, V.C., 748 A.2d at 552 ("[The legal] parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child."); *Parentage of L.B.*, 89 P.3d at 285 ("[T]he action [to establish de facto or psychological parentage] exists only where the legal parent, having consented to and fostered the de facto parent-child relationship, has invited a third party into the relationship, effectively waiving the right to sever the relationship unilaterally."); *Holtzman*, 533 N.W.2d at 436 ("This exercise of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent.").

function as a parent.<sup>150</sup> She urges statutory and common law reform to grant parental custody and visitation rights in favor of the invitee who then functions as a parent upon such a waiver.<sup>151</sup> I argue that the functional parent thereby acquires constitutional parental rights equal to those of the biological or legal parent.<sup>152</sup>

I have argued above that a biological mother has a constitutional right to withdraw her consent to the biological father's parenting of her child at any time before the father's own constitutional parental rights vest as a result of his labor developing a functional parent-child relationship.<sup>153</sup> More generally, a constitutional parent initially has a right to decide who will be invited to be her child's other parent. The constitutional parent, therefore, also has the right to invite another adult biologically unrelated to the child into the child's life to act as a parent.<sup>154</sup>

When the invited parent accepts this invitation and labors as a parent, she thereby earns the status of a constitutional parent and acquires constitutional protection for her relationship with her functional child.<sup>155</sup> The constitutional parent's invitation to the functional parent to act as a co-parent to her child is equivalent for constitutional purposes to biological paternity. Biological paternity signifies the implicit consent by the biological mother to the biological father's co-parenting of her child. When the biological father accepts this invitation to co-parent and functions as a parent to the child, he thereby acquires constitutional protection for his parent-child relationship. Similarly, when the adult unrelated by biology to the child accepts the constitutional parent's invitation to co-parent the child by laboring as a parent to the child, she thereby acquires constitutional protection for her parent-child relationship.

Like the Polikoff Principle, the labor-with-consent theory promotes caretaking behavior, safeguards the child's interests in continuity and stability through protection of the functional parent-child relationship, and yet still sufficiently respects parental autonomy. The labor-with-consent theory promotes caretaking behavior by valuing and rewarding the parental labor of the functional

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150. Polikoff, *Redefining Parenthood*, *supra* note 138, at 575–76 (“Courts should respect parental autonomy by preferring parents over nonparents in custody disputes, but parental autonomy must have limits. It should not include the unilateral ability to remove another person from the status of parent by invoking a rigid legal definition of parenthood.”).

151. *Id.* at 471.

152. *Cf.* Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 297 (2000–01) (arguing that “[t]he non-legal lesbian mother’s interests should be constitutionalized as privacy and liberty rights, which . . . would at a minimum give rise to a procedural due process right to petition for visitation and custody”).

153. *See supra* notes 58–69 and accompanying text.

154. *See Holtzman*, 533 N.W.2d at 436 n.40 (“Through consent, a biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child . . . thereby sharing her parental rights.”).

155. *See Troxel v. Granville*, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting) (“Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.”).

parent. Under the theory, the caretaker who labors sufficiently as a parent to a child at the invitation of any existing constitutional parent of that child enjoys a constitutionally protected right to maintain her relationship with the child. That constitutional protection for the functional parent simultaneously promotes the child's interests in continuity and stability by not allowing the initial constitutional parent to unilaterally cut off the child's relationship with the functional parent.<sup>156</sup>

Finally, the labor-with-consent theory is sufficiently respectful of parental autonomy in that one may become a constitutional parent to another's child only at the invitation of the existing constitutional parent. Indeed, if a child has two existing constitutional parents, the consent of both of them would be necessary for a nonparent to become an additional constitutional parent. The plurality opinion in *Michael H. v. Gerald D.* reflects this important limitation on the constitutional parent's authority to invite another to serve as a constitutional parent to her child. In *Michael H.*, as discussed above, the biological mother lacked the ability to unilaterally consent to the biological father's co-parenting of her child because another man—the husband of the biological mother—already enjoyed that privilege.<sup>157</sup> *Michael H.* thus teaches that a constitutional parent cannot invite another to serve as constitutional co-parent to her child when someone else already serves as the second constitutional parent and does not consent to give up his rights or at least to allow another to share in those rights.<sup>158</sup>

### *C. Constitutional Parental Rights with Respect to Children Born by Means of Assisted-Reproduction Technology*

The labor-with-consent theory has important implications for the claimed constitutional rights of a host of participants in assisted-reproduction technology. The relevant principles most clearly implicate the rights of biological fathers who are either unknown or known sperm donors. However, the principles also carry beyond the claims of biological fathers to those of traditional surrogate mothers, gestational surrogate mothers, egg donors, and intended parents with no genetic or gestational connection to the child born by means of assisted-reproduction technology.

#### *1. Artificial Insemination and the Constitutional Claims of the Sperm Donor*

Artificial insemination is a process in which a sperm sample is injected into a woman's reproductive tract.<sup>159</sup> The woman might know the sperm donor. For example, a couple that wishes to conceive and parent a child together might

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156. See *supra* note 138 and accompanying text (discussing harm to the child arising from denial of legal recognition of functional co-parent).

157. See *supra* notes 76–83 and accompanying text.

158. My theory of the constitutional significance of biological paternity does not otherwise imply any limitations on the number of persons who might simultaneously enjoy the status of constitutional parent with respect to a particular child.

159. Fertilitext, Therapies: Artificial Insemination, [http://www.fertilitext.org/p2\\_doctor/ai.html](http://www.fertilitext.org/p2_doctor/ai.html) (last visited Feb. 9, 2006). For a description of the types of artificial insemination (intrauterine, intracervical, intravaginal, and intratubal), differing by location of sperm injection within the woman's reproductive tract, see *id.*

use artificial insemination to overcome a fertility problem, such as impaired sperm mobility, or to avoid sexual intercourse.<sup>160</sup> Also, a woman who wishes to raise a child on her own or with a partner with whom she cannot conceive might choose a sperm donor known to her because she values the donor's qualities (which she may believe to be genetically linked) or easy and continuing access to the donor's medical history. Alternatively, the woman might choose an anonymous sperm donor.<sup>161</sup> A principal reason for choosing an unknown sperm donor is to guard against the future assertion of a paternity claim by the donor.<sup>162</sup>

The principle that parental labor is necessary to give rise to constitutional protection for parental rights dictates that a sperm donor would not have a constitutional right to establish or maintain a relationship with his biological child merely because he provided the sperm with which the child was conceived. The amount of labor contributed by sperm donation is not significantly different from the amount of labor contributed by a biological father who contributes to conception through sexual intercourse. The resulting constitutional protection or lack thereof should be the same, therefore, whether the claimant biological father was involved in conception through artificial insemination or through sexual intercourse. The sperm donor's contributed parental labor entailed in sperm donation is minimal and should not be deemed constitutionally significant.<sup>163</sup> The

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160. For example, a lesbian and a gay man who wish to conceive and parent a child together might wish to use artificial insemination to conceive the child even if they would anticipate that they would have no difficulty conceiving by means of sexual intercourse.

161. In most instances, the anonymous sperm donor is compensated for his contribution of sperm. Commentators have pointed out that the terms "sperm donor" and "egg donor" in many cases might seem to be misnomers in that the "donor" seeks to be compensated and is compensated for his sperm or her oocyte. See Kenneth Baum, *Golden Eggs: Toward the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 108 n.5. Throughout this Article, I use the terms "sperm donor" and "egg donor" to mean "one used as a source of biological material," see WEBSTER'S NEW COLLEGIATE DICTIONARY 372 (11th ed. 2003) (defining "donor"), regardless of whether the donor is compensated for the contribution of sperm or oocyte. For a discussion focusing on the implications arising from the commodification of sperm, see Ertman, *supra* note 105, at 4 (arguing that among its positive effects, "the alternative insemination market facilitates the formation of families based on intention and function rather than biology and heterosexuality").

162. Ertman, *supra* note 105, at 19 ("In addition to selling . . . medical and character trait information, [sperm] banks sell anonymity, the freedom to become a parent with little risk that the biological father will interfere with the intended family."); see also *id.* at 21 (pointing out that anonymous sperm donation facilitates "the formation of family units based on intent rather than biology alone[, but] it also has negative effects, namely preventing a child from knowing his or her biological father and reducing emotional or financial support from the biological father"). For an argument that the law should mandate sperm donor identification and hold the donor financially responsible for the resulting child when an unmarried woman obtains donor sperm, see Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 903–12 (2000) (arguing that under an "interpretive" approach to determination of legal parentage, mandating donor identification and financial responsibility "seems . . . more consistent with the rules that actually govern sexual conception").

163. See Hill, *supra* note 48, at 408 (contrasting the physical efforts of a surrogate mother in gestating and giving birth to a child with the "de minimis" physical involvement

biological mother, therefore, should have the right to exclude the sperm donor from the child's life where the sperm donor's claim is based merely on his biological paternity.

A known sperm donor, however, might develop a relationship with his biological child with the consent of the biological mother.<sup>164</sup> This relationship might be functionally that of a father-to-child, or the sperm donor's role might be something more akin to that of an uncle or family friend. If the mother and sperm donor later come into conflict over the father's continuing role in the child's life, the issue arises: To what extent does the Constitution protect the sperm donor's right to continue a relationship with his biological child or allow the mother to limit or proscribe the father's further involvement in the child's life?

The principle that the initial constitutional parent has the right to decide who else shall be allowed to parent the child is critical. Unless the mother consented to the sperm donor acting as co-parent to the child (and the sperm donor subsequently did act as co-parent), the mother should retain the constitutional right to exclude the sperm donor from the child's life. The fact that the mother had allowed the sperm donor some contact with the child as a nonparent should not erode the mother's constitutional authority or strengthen the sperm donor's constitutional claim.

Indeed, even if the sperm donor's relationship with the child is of a nature and quality that one might readily conclude that there exists a functional parent-child relationship, the relationship should not give rise to constitutional protections if the mother did not invite the sperm donor into the child's life to serve as a co-parent. Under the labor-with-consent theory, parental labor by one other than the initial constitutional parent is not sufficient for constitutional protection. Consent of the initial constitutional parent to an additional parent-child relationship is also needed. Both are necessary. A nonparent will not become a constitutional parent, no matter what the quality of his relationship with the child is, absent consent by the constitutional parent that he become a parent. Thus, the constitutional parent may invite others—the sperm donor, grandparents, aunts and uncles, nannies, etc.—into the child's life to serve as caregivers and “family members” without fear

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of the sperm donor in conception of the child); 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, 58 n.4 (2000) (“A semen donor who demonstrates a willingness to assist a lesbian mother in forming a family consisting of herself and the child or herself, her partner, and the child does not demonstrate any commitment, let alone a full commitment, to the responsibilities of parenthood.”); Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, 453 (1999) (“The process of sperm donation is simple, painless, fast, and without risk. Gestational surrogacy, on the other hand, involves a substantial time commitment and the potentially serious health risks associated with pregnancy. These physical and emotional differences should compel a court to find the two processes different enough to justify differential treatment under the law.”).

164. See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 532 (Ct. App. 1986) (biological mother allowed known sperm donor to visit child monthly); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357 (App. Div. 1994).

that the person invited in as a nonparent will become a constitutional parent under law.<sup>165</sup>

## 2. Surrogacy

A surrogate mother becomes pregnant with the intention of carrying and giving birth to a child that she will not raise but who instead will be raised by another individual or couple with whom she has contracted to serve as a surrogate mother.<sup>166</sup> The surrogate mother might become pregnant through artificial insemination, in which case she is both the gestational and genetic mother of the child.<sup>167</sup> I shall refer to this type of surrogate mother as a genetic-gestational surrogate. Or the surrogate mother might have implanted within her an embryo formed in vitro using sperm and the egg of another woman.<sup>168</sup> This Article shall mirror common parlance and refer to the latter type of surrogate as a gestational surrogate.<sup>169</sup>

Legal difficulties might arise between the surrogate mother and the intended parents if the surrogate mother decides either during her pregnancy or after the birth of the child that she would like to be the child's legal mother.<sup>170</sup> This Subpart will explore the constitutional claims for protection of the parent-child relationship of both the surrogate mother and the intended parents where the provider of the egg is not a claimant competing with the surrogate mother for parental rights. This Subpart first will consider such claims where the surrogate is a genetic-gestational surrogate, and then will consider such claims where the surrogate is a gestational surrogate. The next Subpart explores such claims for constitutional protection where the provider of the egg has put forth a claim competing with that of the surrogate mother.

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165. See Berg, *supra* note 39, at 196-97 (arguing that a scientist or physician who assists in the creation of an embryo could not assert a claim to the embryo over the objection of the gamete providers "since the labor theory would not recognize the unauthorized investment").

166. See BLACK'S LAW DICTIONARY 1036 (8th ed. 2004) (defining "surrogate mother" as "[a] woman who carries out the gestational function and gives birth to a child for another"); see also Surrogate Mothers, Inc., Options Available, <http://www.surrogatemothers.com/options.html> (last visited Feb. 9, 2006) (describing the options by which a surrogate might come to carry the child of an intended parent, including artificial insemination (using the sperm of the intended father), artificial insemination by donor, in vitro fertilization/embryo transfer (using the egg of the intended mother), and in vitro fertilization utilizing an egg donor); Growing Generations, For Intended Parents, <http://www.growinggenerations.com/parents> (last visited Feb. 9, 2006) (describing surrogacy options marketed to members of the gay community).

167. Surrogate Mothers, *supra* note 166.

168. *Id.*

169. See *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 4 (Ct. Com. Pl. 2004) ("A gestational surrogate is a woman who carries implanted embryos, created by donor eggs fertilized by the biological father's sperm, in her womb until birth.").

170. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998); *In re Baby M.*, 537 A.2d 1227 (N.J. 1988); *J.F.*, 66 Pa. D. & C.4th at 10-11.



## a. Rights of the Genetic–Gestational Surrogate

Consider first the scenario in which the surrogate mother has been artificially inseminated with the sperm of a man who wishes to raise the resulting child with his partner. The insemination takes place pursuant to a contract that calls for the genetic–gestational surrogate to turn over the child at birth to the biological father and his partner and to terminate any legal rights she might otherwise have with respect to the child. Assume that during her pregnancy the genetic–gestational surrogate decides she would like to breach the surrogacy contract and act as mother to the child she is now gestating. Assume further that the biological father and his partner wish to raise the child on their own and seek to exclude the genetic–gestational surrogate from the child’s life.<sup>171</sup>

Pursuant to the labor-with-consent theory, the genetic–gestational surrogate has a strong claim for constitutional protection of her right to develop and maintain a relationship with the child to whom she will give birth. The constitutional claims of the biological father and his partner are unlikely to succeed. Indeed, the genetic–gestational surrogate likely will have the constitutional authority to exclude the intended parents from the child’s life.

The analysis is somewhat similar to the analysis set out above with respect to artificial insemination and the constitutional claims of the sperm donor versus those of the biological mother.<sup>172</sup> One factual difference between the artificial insemination scenario discussed earlier and the genetic–gestational surrogate scenario is that in the latter scenario all relevant parties intend at the beginning that the “sperm donor” and his partner shall parent the child and the biological mother shall not. But this factual difference with respect to initial intent should not change the result that the biological mother becomes the initial constitutional parent and may exclude the biological father from the child’s life, provided that the genetic–gestational surrogate changes her mind with respect to giving up her rights relating to the child prior to any constitutional rights vesting in the biological father or his partner.<sup>173</sup>

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171. See, e.g., *Baby M.*, 537 A.2d 1227 (presenting essentially these facts); *R.R.*, 689 N.E.2d 790 (presenting similar facts).

172. See *supra* notes 159–65 and accompanying text.

173. Under my theory of the constitutional significance of biological paternity, the sperm provider’s intent to parent his biological child would not by itself give the biological father a constitutionally protected right to establish a relationship with his child. Nevertheless, the intended parent’s intent to parent the child and his setting in motion the events that result in the birth of the child could still be grounds for statutorily holding the intended parent liable for child support if the constitutional parent needed economic assistance raising the child (or if there were no constitutional parent). This would be so even if the intended parent had no genetic connection to the child. See *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) (holding that a man who, with his wife, solicited egg donor and sperm donor to contribute gametes to form an embryo and solicited a gestational surrogate to carry and give birth to a child was the legal father of the child under California law despite his changing his mind and disclaiming any rights or obligations with respect to the child); see also *Johnson*, 851 P.2d at 783 (“In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child’s legal, natural parents

The biological father's contribution of sperm is insufficient parental labor to make him a constitutional parent, even if he contributes the sperm with the intent to parent the child.<sup>174</sup> Nor should his payment of a surrogacy fee or related expenses be seen as parental labor "of a quality at least comparable to the labor invested by the mother in gestating and delivering the child."<sup>175</sup> As argued above, in only the most extraordinary circumstances could a biological father perform sufficient parental labor by the time of the birth of his child to qualify him as a constitutional parent.<sup>176</sup> The same is true with respect to the parenting activities and consequent constitutional rights of the biological father's partner—the other intended parent.

Thus, when the genetic–gestational surrogate changes her mind and decides she would like to void the surrogacy contract and parent the child to whom she will give birth, the child is likely to be without any constitutional parent.<sup>177</sup>

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should best promote certainty and stability for the child.”). If the intended parent met his child support obligations and otherwise labored as a parent to his child, my theory would then provide him with a constitutionally protected right to maintain a relationship with his child.

174. See *supra* notes 159–63 and accompanying text (evaluating a sperm donor's contribution to his biological child as parental labor and concluding that the sperm donor's efforts are not sufficient to give rise to constitutional protection for his right to develop or maintain a relationship with his biological child).

175. See *Baby M.*, 537 A.2d at 1259 (noting the greater sacrifices of the genetic–gestational surrogate “compared to the payment of money, the anticipation of a child and the donation of sperm”); *J.F.*, 66 Pa. D. & C.4th at 5 (case in which gestational surrogate, per her doctor's orders, quit her job and remained on bed rest from July through November and then gave birth to triplets by C-section); see also *supra* notes 120–32 and accompanying text (arguing that a biological father's financial support of the biological mother during her pregnancy ordinarily should not give rise to a claim for constitutional protection).

176. See *supra* notes 125–32 and accompanying text.

177. At this point, the gestational mother has performed labor that would be sufficient to entitle her to constitutional parental status—labor that is sustained and has had a profound impact on the development of the child, but for the fact that she has performed the labor without an intent to parent. This point concerning the importance of performing labor with intent to parent is of little consequence in the context of the instant hypothetical; the gestational mother will perform sufficient labor with intent to parent prior to the birth of the child and prior to anyone else having an opportunity to perform sufficient parental labor to qualify as a constitutional parent. The point assumes greater importance in a context in which an egg donor or a surrogate mother changes her mind and seeks to assert a parental claim, but does so only after she has completed performance of her parental labor (respectively, providing the egg or gestating and giving birth to the child). Thus, for example, although this Article argues that provision of an egg is sufficient parental labor to qualify the provider for constitutional parent status, see *infra* notes 191–96 and accompanying text, the woman who provides an egg with the intent that others will raise any resulting child but later changes her mind and asserts a claim to the child would not be entitled to the status of constitutional parent. See also *infra* notes 185–97 and accompanying text (arguing that an analysis of the competing constitutional claims of the egg provider and the surrogate mother should focus on the question of who first performed sufficient parental labor with the intent to exercise parental authority as constitutional parent and whether the initial constitutional parent intended for the other claimant to act as co-parent when the other claimant performed otherwise sufficient parental labor).

When the genetic–gestational surrogate then labors by gestating and giving birth to the child with the intent to exercise her parental authority as constitutional parent,<sup>178</sup> she thereby becomes the initial constitutional parent.<sup>179</sup> As such, she enjoys the authority to exclude the biological father and his partner from acting as additional parents to her child.<sup>180</sup>

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178. A biological mother might exercise her authority as constitutional parent by parenting her child or by placing the child for adoption. A biological mother who gestates and delivers her child without any intent to raise the child, but instead with the intent to place the child for adoption, does so, therefore, with the intent to exercise her parental authority as constitutional parent.

179. See *R.R. v. M.H.*, 689 N.E.2d 790, 795 (Mass. 1998) (noting that a surrogate mother’s “commitment and contribution [to bringing the child to term] is unavoidably much greater than that of a sperm donor”); Berg, *supra* note 39, at 193–94 (noting that “[t]he time and effort involved in gestating and birthing a child is clearly more lengthy (and likely more strenuous) than that of any of the other parties involved in technological reproduction” but questioning whether these greater efforts by the surrogate should entitle her to a greater property interest in the resulting child).

180. One might argue that the initial constitutional parent in such cases contractually has waived her constitutional parental rights and, for that reason, should lose in a parental rights dispute with, for example, intended parents. A full treatment of the issue of waiver is beyond the scope of this Article. I offer here only my initial thoughts.

Two separate issues with respect to waiver of constitutional parental rights would seem to be critical. First, can the initial constitutional parent effectively waive her constitutional parental rights prior to the birth of her child? Second, can the initial constitutional parent confer constitutional parental status on another by contract prior to the birth of her child? The law of adoption would seem to be helpful for thinking through both issues.

With respect to the waiver of constitutional parental rights, adoption statute restrictions on how soon a biological mother may consent to place her child for adoption seem to be on point. Most adoption statutes do not allow a biological mother to consent to adoption of her child prior to birth of the child. NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., STATE STATUTE SERIES 2004: CONSENT TO ADOPTION 2 (2004), available at <http://naic.acf.hhs.gov/general/legal/statutes/consent.pdf>; see also *Baby M.*, 537 A.2d at 1240 (noting in support of its conclusion that surrogate contract was invalid that “[e]ven where the adoption is through an approved agency, the formal agreement to surrender [the child to the adoptive couple] occurs only after birth”); UNIF. ADOPTION ACT § 2-404(a), 9 U.L.A. 53 (1999) (providing that a valid consent to a child’s adoption may be executed only after the birth of the child); *id.* § 2-404 cmt. (“This section is consistent with the rule in every State that a birth parent’s consent or relinquishment is not valid or final until some time after a child is born. . . . Even the few States, like Washington or Alabama, which permit a consent to be executed before a child’s birth, provide that the consent is not final (i.e., it remains revocable) until at least 48 hours after the birth or until confirmed in a formal termination proceeding.”). *But cf.* NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, *supra*, at 2 (reporting that twelve states allow a father to execute a valid consent to adoption prior to the birth of his child). Indeed, many adoption statutes give to a birth mother a period of time after birth of the child before which her valid consent to adoption may not be given. *Id.* (“29 states require a waiting period [after birth] before consent can be executed.”); see also UNIF. ADOPTION ACT § 2-404 cmt. (“Many States provide that a valid consent may not be executed until at least 12, 24, 48, or, more typically, 72 hours after the child is born.”). Many statutes also provide for an additional period of time after the biological mother has given her consent to adoption during which she might withdraw her consent to the adoption. NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, *supra*, at 3 (“In most States, the law provides that consent may be revoked prior to the entry

of the final adoption decree under specific circumstances or within specified time limits.”); *see also* UNIF. ADOPTION ACT § 2-404(a) (“A parent who executes a consent or relinquishment may revoke the consent or relinquishment within 192 hours after the birth of the minor.”); *id.* § 2-404 cmt. (“Most States provide that a consent or relinquishment is revocable for at least some period of time after being executed, but there are substantial and confusing differences from one State to another with respect to these time periods and with respect to the consequences of revocation for the parent, the child, and the prospective adoptive parent.”). In support of these statutory protections is the notion that the birth mother cannot give truly informed consent to surrender her parental rights prior to the child’s birth, as the birth mother cannot know prior to giving birth how the birth of her child will affect her. *See R.R.*, 689 N.E.2d at 796 (referring to a Massachusetts statute that provides that consent to adoption may not be given prior to the fourth day after the child’s birth and commenting that, by that time, the mother “better knows the strength of her bond with her child”); Cahn, *supra* note 69, at 1150 (“While ensuring stability for the child and her family, the law must also reflect that adoptive families can only exist based upon the relinquishment of the birth parents’ rights, and that this relinquishment can only be fair after the birth parents have had an adequate opportunity for thought and counseling.”). This notion would seem to have force beyond the context of adoption statutes, including in the context of surrogacy agreements. *See R.R.*, 689 N.E.2d at 796 (“Policies underlying our adoption legislation suggest that a surrogate parenting agreement should be given no effect if the mother’s agreement was obtained prior to a reasonable time after the child’s birth or if her agreement was induced by the payment of money.”); Garrison, *supra* note 162, at 898 (“An agreement under which the [genetic–gestational] ‘surrogate’ transfers her interest in the child to another is . . . nothing more than an adoption contract. [Therefore], its legality should be dependent on the parties’ compliance with state adoption requirements . . .”). *But see id.* at 913–14 (arguing for rejection of the parental claims of a gestational surrogate “[b]ecause none of the policy-based exceptions to genetic parentage determination apply to a gestational surrogate”); Shultz, *supra* note 3, at 383 (arguing that “the state of mind, the availability of alternatives, and the opportunity for deliberation free of constraints make the decision of a surrogate different from the decision of a woman who, like many birth mothers who give up a child for adoption, is unwillingly pregnant [and t]he differences make the preconception decision of the surrogate considerably more worthy of deference and enforcement”).

With respect to the transfer of constitutional rights, again the law of adoption would seem to be instructive. Arguably, whenever a parent seeks to abandon her parental status, the state should be involved in the transfer of parental rights. The parent’s desire to abandon her parental rights and obligations raises a red flag indicating that she might not have the child’s best interests at heart and suggesting that the state may need to be involved to ensure that the child’s interests are protected in the transfer of parental rights. This red flag does not appear where a parent who desires to continue to parent her child seeks to invite someone else into the life of the child as a co-parent. *Cf.* Garrison, *supra* note 162, at 918 (“In most states, stepchild adoptions are subject to different rules than unrelated-child adoptions. Evaluation of an adopting stepparent typically is not required both because the biological parent . . . has ‘selected’ the adoptive parent and because the child’s living arrangements will remain constant, whether or not the adoption is finalized.”).

In addition, the labor-with-consent theory of parental rights insists that one must both have consent of the existing constitutional parent and perform sufficient parental labor to become a constitutional parent. Ordinarily, no one other than the gestational mother and the egg provider can perform sufficient labor by the time of a child’s birth. *See supra* notes 46–51 and accompanying text; *infra* notes 191–96 and accompanying text. Therefore, it would seem that no one other than a genetic or gestational mother could be a constitutional parent at the child’s birth. Even if the mother could give up her constitutional parental rights prior

## b. Rights of the Gestational Surrogate

Consider next the scenario in which the surrogate mother has had implanted in her an embryo created in vitro utilizing the sperm of a man who wishes to raise the resulting child with his partner and an egg provided by another woman who is not the partner of the biological father and who does not intend to parent the resulting child.<sup>181</sup> Thus, the surrogate mother is not the genetic parent of the child. The implantation takes place pursuant to a contract that calls for the gestational surrogate to turn over the child at birth to the biological father and his partner and to terminate any legal rights she might otherwise have with respect to the child. Assume again that during her pregnancy the gestational surrogate decides she would like to breach the surrogacy contract and act as mother to the child she is now gestating. Assume further that the biological father and his partner wish to raise the child on their own and seek to exclude the gestational surrogate from the child's life.<sup>182</sup>

Under these facts, the labor-with-consent theory would dictate that the gestational surrogate becomes the initial constitutional parent to the child. The gestational surrogate becomes the initial constitutional parent by being the first person to perform sufficient parental labor with the intent to parent the child or otherwise exercise parental authority as the constitutional parent.<sup>183</sup> As the initial constitutional parent, the surrogate mother has the right to exclude both the biological father and his partner from parenting the child.

The fact that the gestational surrogate has no genetic connection to the child does not affect the analysis.<sup>184</sup> The labor-with-consent theory places great emphasis on parental labor and on the consent of an existing constitutional parent to allow another to co-parent her child. A genetic link to a child is relevant under this theory only to the extent that it may signify consent of the initial constitutional parent that the biological father be allowed to co-parent her child. The genetic link is not necessary for the existence of a constitutionally protected parent-child relationship.

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to her child's birth, she could not confer those constitutional rights on another party prior to the child's birth. The other party must first perform sufficient parental labor to earn that constitutional protection.

181. For a discussion of the extent to which the law should allow the commodification of human oocytes, see Baum, *supra* note 161, at 165 (concluding that "the benefits of commodification of oocyte donation—namely increased supply and the resulting enhancement of procreative liberty—outweigh any associated costs").

182. See *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 3–7 (Ct. Com. Pl. 2004) (presenting essentially these facts but where surrogate decided shortly after the birth of triplets that she wished to parent the children).

183. See *id.* at 24 (commenting that gestational surrogate's "every decision prior to the[] birth [of triplets] has affected them—health, nutrition, prenatal care, etc.").

184. See *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 23, 24 (App. Div. 2000) ("It is apparent from the foregoing cases that a 'gestational mother' may possess enforceable rights under the law, despite her being a 'genetic stranger' to the child.").

### 3. Egg Donation—Provision

#### a. Rights of the Gestational Mother when the Egg Provider Claims the Status of Constitutional Parent

Consider a third and final scenario involving a surrogate mother: the surrogate mother has implanted in her an embryo created in vitro utilizing the sperm of a man who wishes to raise the resulting child with his partner and an egg provided by that partner—a woman who also intends at the time she provides the egg to raise the resulting child. The implantation takes place pursuant to a contract that calls for the gestational surrogate to turn over the child at birth to the biological father and his partner and to terminate any legal rights she might otherwise have with respect to the child. Assume again that during her pregnancy the gestational surrogate decides she would like to breach the surrogacy contract and act as mother to the child she is now gestating.

These facts are essentially those presented to the California Supreme Court in the landmark case of *Johnson v. Calvert*.<sup>185</sup> In *Johnson*, the California Supreme Court considered the egg provider's and the gestational surrogate's competing claims to be declared the legal mother of a child under California law.<sup>186</sup> The court focused on the intention of the parties, at the beginning of their undertaking to produce a child, with respect to who would parent that child:

We conclude that although the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, 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.<sup>187</sup>

The court found, therefore, that the provider of the egg, who intended to raise the child conceived by use of that egg, was the legal mother of the child, and the surrogate mother, who agreed to act as surrogate and who then carried and gave birth to the child, was not the legal mother under California law.<sup>188</sup> The court further held that California's statute, as so interpreted, did not violate the federal or California constitutional rights of the gestational surrogate.<sup>189</sup>

Under the labor-with-consent theory, the California Supreme Court reached the correct result in *Johnson* given the facts of that case. Indeed, a claimant's intent to act as parent (as well as a claimant's intent to allow another to act as parent) might well be critical to the decision as to who shall have parental rights. The analysis of the constitutional claims of the egg provider and the surrogate mother in the *Johnson* scenario, however, should focus on the question of who first performed sufficient parental labor with the intent to exercise parental authority as constitutional parent and whether the initial constitutional parent

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185. 851 P.2d 776, 778 (Cal. 1993).

186. *Id.* at 777–78.

187. *Id.* at 782.

188. *Id.*

189. *Id.* at 778, 785–87.

intended for the other claimant to act as co-parent when the other claimant later performed otherwise sufficient parental labor.

In the *Johnson* scenario, the provider of the egg is the initial constitutional parent. She is the first person to perform sufficient parental labor with the intent to exercise parental authority as constitutional parent. First, it is important that the egg provider did not “donate” the egg in the sense of making a present of the egg. She provided the egg so that it could be fertilized with the sperm of her partner, be implanted in the surrogate, and develop into a child that the egg provider and her partner would raise.<sup>190</sup> The egg provider performed her parental labor in the process of creating the child with the intent to parent.

Second, the provision of an egg should be deemed sufficient parental labor to qualify an intended parent as the initial constitutional parent under the labor-with-consent theory. Provision of an egg is less comparable to the biological father’s provision of sperm and more comparable to a biological mother’s efforts gestating and giving birth to a child. Egg provision typically involves the provider’s ingesting or injecting various medications and hormones over a period of several weeks to manipulate her ovulation cycle (synchronizing it with the recipient) and stimulate her ovaries to produce a greater number of mature eggs.<sup>191</sup> This is followed by retrieval of the eggs from the ovaries by needle aspiration, performed while the provider is under anesthesia.<sup>192</sup> During the egg provision process, the provider risks side effects, such as hot flashes, headaches, fatigue, allergic sensitivity, breast tenderness, abdominal bloating, mood swings, temporary weight gain, cramping, and spotting.<sup>193</sup> She also risks ovarian hyperstimulation syndrome, which causes enlargement of the ovaries and accompanying abdominal pain.<sup>194</sup> In sum, provision of the egg is a physically invasive, labor-intensive process that can be painful and has the potential in rare cases to lead to severe and long-term medical complications.<sup>195</sup> Thus, egg provision is of a quality comparable to the biological mother’s efforts carrying and giving birth to the child.<sup>196</sup> The egg provider and intended parent in *Johnson*,

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190. *Id.* at 778.

191. Pacific Fertility Center, *The Four Stages of Egg Donation or In Vitro Fertilization–Embryo Transfer (IVF–ET)*, [http://www.infertilitydoctor.com/donor/egg\\_donor\\_stages.htm](http://www.infertilitydoctor.com/donor/egg_donor_stages.htm) (last visited Feb. 9, 2006).

192. *Id.*

193. *Id.*

194. Claudia Kalb, *Ethics, Eggs and Embryos*, NEWSWEEK, June 20, 2005, at 52 (reporting that two-to-five percent of egg donors suffer from ovarian hyperstimulation syndrome as a result of the process); Pacific Fertility Center, *supra* note 191.

195. See Baum, *supra* note 161, at 117–18 (detailing the oocyte donation process and concluding that “there is certainly the potential for adverse consequences—both for the donor and the recipient—including anesthesia complications, hemorrhage, infection, ovarian hyperstimulation, and even death, although serious complications are exceedingly rare”); see also *Johnson*, 851 P.2d at 790 (Kennard, J., dissenting) (“To undergo superovulation and egg retrieval is taxing, both physically and emotionally; the hormones used for superovulation produce bodily changes similar to those experienced in pregnancy, while the surgical removal of mature eggs has been likened to caesarian-section childbirth.”).

196. See *Johnson*, 851 P.2d at 788 (Kennard, J., dissenting) (“Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less

therefore, became the initial constitutional parent when she labored to provide the egg to be used in conceiving the child.

Third, the initial constitutional parent in *Johnson*—the egg provider—did not consent to the gestational surrogate becoming a co-parent to her child. Under the labor-with-consent theory, parental labor plus consent of the existing constitutional parent is necessary for a nonparent to become an additional constitutional parent. Labor without such consent, no matter how parental in nature, is not sufficient. The labor that the gestational surrogate performs gestating and delivering the child under circumstances such as those in the *Johnson* scenario, therefore, would not give rise to a constitutionally protected parent-child relationship between the gestational surrogate and the child.

Under the labor-with-consent theory, it is possible that both the genetic mother of a child and the separate gestational mother of that child would be constitutional parents to the child at her birth.<sup>197</sup> But this would require that, unlike in *Johnson*, the egg provider provide the egg for conception and implantation after fertilization with the intent that she and the gestational mother would co-parent the child together. A lesbian couple might enter into this relationship so that each could have a biological connection to their child—the first partner having a genetic relationship with the child and the second partner having a gestational relationship with the child. The egg provider would become the initial constitutional parent when she labors to provide the egg for the in vitro fertilization and the subsequent implantation of the embryo into the second partner. The gestational mother would become the second constitutional parent when she is implanted with the embryo and has the consent of the first constitutional parent to become a co-parent. The gestational mother in such a case is by no means a surrogate mother, for she does not become pregnant with the intent of carrying and giving birth to a child that she will not parent.

#### b. Disputes Concerning the Disposition of Frozen Embryos

Modern technology makes it possible to cryogenically preserve embryos created in vitro and later thaw and implant the embryos in the gestational mother.<sup>198</sup> It may be useful to cryogenically preserve embryos for several reasons.<sup>199</sup> First, a woman may anticipate the lessening or loss of her ability to produce viable eggs but may not be ready, perhaps for medical reasons, to attempt a pregnancy. The harvesting of her eggs and frozen storage of embryos created

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substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist.”).

197. See *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 25 n.1 (App. Div. 2000) (“Despite the longstanding tradition that a child cannot have more than one mother and one father at a time, some exceptions to that firm rule have recently begun to develop. . . . It is certainly conceivable that under some other circumstances [than those presented by the instant case], we would have to treat both genetic and gestational mother as parents, at least for certain purposes.”).

198. See *Davis v. Davis*, 842 S.W.2d 588, 592 (Tenn. 1992) (describing the process of cryogenic preservation and later implantation).

199. See Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 60–63 (1999) (listing several potential benefits of cryogenic preservation of embryos).



from them might enable her to bear a child at a later date.<sup>200</sup> Second, the success rate in achieving a pregnancy after implantation of an embryo in the woman's reproductive track is far from perfect. Several attempts at embryo implantation may be needed to achieve a pregnancy.<sup>201</sup> Because the process of extracting ova from a woman can be painful and involves risk of medical complications, it is sometimes desirable to harvest more eggs during the process than will be utilized immediately for fertilization and implantation. The extra fertilized eggs can be frozen and utilized at a later date if an additional attempt at fertilization is needed.<sup>202</sup>

Disputes have arisen between the gamete (egg or sperm) providers about the disposition of frozen embryos.<sup>203</sup> Typically, such a dispute arises after fracture of the partnership between the gamete providers. Given fracture of their relationship, the gamete providers might come to disagree about whether the frozen embryos should nevertheless be available for use by one of the gamete providers to attempt to produce a child, should be destroyed, or should be donated to another person or couple who wish to utilize a frozen embryo to bring to life a child they will raise.<sup>204</sup>

The limited case law on point reveals a deep division in the courts over how to resolve disputes concerning the disposition of frozen embryos.<sup>205</sup> The

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200. *Id.* at 61. Fertilization of a previously frozen egg for implantation is much less likely to result in a successful pregnancy than is implantation of a previously frozen embryo. Freezing of unfertilized eggs, therefore, is not standard practice. *J.B. v. M.B.*, 783 A.2d 707, 709 (N.J. 2001) ("Egg cells must be fertilized before undergoing cryopreservation because unfertilized cells are difficult to preserve and, once preserved, are difficult to fertilize."); Coleman, *supra* note 199, at 61 n.25; Raina Kelley, *Going Straight for IVF*, NEWSWEEK, July 4, 2005, at 55 ("Doctors have been freezing sperm and embryos for years but haven't had much success at fertilizing once frozen eggs.").

201. *See* Pacific Fertility Center, *supra* note 191 ("An important factor in improving the success rate of IVF has been the transfer of more than one embryo . . . because a high percentage of embryos do not implant into the recipient's uterus.").

202. *Davis*, 842 S.W.2d at 592; Coleman, *supra* note 199, at 60–61; *see also J.B.*, 783 A.2d at 709 ("Cryopreservation of unused preembryos reduces, and may eliminate, the need for further ovarian stimulation and egg retrieval, thereby reducing the medical risks and costs associated with both the hormone regimen and the surgical removal of egg cells from the woman's body."); *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998) ("Cryopreservation serves to reduce both medical and physical costs because eggs do not have to be retrieved with each attempted implantation.").

203. *See infra* note 205 (citing several cases relating to such disputes).

204. For an argument that because "contracts for the disposition of frozen embryos undermine important societal values about families, reproduction and the strength of genetic ties" and because a "central aspect of procreative freedom [is] the right to make contemporaneous decisions about how one's reproductive capacity will be used" the law should respect the right of the gamete providers to make contemporaneous decisions about the disposition of frozen embryos regardless of any prior existing agreement, *see* Coleman, *supra* note 199, at 56–57.

205. *See, e.g., A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057–58 (Mass. 2000) (holding that public policy dictates that even an unambiguous agreement between husband and wife regarding the disposition of frozen embryos should not be enforced if the effect would be to compel one party to become a parent against his will); *J.B.*, 783 A.2d at 719 (holding that agreements relating to the disposition of frozen embryos entered into at the time of in vitro

discussion above concerning the significance of egg provision<sup>206</sup> suggests the proper resolution of a “custody” dispute over frozen embryos when the gamete providers cannot agree on their use. The egg provider has performed sufficient parental labor that she has become the initial constitutional parent. The effort, pain, and risk of physical injury that she has endured to produce the eggs are of a quality comparable to a mother’s efforts gestating and delivering a child. In contrast, typically, the sperm provider has not performed sufficient parental labor that would entitle him to the status of constitutional parent.<sup>207</sup> Therefore, the egg provider should have the constitutional right to decide the fate of the frozen embryos, even over the objection of the sperm provider.<sup>208</sup>

### CONCLUSION

The critical variables that give rise to constitutional protection for parental rights are consent of any existing constitutional parent and performance of parental labor that is sustained and has a positive and profound impact on the development of the child. Biological paternity is not in itself a critical factor. Rather, the constitutional function of biological paternity is to help courts reach correct conclusions with respect to the first of these elements—consent of an

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fertilization should be enforced “subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos”); *Kass*, 696 N.E.2d at 180 (holding that “[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them”); *Davis*, 842 S.W.2d at 604 (holding that a predispute agreement between gamete providers concerning the disposition of frozen embryos should be enforced, and if no such agreement exists, the court should resolve the dispute by weighing the relative interests of the gamete providers); *see also* Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002) (enforcing contract concerning disposition of frozen embryos entered into by intended father, whose sperm fertilized the eggs, and intended mother, who was not biologically related to the embryos).

206. *See supra* notes 191–96 and accompanying text (discussing the ova extraction process and concluding that the nature of the process qualifies it as significant parental labor).

207. *See Davis*, 842 S.W.2d at 601 (commenting that “the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men [and i]n this sense, it is fair to say that women contribute more to the IVF process than men” yet holding that in a dispute over the disposition of frozen embryos, the egg provider and the sperm provider “must be seen as entirely equivalent gamete-providers” in light of, *inter alia*, “the relative anguish of a lifetime of unwanted parenthood”).

208. *But see* Berg, *supra* note 39, at 189–91 (questioning whether, in applying labor theory to the claims for control of a frozen embryo, the egg provider contributes significantly more to the creation of the embryo than the sperm provider does when one considers not just physical investment but also psychological and emotional investment); John A. Robertson, *Resolving Disputes over Frozen Embryos*, HASTINGS CENTER REP., Nov.–Dec. 1989, at 7 (criticizing the “sweat-equity” approach to resolving disputes over frozen embryos, which would provide the egg provider greater control over the embryo in light of her greater physical contribution to creation of the frozen embryo). For an argument that courts should consider the declining fertility of a woman as she ages in deciding competing claims to frozen embryos, *see* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063 (1996).

existing constitutional parent to allow another to co-parent her child. In particular, the constitutional significance of biological paternity is that it usually signifies the implicit consent of the biological mother to allow the biological father to co-parent her child. The consent of the biological mother matters because she is the initial constitutional parent. Her maternal labor gestating and giving birth to the child earns her this constitutionally protected status.

As the initial constitutional parent, the biological mother enjoys the right to control access to her child including the right to determine who else shall be allowed to become a parent of the child. She may withdraw her implicit consent to the biological father's parenting of her child at any time prior to the vesting of the status of constitutional parent in him. The biological father's rights as constitutional parent vest only after he performs sufficient parental labor comparable to the biological mother's efforts carrying and giving birth to the child. If the biological father accepts the mother's invitation and functions as a parent for the child, the Constitution will protect his right to maintain a parental relationship with his child.

This labor-with-consent theory of the constitutional significance of biological paternity makes more certain the resolution of constitutional claims by a biological father to be allowed to develop or maintain a relationship with his biological child. The theory can also expand to govern the resolution of claims by functional parents and parties to assisted-reproduction technology. Constitutional protection for a parent-child relationship arises from parental labor. But this parental labor by a nonparent is constitutionally relevant only if any existing constitutional parent has consented to the creation of another constitutional parent-child relationship. When the constitutional parent invites a nonparent into the child's life to serve as a co-parent and when the nonparent in response labors as a parent to the child, the Constitution will protect the new parent's right to maintain a relationship with the child.