MAKING SOME SENSE OF THE CONSTITUTIONAL FAMILY

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ABSTRACT

This essay explores the Supreme Court's approaches to family definition. It unpacks how the Court has defined family differently in different contexts, and it argues that what can appear to be a confused doctrine actually makes some sense once one realizes that how the Court defines family is related to why the State is recognizing family at all. When the law recognizes family for any purpose, it must define it, either with reference to some extra-legal determinant like genetics, a pure legal construction like marriage, or a case-by-case assessment of lived experience like function. The Court has relied on all three of these mechanisms to define family, but it has almost never explained why it uses different definitions at different times. This essay examines the Court's jurisprudence and begins to address the question of why it has used different definitions of family in different contexts. While much of the Court's reasoning in these cases either never made sense or no longer makes sense given the evolution of technology and social norms, many of the Supreme Court's seemingly confused results can be justified if one takes time to appreciate the different contexts in which the State has defined family.

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INTRODUCTION

This essay explores the Supreme Court's approaches to defining family It first unpacks the different ways the Court has defined family. Then, it suggests that what appears to be a confused jumble of definitions make some sense if understood in light of the relation between *how* the Court defines family and *why* the State is recognizing family at all.

In the constitutional jurisprudence of the family, the Supreme Court has protected families as units, protected some—but not all—people's right to claim family membership based on genetic connection, and struck down occasional State attempts to limit family membership. At the same time however, it has paid exceedingly little attention to why it has allowed different definitions of family in distinct contexts and rarely even acknowledged that it is defining family differently in different contexts. Unpacking the different definitions of family and the potential reasons for those differences helps shed light on why the constitutional law of the family looks as confused as it does.

Most of the confusion in this area started in the mid-1960s, when legal aid lawyers, civil rights attorneys, welfare rights attorneys, and civil libertarians collectively began challenging states' ability to condition rights and benefits on family membership.[1] The initial push focused on the ability of states to treat marital and nonmarital children differently.[2] To these challenges were added the claims of unwed genetic fathers, who argued the State could not treat unwed genetic fathers differently than married fathers or mothers.[3] In both sets of those cases, the plaintiffs implicitly argued that the constitution demanded that genetic connection, not marriage, be the root of family definition.[4]

The challenge to marriage as the gateway to defining family legally may seem inevitable today. Most of the justifications for treating nonmarital children differently than marital children and for preventing unwed fathers

1. For a thorough discussion of the strategies employed by these different interest groups, see Serena Mayeri*, Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377 (2017).

2. *See generally* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1651-1673 (2015) (discussing most of the cases brought by nonmarital children challenging the distinction between marital and nonmarital children in depth).

3. *See infra* Part IC.

4. *Id.*; *See also* Baker, *supra* note 2.

from securing parental rights were rooted in ill-conceived and demonstrably false beliefs that punishing the results of nonmarital sex would help deter nonmarital sex.[5] The reasons the states gave for defining family with reference to marriage were entirely unpersuasive.[6] But that hardly means that the only legitimate way for the state to define family is with reference to genetics.

Indeed, in the 1970s, other advocates began to push claims that the state could not use notions of the traditional nuclear family to regulate household occupancy.[7] People have a right to choose with whom they live, these arguments went, and the state can only regulate those choices to the extent necessary to protect public health and welfare.[8] These cases relied mostly on a functional understanding of family; people who act as a family have a right to be treated as a family, and individuals have a right to choose their family.

The wave of family-related advocacy mostly came to an end by the end of the 1980s, leaving the constitutional status of family definition in considerable disarray.[9] As Part I will explain, constitutionally, genetic connection by itself gives some children the right to establish paternity in a genetic father for purposes of child support, but genetic connection without more does not give a genetic father the right to establish parental status. The state can distribute intestacy and social security survivor's benefits to marital children and not their genetic siblings, though it may have to distribute social welfare benefits to nonmarital children who are living with (functioning as a family with) the insured. One does not necessarily have a right to live with whomever one wants to function as a family with, but the State is limited in the extent to which it can tell people who are legally recognized as a family relation that they cannot live together. In prohibiting

5. See Baker, *supra* note 2 at 1653-54 (discussing weakness of states' morality arguments).
6. *Id.*
7. *See infra* Part IF.
8. *Id.*
9. Family definition has also been an issue in the immigration context. For the most part, these cases have involved claims to parental status based on some combination of genetic connection and function. The resolution of those cases should, arguably, be analyzed as analogous to the claims of unwed genetic fathers. *See infra* Parts IC and IID. The same sex marriage equality litigation built on the family definition cases only tangentially. Most of the marriage equality litigation focused on how same sex couples were just like opposite sex couples and therefore had an equality claim to be treated as opposite sex couples. Their claims were based on a very traditional understanding of how the state should recognize legal family, through marriage.

a city from zoning out a grandmother and two of her grandchildren with whom she lived, the Court suggested that any attempt by a State to define family must be carefully scrutinized, famously holding that a statute would trigger extra scrutiny because it "slic[ed] deeply into the family itself."[10]

Requiring such scrutiny suggests an extra-legal definition of family that can act as a constraint on state definitions of family, but that extra-legal definition is precisely what the Court has refused to provide. In practice, the Court has accepted different definitions family in different contexts without acknowledging that it is doing so. When the law recognizes family for any purpose, it has to define it, either with reference to some extra-legal determinant like genetics, or a pure legal construction like marriage, or a case-by-case assessment of lived experience like function.

Part I of this essay unpacks the Supreme Court cases in which the definition of family has been challenged, including claims by genetic children to name a father for purposes of child support and government benefits, claims by genetic fathers to be named as father in order to secure parental rights, claims by genetic children to shares of an intestate's estate, and claims of a variety of groups to share a household as a family. Because most of these challenges involved the parent-child relationship, this article will confine itself to an analysis of that particular relationship. What emerges from a survey of the constitutional case law of family is a jumble of parent-child definitions, and confusion about when, constitutionally, the State must use genetic connection to define family, when it can use function to define family, and when it can defer to extant legal designations of family without worrying about genetics or function.

Part III then analyzes why the different ways the Supreme Court defined family can (sometimes) be justified in context. Once one realizes that the State may have different reasons for recognizing family, the finding that states define it differently in different contexts makes much more sense.

10. "East Cleveland has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . When a city undertakes such intrusive regulation of the family . . . the usual judicial deference is inappropriate." *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977) (plurality opinion).

I. THE CONSTITUTIONAL LAW OF FAMILY DEFINITION

A. Parental Autonomy

The constitutional importance of the family first surfaced in the progressive era when the Supreme Court held that the constitutional right to "liberty"—found in the Fourteenth Amendment—included the right to "establish a home and bring up children" without government interference.[11] Despite the subsequent demise of economic liberty, which was developed at the same time as family liberty,[12] restrictions on the State's ability to interfere in the family have remained intact.[13]

For instance, in the parental context, the Court has consistently protected rights of parents to educate and socialize their children as they choose,[14] and insisted that States must show deference to parents before interfering on behalf of any children. [15] In these cases, and others, the Court has provided some guidance on why it views family autonomy as important. In *Meyer v. Nebraska*, the Court suggested that affording parents freedom to raise their children as they choose promotes pluralism because it facilitates multiple ways of socializing children.[16] In *Moore v. City of East Cleveland*, the Court suggested that the family must be protected because "[i]t is the through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[17] In *Smith v. OFFER*, the Court explained that "the importance of the familial relationship to the individuals

11. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

12. *See West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (upholding minimum wage law for women and presaging Supreme Court's acceptance of government regulation of economic markets).

13. *See Pierce v. Soc'y Of Sisters*, 268 U.S. 510 (1925) (recognizing right to send one's children to parochial school); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) ("It is cardinal [to] us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation of obligations that the state can neither supply nor hinder."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing right of Amish parents to be exempt from mandatory public schooling of teenagers).

14. *See generally* Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412, 437-443 (2022) (discussing the constitutional right to parental autonomy).

15. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (finding parents are entitled to a presumption that they act in the child's best interest); *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745, 746 (1982) (holding the state must prove parental unfitness by clear and convincing evidence before it moves to terminate parental rights).

16. *Meyer*, 262 U.S. 390, 402 (1923) (contrasting American respect for individualism with Plato's ideal of a homogenized citizenry).

17. *City of East Cleveland*, 431 U.S. at 503-04 (citation omitted).

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 'promot[ing] a way of life' through the instruction of children."[18]

Notably, the original family autonomy cases are silent on what constitutes family.[19] It was not until the 1960s that the Supreme Court was asked repeatedly to grapple with the question of how States should be allowed to define family. As suggested, there are three important variables that circulate in most constitutional attempts to define family: formality[20], genetic connection, and function.

B. Child Support and the Right to a Genetic Family

Until the late 1960s, States had considerable freedom to define fatherhood solely with reference to the legal formality of marriage. Marriage assigns paternity to the spouse of the person who gives birth. This marital presumption of paternity was for a long time legally irrebuttable and remained practically difficult to rebut until the advent of reliable genetic testing.[21] Children born to unwed mothers often had no legal father.

In the nonmarital children cases, the Supreme Court repeatedly held that states were not necessarily free to assign nonmarital children only one parent.[22] The Court reasoned that nonmarital children were entitled to two parents because marital children had two parents.[23] As will be clarified below, various caveats make these holdings complicated, but the Court was

18. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 US 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 US 205, 231-33 (1972)).

19. One of the "parents" in the parental autonomy cases was the legal guardian of her niece, the child at the center of the litigation. The statute at issue treated parents, guardians and custodians alike and so did the Court in its analysis, though the opinion refers to rights of parents, not guardians. *See Prince*, 321 U.S. 158, 159-161 (1944). In a later case brought by adults claiming rights as parents notwithstanding having no formal label as such, the Court conceded for the sake of argument that foster parents might have a claim based on function, but readily subordinated their claim to the rights of the legal parent. *Org. of Foster Fams.*, 431 U.S. at 853.

20. By formality, I mean an official legal action delineating family (i.e., a marriage or birth certificate or some other legal document indicating a formal family relationship). This is what the Court seemed to rely upon in family autonomy cases.

21. *See* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 22-26 (2004) (discussing history of paternity law and problems with proof).

22. See generally, Baker, *supra* note 2 at 1651-1673 (discussing "illegitimacy" cases).

23. See *e.g.*, *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (suggesting that nonmarital children should have the same right marital children do).

particularly emphatic that states were not free to assign children only one parent for purposes of child support.[24] When a Texas statute declared that "a natural father has a continuing and primary duty [to support his children]," but prohibited nonmarital children from suing to enforce that duty, the Court invalided the provision barring nonmarital children from suing.[25] When Texas tried to snub the Supreme Court's holding by imposing a one-year statute of limitations on nonmarital children's right to sue, the Court readily struck that limitation down, finding that the opportunity given was little more than "illusory."[26] The Court simultaneously held that the State was not required to make nonmarital children's rights "coterminous with those accorded legitimate children," because of the problems associated with proving paternity.[27] Soon after, in *Clark v. Jeter*, the Court invalidated a longer, six-year statute of limitations as well.[28]

For purposes of this article, what is important about these child support cases is how readily the Supreme Court embraced a genetic understanding of parenthood. In the first two cases, *Gomez v. Perez*[29] and *Mills v. Hablutzel*,[30] Texas did not define what it meant by "natural" father. If what it meant was genetic father, as the Court seemed to think, then Texas' continued use of the marital presumption of paternity should have been suspect. The Court either did not realize or ignored the way the marital presumption relies on a legal formality—marriage—not genetics to define paternity. Apparently, the Court assumed that natural fathers were genetic fathers even though most of the legal fathers in Texas did not have their paternity determined by genetics.[31] Thus, the Court held that if Texas was going to hold natural fathers to a duty of support, it was not free to define natural father with reference to marriage, even though it defined most fathers' paternity with reference to marriage.[32]

24. See *infra* text accompanying notes 26-30.
25. *Perez*, 409 U.S. 535, 536 (1973).
26. *Mills v. Habluetzel*, 456 U.S. 91, 97 (1982).
27. *Id.*
28. *Clark v. Jeter*, 486 U.S. 456 (1988). The U.S. Congress effectively mooted this issue in 1984, when it conditioned federal support for children on states establishing an eighteen-year statute of limitations for child support. Congress required all states to give all children the right to sue for child support up until the time that support was no longer owed. 42 U.S.C. § 666(a)(5)(A)(i).
29. *Perez*, 409 U.S. at 536.
30. *Habluetzel*, 456 U.S. at 91 (1982).
31. See *infra* note 65 (in 1970, 89% of children born in the Unite4d States were born to married mothers and thus had their paternity determined by the marital presumption—a legal formality).
32. *Id.*

None of the alleged fathers in the child support cases had functioned as fathers or taken any legal steps to secure that status. Family status was being imposed on them because there was a link between their sexual activity and the birth of a child, and the Court granted the right to impose that family status in the child produced.

Left unaddressed in the Court's analyses in these cases was whether it was permissible to keep using marriage as the primary legal formality indicating parenthood. Also left unaddressed by the Court in the nonmarital children cases was whether unwed genetic fathers have a right to establish family status in their genetic children in the same way that genetic children of unwed mothers have a right to establish family status in their genetic fathers. It was in a later string of cases, known as the "unwed father cases," that the Supreme Court answered those questions in the negative, thus solidifying the idea that the Constitution only sometimes requires a genetic definition of family.[33]

C. Nonmarital Fathers' Rights and the Relevance of Function (and some Formality)

As the constitutional challenges of children of unwed mothers tapered off in the late 1970s, the challenges of unwed genetic fathers picked up. The first unwed genetic father to assert a constitutional right to family status was Peter Stanley from Illinois.[34] Stanley had lived with his three genetic children most of their lives, but he had never married their mother. When their mother died, Illinois law—presuming an unwed genetic father to be unfit—allowed the State to assume custody of the children. Stanley challenged that presumption. The Supreme Court, after finding that Stanley had "sired and raised"[35] his children, held that Stanley had a constitutional right to a hearing at which the State would have to prove his unfitness before the children could be taken as wards of the State.[36] The combination of his genetic connection and his functioning as a father ("siring and raising"), entitled him to the constitutional right of fatherhood.

33. See *infra* Part IC.
34. *Stanley v. Illinois*, 405 U.S. 645 (1972).
35. *Id.* at 651.
36. *Id.*

Several years later, Leon Quilloin, a genetic father who had not lived with his child, tried to secure the same kind of constitutional rights as a father that Mr. Stanley had.[37] Mr. Quilloin had visited the child "on many occasions" and provided "gifts and toys."[38] When the mother moved to have her new husband adopt the child, Mr. Quilloin moved to legitimate the child. A Georgia court found that legitimation would not be in the child's best interest. In denying Quilloin a constitutional right to anything more than a legitimation proceeding governed by a Best Interest determination, the Supreme Court noted that Quillloin had never sought legal parental status or custody, and granting Quilloin paternal status would disrupt "a family unit already in existence."[39] In other words, the Court found that the absence of legal formality and the existence of an alternative functional family arrangement overrode whatever relevance genetics might have to family status. The Court acknowledged that Quillloin would have been responsible for child support if the mother or child had sued him for such,[40] but their rights to establish family status for purposes of child support did not give him a right to establish family status based on genetics.

The Court also dismissed Quilloin's claim that, as an unwed father, he should be entitled to the same rights as a wed father because Quilloin

> ha[d] 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 [. . . .] In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage.[41]

In this passage the Court seems to find that a marital father functions as a father simply by being married to the mother. This is an odd understanding of "supervision, education, protection or care."[42] It seems more likely that

37. *Quilloin v. Walcott*, 434 U.S. 246 (1978).
38. *Id.* at 251.
39. *Id.* at 255.
40. *Id.* at 256 ("[A]ppellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have been.").
41. *Id.* at 255.
42. *Id.*

the Court did not care about function if a legal formality was already in place. Marital fathers can be granted parental rights even if they have not functioned as parents.

One year later, another unwed genetic father, Abdiel Caban, also argued that the Constitution protected his right to block the adoption of his genetic children by another man. Caban had lived with the children from their birth until the oldest was four years old, but he and the mother had never married.[43] Additionally, Caban was listed as the father on the children's birth certificates—a legal formality)—and had "[t]ogether with [the mother], contributed to the support of the family."[44] Caban did not claim that the combination of his genetic connection and functioning as a father made him similarly situated to a marital father. Instead, he made a sex discrimination claim, arguing that the combination of his genetic connection and his functioning as a father made him similarly situated to the mother.[45] The Court agreed.[46] Caban may have succeeded because he abandoned the marital/nonmarital distinction that had proved critical when children were making claims to family definition, but was not persuasive to the Court when men were making claims to family definition.

In the following decade, two more genetic fathers made comparable constitutional claims to parental status, Jonathan Lehr[47] and Michael H.[48] Lehr claimed that his genetic connection entitled him to the family status that would allow him to block the adoption of his genetic child by another man.[49] He had visited the child in the hospital right after birth. According to Lehr, the mother successfully avoided him after that and did not let him maintain a relationship with the child.[50] The Court found no constitutional right to fatherhood rooted in genetic connection alone, even though the child in that case clearly would have had the right to sue Lehr in paternity and

43. *Caban v. Mohammed*, 441 U.S. 380, 382 (1979). Caban was married to someone else for most of that time. *Id*.

44. *Id*. The role of legal formality in the *Caban* decision is unclear. A name on a birth certificate can constitute proof of parentage in some states. *See, e.g., What is Considered Proof of Parentage*, MICH. CIV. SERV. COMM'N, https://www.michigan.gov/mdcs/disability-gateway/dmu/faqs/parental-care-faqs/what-is-considered-proof-of-parentage#:~:text=Proof%20of%20parentage%20can%20be,adoption%20or%20foster%20care%20documentation.

45. *Id.* at 256.

46. *Id.*

47. *Lehr v. Robertson*, 463 U.S. 248 (1983).

48. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

49. *See Robertson*, 463 US at 250.

50. *Id.* at 269.

despite the fact that the mother inhibited his ability to function as a father.[51] The Court distinguished *Caban* by highlighting that Caban had functioned as a father.[52]

Five years later, an unwed genetic father named Michael H., who had lived intermittently with his genetic child, Victoria, claimed that both a functional and genetic relationship gave him a constitutional right to parental status.[53] A guardian ad litem brought a comparable claim on behalf of Victoria, arguing that she had a right to establish fatherhood in Michael H.[54] The mother was and had been married to another man during the entirety of her affair with Michael, which meant Victoria had a legal father, just not Michael.[55] In a plurality opinion, the Supreme Court held that California was free to vest fatherhood in a marital father, even if it meant excluding from family status a genetic father who had a relationship with the child.[56] A majority of the Court held that neither the genetic father nor the child had a constitutional right to establish legal fatherhood based on genetics.[57]

In the unwed father cases, the Court, without acknowledging that it was doing so, answered at least some of the questions left unaddressed in the nonmarital children cases. Genetic fathers do not necessarily have the rights that genetic children have to establish family based on genetics, and marital

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51. *Id.* at 268.

52. *Id.* at 261 ("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 both clear and significant.").

53. *See Gerald D.*, 491 US at 116.

54. *Id.*

55. This means, among other things, that Michael may not have been liable in child support even though he was the genetic father.

56. The plurality wrote,

> [w]hat counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.

Michael H., 491 U.S. at 127.

57. *Id.* at 130 (the child's claim "is if anything weaker than Michael's"). Justice Stevens, who concurred, found that because a separate California statute gave Michael a right to petition for visitation rights (even if he was not the legal father), whatever rights the Constitution may have conferred on him by virtue of genetics were adequately addressed by his procedural rights under that statute. In other words, genetics and/or function might give him a right to visitation, but not a right to family status. *Id*. at 133 (Stevens J., concurring).

children do not necessarily have the same rights nonmarital children have to establish family based on genetics. Had the latter been the case, Victoria would have been allowed to proceed. Taken as a whole, the unwed father cases stress the relevance of function and legal formalities. The State can use a legal construct (marriage) to assign parenthood to someone who is not genetically related to a child. Functioning as a parent has something to do with the constitutional rights one may have to family designation, though it does not automatically give one rights to family designation any more than genetics does.

D. Intestacy and the Veneration of Formality

Legal formalities also emerged as critical in some of the nonmarital children cases that did not involve child support. Intestacy was one area in which the Court was particularly dismissive of genetics as a source of family definition. For instance, the intestacy statute in *Labine v. Vincent* prohibited nonmarital children from inheriting from a genetic father if there were any eligible collateral relations.[58] The deceased had legally acknowledged his genetic daughter—and was therefore responsible for child support—but had not married her mother or been sued in paternity to establish legal parenthood.[59]

In upholding the statute, the majority emphasized how all intestacy statutes draw lines while delineating family. Indeed, the entire purpose of intestacy statutes is to name and then delineate between some order of takers. Intestacy statutes use family definition to do this.[60] They are majoritarian default rules that list an order of takers that is presumed to effectuate some rough sense of testator intent, though as the majority recognized, "rules for intestate succession may or may not reflect the intent of particular parents."[61] The majority suggested that variation from actual intent for particular intestates is inevitable when drawing lines of this sort and such line-drawing may be especially permissible in the intestacy context

58. In other words, nonmarital children could take before the property escheated to the state, but not over other identifiable family members. *See Labine v. Vincent*, 401 U.S. 532, 534 (1971).

59. *Id.*

60. *Id.* at 537-38.

61. *Id.* at 537.

because individuals are always free to write a will to make their intent clear.[62]

The dissent in *Labine* acknowledged the line-drawing inherent in intestacy statutes, but suggested that the state nonetheless needed some reason for distinguishing between acknowledged genetically related children and marital children. Justice Brennan wrote that "Mr. Vincent's illegitimate daughter is related to him biologically in exactly the same was as a legitimate child would have been."[63] The dissent thus incorrectly assumes a biological connection for all marital children. Justice Brennan then went on to suggest that using the legal formality of marriage to serve as a basis of distinguishing between genetic children was irrational because "the formality of marriage primarily signifies a relationship between husband and wife, not between parent and child."[64] The dissent thus also glosses over the fact that marriage determined parentage for the vast majority of children born in the United States at that time (and still does determine parenthood for approximately 60% of children born in the United States).[65]

The dissent's analysis of other aspects of the Louisiana law led it to the conclusion that the state was more interested in discriminating against nonmarital children than "effectuation [of the] private desires" of intestates.[66] The dissent may have been right about that, but as the majority responded, the statute also "discriminate[d] in favor of wives and against

62. *Id.* at 539.

63. *Id*. at 552 (Brennan, J., dissenting).

64. *Id*. at 552-53.

65. In 1970, only 11% of children born in the United States were born to unmarried mothers. *See* Gretchen Livingston & Anna Brown, *Birthrate for Unmarried Women Declining for First Time in Decades,* Pew Rsch. Ctr. (Aug. 13, 2014), https://iit.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=3577e289-5c25-4a8e-a1d1-af490165b93c [https://perma.cc/X4RK-M3Q9]. Today, 40% of children are born to unmarried mothers *See Unmarried Childbearing*, CTR. FOR DISEASE CONTROL & PREVENTION: NAT'L CTR. FOR HEALTH STAT. (last updated Jan. 31, 2023), https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm [https://perma.cc/484T-NP2A]. If challenged, in most states, the marital presumption of paternity can sometimes be overridden by genetic evidence, but courts do not have to and often do not let genetics determine paternity if a child has another legal father. *See, e.g*., *In re Donovan L., Jr.*, 244 Cal.App.4th 1075 (1 Cal. Ct. App. 2016); *In re D.S.*, 230 Cal.App.4th 1238 (Cal. Ct. App. 6th 2014); *In re J.W.*, 972 N.E.2d 826 (Ill. App. Ct. 4th 2012); *Quiroz v. Gray*, 441 S.W.3d 588 (Tex. App. (Tex. Civ. App.) 8th 2014); *Mario WW v. Kristen XX*, 149 A.D.3d 1227 (N.Y. App. Div. 3d 2017); *C.G. v. J.R.*, 130 So.3d 776 (Fla. Dist. Ct. App. 2d 2014) (all involving contests between an alleged genetic father and the man who was presumed father by marriage).

66. *Labine*, 401 U.S. at 532, 555 (Brennan, J. dissenting).

'concubines.'"[67] That is rank pro-marital discrimination. Why might this be permissible for adults and not children? The common answer—one given by the Court one year later in *Weber v. Aetna Casualty & Surety Co*.,[68]—is that, while adults consent to marriage and have control over whether they engage with others in conjugal relationships, nonmarital children have no control over the behavior of their parents and "legal burdens should bear some relationship to individual responsibility or wrongdoing."[69]

That line from *Weber*, a case involving nonmarital children's claims to workers compensation benefits, sounds noble, but of course a child's plight—e.g., their legal entitlements to private and public support—never has anything to do with their individual responsibility or wrongdoing. A child's plight depends on what their parents earn, what their parents own, where their parents work, whether their parents paid FICA taxes, what their parents saved, and how many other children their parents have—among other factors. What children are entitled to is a function of who their parents are. To assume that the law cannot discriminate in favor of marriage when it comes to assigning parentage is to assume that there is something suspect about marriage (belied by discrimination against concubines and the state licensure of marriages generally), or that children have entitlements stemming from something other than who the law labels as their parents. The dissent in *Labine* (and the majorities in the child support cases) assumed that children's entitlements flow from genetic connection, not legal statuses.

In *Trimble v. Gordon*,[70] decided six years after *Labine*, the Court struck down an Illinois intestacy statute excluding a nonmarital child who had already successfully sued her genetic father in paternity. The extant legal finding of paternity was critical to the Court's analysis because, as the majority emphasized, the legal finding meant that there could be no question of genetic connection.[71] But no one disputed the finding of genetic connection in *Labine* either. The difference between *Trimble* and *Labine* was the legal finding of parentage, not whether there was a genetic connection.

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67. *Id.* at 538.
68. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).
69. *Id.* at 175.
70. *See Trimble v. Gordon*, 430 U.S. 762 (1977).
71. The deceased "was found to be the father . . . in a state court paternity action prior to his death. . . . [t]he State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances." *Id.* at 772.

One year later, in *Lalli v. Lalli*,[72] the Court allowed the state of New York to exclude from intestacy a grown man whom the deceased had acknowledged as his son in a notarized writing (so that the son could marry as a minor). Again, there was no dispute with regard to genetic connection, but neither was there a legal finding of parentage. Relying almost completely on the potential problems with proving paternity in someone who was deceased, which the state had argued was its sole justification for the statute, the Court found no problem with the intestacy statute's reliance on legal determinations of family.[73] Formality, not genetic connection or function, emerged as the critical factor for determining family in the intestacy context.

E. Function Redux

In other nonmarital children cases, those not involving child support (in which the court venerated genetics) or intestacy (in which the court venerated formality), function emerged as quite important (as it had in the unwed father cases). With the exception of the child support and intestacy cases, all of the cases successfully challenging statutory distinctions between genetic children of nonmarital fathers and children of marital fathers were brought on behalf of nonmarital children who were living in a household with their genetic fathers. When those children who were living in a group functioning as family claimed an entitlement to the workers' compensation,[74] welfare benefits,[75] or social security disability benefits[76] of their genetic fathers, the Supreme Court found that the statutes at issue could not discriminate on the basis of whether the children had been born in wedlock. In the one social security benefits case in which the insured was not living with his genetic children, the Court found that the distinction

72. *See Lalli v. Lalli*, 439 U.S. 259 (1978).

73. "We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased father without serious disruption of the administration of estate . . . [but our constitutional focus is] . . . on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks . . . rationality . . . ." *Id*. at 272-73.

74. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

75. *N.J. Welfare Rts. Org. v. Cahill*, 411 U.S. 619, 621 (1973) (per curiam) (striking down statute that awarded benefits to households with married parents but not to households with unmarried parents).

76. *Jimenez v. Weinberger*, 417 U.S. 628, 636-38 (1974) (striking down social security disability statute that prohibited nonmarital children (but not marital children) born after the injured was injured from collecting social security disability benefits even if they were dependent on the insured).

between marital and nonmarital children could stand. The statute in *Mathew v. Lucas* allowed nonmarital children to prove dependence (and therefore entitlement) by proving cohabitation (function), but the genetic father in that case was not functioning as a father at the time of his death so his children could not prove dependence.[77] Together, these cases suggest that genetic connection alone did not entitle those children to claim their genetic fathers as their legal fathers, but if genetic children could prove the insured was functioning as a father, they should have been entitled to family designation.

F. Zoning and the Need to Define Legal Family

As suggested in the family autonomy discussion, the Court has held that allowing families to rear children without too much state interference helps children cultivate strong emotional attachments, a respect for pluralism, and "cherished values."[78] The Supreme Court has also found that fostering and protecting those families, including by "making communit[ies] attractive to families,"[79] through zoning ordinances and land-use regulation, is a legitimate government goal. Because protecting families is so central to the rationale for zoning, zoning statutes put pressure on the definition of family.

From its inception in this country, zoning has been justified because separating spaces for residential, business, and industrial development was thought to "increase the safety and security of home life, greatly tend to prevent street accidents, especially to children . . . and preserve a more favorable environment in which to rear children."[80] In turn, segregating residential housing into single-family, two-family and multi-family dwellings was thought to make sense as a nuisance-prevention measure if nothing else.[81] Allowing too many multi-unit dwellings to mix with single family dwellings blocks light, decreases green space, and creates congestion. Such mixing can "depriv[e] children of the privilege of quiet and open spaces for play. . . ."[82]

Whether creating safe, favorable environments for children is really what motivates a polity to zone is a legitimate question. There is plenty of

77. *Mathew v. Lucas*, 427 U.S. 495, 497, 501 (1976).
78. *See supra* text accompanying notes 13-17.
79. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J dissenting).
80. *Village of Euclid v. Ambler Realty Co.,* 272 US 365, 394 (1926).
81. *Id*. at 388 (discussing benefits of decreasing nuisance risk).
82. *Id*. at 394.

reason to believe that a polity's primary reason for zoning is to preserve property values.[83] Zoning restricts an individual's property rights in order to preserve the collective property rights of others. But the Supreme Court has sanctioned zoning's restriction on individual rights because of the way zoning can protect children, not property values.

Originally, most state courts viewed the term "family" in zoning ordinances broadly, allowing various religious orders to live together as families in single family homes.[84] In other words, many states used a functional approach to family definition in the zoning context. By the mid-twentieth century though, municipalities started narrowing their definition of family to people "related by blood, marriage or adoption."[85] The Long Island zoning ordinance that finally reached the Supreme Court, in *Belle Terre v. Baraas*, limited single family units to any number of people "related by blood, adoption or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit."[86] The ordinance was challenged by a group of students who wanted to live together in a single family house. The Court rejected their constitutional claim in the name of protecting "[a] quiet place where yards are wide, people few and motor vehicles restricted."[87]

Justice Marshall wrote a lengthy dissent, arguing that the right "to establish a home" was

> an essential part of the liberty guaranteed by the Fourteenth Amendment . . . [and] . . . [t]he choice of household companions—of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others—involved deeply personal considerations.[88]

83. *See e.g.*, Ross Kendall and Peter Tulip, *The Effect of Zoning on House Prices*, Research Briefs in Eco Policy No 124, CATA Institute, 8-1-18, https://www.cato.org/research-briefs-economic-policy/effect-zoning-housing-prices.

84. Kate Redburn, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L. J. 2412, 2436 (2019).

85. *Id*. at 2435.

86. *Boraas*, 416 U.S. at 1.

87. *Id*. at 9.

88. *Boraas,* 416 U.S. at 15-16 (Marshall, J., dissenting).

He did not suggest that citizens have an unbridled right to live with whom they choose, but if the statute was going to let "any number of persons related by blood or marriage, be it two or twenty" live together, it could not discriminate against those not related by blood or marriage by limiting the functional definition to just two people.[89] According to Justice Marshall, the state had to either limit the number of people related by blood, marriage, or adoption who could live together or let more non-legally related people live together.

Yet three years later, in *Moore v. City of East Cleveland,* when the City of East Cleveland tried to limit the number of legally related family members who could live together by defining family in a more limited way, Justice Marshall and a majority of the court, struck down that attempt.[90] East Cleveland, a middle class Black community, used a particularly awkward definition of family, one that excluded a grandmother from living with her adult son, his son and another grandson (nephew to the grandmother's son).[91] All of them were related by law.[92] Presumably, they were also related genetically.

As numerous commentators have noted, *Moore* might have been a watershed case in which the Court broke open the legal definition of family for the reasons suggested in Justice Marshall's dissent in *Belle Terre:* Who one wants to function as family with involves the kind of deeply personal decisions protected by the Constitutional guarantee of liberty. [93] But the Court did not do that. Instead, both Justice Powell, writing for the plurality, and Justice Brennan, writing a concurrence (joined by Justice Marshall), found that what was wrong with the ordinance was that it "slic[ed] deeply into the family itself"[94] and "cut deeply into private areas of protected family life."[95] Both plurality and concurrence suggested that the problem was not with how the ordinance regulated who can live together but how

89. *Id*. at 16.
90. *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977).
91. *Id.* at 496 n.2.
92. Grandmothers, sons, uncles, and nephews would all be considered "descendants" under the UNIFORM PROBATE CODE. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE 2-103 (2010) (describing who may take in intestacy other than surviving spouse).
93. For a collection of commentary on *Moore*, see the Fordham Law Review's symposium, *Moore Kinship*, 85 FORDHAM L. REV. 2551 (2017).
94. *Moore*, 431 U.S. at 498.
95. *Id.* at 507 (Brennan, J., concurring).

the ordinance defined family. As June Carbone and Naomi Cahn have observed, the plurality's finding "required the court to provide a definition of family"[96] so that it could explain what the *East Cleveland* ordinance cut into. What it cut into was not the liberty to live with whom one chose, but "[t]he tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children."[97] As Carbone and Cahn note, this is a conservative definition, no different than what legal formalities and tradition have always recognized as family.[98]

It was Justice Stevens, in concurrence, who came closest to articulating a more capacious understanding of constitutional family, though he relied on the Fifth Amendment and an understanding of property rights, rather than the Fourteenth Amendment and an interpretation of liberty and family autonomy. To Stevens, the ordinance was about Ms. Moore's right to use her own property as she saw fit. Drawing on the earlier state decisions that had allowed religious orders to live together by interpreting the term "family" more functionally, Justice Stevens suggested that the State can restrict "the identity, as opposed to the number, of persons who may compose a household only to the extent that the ordinances require such households to remain nontransient, single-housekeeping units."[99] According to Justice Stevens, it is households, not families, that deserve constitutional protection, and they deserve protection because the right to use one's property as one chooses is a constitutionally protected interest.[100]

The Supreme Court has not delved into zoning regulations since *Moore*. As articulated now, the Constitution allows states to restrict household composition to legal family members, as long as that term includes extended legal family members.[101] When providing a functional alternative in addition to legal family definition—allowing people living as a "single housekeeping unit" to live in a single-family dwelling—states are free to

96. June Carbone & Naomi Cahn, *Moore's Potential*, 85 FORDHAM L. REV. 2589, 2595 (2017).

97. *Moore*, 431 U.S. at 504 (Brennan, J concurring).

98. Carbone & Cahn, *supra* note 96, at 2595-96.

99. *Moore*, 431 U.S. at 519. Justice Stevens' approach would eventually require a definition of "non-transient, single-housekeeping unit," but because his analysis was not persuasive to others, the Court never had to define what that might mean.

100. Justice Stevens did not delve into whether the fee simple right to use one's property as one chose (bounded by nuisance doctrine) would also extend to a renter's leasehold interest. It might have mattered to him that Ms. Moore owned her home. This would make *Moore* and *Belle Terre* inapposite.

101. See *supra* text accompanying notes 94-95.

limit that functional family to two.[102] Thus, the Constitutional definition of family that emerges from the zoning cases is mostly a legal one, with perhaps a small functional addendum.

* * *

A short recap is in order here. In the child support context, the Court insisted that genetics define family if the child only had one legal parent. In the intestacy context, the Court rejected that approach and allowed states to rely exclusively on legal formalities to designate family. In the unwed father cases, the Court suggested that genetics accompanied by function can entitle someone to family status, but not if a legal formality has already named someone else as a second parent. In several other social welfare contexts, function emerged as critical as well. In the zoning cases, the Court balked at the idea of adopting anything other than a very traditional understanding of family.

II. THE CONSTITUTIONAL CASES IN LIGHT OF CONTEXT

What follows is a preliminary explanation of the confusion just described. Though the Court has usually been silent on *why* it is defining family the way it is, if one takes the "why question" more seriously, one begins to see how the doctrine might make more sense.

A. Child Support

If the purpose of child support is to hold people accountable for the dependencies that they helped create, then holding a genetic father accountable for child support may make sense, even if genetic fathers of many children are not held accountable because legal formalities have vested fatherhood in someone else. The issue is not, as the Supreme Court's child support cases suggest, that the law has treated nonmarital and marital children differently; it is whether the law can or must link parental responsibility to the sex that led to conception if the child has no other source of support. Marital children or children whose parentage was

102. See functional definition that was upheld in *Baraas*, *supra* note 86.

assigned through some other legal formality (voluntary acknowledgements, adoptions, reproductive technology contracts) usually have two sources of support.[103] The child support cases can be justified if one is willing to endorse the idea that genetic parenthood must serve as a default parental regime to ensure two parents for a child who would otherwise have only one source of support.[104]

There is ample reason to question whether this justification reflects sound policy. A genetically based system of assigning parenthood is rooted in the moralistic regulation of extra-marital sex; it imposes a strict-liability regime on men,[105] and it reifies a genetic essentialism that is inherently heteronormative.[106] It also suggests there is something wrong with contemporary reproductive technology contracts and adoptions that sanction single parents by choice. Nonetheless, every state in the country and even the progressive 2017 Uniform Parentage Act[107] endorse a partial genetic regime in order to try to ensure that potential dependencies get met.

B. Intestacy

In the intestacy context, the different treatment of marital and nonmarital children reflects the goals of intestacy, which are quite different than the goals of child support. Intestacy statutes are not about meeting the needs of dependents; they are about discerning the presumed intent of the intestate.[108] The State uses formal family designation in intestacy to

103. When the child support cases were decided, states also tended to require two parents for adoption, though today single parent adoptions are common. *See* ADOPTING AS A SINGLE PARENT, CHILD WELFARE INFO. GATEWAY (2019), https://www.childwelfare.gov/pubs/single-parent/ [https://perma.cc/RL8W-MD68].

104. For more on the notion that the law should work to ensure two parents for every child. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L REV. 835 (2000).

105. In states that now prohibit all abortion, women are held strictly liable also, though they still usually have access to a "morning after" pill and can thereby eliminate the consequences of their sexual conduct. *See* Guttmacher Inst. Pub. Pol'y. Off., *Emergency Contraception*, GUTTMACHER INSTITUTE (Feb. 1, 2023), https://www.guttmacher.org/state-policy/explore/emergency-contraception. Men have no such option.

106. See Katharine K. Baker, *The DNA Default and its Discontents,* 96 B.U. L. REV. 2037, 2050-56 (2016) (discussing moralism involved in an irrebuttable presumption that the parenthood of nonmarital children should be linked to the extramarital sex in which the child was conceived); *see also* Baker, *supra* note 2 at 1683-89 (discussing heteronormativity of a genetic regime).

107. UNIFORM LAW COMMN. UNIF. PARENTAGE ACT, § 607 (2017) (hereinafter *2017 UPA*).

108. *See supra* notes 60-62. *See generally* RALPH BRASHIER INTESTACY LAW AND THE EVOLVING

distribute the estate to those whom the intestate likely would have wanted to receive their property. The lines drawn are imperfect, but likely accurate enough given that the intestate can write a will and avoid intestacy. Legal formalities—which include marrying and thereby taking responsibility for children of the marriage, signing a voluntary acknowledgement and thereby taking responsibility for children, or adopting—are indications of intent to form a family. Intent to form a family is indicative of presumed intent for one's estate at death.

In contrast, having had sex that produced a child—which is all that is necessary to form a genetic connection—is a poor proxy for presumed intent at death. The deceased may not have wanted the child, may not have known the child, or may have purposefully distanced themselves from the child.

When the Court decided the intestacy cases, it was concerned with the trouble and expense of trying to prove paternity once the intestate was dead. That is no longer an issue for genetic claims, but it is an issue for functional claims. Using formality instead of function allows the law to avoid the potentially troublesome and expensive litigation that could follow if functional family members are allowed to assert claims.[109] The trouble and expense of defending a claim from someone alleging a functional family relationship will be born largely by those whom the intestate most clearly indicated should take—formal family members. Formal family members will be forced to spend down what is a limited pot (the estate) in order to fend off functional claims. Using formality to define family, instead of using function or genetics, helps preserve a limited estate and serves as a good proxy for intent.

C. Dependence or Intent?

The analysis above suggests that it should matter whether a government entitlement statute's definition of family is designed to make sure dependents' needs get met or to approximate an insured person's intent. In cases in which a statute is aimed at meeting dependents' needs, as the Social

FAMILY (2004). Forced share provision are different. They are meant to override testator intent and force a distribution to certain family members. Thus, the way family is determined for forced share provisions should arguably be different than the way it is determined for intestacy. *Id.* at 26, 99.

109. See Katharine K. Baker*, Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI. KENT L. REV. 135, 165-175 (2017) (discussing costs to parties and the judicial system of contested functional parenthood hearings).

Security disability statute was in *Jimenez v. Weinberger*[110] and the Worker's Compensation claim in *Weber* may have been, the purpose of the statute seems to ring in obligation, like child support. Relying on genetics may make sense. The Court insisted that Mr. Jimenez's and Mr. Weber's nonmarital genetic children be allowed to prove function (that they were living with him) in order to establish their entitlement. At that time, the Court seemed to be insisting that function serve as a proxy for genetic connection. Because today there is no need for a genetic proxy, these holdings are questionable; unless one is willing to accept the idea that parental obligation should flow from function, not genetics or formality. For the most part, state laws of child support have yet to move in that direction,[111] but given the contemporary push to recognize functional families for purposes of rights,[112] the Supreme Court may have been prescient in *Webe*r and *Jimenez* when it recognized the relevance of function for purposes of support.

Alternatively, if the delineation of family in these social welfare benefit statutes was working as a proxy for the insured's intent with regard to who should be the beneficiaries of his entitlement, then the statue was working more like intestacy. In that case, formality should govern. This is what the Court may have *implicitly* recognized in *Mathews v. Lucas*, when it denied genetic nonmarital children the right to collect Social Security survivors' benefits, even though marital children could collect.[113]

D. Parental Rights

In the unwed father's rights cases, in which men petitioned for rights based only on genetics, the Court dismissed their claims. This makes sense if rights and obligations can spring from different sources. The 2017 UPA and all states continue to root obligation for nonmarital sexually-conceived children in genetics, even as they expand the use of function to determine

110. *Jimenez v. Weinberger*, 417 U.S. 619 (1974).

111. The 2017 UPA reject function as a source of support. *See* Comment to § 609 (2017) (restricting standing for de facto parenthood claims to potential parents who want rights as opposed to other parents who may want to hold a functional parent liable for child support because of concerns that step-parents might be held responsible for obligations to step-children).

112. *See* Baker, *supra* note 2, at 455-57 (discussing growing use of functional parent claims).

113. *See Mathews v. Lucas*, 427 U.S. 495 (1976).

parental rights.[114] Thus, the source of parenthood depends on why the State is defining family. The Supreme Court's holdings suggest something comparable because the Court rooted child support (obligation) in genetics alone but did not let genetics alone determine parental rights. For rights, the Court demanded more function. Whether this makes sense depends on why the State is recognizing parental rights.

The purposes served by recognizing parental rights are multifarious. Granting parents freedom from state interference when rearing their children allows adults to teach and pass on their own cultural traditions.[115] It encourages unique bonds between legal parents and their children.[116] It breeds respect for pluralism.[117] It affords adults the opportunity to foster one of the most "ennobl(ing]," enriching experiences they will ever have.[118] It also, ultimately, allows children to grow into a sense of their own autonomy as they come to understand how they are the same as and different than their parents.[119] And, it likely leads to decisions made on behalf of children that are simply better than ones the State would make.[120]

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114. Compare 2017 UPA, § 602 (giving standing to children and another parent to establish a parent-child relationship [and thus a support obligation] based on genetics) with § 609 (restricting who may bring functional claim to the functional parent themselves).

115. *Moore*, 431 U.S. at 503-04 ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

116. "Parents' loving efforts to transmit their values help form [] children's characters, enable them to learn what it is to have a coherent way of life and develop their capacity to enter into caring, long-term relationships with others." Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 941 (1996).

117. In *Meyer*, the Court distinguished Plato's ideal of homogenizing children so as to facilitate democratic governance with the United States' belief that respecting different family traditions will breed a respect for pluralism. *See Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (quoting Plato, Ideal Commonwealth); *See also* Anne C. Daily, *Developing Citizens*, 91 IOWA L. REV. 431, 488 (2006) (respecting parental rights encourages respect for pluralism).

118. Katharine T. Bartlett, *Re-Expresssing Parenthood*, 98 YALE L. J. 293, 301 (1988), (citing NEL NODDING, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 5 (1984) (describing parenthood as an opportunity for adults to realize their "ennobled selves"); *See also* David A.J. Richards, *The Individual, The Family and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980) (discussing parenthood as an opportunity to express one's values).

119. As Martha Minnow phrased it, "belonging is essential to becoming." Martha Minnow, *Forming Underneath Everything that Grows*, 1985 WIS. L. REV. 819, 894.

120. Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 647 (2002) ("Parents' strong emotional attachment to their children and considerable knowledge of their particular need make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances."); *See also* Martha Fineman, *What Place for Family Privacy*, 67 GEO. WASH. L. REV. 1207, 1214 (1999) (recognizing the "limitations of legal . . . systems as substitutes for family decision-making.").

Parental rights can clash though. When parental rights clash, many of the goals served by recognizing parental autonomy are compromised because as parents bring their clashes before courts, judges end up making the decisions that parents are otherwise free to make without state intervention. When two people have signed up for joint parenting, as spouses or formally recognizing children (with voluntary acknowledgements or reproductive technology contracts), Courts must insert themselves into parental decision—making when the intended parents disagree. But if only one parent has signed up for legal parenthood, courts may be reticent to entertain claims for parental rights that can clash with the established legal parental rights.

Understanding the relative costs of entertaining parental rights claims helps explain the unwed father cases. When there was no extant parent, as was the case in *Stanley*, awarding rights vis a vis the State should have been relatively easy. No other parent's parental rights were affected by granting Mr. Stanley parental rights. When there was an extant parent, all of the men claiming rights—except Caban—lost. But Caban had some functional relationship with his children and there was intent to share legal parental rights, as evidenced by him having been listed on the birth certificate and the parties on-going informal shared custody agreement.[121] Arguably, through her behavior and co-signing the birth certificate, the extant parent had agreed to share rights. The Supreme Court's unwed genetic father jurisprudence suggests a reticence to entertain competing constitutional claims for parental rights unless parents have formally agreed to co-parent by mutually registering as parents, and little sympathy for the idea that rights can flow from genetic connection alone.

E. Zoning

In the zoning cases, the ones that perhaps most explicitly grapple with family definition, the Court's holding may have yielded a justifiable result, but not for the reasons given. The reason that the Court has blessed zoning as a constitutionally permissible incursion on property owners' rights—is because limiting household units to "single-family" groups is thought to be good for children. This means Ms. Moore's grandsons, as children, were the

121. *Caban v. Mohammed*, 441 U.S. 380, 382 (1979) (noting Caban lived with and supported the children and signed a birth certificate).

intended beneficiaries of the zoning restriction. Accordingly, the statute in *Moore* should have been struck down not because Ms. Moore was taking care of children who were formally related to her, but because she was taking care of children. Zoning a child out of a community deprives the child of the benefits of a community designed for children only because the household unit to which the child is attached has not formally registered as family or is not related by blood. Such households are common. Most children raised in the United States today will spend a part of their childhood with an adult who is not their legal or genetic parent.[122] An adult may not have legal rights or responsibilities for a child but still play a role in helping to rear the child or helping another adult who is doing so. Formality and genetic connection have increasingly little to do with household composition in many communities with children.[123] If zoning statutes are to promote healthy environments for those children, formality and genetic connection should not define permissible household composition.

CONCLUSION

Technology and social norms, especially with regard to LGBTQ and single parenting, have evolved considerably since the Supreme Court decided the cases discussed in this article. In part because of that evolution, much of the Supreme Court's analysis of constitutional family composition no longer makes sense and some of it never made sense as written. But what can look like confused and contradictory results in these cases makes more sense if one is careful to understand that how the Court defined family depended on the purposes served by defining family in different contexts.

122. *See* Rose M. Kreider & Daphne A. Lofquist, *Adopted Children and Step-children*: *2010*, U.S. DEPT. OF COM.: ECON. & STAT. ADMIN. (Apr. 2014) (discussing households with formally and informally adopted and step children). *See also* Lawrence M. Berger, *Parenting Practices of Resident Fathers: The Role of Marital and Biological Ties*, 70 J. MARRIAGE & FAM. 625 (2008) (discussing role of men who parent children to whom they are not related).

123. *Id.*