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Legitimate Families and Equal Protection

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LEGITIMATE FAMILIES AND EQUAL PROTECTION

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Abstract: This Article questions whether and why it should be unconstitutional to treat legitimate and illegitimate children differently. It argues that legitimacy doctrine is rooted in a biological essentialism completely at odds with contemporary efforts to expand legal recognition of nontraditional parenting practices including same-sex parenting, single parenthood by choice, surrogacy, and sperm donation. The routine invocation of legitimacy doctrine by advocates purporting to help nontraditional families is thus at best ironic and at worst dangerous. Analysis of the U.S. Supreme Court's legitimacy cases reveals that liberal Justices, in trying to dismantle marriage—a legal construct—as the arbiter of legitimate parenthood, presumed that a biological construct—genetics—was a superior arbiter. These Justices either did not realize or did not care that the biological determinism driving the impulse to protect illegitimate children could actually undermine a more progressive family law doctrine. Validating nontraditional family structures requires an embrace of law, not blood, as the arbiter of parenthood, and thus requires a very tempered reading of the legitimacy cases. Such a reading mandates that the state be consistent in how it determines parenthood, but does not require the state to recognize genetic parenthood. The power to define parenthood, which the conservative Justices felt comfortable leaving to the state, is best kept with the state, so that the law is able to break free from heteronormative family forms.

INTRODUCTION

Why is it unconstitutional for the law to treat legitimate and illegitimate children differently? This Article argues that usually it is not, but in recent federal same-sex marriage litigation, amici briefs repeatedly argued that legitimacy doctrine requires courts to use heightened scrutiny in evaluating marriage laws because such laws can render children illegitimate.¹

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¹ See Brief of Amici Curiae Carlos A. Ball, Distinguished Professor of Law, Rutgers University et al. in Support of Petitioners at 17–23, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Brief of Amici Curiae Family and Child Welfare Law Professors Addressing the Merits and in Support of Respondents at 29–30, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for Amici Curiae Scholars of the Constitutional Rights

The invocation of legitimacy doctrine in support of same-sex marriage is deeply ironic. The amici seem to suggest that what makes a legitimacy classification problematic for Fourteenth Amendment purposes is that it treats the children of married parents differently than the children of unmarried parents.² But why should the state treat the children of married and unmarried parents alike? Because both groups are children with no control over “the circumstances of their birth”?³ That cannot be right. Almost all children’s entitlements in this country, from child support to intestacy rights to social security payments, are based on who their parents are and what their parents do, or did, or have never done. Children’s life circumstances and legal entitlements are based on the fortuity of their parents’ earned or inherited wealth. Therefore the problem with legitimacy doctrine cannot be that it treats some children differently from others. It must be instead that it draws distinctions between children who for some reason should be treated alike.

When finding in favor of illegitimate children, the U.S. Supreme Court’s legitimacy cases assume that legitimate and illegitimate children are “alike” and thus entitled to comparable treatment because they share a genetic source. Hence, the irony: to rely on a doctrine that posits distinctions between the genetic offspring of the same “parent” as invidious is to reify the natural, biological, and necessarily heterosexual family. It is, to paraphrase the Massachusetts Supreme Judicial Court in 2003’s *Goodridge v. Department of Public Health*, to “single[] out the one unbridgeable difference between same-sex and opposite-sex couples” and make that the es-

of Children in Support of Respondent Edith Windsor Addressing the Merits and Supporting Affirmance *passim*, *Windsor*, 133 S. Ct. 2675 [hereinafter Amicus Brief of Scholars of the Constitutional Rights of Children in *Windsor*]; Brief of Amici Curiae Joan Heifetz Hollinger et al. in Support of Plaintiffs-Appellees and Affirmance at 27, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.) (No. 13-4178), *cert denied*, 135 S. Ct. 265 (2014); Brief of Amici Curiae Family and Child Welfare Law Professors in Support of Affirmance of the Judgment Below at 19–20, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214) [hereinafter Amicus Brief of Family and Child Welfare Law Professors challenging DOMA]; Brief of Amici Curiae in Support of Appellees, Gitanjali Deane & Lisa Polyak, et al. American Academy of Matrimonial Lawyers[,] American Academy of Matrimonial Lawyers, Maryland Chapter at 30–31, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44), *abrogated by Obergefell*, 135 S. Ct. 2584; Amicus Curiae Brief of American Psychological Ass’n at 4, *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (en banc) (Nos. 759354-1, 75956-1), *abrogated by Obergefell*, 135 S. Ct. 2584.

² See, e.g., Amicus Brief of Family and Child Welfare Law Professors challenging DOMA, *supra* note 1, at 20 (“[C]reat[ing] a new class of ‘illegitimate’ children who can be denied the federal marital protections that affect children because of the circumstances of their birth to, or adoption by, married same-sex couples . . . cannot survive equal protection review.”).

³ See *id.* at 19.

sence of parenthood.⁴ This Article examines these legitimacy cases in order explain why they are dangerous precedent for those concerned about reimaging the heteronormative paradigm for parenthood.

It is easy to dismiss the importance of legitimacy doctrine today because it is so simple to use genetic connection to establish a parent-child relationship.⁵ The problem that seemed to give the U.S. Supreme Court the most pause in the legitimacy cases, difficulty in proving a paternal genetic relationship,⁶ has now disappeared, as DNA tests are increasingly available and affordable.⁷ Yet the elimination of proof problems has done nothing other than highlight the core normative questions that the Court never resolved in the legitimacy cases. Genetic science has made questions of legitimate parenthood harder, not easier, because it is so clear to most courts that issues other than genetic connection must be relevant to questions of parenthood.⁸

The liberal Justices who championed the rights of illegitimate children in the legitimacy cases likely thought they needed to dismantle an archaic, moralistic system that linked legitimate parenthood to marriage, but all they

⁴ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (“The ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”).

⁵ The law school curriculum usually pays short shrift to legitimacy doctrine. Constitutional and family law casebooks and professors typically provide only a brief summary of the doctrine before moving on. See *LESLIE HARRIS ET AL.*, *FAMILY LAW* 896 (4th ed. 2009) (discussing all of the legitimacy cases in less than a page); *GEOFFREY R. STONE ET AL.*, *CONSTITUTIONAL LAW* 673–75 (7th ed. 2013) (discussing all of the legitimacy cases in three pages). If given, that summary usually goes something like this: After battling the issue back and forth in a string of cases during the 1960s and '70s, the Supreme Court finally determined that illegitimacy is a semi-suspect class and therefore illegitimacy distinctions are subject to intermediate scrutiny.

⁶ See *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (discussing the “peculiar problems of proof” involved in paternal inheritance); *Mathews v. Lucas*, 427 U.S. 495, 509 (1976) (discussing the administrative burden of determining children’s entitlements on a case-by-case basis); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 174–75 (1972) (discussing “uncertain claims of parenthood”).

⁷ See, e.g., *DNA Test Specimen Collection Locations*, UNIVERSAL GENETICS, <http://www.dnatestingforpaternity.com/locations.html> [<http://perma.cc/J2PM-GE9N>] (promising reliable and affordable DNA testing services in all fifty states).

⁸ For a sample of the kind of difficult questions that arise: What of the marital father who discovers that his wife had an affair, and the five-year-old daughter whom he has loved and supported is not genetically related to him? See, e.g., *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995) (estopping a wife from denying her husband’s paternity during their divorce). What of the sperm donor who is sued in paternity even though the recipient of the sperm promised she would not ask him for child support? See, e.g., *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (enforcing the parties’ agreement not to seek child support from the sperm donor). But see *Budnick v. Silverman*, 805 So. 2d 1112 (Fla. Dist. Ct. App. 2002) (finding an agreement not to seek support unenforceable as against public policy); *In re A.B.*, 444 N.W.2d 415 (Wis. Ct. App. 1989) (refusing to allow genetic parents to sever the parental rights and responsibilities of a biological father through contract). What of the same-sex partner who never had any pretense of genetic connection to a child, but has loved and reared the child as a parent does?

knew to replace that system with was a parenthood regime based on genetic connection. The conservative Justices were far more willing to let the state make judgments about who should be considered a parent. This Article argues that the liberals' parenthood regime, rooted in genetics, is more troubling than that of the conservatives, which was based on a purely legal construct.

Part I of this Article introduces the major legitimacy cases.⁹ This takes some time and patience with detail. The detail is necessary, however, in order to avoid the kinds of traps into which the Justices fell when deciding these cases. Part I explains how very sympathetic fact patterns produced a ten-year tennis match of sorts with conservative and liberal Justices batting the ball back and forth in what were usually close decisions.¹⁰ Both sides won some lasting points. The liberals succeeded to the extent that legitimacy classifications now receive some form of heightened scrutiny.¹¹ The conservatives succeeded to the extent that administrative convenience and the finality of property distribution, both of which are concerns found in almost all cases, can now be sufficient state justification for a categorization of legitimacy.¹² Part I concludes with observations about the light that the battle over illegitimacy sheds on the tradeoff between using fundamental rights and suspect classification doctrine in constitutional family law.¹³ That tradeoff was recently on display in the different ways federal courts approached the same-sex marriage question.¹⁴ Thus, the legitimacy cases are relevant to the same-sex marriage debate, but not for the reasons that many amici suggested.¹⁵

Part II demonstrates how the most common reading of the legitimacy cases—that the state must treat nonmarital genetic (“illegitimate”) children of a particular adult as it treats the marital (“legitimate”) children of that adult unless there is a compelling reason not to—is not the only or the best interpretation of this confusing line of cases.¹⁶ Section A of Part II discusses

⁹ See *infra* notes 20–169 and accompanying text.

¹⁰ See *infra* notes 20–153 and accompanying text.

¹¹ See *infra* notes 20–153 and accompanying text.

¹² See *infra* notes 20–153 and accompanying text.

¹³ See *infra* notes 154–169 and accompanying text.

¹⁴ See *Obergefell*, 135 S. Ct. at 2602–05 (discussing the relationship between fundamental rights and equal protection with regard to marriage). Compare *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (holding that Virginia's ban on same-sex marriage violated the fundamental right to marry), and *Kitchen*, 755 F.3d 1193 (finding a fundamental right to marry), with *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (stating that laws banning same-sex marriage discriminated against a minority class without a rational basis), and *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (treating the same-sex marriage issue as discrimination against a semi-suspect class).

¹⁵ See *infra* notes 154–169 and accompanying text.

¹⁶ See *infra* notes 170–228 and accompanying text.

how reading the legitimacy cases as elevating the importance of genetic connection overstates the holdings of the cases as written.¹⁷ Section B then examines how elevating the importance of the genetic connection also undermines numerous contemporary doctrines that treat as legitimate a variety of non-heteronormative parenting practices, including same-sex parenting, single parenthood by choice, surrogacy, and sperm donation.¹⁸ Part III demonstrates how it is possible to read the legitimacy cases in a manner that does not thwart modern parenting practices, but only by recognizing the state's power to define parenthood as it wants, subject to minimal constitutional constraint.¹⁹ The power that many of the conservative Justices felt comfortable leaving to the state is best kept with the state, lest arguments from biological essentialism play too prominent a role in defining parenthood.

I. THE LEGITIMACY CASES

Between 1968 and 1978, the U.S. Supreme Court decided a rapid series of constitutional challenges to the statutory treatment of illegitimate children.²⁰ At the end of those ten years, legitimacy appeared to emerge as a classification subject to intermediate scrutiny under the Equal Protection Clause.²¹ This Part unpacks those cases.

A. Legitimacy and the Right to Recover: Levy and Glona

The first two Supreme Court legitimacy cases, decided on the same day in 1968, involved Louisiana's wrongful death statute.²² Under Louisiana law, nonmarital children who had not been legally acknowledged by a "parent" were ineligible to sue in tort for the wrongful death of that "parent," and a "parent" of a nonmarital, unacknowledged child was ineligible to sue for the wrongful death of that child.²³

In 1968, in *Levy v. Louisiana*, five nonmarital, unacknowledged siblings who had been denied the right to recover sued, challenging this stat-

¹⁷ See *infra* notes 170–179 and accompanying text.

¹⁸ See *infra* notes 180–228 and accompanying text.

¹⁹ See *infra* notes 229–242 and accompanying text.

²⁰ See *infra* notes 22–153 and accompanying text.

²¹ See *infra* notes 154–166 and accompanying text.

²² See *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968); see also LA. CIV. CODE ANN. art. 2315 (Supp. 1967).

²³ See *Thompson v. Vestal Lumber & Mfg. Co.*, 16 So. 2d 594, 596 (La. Ct. App. 1943) (discussing Louisiana's wrongful death statute, which states that "[c]hildren referred to in this law include only those who are the issue of lawful wedlock or who, being illegitimate, have been acknowledged or legitimated pursuant to methods expressly established by law"), *aff'd*, 22 So. 2d 842 (La. 1944); see also LA. CIV. CODE ANN. art. 2315 (granting the right to recover damages caused by the actions of another to the "children" of the deceased).

ute.²⁴ No doubt, the statute effected an extremely harsh result. Five innocent children were left without any financial redress and a tortfeasor escaped all liability simply because the deceased had not been married at the time she gave birth to the children.²⁵ If the deceased had been married, to anyone, at the time of the children's births, or if she had legally acknowledged the children,²⁶ they would have been entitled to collect for the wrongful death of their mother. The lower Louisiana court found that denying these children the right to recover for wrongful death was nonetheless rationally related to the legitimate state interest in the "health, morals, or general welfare of the people," because it "discourage[ed] bringing children into the world out of wedlock."²⁷

Writing for the Supreme Court majority, Justice William O. Douglas disagreed. He noted that the case might have involved both fundamental rights stemming from an "intimate, familial relationship"²⁸ and an "invidious classification,"²⁹ either of which might trigger more exacting judicial scrutiny under the Fourteenth Amendment:

Why should the illegitimate child be denied rights merely because of his birth out of wedlock? . . . These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.³⁰

There are two points worth noting about this pivotal passage. First, despite the list of qualities that seemed to make Ms. Levy's children "hers" just as legitimate children would be, the majority clearly was not mandating that Louisiana allow a niece or nephew or neighbor's friend whom Ms. Levy nurtured, cared for, and let grow dependent on her to also collect for

²⁴ See 391 U.S. at 69–70.

²⁵ See *id.* at 68–70.

²⁶ Louisiana had a process that allowed putative genetic parents to formally and legally "acknowledge," or register, their legal connection to a child. See *id.* at 79 n.7 (Harlan, J., dissenting) (citing the Louisiana acknowledgement statute). Acknowledged children were not always treated identically to marital children, but they were treated as being in a legally recognized relationship with their parents, which entitled them to certain benefits from those parents. See *Labine v. Vincent*, 401 U.S. 532, 533–35 & nn.1–3 (1971) (explaining various ramifications of the Louisiana acknowledgment provisions).

²⁷ See *Levy v. State*, 192 So. 2d 193, 195 (La. Ct. App. 1966), *writ refused mem.*, 193 So.2d 530 (La. 1967), *rev'd*, 391 U.S. 68.

²⁸ See *Levy*, 391 U.S. at 71.

²⁹ See *id.*

³⁰ See *id.* at 71–72 (footnote omitted).

her wrongful death.³¹ It was only because these children were presumed to be Ms. Levy's genetic issue that the Court concluded they were similarly situated to children who would have been eligible to collect. Second, the invidiousness of the distinction could not stem from the fact that the children's conduct was irrelevant to the harm done to Ms. Levy. Wrongful death claimants' behavior is always irrelevant to the harm caused; they recover simply because of their legally recognized relationship to the deceased.

The second of the Court's 1968 legitimacy cases, *Glonn v. American Guarantee & Liability Insurance Co.*, involved a comparable illegitimate relationship and a comparable windfall for a tortfeasor.³² Because Ms. Glonn, the (presumably) genetic mother of the deceased child, was not married when the boy was born and had not legally acknowledged him as "hers," the tortfeasor owed her no duty of care with regard to her son. The U.S. Court of Appeals for the Fifth Circuit upheld the denial of benefits without even a mention of why the exclusion of illegitimate children was rational.³³

Justice Douglas, again writing for the majority, invalidated the statute handily:

[W]e see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.³⁴

The majority in both *Levy* and *Glonn* was unconvinced that denying recovery in these situations would serve as a disincentive for nonmarital sex or as encouragement to marry. The only evidence that the state seems to have offered in support of its rationale was a history of discouraging such illicit behavior.³⁵ The state did not demonstrate any nexus between the classifications at issue and their ability to discourage immoral behavior.³⁶ In

³¹ Ms. Levy may have been particularly likely to be nurturing toward children who were not her genetic issue because, as one scholar explains, kinship in the African-American community often does not track biology. See Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 214 (1995) ("[B]lood ties are less significant to the definition of family in the Black community than they traditionally have been for white America.").

³² See 391 U.S. at 73–74.

³³ See *Glonn v. Am. Guar. & Liab. Ins. Co.*, 379 F.2d 545, 546 (5th Cir. 1967), *rev'd*, 391 U.S. 73 ("[T]his Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable.").

³⁴ *Glonn*, 391 U.S. at 75.

³⁵ See *id.* at 75–76.

³⁶ See *id.*

Glon, the majority was so unconvinced of a nexus that it struck down the statute as irrational, without any more exacting scrutiny.³⁷

Justice John Marshall Harlan, in a four-Justice dissent written in response to both *Levy* and *Glon*, could not offer any proof that the treatment of illegitimates served the state's interest in morality and public welfare, but neither did he think such proof necessary. He was "[a]t a loss to understand . . . [the majority's conclusion that] the State must base its arbitrary definition of the plaintiff class on biological rather than legal relationships."³⁸ According to the dissent, children are entitled to be treated as related to certain adults when the state decides they are so entitled. Parenthood is a question of law, not fact.

The majority provided a brief paragraph in response, pointing out that the Fourteenth Amendment requires the Court to scrutinize the law: "[T]he Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."³⁹ Parenthood may be a question of law, but that law must be written and applied in a way that protects all citizens equally.

Usually, the Equal Protection Clause only demands serious review of the legal lines drawn by legislatures when there is a fundamental right or a suspect class involved. As the *Levy* majority suggested, legitimacy distinctions might run afoul of the Equal Protection Clause for both reasons.⁴⁰ First, by drawing lines around who is related to whom, the state was interfering with "intimate familial relationship[s]."⁴¹ Perhaps the state must be particularly careful not to be arbitrary when it regulates intimate family relationships. Second, the historical treatment of illegitimate children may suggest that courts should be wary of statutes that treat them poorly. Perhaps classifications based on illegitimacy should be treated the same as statutes based on race, because in both cases legislatures have a long and ugly history of discriminating against those groups without justification.

The *Levy* majority cited *King Lear* to highlight the long and unjustified history of prejudice against illegitimate children.⁴² There is no doubt that for hundreds of years, people who had been born to unwed mothers who never married their (presumably) genetic fathers were treated differently

³⁷ See *id.*

³⁸ See *Levy*, 391 U.S. at 79 (Harlan, J., dissenting).

³⁹ See *Glon*, 391 U.S. at 76.

⁴⁰ See *Levy*, 391 U.S. at 70–71.

⁴¹ See *id.* at 71.

⁴² See *id.* at 72 n.6 ("Why bastard, wherefore base? When my dimensions are as well compact, [m]y mind as generous, and my shape as true . . . ?" (quoting WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 2 (Candace Ward ed., Dover Publ'ns, Inc. 1994) (1608))).

under the law. In England, illegitimates were not allowed to inherit, nor were they allowed to bequeath to anyone but their own children.⁴³ They were considered *filiius nullius*, or children of no one.⁴⁴

The *Levy-Glona* dissent ignored this history of illegitimacy and elided any discussion of whether legitimacy should be considered a suspect class, but the dissent's critique does highlight a critical assumption in the majority's position: biology matters. Any statute that delineates entitlements based on family relationships must draw distinctions based on who is family. Those delineations will inevitably be arbitrary unless one believes that certain relationships, like those based on biology, *must* be considered familial. If there are no relationships that a legislature is required to consider familial, then presumably the legislature is free to draw the lines between family and nonfamily, or takers and nontakers, wherever it wants, unless in doing so it is discriminating against a suspect class.⁴⁵

B. Labine and Weber: *The Critical Cases*

The next two cases, decided within a year of each other, lay out the tension at the core of all of the legitimacy cases. In 1971, in *Labine v. Vincent*, the Supreme Court upheld Louisiana's rank discrimination against illegitimate children in the context of intestacy, explicitly deferring to state determinations of family status for purposes of property distribution.⁴⁶ In 1972, in *Weber v. Aetna Casualty & Surety Co.*, the Court used more exacting scrutiny to strike down Louisiana's workers' compensation scheme because it afforded legitimate but not illegitimate children rights to collect.⁴⁷

⁴³ See Alan Macfarlane, *Illegitimacy and Illegitimates in English History*, in BASTARDY AND ITS COMPARATIVE HISTORY 71, 73 (Peter Laslett et al. eds., 1980).

⁴⁴ See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 3 (1971). In medieval central Europe, illegitimates could not hold public office, testify in court, or leave property to anyone other than their legitimate dependents. The common law tended to be more accepting of illegitimates than were civil law jurisdictions. *See id.*

⁴⁵ If biology need not be determinative of family, then the Louisiana statutory scheme was arguably not arbitrary at all. It allowed parents to acknowledge children, and with that acknowledgement both child and adult could sue for the wrongful death of the other. The system can be justified as one that assigned parenthood based on voluntary legal commitments of the adult. Adults either got married, thereby committing themselves to the parent-child relationship for children born to the marriage, or they acknowledged certain children and thereby legally committed themselves to that parent-child relationship. The state bound itself to recognize the parent-child relationships that the parents signed up for, but not necessarily those relationships that the adults "lived" but did not register. This regime would not be problematic unless it was impermissible to ask the genetic parents of a nonmarital child to take a step—formal, legal acknowledgement—that parents of marital children did not have to take.

⁴⁶ See 401 U.S. at 538–40.

⁴⁷ See 406 U.S. at 175–76.

The illegitimate child in *Labine* was formally acknowledged by both of her unmarried “natural” parents within two months of her birth. Her acknowledged father, Mr. Vincent, died when the child was six years old, leaving behind considerable property but no will.⁴⁸ Under Louisiana’s intestacy law, the acknowledged child could inherit from the deceased only if there were no collateral relations.⁴⁹

Justice Hugo Black, writing for the 5–4 majority, distinguished *Labine* from *Levy* by noting that the wrongful death provision at issue in that case sounded in statutory tort.⁵⁰ The Court suggested that in creating “a large class of persons” who could recover for the tort in *Levy*, the state could not “totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort.”⁵¹ This is an odd way to distinguish *Levy*. The state defines the large class of persons who can take in intestacy as well. It is not clear why the cause of action under which the illegitimate child claims a right should matter if the constitutional problem is with the legitimacy classification itself. Moreover, illegitimate children as an entire category were not discriminated against in *Levy*—acknowledged illegitimate children were able to collect under the wrongful death statute. It was the statute that was upheld in *Labine* that discriminated against all nonmarital children.

After (barely) distinguishing *Levy*, the *Labine* majority highlighted how the Louisiana legislature “carefully regulated many of the property rights incident to family life.”⁵² But unlike the *Levy* majority, which emphasized how anything related to family life might need to trigger added scrutiny,⁵³ the majority in *Labine* suggested that anything dealing with property should trigger deference.⁵⁴ All of the legitimacy cases deal with property entitlements that flow from family status. Whether a court should put a thumb on the scale for the side of deference because it is property, or on the side of scrutiny because it is family, is the critical question. A 5–4 majority in *Labine* thought it more appropriate to emphasize the finality of property rights.

⁴⁸ See *Labine*, 401 U.S. at 533.

⁴⁹ See *id.* at 534. Mr. Vincent had no wife, no other children, and no parents, but he did have relatives who, under Louisiana’s intestacy statute, were entitled to take before his acknowledged daughter. See *id.* The *Labine* statute thus made a distinction between marital children and nonmarital children, whether acknowledged or not. The statute in *Levy* had made no distinction between legitimate and acknowledged children on the one hand and unacknowledged children on the other.

⁵⁰ See *id.* at 535–36.

⁵¹ See *id.*

⁵² See *id.* at 536.

⁵³ See *Levy*, 391 U.S. at 71.

⁵⁴ See *Labine*, 401 U.S. at 537–39.

Louisiana did, at the time of *Labine*, have a particularly comprehensive set of rights and obligations associated with family status. Unlike most states, children had obligations to their parents and were also entitled to a forced share at their intestate parent's death.⁵⁵ In addition, as the Court noted, Louisiana had "a complex set of rules regarding the rights of illegitimate children."⁵⁶ Although acknowledged illegitimate children, like Ms. Vincent, had some intestacy rights if there were no collateral heirs, unacknowledged illegitimate children had no intestacy rights, and in some instances fathers were even barred from bequeathing them property in a will.⁵⁷ This is rank discrimination against illegitimates, but it is also a relatively rational way of keeping unsavory facts (for example, infidelity) secret, and encouraging testators to provide for their marital children.⁵⁸ Paramount in the *Labine* decision was the fact that the Louisiana rules did not just discriminate against illegitimates, but also "against collateral relations, as opposed to ascendants, and against ascendants, as opposed to descendants," as well as "in favor of wives and against 'concubines.'"⁵⁹ Confronted with such an array of discriminations, the Court employed a very deferential standard of review.

The dissent accused the majority of ignoring the Fourteenth Amendment's mandates: "The conclusion the Court appears to draw from its itemization of other discriminations among a deceased's relatives is that Louisiana needs no justification at all for any of the distinctions it draws."⁶⁰ That idea, said the dissent, "flies in the face . . . of the Equal Protection and Due Process Clauses."⁶¹ The dissent is certainly correct that the Fourteenth Amendment requires courts to scrutinize some legislative distinctions, but what does mere rationality—much less heightened scrutiny—look like in intestacy? In general, intestacy laws are thought to try to mimic presumed testator intent, but the freedom legislatures have to presume and at times

⁵⁵ See *id.* at 536.

⁵⁶ See *id.* at 537.

⁵⁷ The idea of barring someone from bequeathing something in a will may sound like a severe restriction on the right to transfer one's property, but the entirety of the Louisiana intestacy statute—because it derived from continental traditions—is much more restrictive of property rights than most state codes. Since feudal times, continental European testators had much less freedom to ignore family members than did British testators. This made the definition of family potentially more important on the continent than in England. See *infra* notes 103–109 and accompanying text.

⁵⁸ Discrimination against illegitimates may seem less pernicious when it is done in the name of protecting the "legitimate" property expectations of the marital family. See *infra* notes 103–109 and accompanying text.

⁵⁹ See *Labine*, 401 U.S. at 537–38.

⁶⁰ See *id.* at 549–50 (Brennan, J., dissenting).

⁶¹ See *id.* at 550.

override that intent is considerable.⁶² Is it rational to prioritize (likely independent) adult children over (likely more needy because they are elderly) parents? Most intestacy statutes do.⁶³ Is it rational to put adopted siblings before blood relations? Many intestacy statutes now do, but the treatment of adoptive children varies considerably among the states.⁶⁴ What about a niece by marriage over a niece by blood? Whose viewpoint is the state empowered to prioritize in the case of illegitimate children: the presumed wishes of the testator, or the presumed wishes of his marital children?

Equal protection doctrine indisputably prevents a state from prioritizing white relatives over African-American relatives. The dissent in *Labine* thus understandably focuses on the “suspect classness” of illegitimates to invalidate the statute. Justice William J. Brennan accuses the majority of “uphold[ing] the untenable and discredited moral prejudice of bygone centuries” and suggests that the majority’s position is comparable to “answering a complaint of Negro school children against separate lavatories for Negro and white students by arguing that the situation is no different from separate lavatories for boys and girls.”⁶⁵ More curiously, the dissent suggests that making any classification between marital and nonmarital children is suspect because “the formality of marriage primarily signifies a relationship between husband and wife, not between parent and child.”⁶⁶

From a family law standpoint, this is an odd comment by Justice Brennan. For most of history, marriage has been the arbiter of parenthood. The marital presumption of paternity predates any law allowing a man to be sued for paternity outside of marriage by at least one thousand years.⁶⁷ Men were considered fathers because of their position as husbands long before they were deemed fathers because the law could establish a biological connection between man and child. In his *Commentaries*, William Blackstone wrote that the “*main end and design of marriage . . . [is] to ascertain and fix upon some certain person, to whom the care, the protection, the mainte-*

⁶² All but one state has a forced spousal share, thus preventing a testator from completely disinheriting a spouse, and only one state, Louisiana, has a forced child’s share, preventing a testator from completely disinheriting his (legitimate) children. See RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 99 (2004).

⁶³ See *id.* at 95.

⁶⁴ See *id.* at 149 (“The inheritance rights between the adoptee and her adoptive parents, the adoptee and her birth parents, and the adoptee and her adoptive and biological relatives other than the parents, vary widely among the states.”).

⁶⁵ See *Labine*, 401 U.S. at 541, 549 (Brennan, J., dissenting).

⁶⁶ See *id.* at 552–53.

⁶⁷ See Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 24 (1902).

nance, and the education of the children should belong.”⁶⁸ Marriage exists, according to Blackstone, to determine parenthood.⁶⁹

If Justice Brennan really meant to invalidate marriage as the arbiter of parenthood then he was also bringing into question the parentage of an overwhelming majority of children in the country. Even today, when non-marital birth rates are far higher than they were in 1971,⁷⁰ the marital presumption is the most common way to determine parenthood in someone other than the birth mother.⁷¹ The best estimates suggest that the presumed father is not the biological father in 10–15% of those births.⁷² If the idea of using marriage as the arbiter of parenthood effects an impermissible dis-

⁶⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *455 (1766) (emphasis added).

⁶⁹ See *id.* The idea that the law can discern a biological parent-child relationship requires some faith in either (i) our ability to discern with specificity who had sex with whom and when (and exclusively enough) or (ii) genetic science. To the extent we ever had faith in the former we were probably far too optimistic about our judicial system. The state desire to collect child support payments from nonmarital fathers spurred the creation of the paternity suit, and thus the idea of a legal parent-child relationship outside of marriage. But the notion that the law could reliably establish the existence of a biological father-child relationship was, in most instances, idealistic. Such determinations were beyond science, and therefore law. 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, 6–7 (2004) (discussing the origins of the paternity suit). Only one person in *Labine*, the woman who gave birth to Ms. Vincent, could have known whether Ezra Vincent was the genetic father of Ms. Vincent, and even that woman, if she had a variety of sexual experiences, may not have known. Relying on genetic science rather than questionable descriptions of sexual encounters makes for much more reliable evidence today, but our ability to reliably do so post-dates all of the Court’s legitimacy cases. See Jeffrey W. Morris & David W. Gjertson, *Genetic Markers Used in Parentage Testing*, 4 MODERN SCIENTIFIC EVIDENCE § 32:9 (David L. Faigman et al. eds., 2014) (discussing how much better current technology is at determining paternity than the previous generation of testing had been).

⁷⁰ The nonmarital birth rate today is 41%; in 1970 it was 11%. See ELIZABETH WILDSMITH ET AL., CHILD TRENDS, CHILDBEARING OUTSIDE OF MARRIAGE: ESTIMATES AND TRENDS IN THE UNITED STATES 1 (2011), http://www.childtrends.org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf [<http://perma.cc/Z6QQ-GBU3>].

⁷¹ Sixty percent of the children born in this country are born to married women. See JOYCE A. MARTIN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS: BIRTHS: FINAL DATA FOR 2011, at 1, 3, 9 (June 28, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01.pdf [<http://perma.cc/K2F4-ALSG>]. All of these children are presumed to have legal fathers. See Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 467 (2012) (“The law in all states presumes that a husband is the father of his wife’s children and gives him the status of the children’s legal father.”).

⁷² See Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 56–57 (2002) (“[T]he professional consensus is that the rate of paternal discrepancy for couples in stable unions, whether legally married or cohabitating, is from ten to fifteen percent.”); see also Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 221–22 (2002) (discussing the high occurrence of wrongly-attributed paternity).

crimination against nonmarital children, then the paternity of all legitimate children is suspect as well.

Taken as a whole, the *Labine* decision suggests that at least five Justices understood line drawing between potential family members in intestacy statutes to be an inevitably messy and probably arbitrary process. The idea that such distinctions in intestacy statutes could trigger added scrutiny because they interfered with a fundamental right to “intimate, familial relationship[s]”⁷³ was tautological. Intestacy statutes were designed to define family relationships, or at least the family relationships that were going to get preference in probate proceedings. The dissent bypassed the fundamental rights quandary by arguing that distinctions based on legitimacy should be subject to heightened review due to the history of discrimination against illegitimates as a class. In doing so, the dissent necessarily drew into question the predominant means of determining paternity—not blood, but marriage.

In 1972, in *Weber*,⁷⁴ the Supreme Court retreated from the deference they endorsed one year earlier in *Labine*. In a notably lopsided opinion, which was 7–1–1 with Justice Harry Blackmun concurring, the Court struck down the Louisiana workers’ compensation scheme that provided benefits to some groups of dependents but did not allow unacknowledged illegitimate children to collect.⁷⁵ Legitimate children and spouses living with the deceased at the time of death were presumed dependent, and acknowledged illegitimate children had the opportunity to prove dependence.⁷⁶ The plaintiff children in *Weber* did not fit into either category. The plaintiffs were living with the deceased, Mr. Stokes, just prior to his death. The household consisted of Mr. Stokes, his four legitimate children, his pregnant (apparently by him) companion Willie May Weber, and his one illegitimate child (also conceived with Ms. Weber).⁷⁷ Mr. Stokes was still married to his first wife, who had been committed to a mental hospital.⁷⁸ Because he was still married to his first wife, Mr. Stokes had been unable to acknowledge his child with Ms. Weber because the Louisiana acknowledgement statute required parents acknowledging a child to be capable of contracting marriage at the time of conception.⁷⁹ Justice Blackmun would have struck down the

⁷³ See *Levy*, 391 U.S. at 71.

⁷⁴ See *Weber*, 406 U.S. at 175–76.

⁷⁵ See *id.*

⁷⁶ See *id.* at 167–68.

⁷⁷ See *id.* at 165.

⁷⁸ See *id.*

⁷⁹ See LA. CIV. CODE ANN. art. 202 (1967). For a discussion of acknowledgement as an alternative means of establishing a legal parental relationship, see *supra* note 26 and accompanying text.

Louisiana scheme only to the extent that it barred Mr. Stokes from ever being able to acknowledge (and thereby make eligible) the children he had with Ms. Weber.⁸⁰

Justice Lewis F. Powell's majority opinion went much further. It distinguished *Labine* as an intestacy rather than tort-related case.⁸¹ Finding *Levy* to be the controlling precedent, the Court then veered off the suspect-class path that the dissent in *Labine* seemed to be heading down, and again rooted this case in fundamental rights doctrine: "The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"⁸²

The Supreme Court noted that the lower court had upheld the statute because it furthered the state's interest in "protecting 'legitimate family relationships.'"⁸³ But the Court dismissed that justification because it saw no indication that the state's denial of workers' compensation benefits to illegitimate children would in any way discourage people from entering into "illegitimate" family relationships.⁸⁴ There was just no proof that these statutory distinctions affected anyone's sexual behavior.

The Court reasoned that there was no valid purpose for the exclusion of unacknowledged illegitimate children because the statute limited recovery to *dependent* children:

By limiting recovery to dependents of the deceased, Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood. . . . It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and it avoids altogether diffuse questions of affection and affinity which pose difficult probative problems.⁸⁵

⁸⁰ See *Weber*, 406 U.S. at 176–77 (Blackmun, J., concurring). Justice Blackmun's opinion corresponds with the "register to parent" rationale offered above. See *supra* note 45 and accompanying text. He would have required states to allow parents to legally acknowledge their children, regardless of whether those children were born to a marriage or not. See *Weber*, 406 U.S. at 176–77 (Blackmun, J., concurring).

⁸¹ See *Weber*, 406 U.S. at 170–71 (majority opinion).

⁸² See *id.* at 173.

⁸³ See *id.* (quoting *Stokes v. Aetna Cas. & Sur. Co.*, 242 So. 2d 567, 570 (La. 1970), *rev'd*, *Weber*, 406 U.S. 164).

⁸⁴ See *id.* at 173–74.

⁸⁵ *Id.* at 174–75 (footnote omitted).

Limiting the class of entitled illegitimate children to those who were dependent was important to the Court because of the proof problems inherent in determining biological paternity.

The Court then suggested that because dependence limits recovery anyway, there was no reason to restrict the rights of nonmarital children.⁸⁶ “[D]irect blood and dependency”⁸⁷ had to be a substitute for legitimacy. The Court explained:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.⁸⁸

This well-meaning and oft-quoted passage⁸⁹ makes little sense. The tort-based and social welfare systems (as opposed to intestacy laws) that the Court deemed most worthy of scrutiny with regard to classifications of illegitimacy all grant rights based on an adult’s economic position. Because such systems rely on extant labor markets and neoliberal entitlements with regard to property,⁹⁰ what a child is burdened or blessed with legally is never a function of the child’s “individual responsibility or wrongdoing.”⁹¹ It is always a function of his or her parents’ behavior.

Through no fault of his or her own, the child of a low-wage earner is entitled to much less in a wrongful death action than the child of a high-wage earner because tort damages are based on the deceased’s expected income stream. A child’s social security survivors or disability benefits are a function of how much money the insured “parent” paid in Federal Insurance Contributions Act (“FICA”) taxes while working. The child whose mother never reported the income she earned while cleaning houses may be entitled

⁸⁶ See *id.*

⁸⁷ *Id.* at 175.

⁸⁸ *Id.*

⁸⁹ See Amicus Brief of Scholars of the Constitutional Rights of Children in *Windsor*, *supra* note 1, at 22 (stating that *Weber* is “the most well-known and cited nonmarital status case”).

⁹⁰ See generally Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008) (discussing the privatization of children’s entitlements); Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25 (2015) (examining how constitutional law, state family law, and welfare law all take the market and its distribution of wealth as a given).

⁹¹ See *Weber*, 401 U.S. at 175.

to nothing, while the child whose mother worked for a cleaning service that automatically deducted her FICA wages is entitled to a benefit. A child whose mother had an affair with the gardener while married to an investment banker is financially secure for reasons that have nothing to do with that child.⁹² Moreover, in all of these cases, the child's entitlements can depend on how many siblings he or she has. Any one child's social security payout,⁹³ just like any one child's allotment of child support,⁹⁴ depends on the number of children with whom he or she is sharing the benefits. So not only is a child's entitlement based on what his or her parent did in the marketplace, it is based on what his or her parent did in the bedroom.

The real question for legitimacy doctrine must be, why it is appropriate to base a child's entitlement on a parent's market and reproductive behavior, but not appropriate to base a child's entitlement on a parent's marital behavior? Why can't parenthood be one of the rights and obligations of marriage? And why is the state not free to ignore genetic connections outside of those marital rights and obligations? After all, to do so arguably affords adults more sexual freedom.⁹⁵

C. Louisiana and Legitimacy

The reader has likely noticed that all of the cases discussed thus far came from Louisiana. Various members of the Supreme Court appeared to be quite hostile to the Louisiana family law regime.⁹⁶ There are two reasons the Court may have been particularly troubled by Louisiana's Code. The first has to do with Louisiana being a southern state in the late 1960s with a

⁹² A child born as a result of that affair would be considered the legal child of the investment banker and presumptively entitled to his or her legal father's wealth.

⁹³ For instance, if an insured deceased has two children and a widow, each of those children may receive less in social security survivors benefits than they would as a single child because of the maximum family amount. See *Survivors Planner: How Much Would Your Survivors Receive?*, SOC. SEC. ADMIN., <http://www.socialsecurity.gov/planners/survivors/onyourown5.html> [<http://perma.cc/6RSE-ZX7Y>]. The more children one has, the more likely the potential recipient entitlements exceed the maximum family amount.

⁹⁴ All states determine child support amounts in light of the number of children in a household. A custodial parent of a single child will receive more per child than for two children. See HARRIS ET AL., *supra* note 5, at 468–74 (explaining how child support formulas operate).

⁹⁵ It affords more freedom because it allows people to have sex outside of marriage without having to worry about liabilities that might attach by doing so. Letting genetic connection serve as the primary means of establishing paternity for nonmarital children results in a strict liability regime for men who have sex with unmarried women. Regardless of any representations on the woman's part, and regardless of his wishes with regard to whether any unwanted pregnancy should be carried to term, he is liable for child support. See Baker, *supra* note 69, at 8–9 (“[P]aternity law seems to be based on a strict liability theory for genetic contribution.”).

⁹⁶ See, e.g., *supra* notes 34–37 and accompanying text (discussing the Supreme Court's invalidation of a Louisiana wrongful death statute because the state lacked a rational basis).

history of racial discrimination.⁹⁷ The second has to do with Louisiana's civil law traditions.

With regard to potentially racist motivations explaining the Louisiana Code, there is ample evidence to suggest that southern states routinely tweaked their laws of domestic relations in order to ensure white supremacy. In addition to their anti-miscegenation laws, which the Supreme Court had only recently struck down,⁹⁸ there is evidence that southern states tried to eliminate common law marriage before many other states in an effort to render illegitimate all African-American children born to couples that had not gone through the formalities of marriage.⁹⁹ Numerous states developed an exception to the marital presumption of paternity when the child was born with African-American features,¹⁰⁰ thus rendering illegitimate children resulting from interracial extramarital affairs, but not those resulting from intraracial extramarital affairs. Moreover, as had been clear since the publication of the *Moynihan Report*, African-American children were far more likely to be born to nonmarital parents than were white children, so laws discriminating against illegitimate children would clearly have a disproportionate impact on African-Americans.¹⁰¹ All of those are strong reasons for the Court to have been suspicious of Louisiana's laws with regard to legitimacy, but none of them indicate why Louisiana might be different from other southern states like Georgia, Alabama, and Mississippi.

Louisiana was unique among its southern counterparts, though. Because of its continental origins, the Louisiana Code created many different categories of relevant family statuses and a variety of rights and obligations that attached to those different statuses.¹⁰² To a judge accustomed to the

⁹⁷ A disproportionate number of plaintiffs in the legitimacy cases were people of color. See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 107–10 (2003).

⁹⁸ See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (finding the prohibition of interracial marriage unconstitutional); see also Christopher R. Leslie, *Justice Alito's Dissent in Loving v. Virginia*, 55 B.C. L. REV. 1563, 1605–06 (2014) (discussing various “uncertainty” arguments made by supporters of miscegenation laws regarding the possible consequences of interracial marriages, including for the children of such marriages).

⁹⁹ See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 351–53 (2012).

¹⁰⁰ See Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 499–503 (1993) (arguing that nineteenth-century American courts did not apply the presumption in cases involving children with African-American features).

¹⁰¹ See DANIEL PATRICK MOYNIHAN, OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 5–12 (1965) (highlighting the higher rate of nonmarital births to African-American women and attributing much of the poverty in African-American communities to this family structure).

¹⁰² See Thomas W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat and the French Codes*, 44 TUL. L. REV. 264, 281–86 (1970).

common law system of other states, Louisiana's Code would not only have looked odd, it could have looked like officious, liberty-reducing state interference with personal relationships, particularly those pertaining to sex. That is the kind of state interference against which the fundamental rights doctrine is supposed to protect.

Viewed from the primarily French tradition from which it emerged, however, the Louisiana Code can be seen differently. As Charles Donohue has explained, the different family property systems in England and France can be traced to different feudal systems. The English system was biased in favor of simplifying ownership so as to facilitate development, whereas the French system was biased in favor of decentralizing power amongst large feudal families so as to check the monarchy's control.¹⁰³ The English system enhanced individuals' liberty while facilitating the growth of a strong centralized government. The French system enhanced family power, so as to restrict the growth of a strong centralized government.

In order to ensure that property stayed in the family and away from the King, the French system developed elaborate rules that determined not only how property must be allocated among family members, but who should be considered family.¹⁰⁴ It is this tradition that explains why Louisiana had "forced share" rules for both parents and legitimate children¹⁰⁵ when the rest of the United States had neither. In Louisiana, legitimate children even had a right to a forced share of property that their father may have transferred during his lifetime, if he was found to have done so to reduce his legitimate children's interest.¹⁰⁶ Because it mandated dissemination of property throughout the family, the French legal system made family categorization more relevant to more people. It mattered more whether one was a descendant, sibling, or ascendant because all of those classes had property rights as family members, regardless of testator intent. In comparison, the British system vested almost complete control in the property owner. The intricacies of the French system required the law to do more work in defining family in order to distribute property.

Although this system may have been different from those with which most of the Justices were familiar, it was not necessarily less progressive.¹⁰⁷

¹⁰³ See Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 64–84 (1979).

¹⁰⁴ See Tucker, *supra* note 102, at 275–76 (contrasting French and British systems and noting how a man's relationship with his family was determined by law in France, but less so in England).

¹⁰⁵ See *Labine*, 401 U.S. at 536.

¹⁰⁶ See *id.*

¹⁰⁷ The marital rule of "community property," which automatically vests both spouses with half of all property brought into a marriage, was also a part of that more communal system. Com-

The French system prevented significant accumulations of wealth in heads of household, forced redistributions of wealth to those who might not be able to earn it, and acted as a check on state control. Louisiana may have discriminated against illegitimate children as opposed to legitimate children more than most states,¹⁰⁸ but it also discriminated in favor of legitimate children as opposed to their parents more than most states. As one scholar has noted, Louisiana is an exception to the “American approach to testate succession [that] seems embarrassingly primitive compared with the wills law of most advanced countries.”¹⁰⁹ Making a policy choice that protects marital children and reflects the child-protective inheritance norms of much of the rest of the industrialized world is not self-evidently irrational or necessarily based on animus.

D. Gomez and New Jersey Welfare: Per Curiam Protection

Two brief per curiam opinions, neither from Louisiana, followed the year after *Weber* was decided. In 1973, in *Gomez v. Perez*, the Supreme Court ruled that Texas could not deny illegitimate children a right to support from their proven biological father because Texas law imposed upon marital fathers a duty to support their legitimate children.¹¹⁰ Citing *Levy* and *Weber*, the Court wrote that “a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.”¹¹¹ The Court did not expand on the level of scrutiny it was ap-

munity property rules, because they vest wives with significantly more property than did the English common law system, are thought to be more progressive. Such rules have been adopted by all U.S. jurisdictions through the concept of equitable distribution for purposes of divorce. See *HARRIS ET AL.*, *supra* note 5, at 358–73.

¹⁰⁸ Moreover, in all cases except the one involving the intestacy provision that the Court upheld, Louisiana let acknowledgement serve as a substitute for legitimacy. See *Labine*, 401 U.S. at 537.

¹⁰⁹ BRASHIER, *supra* note 62, at 118–19.

¹¹⁰ See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam).

¹¹¹ *Id.* It is worth noting that it was not until 1984, when Congress required states to adopt income-based formulas for determining child support, that states began routinely treating unwed and wed fathers' commitments to their children as comparable. See Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 3(c)–(g), 98 Stat. 1305, 1310–11 (codified as amended at 42 U.S.C. § 654 (2012)); Family Support Act of 1988, Pub. L. No. 100-485, § 103(a)–(b), 102 Stat. 2343, 2346 (codified as amended at 42 U.S.C. § 667(b) (2012)). As this author has noted elsewhere, the equities of this equal treatment are debatable. A man who was lied to about his sexual partner's use of birth control, who always made clear that he had no interest in fathering a child, and who was promised that he would not be sued in paternity, has the exact same child support obligation, regardless of the fraud, as does a married man who demonstrated complete devotion to the idea of having children. See Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 345. *Gomez* said that states must allow an unwed mother to sue in paternity,

plying or why it was applying it. In two later cases, *Mills v. Habluetzel*¹¹² in 1982 and *Clark v. Jeter*¹¹³ in 1988, the Supreme Court interpreted the right established in *Gomez* as requiring adequate time for a child to sue to establish paternity.¹¹⁴

Also in 1973, in *New Jersey Welfare Rights Organization v. Cahill*, the Supreme Court struck down a state program that provided benefits to households of marital families with children, but not to households with children whose parents were not married.¹¹⁵ Citing *Weber* and the recently decided *Gomez*, the Court stated, “[T]here can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.”¹¹⁶

What is curious about *Cahill* is that the state argument that had routinely failed previously—that providing benefits to legitimate but not illegitimate children helped encourage marriage—seems far more credible in this case. It may seem farfetched that two people will marry so that if one of them dies or gets injured their children are entitled to benefits, but it is perfectly plausible that two people living in a household with children would marry in order for the household to qualify for governmental benefits. The payoff to marriage would be immediate. There is now ample evidence to support the idea that the payoff from marriage might be long lasting for children. Children from marital households fare better, on average, than children from nonmarital households.¹¹⁷ Married couples are more likely to stay together than unmarried couples, and stability is correlated with better

but it said nothing about the amount that courts had to award in child support. See *Gomez*, 409 U.S. at 538.

¹¹² See 456 U.S. 91, 100–02 (1982) (concluding that one year did not provide illegitimate children sufficient time to establish paternity and procure support).

¹¹³ See 486 U.S. 456, 464–65 (1988) (holding that a six-year statute of limitations on paternity suits by illegitimate children was unconstitutional).

¹¹⁴ As a practical matter, all of the child support cases are largely irrelevant today because federal legislation in 1984 tied federal child support dollars to rules requiring states to adopt eighteen-year statutes of limitations for suits by a child or the state for child support. See 42 U.S.C. § 666(a)(5) (1984).

¹¹⁵ See 411 U.S. 619, 620–21 (1973) (per curiam).

¹¹⁶ *Id.* at 621.

¹¹⁷ See Ryan Heath Bogle, *Long-Term Cohabitation Among Unwed Parents: Determinants and Consequences for Children* 1 (Bowling Green State Univ. Ctr. for Family & Demographic Research Working Paper Series, 2012), <http://papers.ccpr.ucla.edu/papers/PWP-BGSU-2012-038/PWP-BGSU-2012-038.pdf> [<http://perma.cc/W4MM-6D7J>] (citing studies showing that children of cohabitating unions run a greater risk of disruption and have a greater risk of cognitive, behavioral, and economic trouble than children of married counterparts).

child outcomes.¹¹⁸ Additionally, children are thought to benefit from the many incentives that the U.S. Tax Code provides to married couples.¹¹⁹

As a policy matter, there are reasons to doubt whether strong-arming parents of nonmarital children who do not otherwise want to marry to do so would have the desired positive outcome on children.¹²⁰ Moreover, marriage today has become such a classed institution that studies extolling its virtues are very hard to apply across classes.¹²¹ But legislators who believed in the benefits of marriage for children, and wanted to extend those benefits to children whose parents were not married, would not necessarily be acting out of animus toward illegitimate children in enacting legislation encouraging marriage—quite the opposite. The *Cahill* and *Gomez* per curiam opinions demonstrate a growing zeal to protect the rights of illegitimate children but a laxity in explaining why.

E. The Final Quagmire

The U.S. Supreme Court decided four more legitimacy cases in the next five years. The first two cases involved very similar social security provisions, both of which were justified as meeting the needs of an insured's dependent children. The Court held that the social security disability provision in *Jimenez v. Weinberger*¹²² was unacceptable, but upheld the social security survivors' provision in *Mathews v. Lucas*.¹²³ In the final two cases, *Trimble v.*

¹¹⁸ See *id.* at 2; see also Lisa A. Gennetian, *One or Two Parent? Half or Step Siblings? The Effect of Family Structure on Young Children's Achievement*, 18 J. POPULAR ECON. 415, 431–33 (2005) (for educational outcomes, children reared in traditional nuclear families do much better than those reared in other family structures); Donna K. Ginther & Robert A. Pollak, *Family Structure and Children's Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41 DEMOGRAPHY 671, 676 (2004); Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 403–05 (2007) (citing studies on the effects of family structure).

¹¹⁹ For a discussion of the preferential tax treatment afforded married couples, see Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing and the Challenge of Reform*, 1999 WIS. L. REV. 1, 11–16. One of the most salient preferences that the Tax Code embraces is for non-working spouses, whose unpaid domestic labor is not taxed and whose dependence inures to the benefit of the wage-earning head of household. Presumably, this preferential treatment is rooted in a belief that children benefit from the unpaid labor that non-wage-earning spouses provide.

¹²⁰ People who do not marry may well not be marrying because they know that it would not work out.

¹²¹ See Kelly Musick & Larry Bumpass, *Re-Examining the Case for Marriage: Union Formation and Changes in Well-Being*, 74 J. MARRIAGE & FAM. 1, 12 (2012) (noting that “it is very hard to disentangle marriage from other socioeconomic factors that may affect child well-being”); see also Bogle, *supra* note 117, at 7–8 (suggesting that data showing better outcomes for marital children may be deeply affected by socioeconomic factors).

¹²² See 417 U.S. 628, 636–38 (1974).

¹²³ See 427 U.S. at 514–16.

Gordon and Lalli v. Lalli, the Court waded back into intestacy statutes, striking down one statute¹²⁴ that was very similar to the one it had upheld in *Labine*, but allowing another that clearly discriminated against nonmarital children.¹²⁵

1. *Jimenez and Mathews*

The social security disability provision challenged in *Jimenez* allowed illegitimate children to collect disability-related children's benefits as long as the children could inherit under state intestacy law *or* had been acknowledged before the onset of the worker's disability.¹²⁶ Two of Mr. Jimenez's acknowledged illegitimate children were ineligible for benefits under the statute because they were born after their father became disabled.¹²⁷ The state intestacy statute, like the statute in *Labine*, did not list acknowledged illegitimate children as takers.¹²⁸ Plaintiffs in *Jimenez* urged the Court to find that illegitimates constitute a suspect class, like race and national origin.¹²⁹ The Court, in an 8–1 decision, explicitly eschewed that issue.¹³⁰ Instead, using what seems to be rational basis review, the Court simply found that the classification served “no legitimate state interest, compelling or otherwise.”¹³¹

Oddly, the Court focused on the overinclusiveness of the statute.¹³² The Court acknowledged that spurious claims could be a problem, so it did not suggest that it was impermissible to exclude children born after the injury occurred. But the Court did find it impermissible to distinguish between legitimate and illegitimate children born after the injury.¹³³ Legitimate chil-

¹²⁴ See *Trimble v. Gordon*, 430 U.S. 762, 774–76 (1977).

¹²⁵ See *Lalli*, 439 U.S. at 273–75.

¹²⁶ See *Jimenez*, 417 U.S. at 634–35 (also noting that the provision granted benefits to children who were illegitimate solely because of a “formal, nonobvious defect” in their parent’s marriage).

¹²⁷ See *id.* at 628.

¹²⁸ See *id.* These children could only have been legitimated if Mr. Jimenez had divorced his first wife and then married the children’s mother. As was the case in *Weber*, the Court did not seem to entertain this as a realistic option for the father. See *id.*; see also *supra* notes 74–88 and accompanying text (discussing *Weber*).

¹²⁹ See *Jimenez*, 417 U.S. at 631.

¹³⁰ See *id.* (stating that the Court did not need to discuss the suspect classification argument).

¹³¹ *Id.* (citation omitted).

¹³² See *id.* at 636–37. The overinclusiveness that the statute engendered, by providing for all heirs delineated in the state intestacy statute, seemed to bother the Court as much as the underinclusiveness engendered by the fact that the plaintiff was not given the opportunity to prove dependence.

¹³³ See *id.* The Court reasoned that the statute could not have been designed to meet the dependency needs of all of those children impacted by their parent’s disability because it allowed legitimate children born after the injury—who thus could not have been dependent before the

dren born after the injury could collect because they were listed as heirs in the intestacy statute, but after-born illegitimate children could not collect. It was the government's willingness to rely on the intestacy statute in addition to birth at the time of injury that resulted in impermissible discrimination.

Two years later, in *Mathews*, the Supreme Court upheld an identically overinclusive but less underinclusive statute. In a 6–3 decision, the Court let pass a social security survivors benefit test that provided for all heirs listed in the applicable state's intestacy statute, as well as any "child" who could prove his or her dependence on the deceased at the time of death.¹³⁴ The children in *Mathews* had lived with their "father" for thirteen and six years, respectively, but he was not living with or supporting the children when he died.¹³⁵ The Court relied on the state's intestacy statute to determine which children could take at death and thus excluded the deceased's nondependent genetic children.¹³⁶

Mathews is most well known, though, for clarifying the level of scrutiny standard in legitimacy cases. The Court rejected the strict racial analogy because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes. . . . [T]he Act's discrimination between individuals on the basis of their legitimacy does not 'command extraordinary protection from the majoritarian political process.'"¹³⁷ Nonetheless, the Court held that

injury—but not illegitimate children born after the injury to collect. *See id.* The government argued that the disallowance of the illegitimate children born after the injury was necessary to discourage spurious claims. *See id.* at 636.

¹³⁴ *See Mathews*, 427 U.S. at 514–16. No child was eligible for benefits if they had been adopted by someone else. An adoption exception like this makes common sense because the children are now considered to be in a different parent-child relationship, but it also sheds light on how genetic connection can often be subordinated to legal status when it comes to entitlement. A child adopted by someone else has just as much of a blood connection to the insured as a child who is not adopted. The statute excludes adoptees even if they have been completely abandoned by their adoptive parent. It is the fact that they have been legally declared to be a part of another parent-child relationship that disenables them, but the Court spends no time explaining why the government is free to disallow a child who has been adopted, but not a child whose parents were never married.

¹³⁵ *See id.* at 497, 501.

¹³⁶ *See id.* at 500–01.

¹³⁷ *See id.* at 506 (citation omitted) (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The liberal dissenters, confronting their first defeat since *Labine*, again emphasized the analogy to race: "We are committed to the proposition that all persons are created equal." *See id.* at 516 (Stevens, J., dissenting). "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white." *Id.* at 520. If more rigorous scrutiny was applied, the statute should fail for its overinclusiveness. The statute allows all legitimate and acknowledged children, as well as children of men who have been

illegitimates were a semi-suspect class, entitled to a “not toothless” level of scrutiny because of the history of discrimination against them.¹³⁸ It is not the idea of drawing lines around family but the history of discrimination against illegitimate children that triggers the added scrutiny, though the statute that barred recovery for the illegitimate children in *Mathews* survived that scrutiny.

2. *Trimble* and *Lalli*

The intestacy cases that followed two years later did little to clear up the inconsistencies between *Jimenez* and *Mathews*. In 1977, in *Trimble*, the U.S. Supreme Court invalidated an Illinois intestacy statute that allowed illegitimate children to collect from their genetic mothers but not their fathers, ostensibly in order to promote legitimate family relationships and the orderly distribution of property.¹³⁹ The deceased in *Trimble* had been adjudicated as the father and was paying child support when he died, but the child was still considered illegitimate under state law and ineligible to take in probate.¹⁴⁰ The Illinois Supreme Court, believing *Labine* to be precedent requiring deference to legislative decision making in intestacy because of the important state interest in establishing a “method of property disposition,” upheld the statute.¹⁴¹

The U.S. Supreme Court reversed. The Court held that the state’s interest in “the accurate and efficient disposition of property” could not justify the exclusion of the child in this case.¹⁴² The only thing that distinguishes this case from *Labine* is the child support order. In *Trimble*, as in *Labine*, there were no disputed facts regarding genetic connection and no reason to believe that the deceased would not have wanted his estate to go to his acknowledged daughter.¹⁴³ Either nine years of battling over this issue or the existence of the court order establishing paternity convinced enough members of the Court that the state was not free to disregard a previously established legal parent-child relationship, even in an intestacy statute.

In his dissent, Justice William Rehnquist wrote a more in-depth version of the dissent he had penned in every previous case invalidating the

adjudged responsible in a paternity hearing, to collect even though many of those children are “no more likely to be ‘dependent’ than are the children in appellees’ situation.” *Id.* at 522.

¹³⁸ *Id.* at 509–10 (majority opinion) (holding that classifications based on illegitimacy should be reviewed with a level of scrutiny that was “not toothless”).

¹³⁹ See *Trimble*, 430 U.S. at 774–76.

¹⁴⁰ See *id.* at 764–65.

¹⁴¹ See *In re Estate of Karas*, 329 N.E.2d 234, 238–42 (Ill. 1975), *abrogated by Trimble*, 430 U.S. 762.

¹⁴² See *Trimble*, 430 U.S. at 772–73.

¹⁴³ The Court in *Trimble* cited these factors as proof that the statute was discriminatory. See *id.*; see also *Labine*, 401 U.S. at 533–34.

illegitimacy distinction. He recited the history of the Equal Protection Clause, argued that it was meant only to apply to race, and thoroughly dismissed the idea that a classification like legitimacy might demand more scrutiny than any other routine piece of legislation.¹⁴⁴ To anyone who has read Justice Rehnquist's previous dissents, there is nothing surprising in these arguments. What is surprising is that three other Justices were willing to join him. Justices Potter Stewart, Warren E. Burger, and Blackmun all voted to invalidate the statutes at issue in *Jimenez* and *Weber*, and had signed onto the "not toothless" review standard in *Mathews*.¹⁴⁵ Their willingness to join Justice Rehnquist in *Trimble* may suggest that their real motivation was a belief in the "intestacy exceptionalism" that the Court had used earlier to distinguish *Labine* from *Levy* and *Weber*.¹⁴⁶

One year after *Trimble*, in *Lalli*,¹⁴⁷ the Supreme Court upheld a New York intestacy statute that prevented illegitimate children from inheriting from their alleged fathers unless "a court of competent jurisdiction ha[d], during the lifetime of the father, made an order of filiation."¹⁴⁸ Justice Powell switched sides in *Lalli*, determining that the New York statute included all that was required of it under the Equal Protection Clause.¹⁴⁹ Justice Blackmun concurred in the result, but only after making clear that he thought *Lalli* overruled *Trimble*.¹⁵⁰ Justice Rehnquist concurred in the judgment for reasons expressed in his *Trimble* dissent, his opus on how all distinctions based on legitimacy should pass muster under the Equal Protection Clause.¹⁵¹ Justices Powell, Stewart, and Burger were the only Justices who thought *Lalli* was different enough from *Trimble* to find the holdings consistent.¹⁵² Misters Trimble and Lalli had both publicly, though informally, acknowledged their illegitimate children and had both provided for them—at least somewhat—in their youth, but in *Trimble* there had been a legal adjudication of paternity and in *Lalli* there had not. The critical difference was a previous legal finding of parenthood.

¹⁴⁴ See *Trimble*, 430 U.S. at 779–82 (Rehnquist, J., dissenting). The kinds of means-ends analysis that the Court attempted in cases like this was fruitless, according to Rehnquist, because it was simply impossible to discern legislative purpose. See *id.*

¹⁴⁵ See *Mathews*, 427 U.S. at 509–10; *Jimenez*, 417 U.S. at 631; *Weber*, 406 U.S. at 175–76.

¹⁴⁶ See *supra* notes 50–51, 80–82 and accompanying text (discussing the Court's distinctions between *Labine*, *Levy*, and *Weber*).

¹⁴⁷ See *Lalli*, 439 U.S. at 273–75.

¹⁴⁸ See *id.* at 261–62.

¹⁴⁹ See *id.* at 274–76.

¹⁵⁰ See *id.* at 276–77 (Blackmun, J., concurring).

¹⁵¹ See *id.* at 276 (Rehnquist, J., concurring).

¹⁵² See *id.* at 273–76 (majority opinion).

Despite—or perhaps because of—the fairly impenetrable distinctions and justifications offered by the Justices in the last four legitimacy cases, the Supreme Court’s foray into legitimacy classifications came to a rather abrupt end after *Lalli*.¹⁵³

Ultimately, this Article argues that there is no one theory that can unify all of the legitimacy cases. It also suggests that what is likely the most common and intuitive interpretation of the legitimacy cases—that they confer constitutional status on the genetic relationship, allowing blood to trump law in establishing parenthood—is the most dangerous interpretation of the cases. But before examining why that is so, a brief discussion of what the trajectory of the legitimacy cases says more generally about equal protection doctrine and family status determinations is in order.

F. Of Suspect Classes and Fundamental Rights

Notwithstanding the early attempts to identify illegitimacy discrimination as a problem stemming from fundamental rights to family relationships, *Mathews*, followed by *Trimble* and *Lalli*, dispensed with that line of analysis. Illegitimates constitute a suspect class because of a history of discrimination against them. The four most liberal Justices never succeeded in getting illegitimacy to be reviewed as strictly as race, but it is the history of discrimination rather than the idea of family that triggers the “not toothless” review.

The question of which constitutional doctrine, fundamental rights or group discrimination, entitles one to family status may be recognizable to those familiar with the same-sex marriage debate. The right to same-sex marriage might be lodged in fundamental rights doctrine (there is a fundamental right to marry) or group discrimination doctrine (gays and lesbians should be treated as a suspect class). Although the Supreme Court acknowledged the “synergy between the two protections,”¹⁵⁴ the Court’s recent decision in 2015, in *Obergefell v. Hodges*, clearly eschewed a group discrimination finding.¹⁵⁵ The opinion did not suggest that gays and lesbians should be treated as a suspect class. Thus, the Supreme Court aligned more with the Tenth and Fourth Circuits, which found the right to same-sex marriage rooted in fundamental rights, and less with the Seventh and Ninth Circuits,

¹⁵³ As discussed, there were two later statute of limitations cases pertaining to child support. See *supra* notes 112–114 and accompanying text. The authority of those cases is questioned *infra* notes 237–240 and accompanying text.

¹⁵⁴ *Obergefell*, 135 S. Ct. at 2603.

¹⁵⁵ See *id.* at 2598–602 (discussing fundamental right to marry); *id.* at 2603–05 (discussing equality principles but never mentioning suspect-class analysis).

which found the right to same-sex marriage rooted in discrimination doctrine.¹⁵⁶ The legitimacy cases suggest this may have been a mistake.

The legitimacy cases reveal that pressure on the states' classifications of parenthood stemmed from the same kinds of sources that put pressure on states' classifications of marriage. Children who were not entitled to various social welfare benefits tied to the parent-child relationship sued just as same-sex couples sued over the social welfare benefits tied to marriage.¹⁵⁷ In the same-sex marriage cases, many courts found no compelling reason to exclude same-sex couples from the benefits that straight couples received.¹⁵⁸ Comparably, the Supreme Court often found no sound reason to exclude certain children from the benefits that legitimate children received. In both contexts, after toying with the idea that the problem is interference with a fundamental right to family status (either marriage or a parent-child relationship), many courts backed away from fundamental-rights analysis because of the government's inevitable role in defining family.

The Supreme Court has found a fundamental right to marry in only two cases that could not otherwise be decided on group discrimination grounds: one involving men too poor to pay child support and one involving prison inmates.¹⁵⁹ In finding a fundamental right to marry in both cases, the Court was assuming a definition of marriage that incorporated most of the extant governmental regulation of marriage. Thus, neither of those cases explains why the state must allow indigent men to marry their third cousins but not their first cousins.¹⁶⁰ Nor do they clarify why an inmate has a right to marry

¹⁵⁶ See *supra* note 14 and accompanying text (comparing different decisions regarding the right to marry from these circuits).

¹⁵⁷ See Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 135 (2010) (discussing how same-sex couples who could not marry pressured employers to treat them as legally related so as to allow them to access health insurance and other social welfare benefits).

¹⁵⁸ See, e.g., *Lewis v. Harris*, 908 A.2d 196, 215 (N.J. 2006) (listing the extensive array of benefits that are made available to married couples); *Goodridge*, 798 N.E.2d at 969 (holding that the Commonwealth may not deny the benefits and protections of marriage to same-sex couples); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999) ("[T]he State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage.").

¹⁵⁹ See *Turner v. Safley*, 482 U.S. 78, 98–100 (1987) (prison inmates); *Zablocki v. Redhail*, 434 U.S. 374, 389–90 (1978) (men unable to pay child support). See generally *Loving*, 388 U.S. 1 (spending the vast majority of the opinion explaining why anti-miscegenation laws constituted racial discrimination and then three final short paragraphs suggesting a fundamental right to marry). For further discussion, see Baker, *supra* note 157, at 142.

¹⁶⁰ In *Zablocki v. Redhail*, the Supreme Court struck down a Wisconsin statute that prohibited men who were in arrears in child support payments from marrying unless they could certify that they would always be able to provide for their children. See 434 U.S. at 389–90. It was a ridiculously over- and underinclusive statute, and one that was highly unlikely to achieve its purpose. The slightest amount of scrutiny should have invalidated the statute at issue. Perhaps realizing

one person at a time but not two.¹⁶¹ Incest and polygamy are to a “fundamental right to marry” what the intestacy cases became to legitimacy doctrine: thorns in the side of fundamental-rights analysis. Routine governmental regulation of family status undermines fundamental rights claims to that status.

Some scholars have argued that the right to marriage is best understood as an expressive right, cabined by the social meaning of marriage.¹⁶² Because it is so important to people to be able to express themselves by embracing the institution of marriage, the argument goes, the government may not arbitrarily restrict marital status. But for a right to marry to make sense, there must be some agreement on the meaning of marriage. As Cass Sunstein has written, “[T]he expressive benefits of marriage are contingent on a particular constellation of social norms; there is nothing inevitable about them.”¹⁶³

Comparably, for illegitimate children to have a right to a legally recognized parent-child relationship, there must be some agreement on what that relationship is. There is nothing inevitable about a genetically related child’s right to be considered part of a particular parent-child relationship. Historically, as discussed, the legal paternal relationship was rooted in marriage. If one argues from tradition, it would appear that the marital nongenetic child has a much stronger claim to a legal parent-child relationship than does the non-marital genetic child. Living patterns well into the nineteenth century, in both the United States and Europe, show scant support for even an ideal of a biological family.¹⁶⁴ Informal adoption and fostering played prominent roles in

that, the Court paid very little attention to the scope of the “right to marry” that it was using to strike down the statute. *See id.* at 377–78. The Court did, however, counsel that “[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.” *Id.* at 386.

¹⁶¹ In *Turner v. Safley*, the Court invalidated a Missouri provision that barred prison inmates from marrying. *See* 482 U.S. at 98–100. Relying significantly on the expressive content of marriage, the Court again found, with very little explanation of the scope of the right, that the state had almost nothing to gain in prohibiting prisoners from marrying. *See id.* at 97–99. But almost all of the reasons that the Court gave for finding a fundamental right to marry, such as that it could be an “expression[] of emotional support and public commitment” or an “exercise of religious faith as well as an expression of personal dedication,” could be used to justify a right to polygamous marriage as well. *See id.* at 95–96.

¹⁶² *See Baker, supra* note 157, at 144–47; *see also* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2098 (2005).

¹⁶³ Sunstein, *supra* note 162, at 2098.

¹⁶⁴ *See* Signe Howell, *Changes in Moral Values About the Family: Adoption Legislation in Norway and the US*, 50 SOC. ANALYSIS 146, 152–53 (2006); *see also* JOHN R. GILLIS, *A WORLD OF THEIR OWN MAKING: MYTH, RITUAL, AND THE QUEST FOR FAMILY VALUES*

establishing households and dependence.¹⁶⁵ Even for mothers, there was not necessarily an assumption that nurturing followed biology.¹⁶⁶ Parenthood is no more fixed a concept than is marriage.

“Fundamental personal rights”¹⁶⁷ that derive from “intimate familial relationship[s]”¹⁶⁸ presuppose an understanding of what is family. Those understandings are not static, but evolve with changing social norms. Thus, it is difficult to define either parenthood or marriage in a manner that can give full content to those fundamental rights. The inability—or unwillingness—of the Supreme Court to define legal parenthood may explain why it chose group-based discrimination rather than fundamental rights as the reason for added scrutiny in the legitimacy cases. The use of fundamental rights rather than group-based discrimination in the marriage context may ultimately force the Court to limit the “personal choice regarding marriage” that it said was so central to the fundamental right itself.¹⁶⁹ Or else, it must be willing to mandate legal recognition of some forms of marriage—like incest and polygamy—that are well outside contemporary norms.

II. THE PRIMACY OF BLOOD

Applying that group-based discrimination doctrine in the legitimacy context seems to lead to the conclusion that a state must treat the genetic children of an adult as it treats the marital children of that adult: except in intestacy cases, genetic parenthood must be considered equal to or superior to legal parenthood. This Article refers to this as the Primacy of Blood theory. The analysis that follows explains and unpacks the Primacy of Blood theory in order to show, first, that it does not adequately explain the legitimacy cases as written, and second, that it is inconsistent with a growing body of contemporary family law.

A. Blood Trumping Law?

The cases that best exemplify the Primacy of Blood theory are the maternity cases (*Levy v. Louisiana* and *Glona v. American Guarantee & Liability Insurance Co.*) and the child support cases (*Gomez v. Perez* and its prog-

152–56 (1996) (describing various routine practices, including fosterage, founding hospitals, and giving children to the church, that bely the inevitability of the biological family).

¹⁶⁵ See Howell, *supra* note 164, at 149.

¹⁶⁶ See *id.* (“[T]he connection between giving birth and giving nurture, of equating biological maternity with motherhood, was not generally made in Europe until the nineteenth century.” (citing GILLIS, *supra* note 164)).

¹⁶⁷ See *Weber*, 406 U.S. at 173.

¹⁶⁸ See *Levy*, 391 U.S. at 71.

¹⁶⁹ See *Obergefell*, 135 S. Ct. at 2589.

eny). The Supreme Court held that the nonmarital children in *Levy* and *Glon* had a right to be treated as marital children based on an averred genetic connection.¹⁷⁰ In the child support cases, the Court held that an illegitimate child had a constitutionally guaranteed right—by virtue of his or her genetic connection—to establish legal parenthood for purposes of child support, because marital children were entitled to rely on a legal parent-child relationship for child support.¹⁷¹ The Court's analysis in these cases assumed that illegitimate children have entitlements stemming from genetic connection and genetic connection alone.

In other contexts, the Court seemed eager to acknowledge the importance of genetic connection but only if it could be proved adequately. Mere assertions of genetic connection in the context of paternity were not enough to establish parenthood, even if those assertions were uncontested. What the Court needed in order to find that the Constitution required recognition of a particular genetic connection was an averment of connection and action on the father's part consistent with that genetic connection.¹⁷² Thus, the reason the Court required states to let dependence act as a substitute for legitimacy in *Weber v. Aetna Casualty & Surety Co.* and *Jimenez v. Weinberger* was that it thought a man would not provide for children who were not his own genetic issue. Dependence was a proxy for the DNA tests that were unavailable at that time.

Mathews v. Lucas is a bit difficult to square with this theory, but not if one thinks that the Court was wary of the reason why Mr. Mathews may have abandoned his children. If Mr. Mathews had died four years earlier, his children could have collected social security survivors benefits because their genetic father (Mr. Mathews) was still living with them. Because their father left, the children could not establish dependence. The Court in *Mathews* may have thought that Mr. Mathews's leaving established enough doubt about the genetic connection to justify the state in not recognizing the parent-child relationship.¹⁷³

New Jersey Welfare Rights Organization v. Cahill, the 1973 Supreme Court per curiam decision requiring that nonmarital households be treated

¹⁷⁰ See *Glon v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

¹⁷¹ See, e.g., *Gomez v. Perez*, 409 U.S. 535, 537–38 (1973) (per curiam); see also *supra* notes 110–111 and accompanying text (discussing the Court's holding in *Gomez v. Perez*).

¹⁷² See *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

¹⁷³ See *Mathews v. Lucas*, 427 U.S. 495 (1976). Admittedly, this is a bit of a stretch. It is commonplace for formerly married fathers and other men who have no doubt as to their genetic connection to fail to provide support for their children. So Mr. Mathews' leaving is perfectly consistent with him being the genetic father.

as marital households for purposes of welfare benefits, also suggests that the Court believed in the constitutional importance of genetic connection.¹⁷⁴ As discussed, there were many ways a state might have reasonably justified a program that provided disproportionate benefits to marital over nonmarital households; the U.S. Tax Code routinely does so.¹⁷⁵ That the Court dismissed any such arguments with a per curiam opinion suggests that it thought that genetic connection trumped any policy arguments in favor of encouraging marriage.

The only cases that are impossible to square with the primacy of genetic connection theory are the intestacy cases. *Labine v. Vincent*, *Lalli v. Lalli*, and *Trimble v. Gordon* all condone statutory discrimination against nonmarital children.¹⁷⁶ In intestacy, the state is free to let law be the defining feature of parenthood, regardless of genetic connection. But the intestacy statutes might be excused as exceptional. In the means-ends analysis that typifies equal protection doctrine, one can expect different means to be upheld in different contexts, depending on the ends of the statute. Because the purposes of intestacy are different than the purposes of tort law and social welfare provisions, perhaps the state can use different means of determining who should be granted rights. Moreover, the American tradition has always allowed parents to disinherit their children in a will.¹⁷⁷ Perhaps the Constitution does not mandate that intestacy statutes protect illegitimate children because probate law in general pays so little heed to children's rights or needs.¹⁷⁸ The Court suggested this kind of intestacy exceptionalism when it first distinguished *Labine* from *Levy* and then distinguished *Weber* from *Labine*.¹⁷⁹

¹⁷⁴ See 411 U.S. 619, 620–21 (1973) (per curiam); see also *supra* notes 22–153 and accompanying text (examining the various justifications provided by states for granting benefits solely to legitimate children).

¹⁷⁵ See *supra* note 119 and accompanying text (exploring benefits provided to married couples by the U.S. Tax Code).

¹⁷⁶ See *Lalli v. Lalli*, 439 U.S. 259, 261–62 (1978); *Trimble v. Gordon*, 430 U.S. 769, 771–72 (1977); *Labine v. Vincent*, 401 U.S. at 538–40 (1971). In *Trimble v. Gordon*, the deceased had already been adjudicated the father in paternity proceedings. What the Court found problematic was the inconsistent treatment of established fatherhood, not law necessarily trumping blood. See *Trimble*, 430 U.S. at 771–72.

¹⁷⁷ See BRASHIER, *supra* note 62, at 91.

¹⁷⁸ Ironically, the state in which this argument is least persuasive is Louisiana, the one state that does provide children with a forced share, thus protecting children's rights. See *supra* notes 108–109 and accompanying text.

¹⁷⁹ See *supra* notes 50–51, 80–82 and accompanying text (discussing the Court's differentiation of the legitimacy cases).

B. The Problems with Blood

There are two significant problems with reading the legitimacy cases as endorsing the Primacy of Blood theory. The first stems from how poorly an intestacy exceptionalism distinction stands up under scrutiny. The second stems from how inconsistent the Primacy of Blood theory is with the emerging law of parenthood.

1. Intestacy Exceptionalism

Recognizing the different statutory purposes served by the various programs at issue in the legitimacy cases provides a means of distinguishing the intestacy cases from the other legitimacy cases. But, upon examination, it is a distinction without a difference. The fit between the perceived statutory purpose and the class of people entitled to take in all of the statutes at issue in the legitimacy cases is arbitrary, just as inevitably in tort and social welfare contexts as in the intestacy context.

In tort, government benefit, and intestacy statutes, the state delineates classes of people who are entitled to some right by virtue of their family connection to the person or incident at issue. The purpose of delineating that class of takers in tort statutes is thought to be compensation and deterrence. In the governmental benefits cases, the purpose of classifying takers is to meet the needs of dependents. In the intestacy context, delineating takers is supposed to honor the presumed intent of the deceased. Those different statutory purposes cannot explain the Court's unique treatment of illegitimacy in the context of intestacy.

Consider the tort-based cases previously discussed. One of the factors that made the first Supreme Court legitimacy case, *Levy*, so sympathetic was that the statute's intended deterrent function could not be served—there was no one else in the class of potential beneficiaries if the unacknowledged, illegitimate children could not sue for wrongful death.¹⁸⁰ As the Court noted, the tortfeasor could have escaped all liability.¹⁸¹ As decided, though, *Levy* suggests that genetic issue must be able to take even if the deterrent function had been adequately served. If Ms. Levy had birthed two legitimate and three illegitimate children, the Court's holding would have done nothing other than expand the class of recipients and diminish the entitlement of the legitimate children. That is exactly what happened in *Weber*.¹⁸² The workers' compensation statute had a recovery cap which the

¹⁸⁰ See *Levy*, 391 U.S. at 68–70.

¹⁸¹ See *id.* at 71.

¹⁸² See *Weber*, 406 U.S. at 167.

four legitimate children had reached. In concluding that the illegitimate children had a right to collect, the Supreme Court ordered the legitimate children to share; it did nothing to increase the deterrent effect of the statute.¹⁸³

Any tort-based statute that delineates a class of takers will be inevitably over- and underinclusive for purposes of deterrence. It will list more than enough people than are necessary to ensure a full deterrent effect because recovery will be limited by the earnings loss of the injured. It will also list fewer people than may be necessary for effective deterrence in any given instance because the victim may not have close relatives or “dependents.”

Nor can the mandatory recovery that the Court imposed in the tort cases be understood as necessary compensation. As mentioned in the discussion of *Levy*, while the Court seemed moved by how much Ms. Levy cared for and nurtured her children, and how dependent they were on her, the Court clearly was not requiring states to rewrite their wrongful death statutes to allow anyone who might have been hurt by the death of the victim to recover.¹⁸⁴ If Ms. Levy had “taken in” all five of those children, or if Mr. Stokes had lived with Ms. Weber and her existing children without having any of his genetic children with her, none of the dependent children would have been entitled to compensation in either case, though they undoubtedly would have been hurt by their functional parents’ deaths.¹⁸⁵

Comparably, in the government benefit context in which the government argued that the statutory purpose was to meet dependencies created by an accident or injury, the class of takers was inevitably over- and underinclusive. Indeed, the statutes in *Jimenez* and *Mathews* were identically overinclusive: both listed legitimate children, regardless of their dependence, in the class of potential takers.¹⁸⁶ In logic that is difficult to follow, the Court found such overinclusiveness impermissible in *Jimenez* but permissible in *Mathews*.

The social security statutes were also underinclusive. Mr. Jimenez might well have been providing for his paramour’s children from another relation-

¹⁸³ See *id.* at 173–74.

¹⁸⁴ See *supra* notes 24–31 and accompanying text. Ms. Levy’s employer, the neighbors that she routinely helped with child care, and her siblings all might have been able to show financial loss from her death, but it would have been extraordinary for the Court to hold that the Constitution required those individuals to be eligible to sue for wrongful death.

¹⁸⁵ Nongenetically related children might have been completely dependent on Ms. Levy but have no claim in wrongful death, just as Ms. Weber’s children might have been completely dependent on Mr. Stokes but have no claim to his benefits. See *Weber*, 406 U.S. at 173–74; *Levy*, 391 U.S. at 72.

¹⁸⁶ See *Mathews*, 427 U.S. at 514–16; *Jimenez*, 417 U.S. at 636–37.

ship. Men routinely provide, both financially and emotionally, for the children in the household in which they live, regardless of their genetic connection.¹⁸⁷ Contrary to what the Court may have presumed about men's likelihood to support only their own genetic issue, sociological evidence suggests that men create dependencies in nongenetically related children with frequency.¹⁸⁸ Is a social security statute, the purported purpose of which is to meet dependencies, free to ignore those dependencies? Put another way, why were the programs, for which the government argued that the statutory purpose was to alleviate hardship caused to children who were "dependent," linked to parenthood? Is not dependence best addressed by determining dependence? What does a parental link have to do with such a statute?

More comprehensively, the Court failed to grasp that the social welfare programs at issue in these cases were either general welfare statutes aimed to address the needs of children hurt by a worker's death or incapacity—in which case the statutes were far too underinclusive because genetic connection is often irrelevant to dependence—or social welfare programs best conceptualized as mandatory public insurance programs for workers. Perhaps social security and workers' compensation programs operate as mandatory life and disability insurance programs that the worker purchases with withholdings from his or her paycheck. In such programs, one would think that the beneficiaries entitled to the insurance proceeds should be the ones whom the worker would likely designate as beneficiaries given the opportunity, just as intestacy statutes try to mimic a testator's presumed intent. But if it is permissible for a state to presume that a testator would rather take care of his or her marital children at the expense of nonmarital children, why is it impermissible for the Social Security Administration to presume the same thing?

Ultimately, the statutory purposes in all of these contexts collapse into each other. They all involve situations in which the government has to delineate a group of takers from a theoretically infinite pool. In doing so, it will always include some who are seen as particularly deserving and exclude some who are not.

What is perhaps most surprising about the legitimacy cases is that the Court was able to see this inevitable arbitrariness in the intestacy context, but not in other contexts. Intestacy statutes, by their nature, implicate the two strands of equal protection—fundamental rights and suspect classification—that trigger judicial scrutiny. The purpose of intestacy statutes is to

¹⁸⁷ See NANCY E. DOWD, *REDEFINING FATHERHOOD* 26–31, 204 (2000) (elaborating on male patterns of "serial parenting").

¹⁸⁸ See *id.*

label as family, and therefore takers, some list of people at the expense of others. That is what intestacy statutes do: they define family. Then, intestacy statutes discriminate—on purpose—between family members.¹⁸⁹ They create an order of takers, some of whom will be treated better by the law than others.¹⁹⁰

If the real problem in the legitimacy cases was that a class of people who had endured stigma and a history of discrimination could not be singled out for differential treatment, then why are intestacy statutes free to discriminate in favor of first cousins, with no history of stigma or mistreatment, over illegitimate genetic offspring? Why is the Social Security Administration free to treat abandoned legitimate children better than abandoned illegitimate children as in *Mathews*?

Perhaps it was the sheer transparency of the way in which intestacy statutes might trigger scrutiny that made the Supreme Court retract into deference. Only when the government maintained it was doing something other than defining and discriminating between family members did the Court find the discrimination problematic.¹⁹¹ That is a thin reed on which to hang the constitutional stature of the genetic connection.¹⁹²

¹⁸⁹ See *supra* note 59 and accompanying text (noting how the Louisiana statutes arbitrarily discriminated against various family members).

¹⁹⁰ If intestacy law differs from probate law because probate in general pays so little heed to children's rights, whereas in other contexts the statutes were designed to help children, then Louisiana should be the one state that was not free to discriminate in intestacy. See *supra* notes 177–178 and accompanying text. Its probate laws were far more protective of children than were most of the country's, but the Court upheld Louisiana's discrimination against illegitimate children in intestacy. See *Labine*, 401 U.S. at 538–40; *supra* notes 102–109 and accompanying text (discussing Louisiana's laws).

¹⁹¹ In *Weber* and *Jimenez*, the government maintained that it was providing for children who had been dependent on the deceased and used legitimacy as a proxy for dependence. See *Jimenez*, 417 U.S. at 636–37; *Weber*, 406 U.S. at 173–74. The Court was concerned that legitimacy was a bad proxy for dependence—which it may be—but so is genetic connection. See *supra* notes 171–174 and accompanying text.

¹⁹² The Primacy of Blood theory also leaves in limbo children who are legitimate by virtue of having been born into a marriage, but are genetically unrelated to the mother's husband. As indicated above, this is a sizable number of children. See Ellman, *supra* note 72, at 56–57 (“[T]he professional consensus is that the rate of paternal discrepancy for couples in stable unions, whether legally married or cohabitating, is from ten to fifteen percent.”). Law, not blood, has determined parenthood for these children. Does a marital child have a constitutional right to sue for wrongful death if his or her genetic, nonmarital father is tortiously killed? Or a right to sue a (wealthier) genetic, nonmarital father for child support even though that child also has those entitlements through the marital father? Or is the discrimination that illegitimate children have suffered just a result of having only one (or no) legal parental relationship? If the problem is not having two legal parents, then the possibility of acknowledgement should solve any of the discrimination problems. But that is not consistent with the Court's holding in *Levy*, when the Court held that the children had rights derivative from the mother even though she had not acknowledged them. See *Levy*, 391 U.S. at 69–72.

But there is a bigger problem with the Primacy of Blood theory: it undermines most of the contemporary movements to transcend traditional, binary, heterosexual norms of parenthood. The next subsection explains why.

2. Modern Parenting

Despite the availability of genetic testing today, most parents do not establish their legal parental status by proving genetic connection. They establish parental status through legal presumptions, formal acknowledgments, or contract. The two most common ways of establishing parenthood in someone other than the birth mother¹⁹³ are the marital presumption and the Voluntary Acknowledgement of Paternity (“VAP”).¹⁹⁴ Both of these procedures can be viewed as proxies for genetic connection, placeholders of sorts that establish parenthood unless someone proves otherwise with genetic evidence.¹⁹⁵ But the marital presumption and voluntary acknowledgments are increasingly viewed as independent sources of parenthood. The legal constructs of marriage and acknowledgement can only serve as independent sources of parenthood, though, if the legitimacy cases do not preference genetic connection.

a. The Marital Presumption

The marital presumption, which disregards genetic connection and uses the legal construct of marriage to assign parental status, is at the heart of legitimacy doctrine. Construed conclusively, as it used to be, it can also protect the parental status of same-sex couples.

¹⁹³ Birth mothers are presumed parents in most states, but that presumption can be overcome in states that enforce gestational surrogacy contracts. *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 786–87 (Cal. 1993) (finding that the surrogacy contract trumped the gestational surrogate’s claim to motherhood by virtue of having given birth to the child). The Illinois Gestational Surrogacy Act states, “Except as provided in this Act, the woman who gives birth to a child is presumed to be the mother of that child.” *See* 750 ILL. COMP. STAT. 47 / 15 (2014). The statute then goes on to vest motherhood in the intended mother if the requirements of the Gestational Surrogacy Act are met. *See id.* / 15(a)–(b)(1).

¹⁹⁴ *See Harris, supra* note 71, at 469.

¹⁹⁵ June Carbone and Naomi Cahn have suggested that the marital presumption has traditionally been used in this way. They argue that “[m]arriage is an institution historically designed to promote the biological family.” *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, 1019 (2003). William Blackstone’s position linked parenthood to marriage, but did not indicate that biology was relevant. *See BLACKSTONE, supra* note 68, at *455.

i. Lesbian Couples

The marital presumption makes the spouse of the woman who gives birth the other parent of the child, regardless of the source of the semen. As genetic science has grown more reliable, and as marriages grow less stable,¹⁹⁶ the conclusiveness of the presumption has waned. Most state parentage acts allow a man outside a marriage to sue to establish genetic paternity or a marital father to sue to disestablish paternity.¹⁹⁷ Genetic connection does not always trump the marital presumption in these cases, but it can.¹⁹⁸

As a matter of equality, using genetic connection to trump the marital presumption is problematic. If same-sex married couples are to be seen as similarly situated to opposite-sex married couples with regard to parenthood, then the conclusiveness of the marital presumption should be welcomed.¹⁹⁹ If genetics can trump the legal construct, then same-sex couples will never be in the same position as heterosexual couples because they cannot reproduce biologically. Same-sex couples need a conclusive law in order to ensure that genetics is irrelevant.

Applying the genetic connection so strictly impacts some straight couples as well. It reinvigorates the power of the marital bargain by taking away the privilege that genetic science has more recently afforded spouses who either want to relinquish parental responsibility or deny an ex-spouse parental rights. State parentage acts that make genetic connection relevant allow some husbands to disestablish their paternity when they can prove that they are not the genetic father of the child,²⁰⁰ and allow mothers to attempt to deny husbands custody or visitation by establishing a lack of ge-

¹⁹⁶ When married couples get divorced, there is a tendency for both wives and husbands to question paternity that had gone unquestioned before. *See* Carbone & Cahn, *supra* note 195, at 1065–67 (noting that divorcing spouses often seek DNA evidence to establish or disestablish genetic connections to children). DNA testing makes it possible to ask and answer a question that was left unasked for years because there was no way of ascertaining a reliable answer. *See supra* notes 6–7 and accompanying text.

¹⁹⁷ *See, e.g.*, 750 ILL. COMP. STAT. 45 / 7–8 (2014).

¹⁹⁸ *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 234–37 (2006) (surveying state court responses to contests between genetic connection and the marital presumption).

¹⁹⁹ Some jurisdictions have codified the applicability of the marital presumption to lesbian couples. *See, e.g.*, D.C. CODE § 16-909(a-1)(2) (2001); VT. STAT. ANN. tit. 15, § 1204(f) (2014). Other states have validated the marital presumption judicially. *See, e.g.*, *Della Corte v. Ramirez*, 961 N.E.2d 601 (Mass. App. Ct. 2012); *Wendy G-M. v. Erin G-M.*, 985 N.Y.S. 2d 845 (Sup. Ct. 2014).

²⁰⁰ *See, e.g.*, *Markov v. Markov*, 758 A.2d 75, 83–84 (Md. 2000) (holding that a husband was not estopped from challenging child support during a divorce, based on evidence that he was not the genetic father); *In re C.S.*, 277 S.W.3d 82, 86–87 (Tex. App. 2009) (allowing a husband to challenge legal paternity with genetic evidence).

netic connection.²⁰¹ A strong marital presumption takes away parties' ability to use genetic evidence as a sword in this way.²⁰²

Biological parents in same-sex relationships have also used genetics as a sword, though gay and lesbian rights groups have worked consistently to rebuff those attempts. LGBT groups often take sides in disputes between genetic and nongenetic parents, and they take the side of the nongenetic parent.²⁰³ They recognize the need to diminish the lingering importance of genetic connection. The more comfortable judges are in thinking about parenthood as a legal construct, the stronger the marital presumption will be and the more protection there will be for lesbian couples as parents.

ii. Gay Male Couples

For gay men, the marital presumption is less likely to be important, though it still could have some applicability. A gay man who has married someone who had entered into a surrogacy contract before the marriage should be a parent by virtue of his marriage to the legal parent at the time of the child's birth. Although theoretically possible, this situation is not likely to be common. If there is a surrogacy contract, the safest way to ensure dual parenthood for the gay couple will be to make both intended parents parties to

²⁰¹ See, e.g., *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995).

²⁰² This is a loss for those who have tried to use genetic evidence as a sword, though there is tremendous variation in how different state statutes and courts handle these issues. Many states place a statute of limitations on disestablishing parenthood, even though federal law prevents them from putting a statute of limitations on establishing parenthood. See, e.g., 750 ILL. COMP. STAT. 45 / 8(a)(3) ("An action to declare the non-existence of the parent and child relationship . . . shall be barred if brought later than 2 years after the petitioner obtains knowledge of relevant facts."). Thus, often, genetic evidence can make someone a parent, but cannot necessarily relieve that person of parental status. When confronted with DNA evidence presented within a statute of limitations, courts have used different approaches to determine paternity. Some courts use a best-interest-of-the-child standard to find paternity, thus considering both marriage and genetics as relevant but not determinative factors in determining paternity. See Appleton, *supra* note 198, at 235 n.35. Other courts use finality doctrine or a best-interest-of-the-child analysis to dismiss claims for genetic testing, thus rendering it irrelevant. See Baker, *supra* note 69, at 14.

²⁰³ See, e.g., *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014); *McGaw v. McGaw*, No. WD 77799, 2015 WL 4910657, at *1 (Mo. Ct. App. 2015). In these cases, Gay & Lesbian Advocates and Defenders ("GLAD") and Lambda Legal Defense Fund, respectively, represented a nonbiological mother in attempts to secure parental rights when her ex-partner was trying to exclude the nonbiological mother based on lack of genetic connection. *In re Guardianship of Madelyn B.*, 98 A.3d at 496; *McGaw*, 2015 WL 4910657, at *1; see also GAY & LESBIAN ADVOCATES & DEFENDERS, PROTECTING FAMILIES: STANDARDS FOR LGBT FAMILIES (2011), <http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf> [<http://perma.cc/SPGD-YVUS>] (outlining GLAD's position and encouraging potential claimants and lawyers to respect families as they function, rather than as they may be defined biologically). "We believe (as with ducks) that if it looks like a family, if it holds itself out as a family, and if it functions like a family, then it is a family." See GAY & LESBIAN ADVOCATES & DEFENDERS, *supra*.

the contract. Thus, the spouse would become a parent by virtue of contract, not marriage. Comparably, in adoption situations, the practice has always been for married couples to both adopt simultaneously, not to have one party adopt and have the other assume parenthood by virtue of the marriage. Thus, gay men are less likely to ever have to rely on the marital presumption.²⁰⁴ They will need to rely on other legal constructs rather than biology.

b. Voluntary Acknowledgement of Paternity

The second most common way for parenthood to be established in someone other than the birth mother is through a Voluntary Acknowledgement of Paternity. The VAP leaped into prominence as a means of establishing parenthood by congressional fiat. As part of its continuing effort to better privatize the dependency of children who could be entitled to welfare benefits, Congress directed all states to develop a system that would try to ensure that two parents were identified for every child born.²⁰⁵ This required identifying, as soon as possible, men who might otherwise be sued in paternity. If no legal father is presumed at birth, federal law requires that hospital-based programs be implemented to attempt to secure presumptive fathers' signatures "immediately before or after the birth of a child."²⁰⁶

These forms routinely ask men to aver that they are the biological father of the child,²⁰⁷ but that is a rather ridiculous request. Assuming the slightest degree of sexual freedom on the mother's part, and assuming the couple did not use cutting-edge DNA testing in utero,²⁰⁸ the men who sign VAPs are guessing or just hoping that they are the genetic fathers. Or, perhaps, these men are signing up for fatherhood regardless of whether they are genetically related. One independent study found that when given the opportunity for DNA tests to establish the genetic connection definitively,

²⁰⁴ Lesbian couples are more likely to rely on the marital presumption than gay men because sperm banks routinely act as an intermediary, thus eliminating any direct contracting between the progenitors of gametes and the intended parent(s). A sperm donor's parental rights are extinguished in his contract with the sperm bank, so he never has to "transfer" those rights to the intended parent(s).

²⁰⁵ See 42 U.S.C. § 666(a)(5)(C) (2012).

²⁰⁶ See *id.* § 666(a)(5)(C)(ii).

²⁰⁷ See, e.g., *Acknowledgement of Paternity Affidavit*, IDAHO DEP'T HEALTH & WELFARE, <http://www.healthandwelfare.idaho.gov/Health/VitalRecordsandHealthStatistics/VitalRecords/tabid/1506/ItemId/5616/Default.aspx> (click on "Acknowledgment of Paternity Affidavit (English)" under Special Forms) [<http://perma.cc/K923-MHG9>] (sample VAP for Idaho); *Voluntary Acknowledgement of Parentage*, COMMONWEALTH MASS., <http://www.mass.gov/dor/docs/cse/parents/voluntary-ack-of-parentage-form.pdf> [<http://perma.cc/CK88-BVQG>] (sample VAP for Massachusetts).

²⁰⁸ There is a possibility that soon noninvasive in utero testing will be able to reveal the genetic progenitors of a fetus. See Xin Guo et al., *A Noninvasive Test to Determine Paternity in Pregnancy*, 366 NEW ENG. J. MED. 1743, 1745 (2012).

most men refused.²⁰⁹ Many courts are growing increasingly comfortable with treating VAPs as final, legal judgments, regardless of what the genetic evidence might show.²¹⁰

Because most states drafted their VAP forms to include an averment of biological connection, gay and lesbian couples do not tend to use VAPs to establish parenthood. But as Professor Leslie Harris has argued, Congress did not mandate that the VAP be tied to genetics,²¹¹ so there is no reason for nongenetically related adults to be deprived of the right to voluntarily acknowledge parenthood—unless the legitimacy cases do not allow law to trump genetics. If the legitimacy cases must be read to elevate children's right to genetic connection, it would be problematic for nongenetically related adults to routinely bind themselves and certain children to a legally final parent-child relationship. The ability to bind oneself to a parent-child relationship regardless of genetic connection is necessary if unmarried gay or lesbian parents are to be entitled to the same parental avenues as unmarried straight parents.

c. Reproductive Technology Contracts

Contract law and its corollary, the “intent to parent” standard,²¹² are now routinely used to secure parental status in all people who seek to produce a child using gametes from people other than the intended parents. The efficacy of these contracts in trumping genetic connection as sources of parenthood is crucial to the success of these contracts.

i. Excluding Others

In the standard artificial insemination contract, a sperm donor signs away whatever rights and obligations his genetic connection to the child might engender.²¹³ The inseminated woman relies on the donor's intent to abandon parental rights and obligations when she purchases the semen. A gestational surrogate mother signs away whatever rights her gestational

²⁰⁹ See Harris, *supra* note 71, at 477.

²¹⁰ See *id.* at 481–82. As Professor Harris has suggested, if VAPs were truly treated as final judgments, then the success of any challenge to a VAP would require the challenger to have performed due diligence before he signed his name to something that was potentially untrue. Given the availability of DNA evidence, men would not likely succeed in these challenges. See *id.* at 478. But courts are increasingly wary of disrupting the finality of VAPs with genetic evidence, particularly if much time has passed since birth. See *id.* at 481–82.

²¹¹ See *id.* at 478–86.

²¹² For more on how the intent to parent standard operates see Baker, *supra* note 69, at 26–30 (describing the intent to parent standard in the context of reproductive technology contracts).

²¹³ See *id.*

contributions engender.²¹⁴ The intended parent(s) of a child born through surrogacy rely on the surrogate's intent to abandon parental rights and obligations when the intended parent(s) assume parental status.²¹⁵

To this author's knowledge, no one has ever pursued an illegitimacy-based constitutional challenge to the enforcement of a contract for gametes or reproductive services,²¹⁶ but the child support cases suggest that such a claim has merit.²¹⁷ If the state cannot distinguish between marital and non-marital genetic fathers with regard to their child support obligations because the child has the right to support based on genetic connection, how can the state deny a child the right to support from a sperm donor? It is now common for single women and single men, gay and straight, to use reproductive contracts to become single parents by choice. Such a regime discriminates

²¹⁴ See, e.g., 750 ILL. COMP. STAT. 47 / 1, 5, 10, 15, 20, 25 (laying out specifications for an enforceable surrogacy contract). A gestational surrogate may be carrying an embryo fertilized by two genetic parents who intend to be legal parents; an embryo fertilized by one genetic parent and one "donor," only one of whom intends to be a legal parent; or an embryo fertilized by two donors, neither of whom intend to be a legal parent. In "traditional" surrogacy contracts, the surrogate is carrying an embryo consisting of her own egg and the sperm of the intended father. In that contract, the surrogate signs away both whatever rights and obligations her genetic connection to the child might engender, and whatever rights and obligations her gestational contribution might engender.

²¹⁵ Some people argue that the law should not necessarily shut the genetic parents out; it should just expand the number of parents recognized. See NAOMI CAHN & JUNE CARBONE, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 192 (2014) (arguing that "[i]t is therefore time to acknowledge the potential involvement of multiple adults in a child's life"); 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, 880–81 (1984) (examining why considering parenthood as a means of excluding others does not reflect the reality of modern families); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 332–38 (2007) (advocating for the recognition of multiple parentage). Even if the law were to move toward a non-binary regime for parenthood, the parties in these contracts would want to secure superior parental status so as not to have to share substantive parenting decisions with those with whom they might disagree. For a general discussion of the issues involved with multiple parenthood, see Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 705–11 (2008).

²¹⁶ Some men have challenged statutes that deny parenthood for semen donors (as long as certain conditions are met) as violative of constitutional gender equality and due process. See *In re K.M.H.*, 169 P.3d 1025, 1039–41 (Kan. 2007); *McIntyre v. Crouch*, 780 P.2d 239, 243–46 (Or. Ct. App. 1989). These challenges have not been successful. See *In re K.M.H.*, 169 P.3d at 1044; *McIntyre*, 780 P.2d at 246.

²¹⁷ Most state legislatures responded to the introduction of artificial insemination by passing statutes making clear that children born through such procedures were legitimate children of the intended mother's marriage, so long as a doctor participated in the insemination. See KARA W. SWANSON, *BANKING ON THE BODY* 225–26 (2014). Doctors were not in the practice of inseminating single women until relatively recently. See *id.* at 228.

against the resulting child based on “the circumstances of their birth.”²¹⁸ Children born through these reproductive contracts are not *fillius nullius*, but they are *fillius unus*, as were almost all of the children in the legitimacy cases.

One less than satisfactory way to reconcile the child support cases with reproductive technologies is to posit that children produced through heterosexual intercourse have more of a claim to genetic connection than do children born through reproductive technologies.²¹⁹ As a policy matter, this asymmetry might be explained as the state being more concerned with the reckless reproduction through intercourse, than the reckless reproduction of children through contracts.²²⁰ But it is hard to see why the means of conception can affect the substantive constitutional rights of children if the marital status of their parents cannot.

ii. Including Others

Intended parents also rely on contracts and an intent to parent standard to try to confer parental rights. These arguments often surface in the cases mentioned previously, when biological parents try to exclude ex-partners based on their lack of genetic connection.²²¹ To combat that argument, the nongenetically related parent produces evidence that the biological parent fully intended to share parental rights. Sometimes this evidence is based on documentation such as co-executed parenting agreements and guardianship provisions.²²² Sometimes intent is inferred from a functional relationship.²²³

²¹⁸ See Amicus Brief of Family and Child Welfare Law Professors challenging DOMA, *supra* note 1, at 20.

²¹⁹ Susan Appleton argues that recent artificial insemination cases prove that legitimacy doctrine is more concerned with regulating sex than with children’s entitlements. That is why legitimacy doctrine has not had much to say about reproductive technologies. See Appleton, *supra* note 99, at 375.

²²⁰ Moreover, even when men are careful to contract away their rights and obligations before intercourse and make clear their intentions not to be parents, courts refuse to endorse the contract. Those courts reason that the right to receive support is the child’s right and not one that either parent can contract away. See *Budnick v. Silverman*, 805 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 2002) (refusing to enforce a written, signed, pre-intercourse agreement that relieved the genetic father of parental responsibilities); *Pamela P. v. Frank S.*, 449 N.E.2d 713, 715 (N.Y. 1983) (holding that a genetic father’s clear intent not to parent and the mother’s fraud in representing that she was using birth control did not relieve him of an obligation to support the child).

²²¹ See *supra* notes 200–216 and accompanying text (discussing the ways that genetic evidence can be used as a “sword” to challenge the parental rights of a nongenetic parent).

²²² See *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321–22 (Pa. Super. Ct. 1996) (finding intent to parent expressed in guardianship papers, a medical consent authorization, and a co-parenting agreement). Admittedly, courts seem hesitant to foist parental status on someone who does not want it, even though there is evidence that her or she intended to become a parent. See *T.F. v. B.L.*, 813 N.E.2d 1244, 1253–54 (Mass. 2004) (refusing to use an intent to parent standard to hold

The critical question is usually whether the established parent intended to share parental rights or keep them exclusively for him or herself.²²⁴

Courts are most receptive to honoring an intent to parent when it is reflected in a functioning relationship. As one scholar has explained, claims with regard to intent can be contested and the most effective way to prove intent to share parenting is with evidence that the adults did in fact co-parent.²²⁵ Thus function and intent are often coterminous. State courts' eagerness to honor function in finding parental status mirrors the Supreme Court's eagerness to honor functioning illegitimate families.²²⁶ Honoring function through an intent standard limits the unruly problems associated with function (or dependence) as the sole determiner of parenthood because there must be a finding of intent in addition to a functional relationship,²²⁷ but it relies on contract—a quintessentially legal construct—to establish parenthood. It also suggests that children's rights to a particular parental relationship are a function of what his or her "parents" agreed to, which is not very different than suggesting that a child's rights are a function of whether his or her parents agreed to marry. In both cases, the child's "rights" are necessarily limited by the behavior of his or her parents, and it is up to the state to determine whether the parents' conduct suffices to establish a parent-child relationship.²²⁸

an ex-partner liable for child support even though she participated in the planning process for having the child); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (holding that using intent as the standard would invite too many "elusive factual determinations").

²²³ See Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 658–59 (2012).

²²⁴ For a discussion of these cases among same-sex couples, see generally Jenni Millbank, *The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family*, 22 INT'L J.L. POL'Y & FAM. 149 (2008).

²²⁵ See Ball, *supra* note 223, at 657–61.

²²⁶ With the exception of the child support cases, in all of the Supreme Court cases that found in favor of illegitimates, the adult with whom the children claimed a legal relationship functioned as a parent. Thus, one might suggest that the cases best reflect the constitutional import of function, not blood or law. There are two problems with using function as the operative constitutional standard. First, as discussed, this theory would confer constitutional rights on nieces, nephews, second cousins, and neighbors' children, all of whom might exist in a functional family that is not bound by genetics. See *supra* notes 184–190 and accompanying text (discussing the inevitable problem with over- and underinclusiveness). Second, it seems odd to hold that a child's constitutional right depends on whether his or her parents abandoned the functioning family. Under a functional test, the abandoned child, who has already presumably suffered because of abandonment, is entitled to fewer constitutional rights because of that abandonment.

²²⁷ See *supra* notes 184–188 and accompanying text for discussion of the unruliness of function as a standard for parenthood.

²²⁸ It is no answer to say that the parent-child relationship should be established or not based only on the adult's relationship to the child. Parentage actions often have to be decided before relationships get a chance to develop—so that adults can sue to enforce their parental right to have

III. THE PRIMACY OF LAW

If, in support of equality for same-sex couples, the incorporation of reproductive technology contracts, and other evolving understandings of parenthood, one wants to reject the primacy of genetic connection interpretation of the legitimacy cases, is there another way to make sense of them? Yes. Most of the legitimacy cases can be read as accepting robust state power to define parenthood, as long as the state is consistent in letting law, not blood, define parenthood. This Article refers to this as the Primacy of Law theory.

The intestacy cases discussed previously,²²⁹ *Labine v. Vincent*, *Trimble v. Gordon*, and *Lalli v. Lalli*, are not outliers. They are the foundation of the doctrine, which holds that the law does not have to honor a genetic connection between adult and child, but if the law has already used that genetic connection to establish a parent-child relationship for some purposes, it must be careful before it ignores it for others. Because Mr. Trimble had been adjudged the father of the child (in order to make him liable for child support), the intestacy statute had to treat the child as it would his other children who were recognized in law.²³⁰ States should not be free to distinguish between marital children and acknowledged nonmarital children for whom the parent-child relationship is established. So in *Jimenez v. Weinberger*, Mr. Jimenez's acknowledged nonmarital children should have been able to collect because they were acknowledged, not because it is impermissible to distinguish between marital and nonmarital genetic children.²³¹ States must also be careful in how they restrict adults' abilities to acknowledge children under this theory.²³² Thus, the problem in *Weber v. Aetna Casualty & Surety Co.* was not the workers' compensation statute that distinguished between legally recognized parent-child relationships (marital

a relationship develop. Adults also sometimes get called away from children for work, family, or other exigencies. Part of what legal parental status secures is an ability to leave one's child temporarily, secure in the knowledge that one's status as parent cannot be taken by someone else.

²²⁹ *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Labine v. Vincent*, 401 U.S. 532 (1971).

²³⁰ See *Trimble*, 430 U.S. at 764–65.

²³¹ See *Jimenez v. Weinberger*, 417 U.S. 628, 635 (1974) (explaining that the plaintiffs had been acknowledged by Mr. Jimenez).

²³² Under this theory, the government could not arbitrarily deny an adult the right to recognize a parent-child relationship, though fully articulating the parameters that might be appropriate before one was allowed to acknowledge parenthood is beyond the scope of this Article. A state might, for instance, restrict the number of adults who could establish a parent-child relationship to two and require acquiescence by all existing parents, but it would not necessarily have to do so. For a discussion of the advantages and disadvantages of keeping the limit at two and minimizing parental disagreement, see Baker, *supra* note 215, at 674–76 (discussing how states have an interest in children having more than one parent, but not necessarily too many parents).

and acknowledged children) on the one hand, and extralegal adult-child relationships on the other.²³³ The issue, as Justice Blackmun asserted, was the acknowledgement statute that restricted Mr. Stokes from establishing a parent-child relationship.²³⁴

Dependence is not necessarily a proxy for a DNA test. The government benefit cases may appear to say that dependence must be allowed to act as a substitute for a legal determination of parenthood, but the idea of dependence as a substitute for law may be nothing more than an accident of argumentation. If the social welfare statutes in *Weber* and *Jimenez* had limited their beneficiaries to those who could take under state intestacy statutes, the idea of dependence might never have surfaced. "It is too hard and costly," the defenders of such statutes could have argued, "to decide, in any given instance, which children should be entitled to the benefits that might flow from any given adult. Therefore we use the intestacy statute as a proxy for who should take."

There is nothing in any of these cases suggesting that this rationale would run afoul of the Constitution. The incorporation of the intestacy statute would not have been overinclusive in *Jimenez* if the state had never introduced dependence as a variable. The problem, according to the Court, was that some nondependent legitimate children could collect, but if dependence had not been used as a justification for the statute, the inclusion of that group would not have been a problem. The Social Security Act's reliance on the intestacy statute in *Mathews v. Lucas* was upheld.²³⁵ The state does not have to incorporate genetic connection into law, but if it goes beyond already established legal relationships and allows some other metric (genetic connection plus dependence, for instance) to serve as qualification for entitlement, then it must allow all children the opportunity to prove that qualification.

Thus, despite the oft-quoted language in *Weber*, the rights of illegitimate children per se—that is, the constitutional rights of children who have a genetic connection to an adult to have the law recognize that genetic connection as a parent-child relationship—are really quite limited; one might even say such rights are nonexistent.²³⁶ Illegitimate children only have rights if the state has tried to expand the class of takers to include genetical-

²³³ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 174 (1972). Mr. Jimenez had also acknowledged his two illegitimate children, born after his injury. See *Jimenez*, 417 U.S. at 630.

²³⁴ See *Weber*, 406 U.S. at 176–77 (Blackmun, J., concurring); *supra* note 80 and accompanying text (discussing Mr. Stokes's inability to legally acknowledge his illegitimate children due to the Louisiana acknowledgment statute).

²³⁵ See *Mathews v. Lucas*, 427 U.S. 495, 514–16 (1976).

²³⁶ See *Weber*, 401 U.S. at 175.

ly related children. If the state establishes entitlements based on something other than established legal constructs like marriage or acknowledgement, it must do so even-handedly. Biology can be relevant, but only if the state chooses to make it so.

A. The Problems with Law Over Blood

This Primacy of Law theory is not perfect. It inadequately explains both the maternity cases and the child support cases. In *Levy v. Louisiana* and *Glon v. American Guarantee & Liability Insurance Co.*, the Supreme Court held that the nonmarital mother-child relationships had to be treated as marital parent-child relationships even though there was no prior legal declaration of a parental relationship and no finding of dependence.²³⁷ It is very difficult to square *Levy* and *Glon* with the intestacy cases and *Mathews*. The Court concluded that the children in *Levy* must be able to sue for malpractice because marital children would have been able to, but if the tort claim had failed for any reason, those children would not have been entitled to take in intestacy, even though marital children would have. The children in *Mathews* lived with their father as long as the children in *Levy* lived with their mother, but they were not entitled to social security benefits stemming from their father's death, even though the children in *Levy* were entitled to wrongful death benefits stemming from their mother's death.²³⁸ Unlike the mother in *Levy*, the father in *Mathews* abandoned the children, but that hardly seems like a rational reason to disallow the child's entitlement if that entitlement is rooted in genetic connection.

The other line of cases that is exceedingly difficult to square with a Primacy of Law theory is the child support cases.²³⁹ The child support cases say that children must be given adequate time to establish a parent-child relation-

²³⁷ See *Glon v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 73–76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 69–72 (1968).

²³⁸ See *Mathews*, 427 U.S. at 515–16. One might argue that it is maternal exceptionalism that explains *Levy v. Louisiana* and *Glon v. American Guarantee & Liability Insurance Co.* more than intestacy exceptionalism that explains *Labine v. Vincent* and *Lalli vs. Lalli*. The Court has previously held that mothers and fathers are not similarly situated with regard to parental rights, so perhaps illegitimate children have different rights to relationships with their mothers than they do with their fathers. For a discussion of the well known line of unwed fathers' rights cases finding that mothers and fathers have different due process and equal protection rights to parenthood, see Baker, *supra* note 157, at 148–50. The Court has also used biological differences between men and women during gestation and at birth to condone the automatic conferral of citizenship on the genetic children of American mothers, but not necessarily on the genetic children of American fathers. See, e.g., *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011); *Tuan Anh Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 54 (2001); *Miller v. Albright*, 523 U.S. 420 (1998).

²³⁹ See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Gomez v. Perez*, 409 U.S. 535 (1973).

ship for purposes of child support. Traditionally, paternity was established without paying any heed to actual dependence. Indeed, it was established in order to create dependence. But if the state must provide a forum for establishing genetic connection for purposes of child support, why does it not have to provide a forum for purposes of intestacy or social security benefits, which might well involve larger payoffs? The children in *Mathews* were constitutionally entitled to sue their dead father's estate for child support because marital children would have been able to, but they were not entitled to sue the Social Security Administration for survivors benefits even though marital children would have been able to do so. In general, the Court seemed far more concerned with securing nonmarital children's rights to child support than nonmarital children's rights to any other form of benefit. This may make sense from a public fisc perspective,²⁴⁰ but it does not make much sense from an equal protection perspective.

CONCLUSION

There is simply no way to reconcile all of the U.S. Supreme Court's legitimacy cases with each other. Intestacy exceptionalism does not withstand scrutiny, and even if it did, one would be left with *Mathews v. Lucas*, which announced the "not toothless" level of scrutiny but then proceeded to apply a standard without much tooth. In the end, one must choose between the Primacy of Blood and the Primacy of Law theories based on which holdings one is most comfortable dismissing.

The Justices who championed the rights of illegitimate children may well have thought they were dismantling a system of legal classification that was rooted in moral, caste-based judgments of what families "should" look like. They were trying to provide a world of entitlements for children who had been classified by the law as outside the group of children the state actually protects and insures. Although this cause may have seemed noble, the Justices likely embarked on a task they could not complete. To the extent some Justices wanted to rely on genetic connection, rather than marriage, to determine parenthood, they were really just replacing one caste-based system with another.²⁴¹

²⁴⁰ As indicated earlier, the child support cases are practically irrelevant today because federal statute requires states to provide an eighteen-year statute of limitations for establishing parenthood—though it does not say that the establishment of parenthood must be rooted in genetics. See *supra* note 111 and accompanying text.

²⁴¹ As Appleton has observed, "We can probably eliminate the last vestiges of illegitimacy . . . only by dismantling parentage altogether." Appleton, *supra* note 99, at 385.

The idea that certain children cannot be excluded from a parent-child relationship because they share a genetic connection with the adult, through whom certain state-facilitated entitlements flow, undermines contemporary movements to recognize family forms that are not and could not be rooted in genetic connection. The interpretation of the constitutional legitimacy cases that most conforms to contemporary understandings of parenthood is one that makes parenthood a question of law, not blood, and gives the state considerable discretion in defining parenthood. The more robust that discretion is, the weaker are any “fundamental rights” arguments to a parent-child relationship. The fundamental right to a parent-child relationship, like the fundamental right to marry, is necessarily limited because of the state’s power to define those statuses.

Laws that discriminate against illegitimate children, like laws that discriminate against same-sex couples, may be subject to some heightened scrutiny because of a history of discrimination. But in the illegitimacy context, advocates should be careful in explaining why children are being treated unfairly. As the amici briefs in the same-sex marriage litigation demonstrate, parties still use the legitimacy cases, and they use them in support of propositions that are either (i) silly—that all children must be treated alike²⁴²—or (ii) dangerous—that all of an adult’s genetically related offspring must be treated alike. For those interested in expanding contemporary understandings of legitimate parenthood, it is important to emphasize how the legitimacy cases cannot stand for the first proposition and need not be read to stand for the latter. If there is a constitutional problem with the state failing to recognize a parental relationship, it is not rooted in a requirement that the state recognize genetic connection. Rather, it is rooted in a much lesser requirement that a state must be consistent in its decisions to treat particular children as legally in a relationship with particular adults.

²⁴² The principle that all children must be treated alike may not be silly, but it is unrealistically idealistic. It would require dismantling almost all of the state-administered programs that currently provide for children, including child support statutes, social security disability and survivors provisions, workers’ compensation regimes, and tort law. See *supra* notes 90–94 and accompanying text.

