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Comment

LEGISLATING AFTER *JANICE M.*: THE CONSTITUTIONALITY OF RECOGNIZING DE FACTO PARENTHOOD IN MARYLAND

RACHEL SIMMONSEN*

I. INTRODUCTION

Maya had three mothers. She knew two of them. The law saw only one. Before Maya was out of diapers, her birth mother was out of the picture.¹ But, two other women soon filled the void. Maya's adoptive mother, Janice, took the infant from India to Maryland, where Janice shared a home with her longtime partner, Margaret.² For five years, Janice and Margaret shared the duties of bathing Maya, changing her diapers, preparing Maya's meals, accompanying her on school field trips, and driving her to choir practice and horseback riding lessons.³ But while Maya considered both women her mother,⁴ the Court of Appeals of Maryland recognized Janice alone as a parent.⁵ Only Janice had legally adopted Maya,⁶ and thus, only she had the

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1. See *Janice M. v. Margaret K.*, 404 Md. 661, 665–66, 948 A.2d 73, 75–76 (2008) (noting that Maya was still a baby when Janice adopted her and brought her to the United States).

2. *Id.* at 665, 948 A.2d at 75.

3. *Id.* at 666, 948 A.2d at 76; *Janice M. v. Margaret K.*, 171 Md. App. 528, 531, 910 A.2d 1145, 1147 (Md. Ct. Spec. App. 2006), *rev'd*, 404 Md. 661, 948 A.2d 73 (2008); see also Andrea F. Siegel, "De Facto" Parent's Visitation on Trial: High Court to Hear Plea of Ex-Partner to See Adopted Girl, *BALT. SUN*, May 30, 2007, at 1B (noting that "Margaret helped Janice raise her daughter—preparing breakfast, picking her up at school, ferrying her to medical appointments and bathing her").

4. See *Janice M.*, 171 Md. App. at 532–33, 910 A.2d at 1148 (finding that Plaintiff's Verified Emergency Motion for Visitation, which included copies of Mother's Day and "Mommy" birthday cards, written by Janice from Maya to Margaret, "overwhelmingly establish[ed]" a "parent-child bond" between Maya and Margaret).

5. See *Janice M.*, 404 Md. at 685, 948 A.2d at 87 (refusing to recognize de facto parenthood in Maryland and thus deeming Margaret K. a third party, rather than a parent, to Maya).

6. *Id.* at 665 & n.2, 948 A.2d at 75 & n.2. The Court of Appeals of Maryland noted that India's prohibition of adoptions by same-sex couples prevented Margaret from taking

right to custody of the child after Janice and Margaret ended their eighteen year relationship.⁷

The facts of *Janice M. v. Margaret K.*⁸ illustrate an increasingly common dilemma facing state courts and lawmakers: How should the law address child custody and visitation disputes in nontraditional families? As of 2000, same-sex couples were parents to more than 250,000 children under the age of eighteen nationwide.⁹ By 2004, the U.S. Census Bureau estimated that about seventeen percent of children lived in blended families with one or no biological parents and/or stepparents, stepsiblings, or half siblings.¹⁰ In 2009, more than two million children in the United States lived with one parent and that parent's unmarried partner.¹¹

Although family law routinely divides parental rights among divorcing heterosexual parents, it has yet to apply a similar, consistent framework to the dissolution of nontraditional families.¹² Some courts and lawmakers have embraced aspects of a proposal offered by the American Law Institute ("ALI").¹³ In recognizing de facto

part in Maya's formal adoption. *Id.* at 665 n.2, 948 A.2d at 75 n.2; see also *Janice M.*, 171 Md. App. at 531, 910 A.2d at 1147. Margaret never sought to legally adopt Maya in Maryland. *Janice M.*, 404 Md. at 665, 948 A.2d at 75. Although same-sex couples have obtained second-parent adoptions in Maryland, see *Conaway v. Deane*, 401 Md. 219, 336, 932 A.2d 571, 642 (2007) (Raker, J., concurring in part and dissenting) (noting that Maryland "trial courts have granted same-sex couples 'second parent adoptions'"), the Court of Appeals has yet to rule on the legality of such adoptions, *Janice M.*, 404 Md. at 665 n.3, 948 A.2d at 75 n.3.

7. See *Janice M.*, 404 Md. at 664, 948 A.2d at 75 (explaining that although the women had shared a committed relationship for about eighteen years, Margaret was not entitled to custody of Maya because Maryland does not recognize de facto parenthood).

8. 404 Md. 661, 948 A.2d 73.

9. R. BRADLEY SEARS ET AL., SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES: DATA FROM CENSUS 2000, at 1 (2005).

10. ROSE M. KREIDER, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2004, at 2 (2008), available at <http://www.census.gov/prod/2008pubs/p70-114.pdf>.

11. *America's Families and Living Arrangements: 2009*, U.S. Census Bureau, tbl. C3 (2009), <http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html>.

12. See Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 635 (2002) ("The law governing . . . relationships [between children and nontraditional caregivers] is poorly developed.")

13. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000) (finding that psychological parents stand in parity with legal parents); *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (holding that an individual establishes standing as a de facto parent if (1) the legal parent "consented to and fostered [a] parent-like relationship" between the child and the de facto parent, (2) the de facto parent lived in the same household as the child, (3) the de facto parent assumed parental duties without compensation, and (4) the de facto parent served in the parental role for a period of time long enough to have established a "bonded, dependent relationship, parental in nature"); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (holding that courts may apply the best interests of the child standard in visitation disputes between a legal parent and a "non-traditional" parental fig-

parenthood, the ALI's *Principles of the Law of Family Dissolution*¹⁴ bestow parental rights on individuals who have lived with a child and developed a parent-like bond with the consent and support of the legal parent.¹⁵ This standard allows individuals, such as same-sex partners and stepparents, to continue to parent their nonbiological children once the adults' romantic relationship has ended. Nonetheless,

ure, provided that the latter can show that the legal parent "consented to, and fostered," a parent-like relationship between the nontraditional parental figure and the child and that the nontraditional parental figure lived with the child, took on parental obligations without expectation of compensation, and has served "in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature"); *see also, e.g.*, MINN. STAT. ANN. § 257C.08, subdiv. 4 (West 2007) (allowing a person who has lived two or more years with a child to petition for visitation, provided the petitioner can show that visitation would be in the child's best interests, the petitioner and the child shared a "parent and child relationship," and visitation would not interfere with the relationship between the custodial parent and the child). These authorities all draw from concepts and language in the ALI's *Principles of the Law of Family Dissolution*. *See infra* notes 14–15.

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14. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter PRINCIPLES].

15. Section 2.03 of the *Principles* provides that a de facto parent is

[A]n individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

Id. § 2.03. "Parent by estoppel" is defined as

[A]n individual who, though not a legal parent,

(i) is obligated to pay child support . . . ; or

(ii) lived with the child for at least two years and (A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or

(iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

Id. § 2.03(b).

courts in many other states have refused to accept de facto parenthood.¹⁶

In *Janice M.*, the Maryland Court of Appeals joined those state courts rejecting judicial recognition of de facto parenthood, but at least some state lawmakers hope to override the decision. In February 2010, legislators introduced companion bills in the Maryland Senate and House of Delegates to recognize de facto parents upon clear and convincing evidence of three factors: first, that each parent of the child had “fostered” a “parent-like” relationship with the child; second, that the individual had exercised “parent-like responsibility” for the child; and third, that the individual had acted in a “parent-like role for a length of time sufficient to have established a bonded and dependent relationship” with the child that is “parental in nature.”¹⁷ Under this proposed legislation, de facto parents would have had “the duties and obligations” of a legal parent.¹⁸ Based on Maryland case law,¹⁹ visitation and custody disputes between legal parents and de facto parents presumably would have turned on the “best interests of the child” standard, which “triggers a fact-specific inquiry that vests considerable discretion in the court.”²⁰

Though ultimately unsuccessful,²¹ the bills proposing recognition of de facto parent status in Maryland raised an important question:

16. See, e.g., *In re Marriage of Simmons*, 825 N.E.2d 303, 307–08, 312–13 (Ill. App. Ct. 2005) (refusing to recognize an individual as a de facto parent, even though he had co-parented the child since birth); *Black v. Simms*, 12 So. 3d 1140, 1143 (La. Ct. App. 2009) (holding that any third party seeking custody, including an individual claiming de facto parenthood status, must first show that awarding sole custody to the legal parent would cause the child substantial harm).

17. H.B. 1241(B)(2)(I)–(III), 427th Sess. (Md. 2010); S.B. 600(B)(2)(I)–(III), 427th Sess. (Md. 2010). Throughout this Comment, I refer to the bills collectively as “the proposed legislation.”

18. H.B. 1241(C); S.B. 600(C).

19. The Maryland Court of Appeals has said that the best interests of the child standard applies in custody and visitation disputes between fit legal parents. See, e.g., *Janice M. v. Margaret K.*, 404 Md. 661, 675, 948 A.2d 73, 81 (2008) (identifying “disputes between fit legal parents” as one of three circumstances in which the best interests of the child standard might arise).

20. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* 628 (3d ed. 2007).

21. Sponsors of the House Bill withdrew the measure after it received an unfavorable report from the Judiciary Committee. See H. COMM. ON THE JUDICIARY, VOTING RECORD ON H.B. 1241 (March 25, 2010), available at http://mlis.state.md.us/2010rs/votes_comm/hb1241_jud.pdf. The 2010 Legislative Session came to a close with no action on the Senate version. According to Equality Maryland, a gay rights group, both bills were under “serious attack by lawmakers who want[ed] to amend [them] to include language to take away the recognition of out of state marriage licenses.” *Less than 6 Days Left for LGBT Bills!*, EQUALITY MD. BLOG (Mar. 23, 2010) (on file with the Maryland Law Review). In February of 2010, the Maryland Attorney General stated that Maryland may recognize gay marriages per-

Can Maryland lawmakers constitutionally recognize de facto parenthood, or was *Janice M.* the final word? Though the Court of Appeals noted lawmakers' power to legislate the matter, the court reserved judgment on whether a de facto parenthood statute would be valid under the Federal Constitution or the Maryland Declaration of Rights.²²

This Comment explores the constitutionality of the proposed Maryland legislation, analyzing the bills under both the Federal and Maryland Constitutions. Part II summarizes the Maryland Court of Appeals's opinion in *Janice M.* and presents more fully the constitutional problem facing Maryland lawmakers. Part III focuses on the jurisprudence of the Supreme Court of the United States and its implications for de facto parenthood and concludes that the proposed legislation would have been valid under the Federal Constitution. Part IV then explores potential problems under the Maryland Constitution and concludes that if lawmakers reintroduce the proposed legislation, they should amend it to more effectively balance the constitutional rights of legal and de facto parents. Despite the fact that the Court of Appeals provided little guidance on how to legislate the rights of legal and de facto parents constitutionally, Maryland lawmakers must move forward and enact statutory language that recognizes de facto parents in Maryland. This legislation is particularly important in protecting the rights of same-sex partners, as Maryland has yet to legalize same-sex marriage or determine officially whether same-sex couples may adopt.²³

II. JANICE M.: RAISING MORE QUESTIONS THAN ANSWERS

Were it not for the timing of the proposed legislation on de facto parenthood, Margaret K.'s request for de facto parent status might have escaped serious constitutional inquiry by the Maryland Court of Appeals. Maryland courts generally presume the constitutionality of statutes, reasoning that the "adequacy of the legislative scheme is for the Legislature to determine."²⁴ Nonetheless, if the basis for a judicial decision rests on constitutional guarantees of due process, the legisla-

formed in other states. 95 Md. Op. Att'y Gen. 3, 3-4 (2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>.

22. *Janice M.*, 404 Md. at 689, 948 A.2d at 89.

23. Maryland lawmakers introduced a bill to recognize same-sex marriage during the 2011 session, but the bill's likely success remained unclear in early February 2011. Annie Linskey & Julie Bykowitz, *Six Senators Hold the Key to Passage of Gay-Marriage Bill*, BALT. SUN, Feb. 6, 2011, at 1A.

24. *Pitts v. State Bd. of Exam'rs of Psychologists*, 222 Md. 224, 227, 160 A.2d 200, 201 (1960).

ture may not simply pass a law overriding the judicial decision; due process guarantees, as interpreted by the courts, constrain lawmakers.²⁵ Thus, had the de facto parenthood bills not come so soon after the *Janice M.* case, the proposals may have enjoyed a presumption of constitutionality.²⁶

In *Janice M.*, the Court of Appeals expressly rejected Margaret's argument that Maryland should recognize de facto parenthood,²⁷ even though the lower courts had granted Margaret visitation on that ground.²⁸ After Janice and Margaret's split, Janice did not allow Margaret to have any contact with Maya,²⁹ and Margaret subsequently sued for custody, or in the alternative, visitation.³⁰ The Circuit Court for Baltimore County granted Janice custody, noting that legal parents are entitled to a presumption of custody and finding that no evidence established Janice as an unfit parent or that any extraordinary circumstances were present.³¹ On the matter of visitation, however, the circuit court found that Margaret was a de facto parent and that visitation was in Maya's best interests.³² The Maryland Court of Special Appeals affirmed.³³

In its reversal, the Maryland Court of Appeals reasoned that recognizing de facto parenthood would defy established Maryland case law by allowing third parties in visitation and custody cases to "short-circuit[] the requirement to show unfitness or exceptional circumstances."³⁴ Writing for the majority, Chief Judge Bell emphasized that

25. *See* *Ulman v. Mayor of Balt.*, 72 Md. 587, 592, 20 A. 141, 142 (1890) ("The Article of the Constitution is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the Legislature free to make any process due process of law by its mere will and pleasure.").

26. *See* *Woodell v. State*, 2 Md. App. 433, 437, 234 A.2d 890, 892 (1967) ("[A]ll presumptions favor the constitutionality of a duly enacted statute and it will not be declared unconstitutional unless it plainly contravenes the federal or state constitutions.").

27. *Janice M.*, 404 Md. at 685, 948 A.2d at 87; *see also* Emily R. Lipps, Note, *Janice M. v. Margaret K.: Eliminating Same-Sex Parents' Rights to Raise Their Children by Eliminating the De Facto Parent Doctrine*, 68 Md. L. Rev. 691 (2009).

28. *Janice M. v. Margaret K.*, 171 Md. App. 528, 536–37, 540, 910 A.2d 1145, 1150–52 (2006), *rev'd*, 404 Md. 661, 948 A.2d 73 (explaining that the Circuit Court for Baltimore County granted Margaret visitation because she was a de facto parent and visitation was in Maya's best interests and upholding that decision upon finding that the lower court neither erred nor abused its discretion).

29. *Janice M.*, 404 Md. at 666, 948 A.2d at 76.

30. *Id.* at 666–67, 948 A.2d at 76.

31. *Id.* at 667–68, 948 A.2d at 76–77.

32. *Id.* at 668, 948 A.2d at 77.

33. *Janice M.*, 171 Md. App. at 538, 910 A.2d at 1151.

34. *Janice M.*, 404 Md. at 685, 948 A.2d at 87. In two prior cases, the court held that third parties seeking custody or visitation must prove parental unfitness or exceptional circumstances before a court could apply the best interests of the child test. *See* *Koshko v.*

the United States Supreme Court has consistently recognized that parents have a constitutional right “to direct and govern the care, custody, and control of their children.”³⁵ In addition, the Maryland Declaration of Rights often affords an even more protective “compliment of safeguards.”³⁶ Thus, to adequately protect the full array of these liberties, the Court of Appeals previously has required third parties seeking custody or visitation of a child to show that the legal parent is unfit or that such exceptional circumstances exist that the child would suffer serious harm if the court denied the third party’s petition.³⁷ With only one judge dissenting,³⁸ the Court of Appeals refused to treat de facto parents any differently than other third parties.³⁹ The problem with the lower courts’ decisions in *Janice M.*, the court reasoned, was that both courts had granted Margaret visitation based on her status as a de facto parent without first deciding whether exceptional circumstances existed.⁴⁰ The court remanded the case to the circuit court to determine that issue.⁴¹

In one of the more enigmatic parts of the opinion, the Court of Appeals suggested that lawmakers might recognize de facto parenthood by enacting third party visitation statutes.⁴² But, the court gave little guidance as to the constitutional requirements that a statute

Haining, 398 Md. 404, 444–45, 921 A.2d 171, 195 (2007) (concluding that “a finding of either parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child” is a “prerequisite to application of the best interests analysis”); McDermott v. Dougherty, 385 Md. 320, 325–26, 869 A.2d 751, 754 (2005) (holding that “in disputed custody cases where private third parties are attempting to gain custody of children from their natural parents,” a court must determine “that both natural parents are unfit to have custody of their children or that extraordinary circumstances exist which are significantly detrimental to the child” before conducting the “best interest of the child” analysis).

35. *Janice M.*, 404 Md. at 671, 948 A.2d at 79.

36. *Id.* at 679 n.7, 948 A.2d at 83 n.7 (quoting *Koshko*, 398 Md. at 443–44, 921 A.2d at 194) (internal quotation marks omitted).

37. *Id.* at 685, 948 A.2d at 87.

38. In dissent, Judge Raker argued that the court not only should recognize de facto parenthood, but it also should focus solely on the child’s best interests in determining whether a de facto parent should have custody or visitation rights. *Id.* at 696–97, 948 A.2d at 94 (Raker, J., dissenting).

39. *See id.* at 685, 948 A.2d at 87 (majority opinion) (“Even were we to recognize some form of *de facto* parenthood, the real question . . . will remain, whether, in a custody or visitation dispute, a third party . . . who satisfies the test necessary to show de facto parenthood should be treated differently from other third parties.”)

40. *Id.* at 695, 948 A.2d at 93. The circuit court found no evidence that Janice was an unfit parent. *Id.* at 667, 948 A.2d at 76.

41. *Id.* at 682, 695–96, 948 A.2d at 85, 93.

42. *See id.* at 686–89, 948 A.2d at 88–89 (discussing a Minnesota statute that grants de facto parents visitation rights and concluding that the Maryland General Assembly has the power to enact similar legislation if it so desires).

granting de facto parents visitation rights would need to meet. Noting that other states had already enacted similar statutes, the court focused on a Minnesota law granting visitation to third parties who had lived with a child for at least two years.⁴³ The court further detailed how the Minnesota Supreme Court upheld the constitutionality of the provision under strict scrutiny.⁴⁴ Providing a lengthy excerpt of the Minnesota Supreme Court's opinion, the Maryland Court of Appeals pointed out the distinction between the Minnesota statute and a third party visitation law that the United States Supreme Court struck down in 2000.⁴⁵ The Court of Appeals then noted that if the Maryland legislature wished to enact similar legislation, it would be "within its prerogative, of course."⁴⁶ But just as quickly, the court cautioned that it "express[ed] no view . . . as to any such statute's constitutionality" under the federal and state constitutions.⁴⁷

The lack of clarity in *Janice M.* provides little insight into how the court might rule on a constitutional challenge to statutory de facto parenthood.⁴⁸ More telling are the court's decisions in other areas of family law and due process, which receive more attention in Part IV. Equally important is the jurisprudence of the United States Supreme Court, which is the focus of the next Part.

III. LEGISLATION RECOGNIZING DE FACTO PARENTHOOD IS VALID UNDER THE FEDERAL CONSTITUTION

As the *Janice M.* court noted,⁴⁹ the United States Supreme Court long has recognized the right of parents to raise their children as they see fit.⁵⁰ But, the precise scope of this right, and to whom it applies, is less clear. Though the Court has declared that the parental right of

43. *Id.* at 686–87, 686 n.10, 948 A.2d at 88 & n.10 (citing MINN. STAT. ANN. § 257C.08, subdiv. 4 (West 2007)). The Minnesota statute also requires visitation to be in the child's best interests and that visitation "not interfere with the relationship between the custodial parent and the child." MINN. STAT. ANN. § 257C.08, subdiv. 4.

44. *Janice M.*, 404 Md. at 687–89, 948 A.2d at 88–89.

45. *Id.* The 2000 Supreme Court case referenced in the *Janice M.* opinion is *Troxel v. Granville*, 530 U.S. 57 (2000). *Troxel* involved a Washington statute that allowed any third party to petition for visitation with a child. 530 U.S. at 60 (plurality opinion). The Supreme Court found the statute "breath-takingly broad," because it failed to limit the scope of potential petitioners and "gave no special weight" to the legal parent's decision making. *Id.* at 67, 69. For a more detailed discussion of *Troxel*, see *infra* Part III.A.2.

46. *Janice M.*, 404 Md. at 689, 948 A.2d at 89.

47. *Id.*

48. See *supra* text accompanying notes 42–47.

49. See text accompanying *supra* note 35.

50. See, e.g., *Troxel*, 530 U.S. at 65 (noting that parents' interest "in the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court").

child-rearing is a fundamental liberty,⁵¹ the Court's decisions regarding parental rights have applied something less than strict scrutiny.⁵² At the same time, the Court has recognized that nonparent family members also have protectable interests.⁵³ Finally, although the Court has emphasized that parental rights stem from an individual's assumption of parental responsibilities, the Court has continually deferred defining parenthood.⁵⁴ In light of this framework, the Maryland lawmakers' proposed legislation would have been valid under the Federal Constitution.⁵⁵

A. *In Defining Parents' Constitutional Rights, the Supreme Court Has Emphasized Parents' Responsibility to Assume Caregiver Roles, the Competing Interests of Children and Other Family Members, and States' Broad Authority to Assign and Limit Parental Power*

The Court's parental rights cases offer many insights relevant to the constitutionality of de facto parenthood. The Court has established constitutional protection for parents but allowed states to infringe such rights when the state's interest outweighs that of the parents.⁵⁶ In addition, the Court has recognized that parental rights compete with the constitutional interests of children and other family members.⁵⁷ Finally, the Court has frequently deferred to state definitions of parenthood while making clear that individuals who assume caregiving roles have a greater claim to constitutional protections as parents.⁵⁸ Under this framework, Maryland lawmakers' proposed legislation to recognize de facto parenthood would have been constitutionally valid.

1. *Parents Have a Constitutional Right to Raise Their Children As They See Fit*

For decades, the Supreme Court has recognized that parents possess a special constitutional right to decide how to raise their children. In the 1923 case *Meyer v. Nebraska*,⁵⁹ the Court struck down a statute barring foreign language instruction to children who had not yet

51. *Id.*

52. *See infra* Part III.A.2.

53. *See infra* Part III.A.3.

54. *See infra* Part III.A.4.

55. *See infra* Part III.A-B.

56. *See infra* Part III.A.1-2.

57. *See infra* Part III.A.3.

58. *See infra* Part III.A.4.

59. 262 U.S. 390 (1923).

passed the eighth grade.⁶⁰ In so doing, the Court emphasized that the Due Process Clause⁶¹ protects “not merely freedom from bodily restraint” but also the right to contract, to pursue common occupations, to acquire knowledge, and to “establish a home and bring up children.”⁶² Though the Court’s opinion rested partly on the right of individuals to teach foreign languages and the rights of children to acquire knowledge,⁶³ the Court found that the statute at issue materially interfered with “the power of parents to control the education of their own.”⁶⁴ Two years later, in *Pierce v. Society of Sisters*,⁶⁵ the Court again invoked the rights of parents when it struck down an Oregon statute that required all children to attend public schools.⁶⁶ According to the Court, the statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁶⁷

In the following decades, the Court described parental rights in increasingly reverential terms. By 1944, the Court considered it “cardinal” that “the custody, care and nurture of the child reside first in the parents.”⁶⁸ Thirty years later, the Court declared parents’ right “to guide the religious future and education of their children” a “fundamental interest.”⁶⁹ In 2000, the Court reaffirmed that the “interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁷⁰

Despite this exalting language, however, the Court has been less protective of parental rights than of other so-called fundamental liberties.⁷¹ Typically, the Court has applied strict scrutiny to fundamental rights, invalidating state infringement unless the state could show that

60. *Id.* at 397, 403.

61. The Due Process Clause of the Fourteenth Amendment prohibits states from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XXIV, § 1.

62. *Meyer*, 262 U.S. at 399.

63. *See, e.g., id.* at 400 (noting that parents have a duty to provide children “education suitable to their station in life” and that teachers have a “right thus to teach”).

64. *Id.* at 401.

65. 268 U.S. 510 (1925).

66. *Id.* at 534–35.

67. *Id.*

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

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

70. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

71. *See infra* Part III.A.2. Among the rights the Court has deemed fundamental liberties are the rights to free speech, free exercise of religion, travel, and voting. ERWIN CHERMERNSKY, CONSTITUTIONAL LAW 943 (3d ed. 2009).

the action was necessary to achieve a compelling state interest.⁷² For example, in a case involving the fundamental right to marry, the Court invalidated a law that required individuals who were under an obligation to pay child support to seek court approval before obtaining a marriage license.⁷³ Although the Court acknowledged that the state had a substantial interest in assuring that children receive the benefit of child support,⁷⁴ it held that the state could accomplish its end through means less restrictive of the right to marriage, such as wage garnishment, civil contempt, or criminal penalties.⁷⁵ Conversely, the Court has upheld state restrictions on parental rights without requiring a showing that such restrictions are necessary to further compelling state interests.⁷⁶

2. *Although the Supreme Court Has Deemed Parental Rights Fundamental Liberties, Such Rights May Be Subject to State Interference Even When the State Fails to Narrowly Tailor Its Intrusion to a Compelling State Interest*

In cases involving challenges to parental rights, the Court typically has employed a “sliding scale” inquiry into the rationality of government intrusion.⁷⁷ As the degree of government interference has increased, so too has the Court’s level of scrutiny.⁷⁸ In *Santosky v. Kramer*,⁷⁹ for instance, the Court emphasized that parents facing an order to terminate parental rights possess a “vital interest in preventing the irretrievable destruction of their family life”⁸⁰ because the state “seeks not merely to infringe that fundamental liberty interest, but to end it.”⁸¹ Accordingly, parents facing a termination order “have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.”⁸² Similarly, in *M.L.B. v. S.L.J.*,⁸³ the Court emphasized the “unique kind of depriva-

72. See CHEMERINSKY, *supra* note 71, at 943; David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 838 (1999). R

73. *Zablocki v. Redhail*, 434 U.S. 374, 375, 388 (1978).

74. *Id.* at 388.

75. *Id.* at 388–90.

76. See *infra* Part III.A.2.

77. Meyer, *supra* note 72, at 838–41. R

78. *Id.*

79. 455 U.S. 745 (1982).

80. *Id.* at 753.

81. *Id.* at 759.

82. *Id.* at 753. The Court held that before a state may terminate someone’s parental rights, the state must prove the necessity of doing so by “at least clear and convincing evidence.” *Id.* at 769.

83. 519 U.S. 102 (1996).

tion” that comes with the termination of parental rights.⁸⁴ Because this sanction is “so severe and so irreversible,”⁸⁵ the Court recognized the need to apply heightened constitutional protection to an indigent mother appealing a court order terminating her parental rights.⁸⁶ In so holding, the Court contrasted termination with less intrusive custody orders.⁸⁷ If not explicitly so holding, the Court has at least implied that the Constitution provides more protection when parents suffer a complete loss of parental authority as opposed to only an interference with that right.⁸⁸

Even in those cases involving complete loss of parental rights, however, the Court has refrained from employing strict scrutiny. While noting the need for “close consideration”⁸⁹ of the state’s authority to sever the parent-child bond in *M.L.B.*, the Court never discussed the state’s need to demonstrate a compelling interest or to narrowly tailor its infringement of parental rights to that interest.⁹⁰ Instead, the Court employed a simple balancing test, analyzing “the character and intensity of the individual interest at stake, on the one hand, and the State’s justification for its exaction, on the other.”⁹¹ The Court concluded that an indigent mother’s attempt to prevent the “devastatingly adverse action” of losing her parental rights far outweighed the state’s financial interest in charging an administrative fee for appeals.⁹² In *Lassiter v. Department of Social Services*,⁹³ the Court noted that states have an “urgent interest” in children’s welfare,⁹⁴ but never once mentioned the word “compelling.”⁹⁵ *Lassiter* involved an indigent mother who argued that the fundamental nature of parental rights entitled her to appointed counsel in a proceeding to terminate

84. *Id.* at 118 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

85. *Id.* (quoting *Santosky*, 455 U.S. at 759).

86. *Id.* at 113–24. Specifically, the Court held that Mississippi could not deny appeals of termination orders because of a parent’s inability to pay administrative fees. *Id.* at 107.

87. *Id.* at 118 (citing *Lassiter*, 452 U.S. at 39 (Blackmun, J., dissenting)).

88. Meyer, *supra* note 72, at 840.

89. *M.L.B.*, 519 U.S. at 116–17.

90. The Court contended that Mississippi’s financial interest would satisfy a “rationality requirement,” but not the more demanding standard for “quasi-criminal” proceedings, such as those to terminate parental rights. *Id.* at 123–25.

91. *Id.* at 120–21.

92. *Id.* at 122, 125.

93. 452 U.S. 18 (1981).

94. *Id.* at 27.

95. Justice Blackman’s dissent provides the only use of the word “compelling.” *Id.* at 58 (Blackman, J., dissenting). As Justice Blackman pointed out, however, the Court emphasized the “compelling interest in the accuracy of [the] determination” of paternity in another case decided the same day. *Id.* (alteration in original) (quoting *Little v. Streater*, 452 U.S. 1, 13 (1981)) (internal quotation marks omitted).

those rights.⁹⁶ Rather than applying strict scrutiny, however, the Court weighed various elements against a presumption that an indigent litigant has a right to counsel only where he risks losing personal freedom.⁹⁷ According to the Court, not even a mother's "extremely important" interest in maintaining a bond with her child would sufficiently rebut that presumption in every case.⁹⁸ Consequently, the Court held that states may deny indigent parents counsel in proceedings to terminate parental rights.⁹⁹ Thus, even in cases threatening complete loss of parental power, the Court has refrained from applying strict scrutiny, which is typically the standard used in cases involving fundamental interests.

When state action falls short of terminating parental rights, the Court has allowed broad limitation of parental authority without considering whether such action is essential to furthering a strong state interest. In one of the earliest parental rights cases, *Prince v. Massachusetts*,¹⁰⁰ the Court upheld an absolute ban on children selling pamphlets on the street, even when a parent or guardian was present.¹⁰¹ Although the case arose before the Court had developed its strict scrutiny standard, the case illustrates the broad deference the Court has traditionally given states to regulate parental rights. When a guardian challenged the law in *Prince* as an overly broad "absolute prohibition, not merely a reasonable regulation," the Court countered that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."¹⁰² Acting as *parens*

96. *Id.* at 24 (majority opinion).

97. *Id.* at 27. Specifically, the Court considered three elements: the parental interests at stake, the government's interests, and "the risk that the procedures used will lead to erroneous decisions." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

98. *Id.* at 31–32. In addition to recognizing the state's "urgent interest" in children's welfare, the Court noted the financial interest of the government "to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause." *Id.* at 27–28. As to the question of accuracy in proceedings, the Court recognized that "the ultimate issues with which a termination hearing deals are not always simple." *Id.* at 30. Nonetheless, the Court reasoned that the "incapacity of the uncounseled parent . . . would not always be [] great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." *Id.* at 31. Because the strength of the various interests would vary from case to case, the Court refrained from requiring counsel in every proceeding to terminate parental rights. *Id.* Instead, the Court opted to "leave the decision . . . to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 31–32.

99. *Id.* at 31–33.

100. 321 U.S. 158 (1944).

101. *Id.* at 169–70.

102. *Id.* at 167.

patriae,¹⁰³ the state may restrict parents' control over their children by legislating compulsory school attendance or prohibiting child labor.¹⁰⁴ Conceding that the presence of a guardian or parent could "lessen the likelihood" of harm to the child, the Court deferred to the state legislature's determination that an outright ban was "necessary to accomplish its legitimate objectives."¹⁰⁵ Effectively, the *Prince* Court applied what it now refers to as "loose" rational basis scrutiny—a standard far more lenient than strict scrutiny.

The Court's most recent statement on parental rights reaffirms its preference for informally balancing factors over applying strict scrutiny. *Troxel v. Granville*¹⁰⁶ involved a couple who petitioned to have overnight visits with their granddaughters under a Washington third party visitation statute.¹⁰⁷ The couple's son, Brad Troxel, had two children with Tommie Granville.¹⁰⁸ After Troxel and Granville separated, Brad Troxel lived with his parents and regularly hosted the girls on weekend visits.¹⁰⁹ Two years after the separation, Brad Troxel committed suicide.¹¹⁰ Though the grandparents initially continued regular visits with the children, Granville later limited the visits to once a month.¹¹¹ Disappointed with this arrangement, the Troxels sued under a state statute that allowed any person to petition for visitation rights at any time.¹¹²

In a case that produced six separate opinions, a plurality of the Supreme Court bypassed strict scrutiny and held that the statute was

103. Latin for "ultimate parent or parent of the country," *parens patriae* is a common law doctrine under which the state serves "as the ultimate guardian of all children." Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 60 (2009) (internal quotation marks omitted). As early as 1890, the Supreme Court established that *parens patriae* was "inherent in the supreme power of every State" for "the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890).

104. *Prince*, 321 U.S. at 166.

105. *Id.* at 169–70. The Court noted that even parentally supervised children could suffer "emotional excitement and psychological or physical injury" while "propagandizing the community." *Id.* Notably, however, the Court pointed to no legislative findings to support this statement. *Id.* at 170 (noting only that "Massachusetts has determined that an absolute prohibition . . . is necessary to accomplish its legitimate objectives").

106. 530 U.S. 57 (2000).

107. *Id.* at 60–61 (plurality opinion).

108. *Id.* at 60.

109. *Id.*

110. *Id.*

111. *Id.* at 60–61.

112. *Id.* at 61.

unconstitutional as applied.¹¹³ Writing for the plurality, Justice O'Connor found that parents have a "fundamental right" to make decisions about the control and custody of their children; thus, any court-ordered visitation necessarily interferes with that right.¹¹⁴ Rather than applying strict scrutiny and demanding that the state show a narrowly tailored compelling interest in such broad visitation standards, the plurality rested on narrower grounds.¹¹⁵ Justice O'Connor concluded that Washington's statute was "breathhtakingly broad"¹¹⁶ and unconstitutional as applied to Granville because the trial judge had given no deference to the mother's decision about what was in her daughters' best interests.¹¹⁷ Because courts presume that fit parents act in their children's best interests, the plurality explained, states may not impose their own child welfare decisions without first rebutting this presumption with "special factors."¹¹⁸ Despite failing to explain what might constitute "special factors," the *Troxel* plurality found that the state did not satisfy its burden.¹¹⁹ The Court did not address whether those petitioning for visitation must show exceptional circumstances or potential harm to the child.¹²⁰ The Court also said nothing of the need for states to show a compelling interest before interfering with parental rights.¹²¹

On the rare occasions that the Court has applied strict scrutiny to cases involving parental rights, the Court has found that other fundamental liberties bolstered the parents' need for constitutional protection. In *Wisconsin v. Yoder*,¹²² for instance, the Court applied strict scrutiny to a compulsory school attendance law because it interfered with the rights of Amish parents and children to freely exercise their

113. *Id.* at 67; see also David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1141-42 (2001) (noting that the Court did not apply strict scrutiny in *Troxel*, which would have required the state to show that its regulation was narrowly tailored to a compelling interest).

114. *Troxel*, 530 U.S. at 66-67.

115. See *id.* at 67-73 (failing to apply strict scrutiny review to the Washington nonparental visitation statute).

116. *Id.* at 67.

117. *Id.* at 69-70.

118. *Id.* at 68-69.

119. The Court suggested that even the death of a parent did not constitute such a special factor. See *id.* (noting that "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family").

120. *Id.* at 73. The *Troxel* plurality explicitly evaded defining "the precise scope of the parental due process right in the visitation context." *Id.*

121. See *supra* text accompany note 115.

122. 406 U.S. 205 (1972).

religious beliefs.¹²³ While the Court acknowledged that the statute also burdened parental rights, it was the additional concern arising from the First Amendment that convinced the Court that heightened scrutiny was necessary.¹²⁴ Since then, the Court has applied true strict scrutiny in parental rights cases only when the state action at issue impacted another fundamental liberty.

Despite the Court's use of laudatory language, parental rights receive less protection under the Constitution than do other so-called fundamental liberties. Even in cases in which the Court has found state intrusion on parental rights unconstitutional, it has done so without invoking strict scrutiny. Indeed, the only parental rights cases to apply true strict scrutiny have involved other fundamental liberties. In the other parental rights cases, the Court's reliance on balancing tests suggests its awareness that parents' rights often compete with the important interests of other private stakeholders, including other family members.

3. *While Establishing the Rights of Parents, the Supreme Court Has Recognized That Children and Other Family Members Also Have Protectable Interests*

The Supreme Court's reluctance to apply strict scrutiny to parental rights cases coincides with the acknowledgement that the Constitution also protects the interests of children. Perhaps no line of cases demonstrates this more clearly than the Court's jurisprudence involving minors' abortion rights. In *Bellotti v. Baird*,¹²⁵ for instance, the Court began its analysis by stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹²⁶ Noting that states may ordinarily impose parental notice and consent requirements on a minor's "right to make important decisions,"¹²⁷ the Court concluded that the "abortion decision differs in important ways."¹²⁸ Accordingly, the Court held that a pregnant minor need not notify

123. *Id.* at 215–34.

124. *See id.* at 233 ("[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."); *see also* *Emp't Div. v. Smith*, 494 U.S. 872, 881 & n.1 (1990) (noting that the *Yoder* Court applied strict scrutiny only because the case involved both due process and free exercise interests), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

125. 443 U.S. 622 (1979).

126. *Id.* at 633 (quoting *In re Gault*, 387 U.S. 1, 13 (1967)).

127. *Id.* at 640.

128. *Id.* at 642.

her parents of her intent to seek an abortion.¹²⁹ In so holding, the Court balanced the interests of parents against those of their children, concluding that a minor's fundamental right to an abortion outweighed the constitutional right of parents to raise their children as they see fit.¹³⁰ Two years later, in *H.L. v. Matheson*,¹³¹ the Court upheld a statute requiring a physician to give notice to a minor's parents before performing an abortion on their daughter.¹³² Notably, the Court made clear that the statute's constitutionality rested partly on the fact that parents lacked "veto power over the minor's abortion decision."¹³³ Similarly, in *Hodgson v. Minnesota*,¹³⁴ the Court balanced the rights of minors against those of their parents in upholding a state law that required parental notification of both parents before a minor had an abortion.¹³⁵ Critical to the Court's conclusion was a statutory provision that allowed minors to bypass parental notification by seeking a court order allowing the abortion.¹³⁶ In its cases involving minors and abortion, the Court has made clear that the Constitution protects not only the liberty interests of parents but also those of their children.

In several other cases, the Court has recognized that family members who are not legal parents also have protectable interests in family matters. In *Moore v. City of East Cleveland*,¹³⁷ for instance, the Court recognized a grandmother's interest in maintaining her family unit.¹³⁸ The Fourteenth Amendment protects not only parental rights, the Court said, but a broader "freedom of personal choice in matters of . . . family life."¹³⁹ The Court found that this freedom encompassed a grandmother's right to live with her son and two grand-

129. *Id.* at 643. Specifically, the Court held that a state can require a minor to seek parental consent for an abortion only if it also provided the minor the alternative of seeking a judicial order. *Id.* "A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-44 (footnote omitted).

130. *See id.* at 647 (finding that a statute requiring parental consent, without the opportunity to go directly to a court to gain permission for an abortion, would pose "an undue burden upon the exercise by minors of the right to seek an abortion").

131. 450 U.S. 398 (1981).

132. *Id.* at 399-400, 413.

133. *Id.* at 411.

134. 497 U.S. 417 (1990).

135. *Id.* at 422-23.

136. *Id.* at 423, 455.

137. 431 U.S. 494 (1977).

138. *See id.* at 495-96, 499 (striking down a city ordinance that barred a grandmother from living with her grandson).

139. *Id.* at 499 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

sons, and consequently, the Court struck down a zoning ordinance that allowed only nuclear families to live together.¹⁴⁰ Similarly, in *Prince v. Massachusetts*, the Court explained that parental rights cases more generally recognize “the private realm of family life which the state cannot enter.”¹⁴¹ As a result, the Court entertained an aunt’s challenge to a child labor law that prohibited children from selling pamphlets on the street.¹⁴²

Troxel provides another example of the Court’s acknowledgement that nonparent family members have constitutionally protected parental interests.¹⁴³ In considering the factors that combined to violate Granville’s rights as a parent, the plurality emphasized that Granville never sought to completely cut off visitation between her children and their grandparents.¹⁴⁴ The plurality then contrasted the statute to those in other states that allowed court intervention only when a parent has denied visitation, not merely curtailed it.¹⁴⁵ Parental decisions to cut off contact between children and certain third parties could warrant closer judicial scrutiny only if the parties have their own interests worthy of protection.¹⁴⁶ Recognition of these competing interests may explain the Court’s reluctance to strike down the Washington statute on its face. Emphasizing that many state courts resolve family law questions “on a case-by-case basis,” the plurality remained “hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.”¹⁴⁷

As the Court has established and defined the constitutional rights of parents, it also has recognized that family relationships involve other parties with their own constitutional interests. In cases such as *Bellotti*,¹⁴⁸ the Court has acknowledged that the Constitution protects children, even when their interests conflict with those of their parents. As recently as *Troxel*, the Court has recognized that other parties, such

140. *Id.* at 495–99.

141. 321 U.S. 158, 166 (1944).

142. *See id.* at 159–61, 170 (recognizing the legitimacy of the aunt’s claim of a parental right, but finding that the state’s interest in protecting children outweighed that right). Prince was the guardian of her nine-year-old niece, whom she allowed to join her in distributing religious literature in public. *Id.* at 159, 162.

143. *See supra* text accompanying notes 106–21. R

144. *Troxel v. Granville*, 530 U.S. 57, 71 (2000).

145. *Id.* at 71–72.

146. *See Meyer, supra* note 113, at 1152 (noting the *Troxel* Court’s “seeming acknowledgement of the constitutional relevance of the ongoing changes in family relationships,” including its recognition of “substantial emotional relationships between children and non-parents”). R

147. *Troxel*, 530 U.S. at 73.

148. *See supra* text accompanying notes 125–30. R

as grandparents, may have protectable interests in family matters. The Court's ability to balance these competing interests, however, hinges on its determination of who qualifies as a parent.

4. *The Supreme Court Often Defers to State Determinations of Parenthood, but Has Emphasized That Parental Rights Correspond to Parental Obligations*

In most of its parental rights jurisprudence, the Supreme Court has affirmed the states' ability to determine who is a parent.¹⁴⁹ Cases involving unwed fathers, for instance, have shown the Court's willingness to accept states' assignment of parental liberties even when it means denying rights to biological fathers. For example, in *Quilloin v. Walcott*,¹⁵⁰ the Court upheld a Georgia law that deprived a biological father the power to block an adoption.¹⁵¹ Under the law, an unmarried father could veto an adoption only if he married the mother and acknowledged the child as his own, or if he sought a court order declaring paternity.¹⁵² Otherwise, state courts applied the "best interests" standard to a father's petition for custody, rather than automatically granting custody absent a showing of the father's parental unfitness.¹⁵³ The law required that only the biological mother consent to the adoption.¹⁵⁴ Upholding the law, the Court concluded that the state had a legitimate role in determining which relationships between an adult and a child would enjoy constitutional protections.¹⁵⁵ Similarly, in *Lehr v. Robertson*,¹⁵⁶ the Court upheld a New York law that allowed the adoption of a child without prior notice to the biological father.¹⁵⁷ Under the law, notice was only required if a court had al-

149. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("In the vast majority of cases, state law determines the final outcome.").

150. 434 U.S. 246 (1978).

151. *Id.* at 248-49, 265, 267-68.

152. *Id.* at 248-49.

153. See *id.* at 249-51 (describing how a Georgia trial court applied the "best interests" standard to grant an adoption over the objections of the biological father).

154. *Id.* at 248.

155. See *id.* at 256 ("We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."). The Court's ruling necessarily rejected the biological father's claim of paternity. He never sought an order claiming paternity until the husband of the child's mother petitioned for adoption; by this time, the husband had lived with the mother and child for eleven years. *Id.* at 247, 249. The state courts rejected the biological father's petition, noting that adoption was in the child's best interests. *Id.* at 251. The United States Supreme Court affirmed. *Id.* at 254.

156. 463 U.S. 248 (1983).

157. *Id.* at 249-51.

ready recognized the biological father as the father, he had demonstrated an interest in the child by filing a claim of possible paternity with the state's putative father registry, he was listed on the child's birth certificate as the father, he lived openly with the child and the child's mother and represented himself as the father, he married the child's mother before the child was six months old, or he was identified as the father by the mother in a sworn statement.¹⁵⁸ The biological father in *Lehr* appealed the adoption of his child on several grounds: first, the law failed to adequately protect a putative father's actual or potential relationship with his child because it failed to give adequate notice and an opportunity to be heard before depriving the father of that relationship; second, the law violated the Equal Protection Clause by according putative fathers fewer procedural rights than biological mothers; and finally, even if the law adequately protected a putative father's interest, he had adequately expressed an interest in his child by filing an affiliation proceeding in another court.¹⁵⁹ The Supreme Court rejected each argument.¹⁶⁰ Despite conceding that the Justices may not have adopted the same statutory scheme, the Court concluded that a state has the authority to define parental rights for the purpose of encouraging adoption and protecting the privacy interests of unwed mothers.¹⁶¹

Just a few years later, the Court again affirmed a state's power to define who counts as a legal parent. In *Michael H. v. Gerald D.*,¹⁶² the Court upheld a California law that assigned paternity to the man married to a child's mother even though he was not the child's biological father.¹⁶³ A biological father could rebut the so-called "marital presumption" only if the mother or the husband sought blood tests within two years of the child's birth.¹⁶⁴ Writing for a plurality, Justice Scalia concluded that it was "a question of legislative policy and not constitutional law" whether a state will allow a biological father to rebut the presumption that a woman's husband is the father of her child.¹⁶⁵ Thus, the Court reiterated states' broad power to determine who qualifies as a legal parent.

158. *Id.* at 250–51.

159. *Id.* at 255, 264–65. Though the biological father had failed to add his name to the putative father registry, he filed a visitation and paternity petition a month after the adoption proceeding began. *Id.* at 252.

160. *See id.* at 250 (rejecting both the due process and the equal protection arguments).

161. *See id.* at 264–68.

162. 491 U.S. 110 (1989).

163. *Id.* at 115, 129–30.

164. *Id.* at 115.

165. *Id.* at 129–30.

Furthermore, the Court has afforded states substantial discretion in distributing various rights among parents. In *Elk Grove Unified School District v. Newdow*,¹⁶⁶ the Court found that a father lacked standing to challenge the recitation of the Pledge of Allegiance at his daughter's school because he was a noncustodial parent; state law had restricted decision making authority to the girl's mother.¹⁶⁷ Strikingly, the Court did not question the power of state lawmakers to determine who could assert constitutional parental rights.¹⁶⁸ While California law provided Newdow a "cognizable right to influence his daughter's religious upbringing,"¹⁶⁹ the law defined Newdow as a noncustodial parent, and thus someone who lacked "a right to dictate to others what they may and may not say to his child respecting religion."¹⁷⁰ State law assigned this latter authority to the girl's mother.¹⁷¹ Therefore, in *Quilloin, Michael H.*, and *Elk Grove*, the Court has established that states have broad authority to define parenthood and distribute parental rights.

Despite its frequent deference to the states, the Court has provided some guidance regarding what entitles someone to claim parental rights. In particular, the Court has emphasized the link between parental rights and parental responsibilities. Thus, individuals who have failed to take on caregiving roles may sacrifice their claims to constitutional protections as parents. In *Quilloin*,¹⁷² for instance, the Court rejected the constitutional claim of a biological father after noting that he "has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."¹⁷³ The Court made this point more explicit in *Lehr v. Robertson*.¹⁷⁴ There, the Court noted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."¹⁷⁵ Hence, the Court explained, if a natural father failed to "grasp[] that opportunity" to "de-

166. 542 U.S. 1 (2004).

167. *Id.* at 4–5, 9, 16–18.

168. *See id.* at 16 (noting that Newdow's parental status was defined by California domestic relations law and that the Court typically deferred to lower courts' interpretation of state laws).

169. *Id.* at 16.

170. *Id.* at 9, 17.

171. *See supra* note 168 and accompanying text.

172. *See supra* text accompanying notes 150–55.

173. *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

174. *See supra* text accompanying notes 156–61.

175. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (emphasis omitted) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)) (internal quotation marks omitted).

velop a relationship with his offspring” and “accept[] some measure of responsibility for the child’s future,” the Constitution does not automatically afford him protection against state action.¹⁷⁶

On the other hand, if a biological father has taken a more active role in his child’s life, the Court has been more protective of his constitutional rights as a parent. In *Caban v. Mohammed*,¹⁷⁷ for instance, the Court struck down a state law that denied unwed fathers the power to block the adoption of their children, even when their parental relationships were “substantial.”¹⁷⁸ According to the Court, the statute wrongly assumed that mothers inherently have stronger parental bonds with their children than did unwed fathers.¹⁷⁹ The Court acknowledged that states may encourage adoptions by drafting legislation that gives greater protections to a biological mother than to an unwed father who has been absent from his child’s life.¹⁸⁰ But, the Court emphasized that when a father has established a “substantial relationship with the child,” the state cannot justify a law that rejects the father’s right to object to an adoption.¹⁸¹ Similarly, in *Stanley v. Illinois*,¹⁸² the Court held that a state could not deny an unwed father parental rights without first giving the father an opportunity to establish his parental fitness.¹⁸³ Although it conceded that many unwed fathers may be “unsuitable and neglectful parents,” the Court made clear that “all unmarried fathers are not in this category.”¹⁸⁴ Accordingly, the Court has distinguished absentee fathers from those who have been actively involved in their children’s lives. Because the biological father in *Lehr* “never had any significant custodial, personal, or financial relationship” with his child, the Court rejected his assertion that the state was required to notify him before permitting another man to adopt his child.¹⁸⁵

The Court long has linked the constitutional rights of parents to their obligations as children’s caretakers. In *Meyer v. Nebraska*,¹⁸⁶ the Court noted that parents’ right of control over their children corre-

176. *Id.* at 262.

177. 441 U.S. 380 (majority opinion).

178. *Id.* at 382, 385–87.

179. *Id.* at 389.

180. *See id.* at 392 (“In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.”).

181. *Id.* at 393.

182. 405 U.S. 645 (1972).

183. *Id.* at 649.

184. *Id.* at 654.

185. *Lehr v. Robertson*, 463 U.S. 248, 262, 265 (1983).

186. *See* text accompanying *supra* notes 59–64.

sponds to “the natural duty of the parent to give his children education suitable to their station in life.”¹⁸⁷ Just two years later, in *Pierce*,¹⁸⁸ the Court described a parent’s constitutional interest as a “right, coupled with the high duty, to recognize and prepare [the child] for additional obligations.”¹⁸⁹ The Court reiterated this connection between parental obligation and parental right when it declared in *Prince*¹⁹⁰ that parents retained the right to dictate the “custody, care and nurture of the child” but also were responsible for fulfilling the “primary function” of preparing the child “for obligations the state can neither supply nor hinder.”¹⁹¹ A survey of the Court’s parental rights cases thus reveals that individuals who assume caregiving functions have stronger claims to the constitutional protections of parenthood.

While denying parental rights to those who have neglected caregiving functions, the Court has ratified states’ authority to define parenthood in ways that maintain existing familial relationships. In *Quilloin*,¹⁹² for example, the Court noted that allowing adoption over the biological father’s objections gave “full recognition to a family unit already in existence, a result desired by all concerned, except [the biological father].”¹⁹³ *Michael H.*¹⁹⁴ provides another example of the Court’s recognition that states may legislate with the purpose of maintaining family units. Writing for the plurality, Justice Scalia noted that when a child is the product of an extramarital affair, “the natural father’s unique opportunity” to establish a meaningful relationship with his child “conflicts with the similarly unique opportunity of the husband of the marriage.”¹⁹⁵ Justice Scalia thus framed the case as one of sparring interests, with the natural father’s “freedom” to parent his biological child on the one hand, and the husband’s right “to preserve the integrity of the traditional family unit” on the other hand.¹⁹⁶ The Court decided that a state may constitutionally “give categorical preference to the latter.”¹⁹⁷ Hence, in both *Quilloin* and *Michael H.*, the Court recognized a state’s prerogative in favoring one

187. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

188. See text accompanying *supra* notes 65–67.

189. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

190. See *supra* text accompanying notes 100–05.

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

192. See *supra* text accompanying notes 150–55, 172–73.

193. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

194. See *supra* text accompanying notes 162–65.

195. *Michael H. v. Gerald D.*, 491 U.S. 110, 128–29 (1989).

196. *Id.* at 130.

197. *Id.* at 129.

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definition of family over another.¹⁹⁸ Both cases show that the states have substantial authority to assign parental rights in ways that maintain existing family structures.

B. The Proposed Legislation Would Have Been Valid Under the Federal Constitution

Maryland lawmakers' proposed legislation to recognize de facto parenthood likely would have survived a challenge under the Federal Constitution. The proposed legislation advanced strong state interests of child welfare and preserving family units, and its recognition of de facto parenthood sufficiently related to those interests.¹⁹⁹ The proposed legislation safeguarded rights of parents and the interests of children and other family members,²⁰⁰ and it linked parental rights to parental obligations.²⁰¹

1. Recognizing De Facto Parenthood Sufficiently Relates to Achieving Two Strong State Interests

The language of the proposed legislation made clear that lawmakers intended for de facto parenthood to promote the general welfare of children. Only those adults who had established a "parent-like," "bonded and *dependent* relationship" with a child would have qualified as de facto parents.²⁰² In phrasing the requirement this way, lawmakers hinted at the emotional and psychological harm that a child may suffer when he loses contact with a parental figure.²⁰³ This type of legislation, which aims to "guard the general interest in youth's well being,"²⁰⁴ falls within a state power the Supreme Court long has recognized. Because children cannot protect themselves, the

198. See Buss, *supra* note 12, at 658 (noting that "the Court has tolerated considerable state intrusions . . . aimed at facilitating, rather than disrupting, the functioning of a private familial unit").

199. See *infra* Part III.B.1.

200. See *infra* Part III.B.2.

201. See *infra* Part III.B.3.

202. H.B. 1241(B)(2)(I), (III), 427th Sess. (Md. 2010); S.B. 600(B)(2)(I), (III), 427th Sess. (Md. 2010) (emphasis added).

203. Many commentators have addressed the importance of stability in a child's personal relationships. See, e.g., 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, 902 (1984) (noting the "[n]ear consensus . . . that a child's healthy growth depends in large part upon the continuity of his personal relationships"); Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIMONIAL L. 95, 119 (2002) (arguing that states may constitutionally consider, "in the child's behalf, intruding upon parental autonomy via court proceedings . . . to avoid an emotional or other detriment to a child").

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

state has a strong interest as *parens patriae* in protecting children's emotional well-being by recognizing de facto parenthood.²⁰⁵

The drafters of the proposed legislation sought to achieve a second state interest that the Supreme Court has already validated: maintaining existing parent-child relationships. Though the bills' sponsors included only a vague purpose statement,²⁰⁶ the bills' provisions made clear that the lawmakers' concern laid with preserving significant relationships between children and their caregivers. To that end, de facto parenthood status would have been available only to those individuals who had "acted in a parent-like role" long enough to have established "a bonded and dependent relationship with the minor child."²⁰⁷ Moreover, an individual would not have become a de facto parent without showing that the child's legal parent "fostered the establishment of a parent-like relationship between the minor child and the individual."²⁰⁸

De facto parenthood protects existing family units as much as state actions the Court affirmed in its unwed father cases. In *Quilloin*, the Supreme Court specifically noted the state's prerogative in assigning parental rights to preserve a "family unit already in existence."²⁰⁹ Similarly, the *Michael H.* Court made clear that states may adopt a presumption that the husband of a child's biological mother is the child's father.²¹⁰ The Supreme Court noted that such a presumption protects the important relationship between the child and the man who has cared for and accepted the child as his own.²¹¹ Similarly, recognizing de facto parents preserves bonds between children and adults who have cared for them as parents. In *Janice M.*, had the state recognized Margaret as a de facto parent, she would have been able to maintain her relationship with Maya, the child she fed, bathed, and otherwise nurtured for five years.²¹² The failure of the Maryland Court of Appeals to recognize Margaret as a de facto parent severed the bond between a child and a nonbiological caregiver that the Supreme Court exalted in *Quilloin* and *Michael H.*²¹³ Thus, in proposing

205. See *supra* note 103 (describing the state's interest as *parens patriae*).

206. The purpose clause of each bill states only that the legislation would require "a court to determine that an individual is a de facto parent under certain circumstances." H.B. 1241; S.B. 600.

207. H.B. 1241(B)(2)(III); S.B. 600(B)(2)(III).

208. H.B. 1241(B)(2)(I); S.B. 600(B)(2)(I).

209. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

210. See text accompanying *supra* notes 195–97.

211. See text accompanying *supra* notes 195–97.

212. See text accompanying *supra* note 3.

213. The Court of Appeals rejected Margaret K.'s claim of parental rights, even though she shared "responsibilities for preparing Maya's food, changing her diapers, bathing her,

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to statutorily recognize de facto parenthood, Maryland lawmakers sought to protect a state interest in maintaining familial relationships that the Supreme Court has already endorsed as legitimate.

Recognizing de facto parenthood also relates sufficiently to these interests that have survived constitutional challenge. As the Supreme Court noted in *Prince*, states have broad powers to limit parental freedom in “things affecting the child’s welfare.”²¹⁴ Because the Supreme Court’s emphasis on maintaining familial relationships implies that severing such bonds would harm the child, Maryland lawmakers proposed legislation that related directly to children’s welfare.²¹⁵ Were the Supreme Court to employ the sort of balancing test it has used in earlier cases, the proposed legislation would have survived constitutional attack. The worst consequence de facto parenthood poses to a legal parent is that it may render him unable to prevent another caregiver from maintaining a significant bond with the child.²¹⁶ This pales in comparison to the kind of state intrusion that terminates parental rights²¹⁷ or denies a parent the right to direct his child’s education.²¹⁸ Moreover, recognition of de facto parenthood neither invalidates the rights of legal parents nor changes their legal status.²¹⁹ Accordingly, the Supreme Court likely would have found that the state’s interest in maintaining familial relationships and protecting children from the harm of severing familial bonds outweighed a parent’s interest in keeping a child from interacting with a de facto parent.

In addition, the proposed legislation complied with the principles of *Troxel*.²²⁰ In that case, the Supreme Court was concerned with the “breathhtakingly broad” scope of Washington’s third party visitation statute.²²¹ The statute stated that “[a]ny person” could petition “at any time” to visit a child against the wishes of the legal parent.²²²

handling her schooling, addressing her healthcare needs, and performing most other caretaking duties.” *Janice M. v. Margaret K.*, 404 Md. 661, 666, 948 A.2d 73, 76 (2008). These are the same types of responsibilities that the Supreme Court has said correspond to parental rights. See text accompanying *supra* notes 156–65.

214. See text accompanying *supra* note 102.

215. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); see text accompanying *supra* note 17.

216. The proposed legislation would have granted de facto parents “the duties and obligations of a parent” but would not have otherwise limited the rights of existing legal parents. H.B. 1241(C), 427th Sess. (Md. 2010); S.B. 600(C), 427th Sess. (Md. 2010).

217. See text accompanying *supra* notes 83–99.

218. See text accompanying *supra* notes 65–67.

219. See *supra* note 216 and accompanying text.

220. See text accompanying *supra* notes 106–21.

221. *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (plurality opinion).

222. *Id.* (alteration in original) (internal quotation marks omitted).

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Notably, however, the *Troxel* Court refrained from striking down all third party visitation statutes or establishing a rule that third parties must demonstrate parental unfitness or potential harm to succeed on a petition for visitation.²²³ Reflecting on the changing demographics of American families,²²⁴ the *Troxel* plurality recognized that most family law matters are resolved on a case-by-case basis.²²⁵ Accordingly, the Supreme Court invalidated the statute's application on narrow grounds, providing states only general guidelines on constitutionality: (1) states must presume that a fit parent acts in her child's best interest and thus give special weight to the parent's decisions;²²⁶ and (2) states must demonstrate "special factors" in overcoming this presumption.²²⁷

The proposed Maryland legislation complied with both of these guidelines. First, recognizing the presumption that fit parents act in their child's best interests, the proposed de facto parenthood legislation gave special weight to legal parents' decisions. Notably, de facto parenthood status would have been available only to those individuals who had the consent of the legal parent to interact with the child.²²⁸ Consent, however, would not have been enough. The individual seeking de facto parenthood status also would have had to show that the legal parent "supported and fostered" a parent-like relationship between the individual and the child.²²⁹ Hence, the legal parent would have wielded considerable power in determining who may achieve de facto parenthood status. According to one commentator, predominant in any successful petition for de facto parent status is a showing that the legal parent at one time considered a relationship between the petitioner and the child to be in the child's best interests:

A showing that an involved parent exercised her autonomy to permit or encourage the child to form an exceptionally strong bond with another adult, affirming its importance to the child's best interests, gives the state cause to treat more

223. *See id.* at 73–75 (declining to rule more broadly on third party visitation statutes and resting the decision on the "sweeping breadth" of the statute at hand).

224. *Id.* at 63–64. In particular, the Court noted that twenty-eight percent of all children under the age of eighteen lived in a single-parent family in 1996. *Id.* at 64. In 1998, 5.6% of all children under the age of eighteen lived with their grandparents. *Id.*

225. *Id.* at 73.

226. *Id.* at 67–69.

227. *Id.* at 68.

228. H.B. 1241(B)(2)(I), 427th Sess. (Md. 2010); S.B. 600(B)(2)(I), 427th Sess. (Md. 2010).

229. *Id.*

skeptically the parent's claim that ending the relationship is now what serves the child's welfare.²³⁰

In this way, the proposed legislation incorporated the *Troxel* requirement that states give special weight to legal parents' authority.

The proposed legislation also incorporated several "special factors" that could have been used to rebut any presumption that a legal parent's denial of visitation was in the child's best interest. The *Troxel* Court did not explicitly define what constitutes a "special factor," but the plurality provided hints.²³¹ For instance, the Court emphasized timing, complaining that the Washington statute allowed someone to petition for visitation at any time.²³² Generally, the Court noted, a state has no reason "to inject itself into the private realm of the family."²³³ In contrast to the Washington statute, the proposed Maryland legislation would have allowed someone to petition for de facto parenthood status only after enough time had passed that the individual established a "bonded and dependent relationship" with the child that was "parental in nature."²³⁴ The *Troxel* Court also was concerned that a limitless number of people could petition for visitation under the Washington statute,²³⁵ a factor that the Maryland lawmakers addressed by limiting who could qualify as de facto parents. Only those individuals who had the consent and support of the legal parents to develop a parental relationship with the child could become de facto parents.²³⁶ Finally, the proposed legislation would have required a petitioner to establish the relevant evidence by a "clear and convincing" margin.²³⁷ This provided yet another "special factor"—an extra layer of protection for parental autonomy. Only those cases that showed "clear and convincing" evidence of a deep, emotional bond with the child, fostered by the legal parent herself, would succeed under the proposed legislation.²³⁸ Cases in which the de facto parent's evidence conflicted with the legal parent's would not have met the standard necessary to recognize de facto parenthood.²³⁹

230. Logue, *supra* note 203, at 120.

231. *Troxel*, 530 U.S. at 68; *see also* Meyer, *supra* note 113, at 1142 (noting that the "plurality refused to say just what 'special factors' might overcome the 'presumption that fit parents act in the best interests of their children'" (quoting *Troxel*, 530 U.S. at 72)).

232. *Troxel*, 530 U.S. at 67.

233. *Id.* at 68.

234. H.B. 1241(B)(2)(III), 427th Sess. (Md. 2010); S.B. 600(B)(2)(III), 427th Sess. (Md. 2010).

235. *Troxel*, 530 U.S. at 67.

236. H.B. 1241(B)(2)(I); S.B. 600(B)(2)(I).

237. H.B. 1241(B)(2); S.B. 600(B)(2).

238. *See supra* text accompanying note 235.

239. *See supra* text accompanying note 238.

In proposing to recognize de facto parenthood, Maryland lawmakers asserted strong state interests that the United States Supreme Court previously validated. In numerous cases, the Supreme Court has affirmed states' substantial interests in child welfare²⁴⁰ and preserving family units.²⁴¹ Moreover, the proposed legislation would have sufficiently related to that interest. By redressing the concerns of the *Troxel* Court, lawmakers bolstered their chances of surviving a constitutional challenge to the law.

2. *Recognizing De Facto Parenthood Acknowledges the Constitutional Interests of Children and Other Family Members*

While Maryland lawmakers protected parents' rights by incorporating the *Troxel* principles in the proposed legislation, they also safeguarded the interests of nonlegal parents who serve as caregivers. In *Moore*, the Court made clear that parents are not the only parties who merit constitutional protection in family matters.²⁴² Just as the relationship between children and their caregiving grandmother may be substantial enough to warrant constitutional protection,²⁴³ de facto parenthood recognizes that individuals such as same-sex partners, stepparents, and unmarried partners have constitutional interests in continuing relationships with the children they have nurtured.²⁴⁴ Admittedly, a de facto parent differs from the grandmother in *Moore* because a de facto parent's claim to visitation or custody clashes with the legal parent's wishes.²⁴⁵ Further, unlike a grandparent, a de facto parent is not merely a third party challenger.²⁴⁶ The proposed de facto parenthood bill recognized the constitutional interests of individuals like Margaret K. by granting them equal standing with legal parents in

240. See *supra* text accompanying notes 102–04.

241. See *supra* text accompanying notes 190–98.

242. See *supra* text accompanying notes 137–40.

243. See *supra* text accompanying notes 137–40; see also Meyer, *supra* note 113, at 1175 & n.259 (noting that *Moore* defined constitutional protection of family privacy to encompass a grandmother's right to live with the grandchildren with whom she had been residing).

244. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (recognizing visitation rights of a de facto parent, a person “who has no biological relation to the child, but has participated in the child's life as a member of the child's family”).

245. Compare *Moore v. City of E. Cleveland*, 431 U.S. 494, 495–97 (1997) (describing a grandmother's constitutional challenge to a city ordinance that allowed only certain family members to cohabitate), with *Janice M. v. Margaret K.*, 404 Md. 661, 664, 948 A.2d 73, 75 (2008) (addressing a custody and visitation dispute between a legal parent and her long-term same-sex partner).

246. The proposed Maryland legislation, for instance, would have granted de facto parents “the duties and obligations of a parent.” H.B. 1241(C), 427th Sess. (Md. 2010); S.B. 600(C), 427th Sess. (Md. 2010).

disputes over custody or visitation.²⁴⁷ In so doing, however, lawmakers gave the requisite “special weight” to legal parents’ decision making: Only those individuals who developed parent-child relationships with the consent and support of the children’s legal parents could have become de facto parents.²⁴⁸ In this way, the proposed legislation not only protected the authority of legal parents, but also recognized that other adults in a child’s life may have protectable constitutional interests.

De facto parenthood also protects the interests of children, who may suffer if they are unable to continue significant relationships with nonlegal-parent caregivers. As the Supreme Court has emphasized, the Fourteenth Amendment applies to children as well as adults.²⁴⁹ The proposed Maryland legislation recognized this fact by increasing the likelihood that children would not suffer the emotional and psychological harm of losing contact with a significant caregiver.²⁵⁰ Drawing on the state’s power as *parens patriae*, lawmakers proposed de facto parenthood as a means of protecting what the Supreme Court has long acknowledged: “the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth”²⁵¹ Hence, the proposed de facto parenthood legislation would have protected parents’ rights while recognizing the constitutional interests of children and their nonlegal parent.

3. *Recognizing De Facto Parenthood Effectively Links Parental Rights to Parental Obligations*

In proposing recognition of de facto parenthood, Maryland lawmakers adopted the same reasoning of the *Quilloin* and *Lehr* Courts. If a natural parent loses parental rights for failing to establish a significant relationship with his child,²⁵² it follows that a parental figure’s claim to constitutional protection of parental rights increases as that individual assumes increasingly significant caregiving func-

247. *Id.* In custody disputes between parents, Maryland courts apply the best interests of the child standard. *McDermott v. Dougherty*, 385 Md. 320, 354–55, 869 A.2d 751, 771 (2005). Thus, de facto parents presumably would not have to show that the legal parent is unfit or that the child would suffer harm absent visitation, factors that third parties must show in custody and visitation disputes. *See supra* note 34.

248. *See supra* text accompanying notes 228–30.

249. *See supra* text accompanying notes 125–26.

250. *See supra* text accompanying notes 202–09.

251. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

252. *See supra* text accompanying notes 172–76.

tions.²⁵³ Thus, de facto parenthood employs the same reasoning validated by the Supreme Court in its unwed father cases.

The Supreme Court's reasoning in the unwed father cases supports whatever limit the proposed legislation would have placed on the rights of legal parents. Unlike adoption,²⁵⁴ the recognition of de facto parents in the proposed legislation would not have terminated the rights of natural parents.²⁵⁵ But, the addition of an individual with rights to visit or to have custody of the child may well have diluted the authority of the legal parent.²⁵⁶ This dilution would have been permissible, however, because of the Supreme Court's conclusion that the actions of parental figures affect the strength of their constitutional claims.²⁵⁷ Under the bills, de facto parents could not have existed without the consent and support of the legal parents.²⁵⁸ Thus, the proposed legislation appropriately applied the Supreme Court's principle that a parent's actions affect the extent of his claims to parental rights.

Maryland lawmakers' proposal to recognize de facto parenthood likely would have survived a challenge under the Federal Constitution. The legislative proposal not only advanced strong state interests of child welfare and maintaining family units, but its recognition of de facto parenthood sufficiently related to those interests.²⁵⁹ The bills safeguarded the rights of parents by redressing the concerns of the *Troxel* Court while also protecting the interests of children and other family members.²⁶⁰ Finally, the legislation effectively linked parental rights to parental obligations according to the Court's reasoning in cases such as *Quilloin* and *Lehr*.²⁶¹

253. See *supra* text accompanying notes 177–85.

254. In adoption, “the new family unit” takes the place of the child's birth parents, rather than becoming an additional set of parents. Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 153 (1999).

255. While de facto parents would have had the “duties and obligations of a parent,” nothing in the proposed Maryland legislation would have terminated the legal parents' rights. H.B. 1241(C), 427th Sess. (Md. 2010); Md. S.B. 600(C), 427th Sess. (Md. 2010).

256. A legal parent in a custody or visitation dispute with a de facto parent would no longer enjoy a presumption that her decisions are in the best interests of her child. See *supra* note 247. Thus, any decision of a legal parent could be challenged by a de facto parent on the grounds that the decision was not in the best interests of the child.

257. See *supra* text accompanying notes 252–53.

258. See *supra* text accompanying note 17.

259. See *supra* Part III.B.1.

260. See *supra* Part III.B.2.

261. See *supra* Part III.B.3.

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IV. IF THEY PLAN TO REINTRODUCE THE PROPOSED LEGISLATION,
LAWMAKERS SHOULD AMEND IT SO THE PROPOSED
LEGISLATION WOULD SURVIVE A CHALLENGE UNDER
THE MARYLAND CONSTITUTION

The constitutional analysis of the proposed legislation does not end with the Federal Constitution. As Justice Brennan noted, “State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”²⁶² Indeed, even when a Maryland constitutional provision seems synonymous with a federal provision, the Maryland Court of Appeals has emphasized that the similarity “does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart.”²⁶³

In *Janice M.*, the Court of Appeals deliberately dodged the question of whether de facto parenthood legislation would be constitutional under state law. While suggesting that the legislature might enact a statute recognizing de facto parenthood, the court also withheld judgment on whether such a statute could survive a constitutional challenge.²⁶⁴ Muddying the water even further, the court reiterated that although Article 24 has “long been equated” with the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States,²⁶⁵ the Court of Appeals has sometimes found the Maryland provision to be more protective than its federal counterpart.²⁶⁶ As explanation for these distinctions, however, the Court of Appeals in *Janice M.* offered only the vague language of an earlier case: “fundamental fairness demanded that we do so.”²⁶⁷

Despite its ambiguity in *Janice M.*, the court’s jurisprudence more generally suggests that the de facto parenthood legislation would have survived constitutional scrutiny if lawmakers had made minor amendments. Although the Court of Appeals has found Article 24 to be

262. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

263. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002).

264. *Janice M. v. Margaret K.*, 404 Md. 661, 686–89, 948 A.2d 73, 88–89 (2008).

265. *Aero Motors, Inc. v. Adm’r, Motor Vehicle Admin.*, 274 Md. 567, 587, 337 A.2d 685, 699 (1975).

266. *Id.* at 679 n.7, 948 A.2d at 83 n.7. Article 24 states that “no man ought to be . . . deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the land.” MD. CONST. DECL. OF RTS. art. 24; *see also infra* Part IV.A.

267. *Janice M.*, 404 Md. at 680 n.7, 948 A.2d at 84 n.7 (quoting *Borchardt v. State*, 367 Md. 91, 175, 786 A.2d 631, 681 (2001) (Raker, J., dissenting)) (internal quotation marks omitted). The court also cited a few examples of occasions when it has “read Maryland’s due process clause more broadly than the federal constitution,” all of which related to criminal procedure. *Id.*; *see also infra* Part IV.A.1–2.

more protective than the Fourteenth Amendment most often in cases involving economic liberties and the rights of criminal defendants,²⁶⁸ the court recently found that the Maryland due process provision offered heightened protection in two family law cases.²⁶⁹ Adding detail to the legislation would clarify what rights de facto parents can claim.²⁷⁰ For the sake of caution, therefore, lawmakers should amend the proposed legislation before reintroducing it.²⁷¹

A. *The Maryland Court of Appeals Interprets Article 24 to be More Protective than the Fourteenth Amendment Only in Certain Cases*

1. *Until Recently, the Court of Appeals Has Found Heightened State Constitutional Protections Primarily in Cases Involving Economic Liberties and the Rights of Criminal Defendants*

In *Janice M.*, the only cases cited as examples of Article 24's heightened protection were criminal cases.²⁷² Indeed, over the past thirty years, the Court of Appeals has found on several occasions that Article 24 provides criminal defendants more protection than the Federal Constitution. In *White v. State*,²⁷³ for instance, the Court of Appeals found that Maryland common law principles required the court to merge two offenses, even though the Federal Constitution would not require merger.²⁷⁴ Likewise, in *Wadlow v. State*,²⁷⁵ the court held that when legislatures recommend prison sentences in certain circumstances, juries must find that such circumstances exist beyond a reasonable doubt before recommending the corresponding sentence;²⁷⁶ federal law, however, requires only a finding by a preponderance of

268. See *infra* Part IV.A.1.

269. See *infra* Part IV.A.2.

270. See *infra* Part IV.B.

271. See *infra* Part IV.B.

272. See *Janice M.*, 404 Md. at 679–80 & n.7, 948 A.2d at 83–84 & n.7 (citing only criminal cases as examples of the heightened protection offered by Article 24).

273. 318 Md. 740, 569 A.2d 1271 (1990), *superseded by statute*, MD. CODE ANN., CRIM. LAW § 3-601 (LexisNexis 2006), *as recognized in* *Fisher v. State*, 367 Md. 218, 786 A.2d 706 (2001).

274. See *id.* at 744–45, 748, 569 A.2d at 1273–75 (noting that the rule of lenity provides one basis for merger but pointing out that the Supreme Court has found the rule inapplicable in some cases where statutory language or legislative history shows lawmakers' intent not to merge offenses).

275. 335 Md. 122, 642 A.2d 213 (1994).

276. See *id.* at 132, 642 A.2d at 218 (“[W]hen the State seeks the enhanced penalties provided by [the statute] it must allege the necessary fact concerning the amount, and prove that fact beyond a reasonable doubt.”).

the evidence.²⁷⁷ In explaining why these criminal cases departed from federal law, the *Janice M.* court mentioned only “fundamental fairness.”²⁷⁸

Economic regulation is another area in which the Court of Appeals has found more protection in Article 24 than in the Fourteenth Amendment of the Constitution of the United States. More than thirty years after the Supreme Court abandoned such a view,²⁷⁹ the Court of Appeals continued to interpret substantive due process to include the freedom to contract.²⁸⁰ While the Supreme Court required only a loose rational basis for economic regulations, the Court of Appeals persisted in requiring that such regulations “bear a real and substantial relation to the object sought to be attained.”²⁸¹ Eventually, Maryland courts also came to require only a rational basis for economic regulations.²⁸²

The court, however, has had less opportunity to explore the boundaries of Article 24’s protection of privacy and personal autonomy.²⁸³ As of 1989, the court had “not identified any right of privacy protected by the Maryland Constitution.”²⁸⁴ This changed with two recent child custody disputes that applied heightened state protections to legal parents.²⁸⁵ Even so, these cases shed little light on de facto parenthood, as their facts differ substantially from any potential dispute involving a statutorily recognized de facto parent.

277. *Id.* at 128, 642 A.2d at 216 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)).

278. *Janice M. v. Margaret K.*, 404 Md. 661, 680 n.7, 948 A.2d 73, 84 n.7 (citing *Borchardt v. State*, 367 Md. 91, 175, 786 A.2d 631, 681 (2001) (Raker, J., dissenting)).

279. In *Lochner v. New York*, the Supreme Court found freedom of contract among those rights protected under the Due Process Clause of the Fourteenth Amendment. 198 U.S. 45, 53 (1905). For the next three decades, the Court applied heightened scrutiny and permitted government interference with this freedom only to protect public health, safety, or morals. CHEMERINSKY, *supra* note 71, at 602, 606. What came to be known as the “*Lochner* Era” ended in 1937, when the Court upheld a minimum wage law in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). CHEMERINSKY, *supra* note 71, at 624. Making clear it had abandoned its earlier view, the Court held that a state satisfies due process when its regulation is “reasonable in relation to its subject and is adopted in the interests of the community.” *West Coast Hotel Co.*, 300 U.S. at 391.

280. DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 34 (2006).

281. *Md. Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 120, 311 A.2d 242, 251 (1973) (internal quotation marks omitted).

282. *See, e.g., Governor of Md. v. Exxon Corp.*, 279 Md. 410, 426, 370 A.2d 1102, 1111 (1977) (noting that economic regulations are presumed valid unless “arbitrary” or without “considerations relating to the public welfare by which it can be supported” (internal quotation marks omitted)).

283. FRIEDMAN, *supra* note 280, at 34.

284. 74 Op. Md. Att’y Gen. 19, 30 (1989).

285. *See infra* Part IV.A.2.

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2. *The Court of Appeals Has Found Heightened State Constitutional Protections for Parents in Third Party Custody Disputes, but Never in Disputes Solely Among Statutorily Recognized Parents*

In *McDermott v. Dougherty*,²⁸⁶ the Maryland Court of Appeals applied state protections to parents in third party custody disputes that may well have exceeded the protections required by the Fourteenth Amendment. While noting that a court could apply the “best interests of the child” standard in a custody dispute among parents,²⁸⁷ the court found that disputes between a parent and a third party demanded a standard more protective of the parent’s rights.²⁸⁸ Specifically, the court held that third parties seeking custody must show that the parent is unfit or that exceptional circumstances exist such that the child would suffer harm if left in the parent’s custody.²⁸⁹ In *McDermott*, a child’s maternal grandparents failed to meet this standard when they sought custody from the child’s father, who traveled often as a merchant seaman.²⁹⁰ In so holding, the court never invoked Article 24,²⁹¹ though a visitation dispute just two years later suggested that the state provision may have been the impetus for the heightened parental protection.

In *Koshko v. Haining*,²⁹² the court also applied heightened constitutional protections to parents, this time explicitly relying on Article 24.²⁹³ *Koshko* involved a couple who sought visitation under Maryland’s grandparent visitation statute.²⁹⁴ To save the statute from a potential constitutional infraction, the court read into the law a presumption that parental decisions are in a child’s best interests.²⁹⁵ The court held that the same standards for custody petitions apply to petitions for visitation: Third parties, such as grandparents, must show parental unfitness or exceptional circumstances before a court will ap-

286. 385 Md. 320, 869 A.2d 751 (2005).

287. *Id.* at 354–55, 869 A.2d at 771 (internal quotation marks omitted).

288. *Id.* at 418–19, 869 A.2d at 808–09.

289. *Id.*

290. *Id.* at 323–27, 869 A.2d at 753–55.

291. The court did, however, refer to the Fourteenth Amendment of the Federal Constitution. *See, e.g., id.* at 331–32, 869 A.2d at 757–58. The court described the Supreme Court’s reasoning in *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Supreme Court interpreted the Fourteenth Amendment to include the right to “establish a home and bring up children.” *McDermott*, 385 Md. at 332 (alteration in original) (quoting *Meyer*, 262 U.S. at 399) (internal quotation marks omitted).

292. 398 Md. 404, 921 A.2d 171 (2007).

293. *See infra* text accompanying note 298.

294. *Koshko*, 398 Md. at 408–10, 921 A.2d at 173–74.

295. *Id.* at 425–26, 921 A.2d at 183–84.

ply a “best interests” test to determine whether to grant visitation.²⁹⁶ In so holding, the court made clear that the plurality opinion in *Troxel* did not compel the result.²⁹⁷ Instead, the court cited the “full complement of safeguards extended to liberty interests available under . . . Article 24.”²⁹⁸

The court’s willingness to find heightened state constitutional protection in two family law cases suggests its capacity to do so with statutory de facto parenthood.²⁹⁹ But, closer consideration reveals dramatic differences between *McDermott* and *Koshko* on the one hand, and any potential dispute involving a de facto parent on the other. Both *McDermott* and *Koshko* involved grandparents, who are third parties under the law.³⁰⁰ Even though a specific statute gives grandparents the right to petition for visitation,³⁰¹ the statute does not elevate grandparents to a level on par with parents.³⁰² Should grandparents obtain visitation, they remain grandparents but enjoy a share of parental power.³⁰³ By contrast, de facto parents would be more than just third parties; they would be parents themselves.³⁰⁴ Thus, any visitation dispute would involve not third parties, but rather, two classes of parents.

While *Koshko* and *McDermott* involved challenges to parental authority, the cases’ reasonings are inapposite to a visitation case involving a de facto parent and a legal parent. Even so, the court’s language in *Janice M.* suggests a concern that any potential legislation guard legal parents against frivolous interference with their parental decision making.³⁰⁵ For this reason, lawmakers should add more detail to any proposed legislation recognizing de facto parenthood.

296. *Id.* at 440, 921 A.2d at 192.

297. *Id.* at 443–44, 921 A.2d at 194.

298. *Id.*

299. *See supra* text accompanying notes 286–98.

300. *Koshko*, 398 Md. at 408, 423, 921 A.2d at 173, 182 (describing the family dispute between parents and grandparents and one between parents and third parties); *McDermott v. Dougherty*, 385 Md. 320, 323–24, 869 A.2d 751, 753 (2005) (describing the respondents as grandparents who filed a third party custody complaint).

301. MD. CODE ANN., FAM. LAW § 9-102 (LexisNexis 2006).

302. *Compare id.*, with H.B. 1241, 427th Sess. (Md. 2010); S.B. 600, 427th Sess. (Md. 2010).

303. FAM. LAW § 9-102.

304. *See supra* note 246 and accompanying text.

305. *See infra* text accompanying note 316.

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B. *Adding More Detail to the Proposed Legislation Would More Effectively Balance the Rights of Legal and De Facto Parents*

Although the broad concept of de facto parenthood appears valid under the state constitution, lawmakers could improve the language of proposed legislation to more directly address potential concerns about the concept's application. In particular, the Maryland Court of Appeals has suggested potential problems with the number of individuals claiming de facto parenthood status.³⁰⁶ The court also may take issue with the manner by which legal parents consent to share their parental authority.³⁰⁷ Lawmakers can address both concerns with minor revisions to the proposed legislation.³⁰⁸

1. *Lawmakers Should Be More Specific As to Who May Petition for De Facto Parenthood Status*

In the proposed legislation, Maryland lawmakers substantially limited who may qualify as a de facto parent. For instance, only individuals who formed a parent-like relationship with the consent of the legal parent would have qualified.³⁰⁹ Moreover, those who petitioned for de facto parenthood status would have had to be willing to accept all the "duties and obligations" of parents.³¹⁰ Such requirements not only limited who could successfully petition for recognition as de facto parents, but who was likely to petition in the first place.³¹¹ In this way, statutory recognition of de facto parenthood lacks a central concern of the *Koshko* court—that third parties too easily could bring an action in a court to override a parent's decision.³¹² By requiring elements that only a narrow group of people could have satisfied, Maryland lawmakers drafted legislation that reduced the possibility that a legal parent could be subject to multiple challenges to his parental authority. Nonetheless, Maryland lawmakers could add even more details to limit who may qualify as a de facto parent.

If lawmakers reintroduce the proposed legislation, they should amend it specifically to require that de facto parents live with a child

306. See *infra* text accompanying note 314.

307. See *infra* Part IV.B.2.

308. See *infra* Part IV.B.1–2.

309. See *supra* text accompanying note 17.

310. See *supra* text accompanying note 18.

311. See PRINCIPLES, *supra* note 14, § 2.03, cmt. c (describing the de facto parent requirements as "strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children").

312. Compare *id.*, with *Koshko v. Haining*, 398 Md. 404, 439–40, 921 A.2d 171, 192 (2007) (explaining the need to protect parental decision making from becoming too "vulnerable to frustration by third parties").

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for a minimum amount of time without expectation of compensation. In its original form, the proposed legislation required only that the petitioner demonstrate that the legal parent fostered a parental relationship between the petitioner and the child, and that the relationship lasted long enough to develop an emotional bond with the child.³¹³ The bills made no mention of living with the child or what length of time was sufficient to develop the requisite bond with the child.³¹⁴ This ambiguity could encourage anyone who ever fulfilled any caretaking role for a child to seek court intervention.³¹⁵ Indeed, this appeared to be a real concern for the Court of Appeals in *Janice M.*, where the court noted that not only same-sex partners but grandparents, stepparents, and “significant others” could petition for visitation rights as de facto parents.³¹⁶

The ALI’s *Principles* provide a useful template for legislation that would curb this potential flood of litigation. By requiring a de facto parent to have lived with the child,³¹⁷ the *Principles* prevent individuals (such as grandparents or neighbors) who may have fulfilled some caretaking functions but have not lived with the child from claiming de facto parent status.³¹⁸ For instance, these individuals may have picked up the child from school or provided meals while the legal parents were at work. Under the broad language of the original proposed legislation, such an individual could have argued the presence of a parental relationship.³¹⁹ But by adding a requirement that the petitioner have lived with the child, a de facto parenthood statute could more effectively limit the number of potential court challenges to the legal parent’s authority.

Lawmakers likewise should require that would-be de facto parents live at least two years with a child and do so without expectation of financial compensation.³²⁰ These additional requirements would pro-

313. H.B. 1241, 427th Sess. (Md. 2010); S.B. 600, 427th Sess. (Md. 2010).

314. See H.B. 1241; S.B. 600 (failing to note any minimum amount of time for a de facto parent to have been involved in a child’s life).

315. See PRINCIPLES, *supra* note 14, § 2.03, cmt. c(i) (noting that a residence requirement is “especially important, since the de facto parent category might otherwise include neighbors, nonresidential relatives, or hired babysitters on whom parents have relief for regular caretaking functions”).

316. *Janice M. v. Margaret K.*, 404 Md. 661, 686, 948 A.2d 73, 88 (2008).

317. PRINCIPLES, *supra* note 14, § 2.03.

318. See *supra* note 315.

319. The proposed legislation required that individuals exercise “parent-like responsibility for the minor child,” but did not require living with the child. H.B. 1241(B)(2)(II), 427th Sess. (Md. 2010); S.B. 600(B)(2)(II), 427th Sess. (Md. 2010).

320. Cf. H.B. 1241(B)(2)(II); S.B. 600(B)(2)(II) (requiring that those who wish to petition for de facto parenthood status live with the child for at least two years prior to petitioning).

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vide more protection for legal parents while not adding any additional burden to de facto parents. The requirement of living at least two years with the child assures that someone who has lived only temporarily in the same household as the child could not use that as the basis for a de facto parenthood claim.³²¹ If past cases are any indication, most petitioners for de facto parenthood will base their claim at least partly on an intimate relationship with the legal parent and child.³²² While any time limit on the residence requirement is arbitrary, requiring at least two years makes it more likely that this intimate bond is significant, and not just a casual relationship.³²³ Requiring a minimum of two years will encompass most long-term significant others and stepparents,³²⁴ but it would shut out most individuals like neighbors, family friends, and grandparents who do not live with the child. Adding the complementary requirement that the petitioner live or take care of the child without the expectation of compensation assures that paid caretakers, such as nannies, lack standing to become de facto parents. Thus, incorporating elements of the ALI's *Principles* into proposed legislation makes it more likely that legal parents will be able to avoid frivolous challenges to their parental authority, while adding no additional burden to true de facto parents.³²⁵

Including these additional details more directly addresses another potential concern of the Court of Appeals—the possibility that a child could have an endless number of parents.³²⁶ The addition of de facto parents to a child's life necessarily infringes on the scope of parental authority for the original parents. As many scholars have noted, there is concern that courts may dilute parental rights by mak-

321. See *supra* note 315 and accompanying text.

322. Janice M. and Margaret K., for instance, were partners for eighteen years. See *supra* note 7 and accompanying text. Many other cases involving similar claims also have involved intimate relationships between the legal parent and the individual seeking custody or visitation with the child. See, e.g., *E.N.O v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (child custody dispute between two women who shared a committed, monogamous relationship for thirteen years); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (child custody dispute involving children's birth mother and her same-sex former domestic partner); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (de facto parenthood claim by the former domestic partner of the child's birth mother, who helped raise the child for four years).

323. See PRINCIPLES, *supra* note 14, § 2.03, cmt. c(iv) (noting that a two year period in which the de facto parent performs caretaking functions is "likely to qualify as significant").

324. Assuming, of course, the marriage lasts at least two years.

325. See *supra* note 315 and accompanying text.

326. See *Janice M. v. Margaret K.*, 404 Md. 661, 686, 948 A.2d 73, 88 (2008) (noting that not just same-sex partners, but stepparents, grandparents, and "parties in a relationship with 'a significant other'" could bring claims as de facto parents).

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ing too many cuts into the “parenthood pie.”³²⁷ By limiting the number of individuals who could seek de facto parenthood status in the first place, legislators would more directly address this broad concern about rights dilution. Amending the legislation also would more effectively address a related concern—the method by which legal parents must consent to share their rights, and thus, effectively dilute them.³²⁸

2. *Adding More Detail to the Legislation Would More Effectively Assure That Parents Do Not Diminish Their Parental Rights Without Full Consent*

Maryland law already allows parents to share their parental rights, which effectively dilutes them.³²⁹ It does so, however, only when the legal parent makes clear that she has consented. Postadoption contact agreements provide an illustration. As early as 1983, the Maryland Court of Special Appeals upheld a written agreement between an adoptive mother and a natural mother that allowed the natural mother to visit the child after adoption.³³⁰ More than twenty years later, the Maryland legislature codified parents’ ability to enter into this type of agreement.³³¹ Under the relevant statute, adoptive parents can agree in writing to allow postadoption visitation by the child’s natural parent or “other relative.”³³² Courts must enforce the agreements unless doing so is “not in the adoptee’s best interests.”³³³ Failure to comply with the terms of the agreement does not necessarily nullify the adoption,³³⁴ but courts do have the power to refer parties to mediation to try to resolve disputes.³³⁵ Thus, while these agreements do not bestow full parental status on more than two people, they do allow parents to effectively diminish their constitutional right

327. See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 23 (2008) (“[A]lmost every state has well-established rules for a division of the ‘parenthood pie’ after dissolution of marriage . . .”).

328. See *infra* Part IV.B.2.

329. Indeed, in the context of divorce, the law *requires* parents to share their rights. See MD. CODE ANN., FAM. LAW § 5-203(d) (LexisNexis 2006) (noting that “[n]either parent is presumed to have any right to custody that is superior to the right of the other parent” and “[i]f the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents”).

330. *Weinschel v. Strople*, 56 Md. App. 252, 261, 466 A.2d 1301, 1305 (Md. Ct. Spec. App. 1983). The court added the caveat that such agreements must be in the child’s best interest and must not violate public policy. *Id.*

331. FAM. LAW § 5-308.

332. *Id.* § 5-308(a).

333. *Id.* § 5-308(f)(1).

334. *Id.* § 5-308(d).

335. *Id.* § 5-308(e).

to custody by granting other parties the incorporated right of visitation.³³⁶

The proposed de facto parenthood legislation may similarly require legal parents to share their constitutional authority, but with one significant distinction. In postadoption contracts, adoptive parents explicitly agree to share their parental rights.³³⁷ With de facto parenthood, the consent is implied: Instead of signing a written agreement, the legal parent implies consent to future visitation by fostering a parent-like relationship between the child and the person petitioning for de facto parenthood status.³³⁸ Because of the presumed constitutionality of postadoption contact agreements in Maryland,³³⁹ the Court of Appeals may raise issues with the manner by which legal parents extend their rights to others through de facto parenthood.

Lawmakers can assuage any potential fears about consent by amending the proposed statute to include the aforementioned details that would address how many individuals can petition for de facto parenthood. Generally, courts disfavor implied waivers of fundamental constitutional rights.³⁴⁰ The United States Supreme Court has acknowledged only knowing and voluntary waivers of fundamental rights.³⁴¹ Nonetheless, the Supreme Court has treated parental rights differently than other fundamental liberties,³⁴² and de facto parenthood requires only that a legal parent share his right, not waive it completely. This distinction means that Maryland lawmakers need not meet the high standard of proof regarding the waiver of a true fundamental right, such as the right to counsel or the right against self-incrimination. Nonetheless, adding the requirements of residency, minimum time, and caretaking without the expectation of payment decreases the chance that a legal parent will successfully argue

336. The Court of Appeals has deemed visitation a subspecies of custody, which is itself a constitutional right of parents. See *Koshko v. Haining*, 398 Md. 404, 429, 921 A.2d 171, 185 (2007) (noting that “visitation is a species of custody, albeit for a more limited duration”).

337. See *supra* text accompanying notes 330–32.

338. H.B. 1241(B)(2)(I), 427th Sess. (Md. 2010); S.B. 600 (B)(2)(I), 427th Sess. (Md. 2010).

339. The Court of Appeals apparently has never considered the constitutionality of such agreements under federal or state constitutional law. As of February 2009, more than twenty other states allowed postadoption contact agreements. ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES: SUMMARY OF STATE LAWS 2 & n.2 (2009).

340. *E.g.*, *Countess v. State*, 286 Md. 444, 449, 408 A.2d 1302, 1304 (1979) (“Courts indulge every reasonable presumption against waiver of fundamental constitutional rights . . .”), *rev’d on other grounds*, *Walker v. State*, 406 Md. 369, 958 A.2d 915 (2008).

341. *E.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (noting that “a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”).

342. See *supra* Part.III.A.2.

that she did not understand the consequences of fostering a parent-like relationship between her child and the would-be de facto parent. Though visitation disputes certainly arise after lengthy relationships,³⁴³ the argument that a legal parent did not expect contact to continue between her child and a former partner after a breakup carries less weight when the person claiming de facto parenthood can show that he lived with the child for at least two years.³⁴⁴

Although the Maryland Constitution likely encompasses the broad concept of de facto parenthood, lawmakers should amend their proposed legislation to more effectively address the potential concerns of the Court of Appeals. In particular, adding more details about what constitutes a parental relationship and how long it takes to develop such a relationship would allay fears that an unlimited number of people could bring court actions against a legal parent.³⁴⁵ Adding such details would weaken legal parents' claims that they did not knowingly imply consent to future visitation between their children and those individuals claiming de facto parenthood status as well.³⁴⁶ Because the proposed legislation already would comply with the Federal Constitution, adding these details would assure survival under a state constitutional challenge as well.

V. CONCLUSION

As Justice O'Connor observed a decade ago, "[D]emographic changes of the past century make it difficult to speak of an average American family."³⁴⁷ Today's narrow legal definition of parenthood, rooted in traditions that predate divorce and open acceptance of gay relationships, no longer encompasses the practical realities of family. Children do not care about legal definitions; they care about the psychological bonds they form with the caregivers in their lives.³⁴⁸ More-

343. One need only consider the facts of the *Janice M.* case. *See generally supra* note 322 (describing cases from other jurisdictions in which custody and visitation disputes arose after lengthy relationships). R

344. As the Maryland Court of Appeals has noted, "[i]t is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel." *Dietrich v. Anderson*, 185 Md. 103, 119, 43 A.2d 186, 193 (1945). Indeed, in custody disputes between parents, Maryland courts consider length of time apart from a child and thus, necessarily, the time spent with a child. JOHN F. FADER & RICHARD J. GILBERT, *MARYLAND FAMILY LAW* § 6-3 (4th ed. 2005).

345. *See supra* text accompanying notes 326–28.

346. *See supra* note 344 and accompanying text. R

347. *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion). R

348. *See* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 390 (1996) (noting that

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over, the Federal Constitution does not support only one image of a parent; those adults who take up the responsibilities and duties of parents should have the opportunity to enjoy the same constitutional protections as natural and adoptive parents.³⁴⁹

Recognizing de facto parenthood is particularly critical to protecting the interests of same-sex partners, such as Margaret K. Currently, gay and lesbian individuals are denied the right to marry in Maryland.³⁵⁰ Furthermore, their right to adopt children is questionable.³⁵¹ Without the ability to achieve the legal status of parent through marriage or adoption, many gay and lesbian individuals lack a basic right readily available to heterosexuals. If for no other reason, this glaring inequality demands that lawmakers continue their push to recognize statutory de facto parenthood in Maryland.

“parental influence is not limited to or defined by biology”); *see also* Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) (“No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.”).

349. *See supra* Part III.A.3–4.

350. Maryland law recognizes only marriages between one man and one woman. MD. CODE ANN., FAM. LAW. § 2-201 (LexisNexis 2006); *see also supra* note 23. In 2007, the Court of Appeals upheld this law against a challenge that it violated the Equal Protection Clause of the state’s constitution. *See generally* Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007).

351. *See supra* note 6.

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