NOTES

THE AUTHORIAL PARENT: AN INTELLECTUAL PROPERTY MODEL OF PARENTAL RIGHTS

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The United States Supreme Court currently understands parenting as a constitutionally protected, substantive due process right. Yet the divisive nature of the doctrine of substantive due process has resulted in a confusing cacophony of pluralities, concurrences, and dissents that offer little guidance to lower courts. In this Note, Merry Jean Chan offers a new model with which to understand the Court's parental rights jurisprudence. Identifying the expressive aspects of both procreation and childrearing, she argues that the constitutional foundation for the protection of parental rights lies in the First Amendment. The First Amendment, however, is only part of the story. The democratic state has a valid interest in children and the continuing production of functioning, diverse citizens. This interest may conflict with parental prerogative. Chan observes that intellectual property law mediates a similar tension between state interests and expressive rights. She proposes the "authorial parent paradigm," conceiving exclusive parental rights as an incentive for and reward to those who meaningfully and responsibly contribute to the perpetuation of democracy through reproduction and childrearing. The interplay between the intellectual property analogy and the protections of the First Amendment serves to recognize both the rights of parents and the interests of the state.

INTRODUCTION

For over eighty years, the Supreme Court has held that there is a constitutional right to parent—to make decisions about whether to procreate and how to rear one's children. The footing of this constitutional right, however, is precarious. Nothing in the United States Constitution explicitly references family or parental rights. When the

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Court first enunciated parental rights as constitutional in nature, it grounded parental rights in the Liberty Clause of the Fourteenth Amendment. Despite its definitive rejection of *Lochner v. New York*,[1] the Court continues to uphold parental rights, among other rights, as entrenched in substantive due process. It does so to the discomfiture of individual Justices. For example, *Troxel v. Granville*,[2] one of the Court's most recent parental rights cases, generated two concurrences and three dissents,[3] each expressing the writer's chariness of developing a theory of unenumerated rights. Even the plurality danced carefully around defining the scope of substantive due process, basing the finding on narrow, as-applied grounds.[4] Such a narrow, convoluted decision provides limited guidance to lower courts.[5] While the substantive due process approach to parental rights may be defensible, the constitutional basis for parental rights could certainly benefit from rethinking.

This Note proposes an intellectual property model called the "authorial parent paradigm." Anchoring parental rights in the First Amendment provides a coherent and current *descriptive* alternative

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[1] 198 U.S. 45 (1905), overruled by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); see also Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 861 (1992) (recognizing overruling).

[2] 530 U.S. 57 (2000).

[3] Id. at 75 (Souter, J., concurring); id. at 80 (Thomas, J., concurring); id. at 80 (Stevens, J., dissenting); id. at 91 (Scalia, J., dissenting); id. at 93 (Kennedy, J., dissenting).

[4] See id. at 67 (O'Connor, J.) ("[This law], as applied to Granville and her family in this case, unconstitutionally infringes on [a] fundamental parental right.").

[5] See Emily Buss, Adrift in the Middle: Parental Rights After *Troxel v. Granville*, 2000 Sup. Ct. Rev. 279, 313 (expressing worry that *Troxel*'s "in-between approach" gave too little guidance "to state and federal courts, charged with resolving the host of cases that *Troxel* [would] inspire"); Janet L. Dolgin, The Constitution as Family Arbiter: A Moral in the Mess?, 102 Colum. L. Rev. 337, 377 (2002) (ascribing significant social and legal confusion to *Troxel* and similar decisions); Ellen Marrus, Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-*Troxel?*, 43 Ariz. L. Rev. 751, 793 (2001) (observing that *Troxel* disappointed "raised expectations that the Justices would provide clear guidance on how and when states could or could not interfere with the parent's decisions regarding visitation between the child and third parties"); David D. Meyer, Constitutional Pragmatism for a Changing American Family, 32 Rutgers L.J. 711, 712 (2001) (arguing that *Troxel* signals emergence of flexible standard for parental rights, but that it is itself incoherent, "emerg[ing] finally from a meandering tour of hoary platitudes too general to be helpful and factual details so case-specific as to give little guidance for the future"); Christina M. Alderfer, Note, *Troxel v. Granville*: A Missed Opportunity to Elucidate Children's Rights, 32 Loy. U. Chi. L.J. 963, 1005 (2001) ("The Court took a middle ground in this case, thereby offending no one. Unfortunately, the standard for governmental interference with parental rights remains extremely vague."). There is a credible argument for undertheorization and one-case-at-a-time jurisprudence. However, this Note proceeds from the view that Supreme Court constitutional decisionmaking should do more than resolve private disputes.

account of the Court's parental rights jurisprudence while also avoiding some of the problems attending substantive due process.

The authorial parent paradigm might be thought of as a sort of decoder that makes visible the structural approach to parental rights latent in both the Court's substantive due process cases and historical approaches to parental rights. This approach does not advance any particular substantive result in parental rights jurisprudence. Rather, it shifts the lens through which current jurisprudence is best viewed. Through the prism of the authorial parent paradigm, it becomes apparent that the Court's parental rights doctrine can be flexible enough to accommodate evolving societal interests, without regard to how they develop.

There are two overlapping inquiries involved in parental rights: Why do parents have any rights over their children, and what are the constitutional limits of their discretion? As some in the legal community have hinted,[6] and as this Note maintains, the answer to the former can be found primarily in the First Amendment. Parenting—both procreation and childrearing—can be thought of as creative expression, akin to authorship. Procreation, the prerequisite for childrearing, mingles two sets of DNA into one new, unique blueprint for a person. Childrearing is a process by which adults imbue their children with values, knowledge, skills, traits, etc., that shape the kind of adults that children grow up to be. These works of authorship in parenting give rise to parental rights.

Under a First Amendment approach to parental rights, those aspects of parenting that most clearly implicate expressive values are at the core of what the Constitution protects in parental rights. However, the First Amendment does not by itself provide the extent to which parental rights may be regulated. Why, for example, should any one parent have rights over any particular child? Certainly, the First Amendment, standing alone, does not guarantee exclusivity. It allows Sally Mann to create and publish controversial nude photographs of her own children.[7] It does not allow her to do so completely free from legislative constraints, however. If Sally Mann's photographs were

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[6] See infra notes 54-56, 62 and accompanying text.

[7] Sally Mann's most acclaimed and controversial work blurs parental and artistic authorship. She created photographs of the children she created (and whom she influenced by using them as subjects of publicly exhibited artwork). Sally Mann was in the unique position of possessing parental rights to her children and copyrights to their photographs. For photographs portraying her own children nude and in provocative poses, see Sally Mann, Immediate Family (1992). See also Sarah Milroy, The Mother of All Controversies, Feb. 25, 2003, Globe & Mail (Toronto) at R1 (discussing controversies over artwork created by mothers featuring their children), available at http//www.theglobeandmail.com/servlet/ArticleNews/TPPrint/LAC/20030225/RVBABY/TPEntertainment.

deemed pornographic, for example, her work would certainly be prohibited. Nor does the First Amendment ensure her a remedy if someone appropriates or modifies her photographs and claims them as his own. Finally, the First Amendment does not completely shield her from government regulations on where she may display her work, or on what methods and materials she may employ for her artwork.

The extent of Sally Mann's control over her work is dictated by societal recognition of her copyright. Society has a great interest in the proliferation of "writings," and a property right in one's writings is believed to give would-be authors the incentive to create them. The length and scope of the copyright is designed to stimulate an appropriate amount of production that will fall into the public domain soon enough to enrich the public discourse.

The project of this Note is *not* to make an exact analogy between parental rights and copyright; the two are dissimilar in many ways. However, a structural comparison is useful. As American society values writings, so too does it value the expressive nature of parenting and its results—children themselves. Supreme Court opinions and historical approaches to parenting have established a strongly rooted belief that perpetuation of the American democratic order requires that children be born and reared into a pluralistic, literate, and otherwise competent citizenry. To stimulate childbearing and childrearing that achieves these results, parental rights—the duration and scope of which may be malleable—to direct the upbringing of a child are recognized in those who do the work of producing new citizens. Regulating parental rights is necessary to prevent certain extreme expressive choices with respect to childbearing or childrearing from undercutting the social goal of regenerating society.[8]

Yet regulation must be constrained. Because parenting is fundamentally expressive, regulation of parental rights may often impinge on parents' First Amendment rights. In such cases, regulation is con-

[8] Could society prospectively deny parental rights altogether? As a matter of politics, complete abrogation is highly unlikely. Cf. Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000) (arguing that politics can play important role in safeguarding constitutional commands). Moreover, under the authorial parent paradigm, this would probably be unconstitutional. It seems plain, however, that the age of majority could be shifted. For example, in some jurisdictions, for purposes such as medical treatment or criminal trials, children are considered to have reached majority before turning eighteen. See Martin Guggenheim, Minor Rights: The Adolescent Abortion Cases, 30 Hofstra L. Rev. 589 (2002) (discussing mature minor exception). Shifting the age of majority to six months, however, would essentially eliminate any opportunity for childrearing. If childrearing is a fundamentally expressive activity, absolutely denying the ability to rear a child would require rigorous scrutiny under the First Amendment.

stitutional only when reasonably necessary to effectuate the social goals of regenerating society.[9]

The authorial parent paradigm views the part of parenting that occasions legal rights as authorship. The paradigm posits parenting as essentially an expressive activity, grounded in the First Amendment, whose parameters are prescribed both by the Constitution and by societal interests in the production of a functioning citizenry for a democracy. Regarding parental rights as a limited property right that parents possess in order to do the expressive work of procreation and childrearing allows parental rights to remain constitutionally grounded without recourse to substantive due process.

Part I of this Note shows how substantive due process as a constitutional theory hampers parental rights cases. Part II explains why parenting is expressive and should be grounded in the First Amendment. Part II.A makes the case that procreation is expressive. Part II.B argues that childrearing is expressive. Part III begins by recognizing that a First Amendment theory by itself does not explain why, when, and to what extent government regulation of parental rights is both appropriate and constitutional. Part III.A establishes that every society has interests in the quantity and quality of childbearing and childrearing of its citizenry. On a primal level, the continued existence of any state depends on the production of new citizens. On a political level, regeneration of a society's deep structure and ideology requires that children be born and reared to possess certain basic qualities. The United States, as reflected in Supreme Court opinions and contests over public education, considers pluralism and literacy, among other qualities, to be fundamental to its democratic order. Part III.B briefly describes how the device of copyright mediates a similar conflict between expressive and societal interests in the realm of intellectual property. Part III.C then introduces the authorial parent paradigm and explains how thinking of parental rights as authorial—both expressive and akin to intellectual property rights—

[9] One could press the analogy further and argue that if parental rights *to bear* and *to direct the upbringing of* a child (as opposed to rights to the child) are conceived of as intellectual property rights, they are protected by the Fifth and Fourteenth Amendments. Regulation is constitutional only if the deprivation of private property for public use is justly compensated and effected with procedural due process. See, e.g., Santosky v. Kramer, 455 U.S. 745, 768-70 (1982) (holding that Fourteenth Amendment requires showing of "clear and convincing evidence" of child's permanent neglect before parental rights may be terminated); Stanley v. Illinois, 405 U.S. 645, 656-58 (1972) (holding that Fourteenth Amendment entitled unwed father to hearing before children could be taken in dependency hearing). For a discussion of the distinction between the intellectual property model of parental rights this Note advances and the notion of children as "chattel," see infra notes 182-90 and accompanying text.

provides meaningful but flexible standards for determining the permissibility of government regulation of parental rights. The structure of the authorial parent paradigm is imbedded in, and consistent with, current Supreme Court precedent as well as historical treatment of parental rights.

I
THE CONUNDRUM OF PARENTAL RIGHTS AS SUBSTANTIVE DUE PROCESS

As nontraditional family forms and origins become ever more mainstream, the need for elaborating the parameters of parental rights seems great.[10] However, the Supreme Court's parental rights opinions in recent years have not filled this need. The dispositions have been narrow, contained in plurality opinions that are nearly drowned out by backgrounds of concurrences and dissents. This Part explains that the Justices' conflicting views of the scope and meaning of substantive due process is responsible for the lack of clearer guidance in the area of parental rights. The Court has steadfastly adhered to the characterization of parental rights as a Fourteenth Amendment guarantee of liberty. Yet whatever the merits of substantive due process, several of the Justices and many commentators are deeply troubled by whether principled decisionmaking with respect to fluid and evolving conceptions of family relations is possible under substantive due process analysis.[11] Those who argue that substantive due process pertains only to traditional forms of family would freeze the law;[12] those who would stretch parental rights to encompass the nontraditional are vulnerable to accusations of making it all up.[13]

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[10] See, e.g., Brief of Amici Curiae Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders at 3-5, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) (observing that "[a]s family structures evolve, there are diverging opinions as to who should have a legally protected role in a child's life").

[11] See supra note 5.

[12] Some commentators view substantive due process as a way for the Court to impose the status quo as a constitutional mandate. See, e.g., Cass R. Sunstein, *Lochner*'s Legacy, 87 Colum. L. Rev. 873, 875 (1987) (arguing that *Lochner* stands for "preservation of the existing distribution of wealth and entitlements" and, as such, is still very much alive).

[13] In Michael H. v. Gerald D., for example, Justice Scalia prefaced his discussion of substantive due process by emphasizing the need for restraint: "'The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.'" 491 U.S. 110, 122 (1989) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)). See also John Hart Ely, Democracy and Distrust 18 (1980) (describing substantive due process as "a contradiction in terms—sort of like 'green pastel redness'").

The Supreme Court first upheld parental rights as constitutionally protected in the 1920s with *Meyer v. Nebraska*[14] and *Pierce v. Society of Sisters*.[15] The Court located the guarantee of parental rights in the Liberty Clause of the Fourteenth Amendment, finding the right to "bring up children" a fundamental one.[16] It has maintained this position despite rejecting the idea of substantive due process elsewhere.[17] Barbara Bennett Woodhouse surmises that "[w]e like to think of [parental rights] as the good personal liberty gold of substantive due process left when the evil dross of economic due process was purged."[18]

Even if they might be distinguished from economic rights, so long as parental rights are grounded in substantive due process, they remain exposed to the criticisms that led to *Lochner*'s demise. When the Court overturns regulations of parental rights, it can still be said that the Court interferes with policymaking in an essentially subjective manner. In defining substantive due process with respect to "families," Justices tend to refer to what they themselves understand to be the norm, and thereby sanctify a particular form of family to the exclusion of other formations.[19] Given that personal relations and family structures are in constant flux, a doctrine as amorphous as substantive due process seems particularly ill suited to the area of parental rights.

The two solutions—tradition and narrow holdings—used to check the arbitrariness of substantive due process each pose their own difficulties as well. The Court has noted that "careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society'"[20] may curb the risks that "the only limits to

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[14] 262 U.S. 390 (1923).

[15] 268 U.S. 510 (1925).

[16] *Meyer*, 262 U.S. at 399 ("Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes . . . the right of the individual to . . . establish a home and bring up children . . . and generally to enjoy those privileges . . . essential to the orderly pursuit of happiness . . . .").

[17] See supra note 1 and accompanying text (discussing rejection of economic substantive due process). The decision to overrule *Lochner* has been applauded as recognition that the Court should not transgress the legislative sphere. See, e.g., Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1697 (1984) (noting that "the theoretical basis of the *Lochner* era foundered on a mounting recognition that the market status quo was itself the product of government choices").

[18] Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 Wm. & Mary L. Rev. 995, 997 (1992).

[19] In fact, it might be said that the Court is interfering with regulation of the family—something that has long been recognized as the province of the states.

[20] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring)). In *Moore*, by a five-to-four majority, with a total of five opinions, the Court extended the constitutional protection of

such judicial intervention [will] become the predilections of those who happen at the time to be Members of this Court."[21] Tethering parental rights jurisprudence to tradition leads, however, to a sort of fetishism of the status quo.[22] Thus, in *Michael H. v. Gerald D.*,[23] the plurality, appealing to history and tradition, found that Michael H. did not have a protected liberty interest in his relationship with his biological daughter because history and tradition only validated such relationships in the "unitary family."[24] In Michael H.'s case, the biological mother of his child had been at all relevant times married to another man.[25] The rigidity of such an approach is problematic. Justice Brennan penned a heated dissent, characterizing the plurality's conception of parental rights as "pinched," and arguing for a more functional model that would recognize Michael H.'s parental rights.[26] Indeed, a total of five Justices of the *Michael H.* Court refused to foreclose "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth."[27] Even Justices O'Connor and Kennedy, who signed on to the plurality opinion, specifically disclaimed Justice Scalia's assertion that appeal to longstanding tradition was the only appropriate mode of analysis for parental rights conflicts.[28]

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the family to a grandmother who lived with her son and two grandsons, who were first cousins. Although unclear, it seems highly dubious that "deeply rooted . . . tradition," id., could expand to accommodate more nontraditional family units.

21 Id. at 502.

22 See supra note 12.

23 491 U.S. 110, 117 (1989) (upholding, by five-to-four decision, constitutionality of California statute reading: "[T]he issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage," unless blood tests proved paternity to be otherwise within two years of the child's birth (quoting Cal. Evid. Code § 621 (West. Supp. 1989) (repealed 1994))). Although a majority agreed on the outcome, the Justices differed widely on the doctrine and details: Justice Scalia wrote an opinion, in which Chief Justice Rehnquist joined, and in which Justices O'Connor and Kennedy joined in part, id. at 113; Justice O'Connor wrote a separate concurring opinion, in which Justice Kennedy joined, id. at 132; Justice Stevens also wrote a separate concurrence, id. at 132; Justice Brennan wrote a dissent, in which Justice Marshall and Justice Blackmun joined, id. at 136; and Justice White wrote his own dissent, in which Justice Brennan joined, id. at 157.

24 Id. at 123.

25 Id. at 113-15.

26 Id. at 145 (Brennan, J., dissenting).

27 Id. at 133 (Stevens, J., concurring); id. at 136 (Brennan, J., dissenting) (opinion joined by Marshall, J., and Blackmun, J.); id. at 157 (White, J., dissenting) (opinion joined by Brennan, J.).

28 Id. at 132 (O'Connor, J., concurring in part). Justice Kennedy joined Justice O'Connor's concurrence.

Narrow holdings have also been employed as a method of checking the formless subjectivity of substantive due process. This method, however, also fails to quell the discordant clatter of concurrences and dissents enunciating different reasoning and questioning the legitimacy of developing a doctrine of unenumerated rights at all. A good illustration is *Troxel v. Granville*, in which the Court rejected a challenge to a Washington state court ruling against the constitutionality of the state's visitation laws.[29]

The factual background of *Troxel* is complex, and the family forms involved are nontraditional. Tommie Granville and Brad Troxel, though never married, produced two daughters. Brad's parents, the Troxels, saw their granddaughters regularly on weekends, even after Tommie and Brad separated and Brad committed suicide. Five months after the suicide, however, Tommie informed the Troxels that she wished to scale back the frequency of visits. In response, the Troxels petitioned under a Washington state statute allowing "[a]ny person" to petition for visitation rights over a child "at any time," and allowing a judge to grant that petitioner rights if he or she deemed it to be in the "best interest" of that child.[30] The Washington Superior Court granted the Troxels a modified version of their original request on the basis that the court believed it to be in the girls' best interests.[31] Tommie appealed, during which time she married a man who adopted the girls. The Washington Court of Appeals reversed on the ground that the Troxels lacked standing.[32]

The Washington Supreme Court affirmed the reversal, but on different grounds.[33] The court found the third-party visitation statute in violation of the Federal Constitution. First, the statute used a "best interest of the child" standard that was underprotective of parental rights.[34] The court found that parental discretion over visitation could only be disrupted after the custodial parent met the threshold requirement by showing harm to the child.[35] Second, the statute was overbroad in allowing "any person" to petition for forced visitation at "any time," and permitting the granting of such petition if the court found that the visitation served the "best interest of the child."[36]

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29 530 U.S. 57 (2000).

30 Id. at 60 (citing Wash. Rev. Code Ann. § 26.10.160(3) (West, WESTLAW through 2003 Sess.)).

31 Id. at 61.

32 Id. at 62.

33 Id.

34 See id. at 63.

35 Id.

36 Id.

The U.S. Supreme Court affirmed six to three. However, it narrowly found the third-party visitation statute unconstitutional on overbreadth grounds.[37] Indeed, while eight Justices recognized some constitutionally protected parental right to control the private associations of one's children, seven did so without foreclosing that such a parental right could be qualified in the face of competing relational claims more compelling than those asserted in the case.[38] Justice O'Connor's plurality opinion explicitly distinguished Washington's sweepingly broad statute from the grandparent visitation statutes more common in other states.[39] The Court also found the statute unconstitutional only on this particular application.[40] Notwithstanding the narrowness of the Court's as-applied decision, a majority of the Justices nevertheless felt compelled to clarify their positions, yielding a total of six separate opinions.[41] Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined Justice O'Connor's opinion. Justice Souter and Justice Thomas each filed a concurring opinion.[42] Justice Stevens, Justice Scalia, and Justice Kennedy each filed a dissenting opinion.[43]

Every opinion acknowledged that "the interest of parents in the care, custody, and control of their children" was "perhaps the oldest of the fundamental liberty interests recognized by this Court."[44] However, each also expressed discomfort with substantive due process—though for different reasons—and attempted to limit the inquiry.[45]

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37 Id. at 67.

38 Buss, supra note 5, at 279.

39 In the last few decades, all fifty states have enacted grandparent visitation statutes. See Stephen G. Gilles, Parental (and Grandparental) Rights After *Troxel v. Granville*, 9 Sup. Ct. Econ. Rev. 69, 70-74 (2001) (describing various state grandparent visitation statutes and characterizing statute in *Troxel* as "outlier" compared to more "moderate" statutes).

40 *Troxel*, 530 U.S. at 73 ("Accordingly, we hold that [the statute], as applied in this case, is unconstitutional.").

41 Buss, supra note 5, at 286 (arguing that Court's attempt to reach "compromise" on issues it is ambivalent about is certain to backfire in "an endless stream of constitutional litigation" and are "likely to produce bad results for children").

42 *Troxel*, 530 U.S. at 75 (Souter, J., concurring); id. at 80 (Thomas, J., concurring).

43 Id. at 80 (Stevens, J., dissenting); id. at 91 (Scalia, J., dissenting); id. at 93 (Kennedy, J., dissenting).

44 Id. at 65; see also id. at 77 (Souter, J., concurring); id. at 80 (Thomas, J., concurring); id. at 87 (Stevens, J., dissenting); id. at 92 (Scalia, J., dissenting); id. at 95 (Kennedy, J., dissenting).

45 While ambiguities in the state court opinion may have made consensus in *Troxel* particularly difficult, it is important to note that there is a more general pattern of multiple dissents and concurrences in parental rights cases.

Justice Scalia offered the most skeptical view in his dissent. He noted that the theory of unenumerated parental rights was from "an era rich in substantive due process holdings that have since been repudiated," and that while he would not overrule cases establishing parental rights as a Fourteenth Amendment guarantee, "neither would [he] extend the theory upon which they rested to this new context."[46] Indeed, Justice Scalia remarked upon the "sheer diversity" of *Troxel* opinions as evidence that "the theory of unenumerated parental rights . . . has small claim to *stare decisis* protection."[47]

In his concurrence, Justice Thomas also reserved for "another day" the right to decide the question of whether an "original understanding" of the Due Process Clause would preclude judicial enforcement of "unenumerated rights."[48] Justice Stevens, dissenting, would never have granted certiorari, thus avoiding any elaboration of substantive due process parental rights.[49]

Justice Souter, concurring, indicated that he would have decided the case in a more limited manner. So as to avoid "turning any fresh furrows in the 'treacherous field' of substantive due process," he would have affirmed on the basis of overbreadth and avoided an as-applied analysis.[50] In fact, as noted above, the plurality opinion itself declined to address the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation," even though it recognized this as the primary constitutional question addressed by the Washington Supreme Court.[51] In this respect, the plurality agreed with Justice Kennedy, who in dis-

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[46] *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting). Under Justice Scalia's approach, John Hart Ely's critique of *Roe v. Wade*, 410 U.S. 113 (1973), seems applicable to parental rights. Ely argues that *Roe* is an unsound opinion as a matter of representation reinforcement, once the interests of fetuses are taken into account. John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 933-39 (1973). Even if women's interests might be underrepresented in Congress, they are still certainly more represented than those of unborn children. Id. at 933. Certainly, children are better equipped than fetuses to represent their interests—but without votes, not by much, especially very young children.

[47] *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting); see Michael H. v. Gerald D., 491 U.S. 110, 121-22 (1989) (Scalia, J., plurality opinion) (arriving at similar conclusion).

[48] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

[49] Id. at 80 (Stevens, J., dissenting).

[50] Id. at 75-77 (Souter, J., concurring) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

[51] Id. at 73.

sent stressed that great care should be taken in the elaboration of the scope of parental due process rights.[52]

Regardless of the precise theoretical criticisms of substantive due process, the multiple opinions in *Troxel* suggest the Court is uncomfortable with substantive due process to the point where it cannot agree and is unwilling to develop parental rights jurisprudence. Because substantive due process has the tendency to freeze the status quo and because Supreme Court Justices are very reluctant to elaborate the scope of substantive due process, an alternative grounding for constitutional parental rights would be helpful.

II

PARENTING AS EXPRESSIVE ACTIVITY

As an alternative to substantive due process, the First Amendment seems a more promising basis for parental rights.[53] It has already gained currency with certain members of the Court. Justice Stewart has explicitly identified certain parental rights within the First Amendment: "[T]he Court has recognized a First Amendment right 'to engage in association for the advancement of beliefs and ideas . . . .' . . . . From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions [of their choice]."[54] More recently, Justice Kennedy also noted that if he had the opportunity to decide *Meyer* and *Pierce* anew, he would likely decide them on the basis of "First Amendment principles protecting freedom of speech, belief, and religion."[55] Likewise, Justice Scalia has indicated that he might have come out differently in

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[52] Id. at 101-02 (Kennedy, J., dissenting) (preferring to vacate and remand because delimitative scope of substantive due process rights requires more detailed findings and analysis).

[53] Other alternative theories for grounding parental rights include the Ninth Amendment, the Privileges and Immunities Clause of the Fourteenth Amendment, and procedural due process. See David D. Meyer, Self-Definition in the Constitution of Faith and Family, 86 Minn. L. Rev. 791, 817 (2002) (inventorying these theories). The Ninth Amendment alternative has been lofted more frequently than some of the others. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 495-99 (1965) (Goldberg, J., concurring) (suggesting relevance of Ninth Amendment to fundamental right of married couples to use contraception); Daniel E. Witte, Comment, *People v. Bennett*: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment, 1996 BYU L. Rev. 183, 261 (1996) (concluding that "[n]atural law, original intent, and public policy approaches" justify "recognizing a broad, fundamental parental right under the Ninth Amendment of the United States Constitution").

[54] Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (citation omitted) (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

[55] *Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting).

Troxel if the case had been brought as a First Amendment challenge to vindicate the rights of the children to associate freely.[56]

Though complex in its own right, First Amendment jurisprudence is developed and capacious. Not only has the Court considered various forms of expression "speech" for purposes of the First Amendment,[57] a clear majority of the Court has affirmed the existence of constitutionally protected expressive conduct.[58] Parenting should therefore be understood as constitutionally protected speech or expressive conduct.[59]

The applicability of a First Amendment approach is relatively straightforward in cases involving education or religion, because such cases clearly involve parents' rights to expression.[60] *Meyer* and *Pierce*, after all, can both be understood as cases about parental educational rights. Stephen Gilles compellingly argues that parents' educational decisions are messages to their children.[61] Whether delivered directly or through selected agents such as schools, these messages deserve First Amendment protection.[62]

While Gilles is concerned primarily with parental educational rights, a First Amendment approach also can be developed to encompass parental rights that do not involve education or religion. A more comprehensive approach to a First Amendment theory of parental

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[56] See id. at 93 n.2 (Scalia, J., dissenting); see also Laurence H. Tribe, Disentangling Symmetries: Speech, Association, Parenthood, 28 Pepp. L. Rev. 641, 655 (2001) (referring to Scalia's preference for First Amendment approach instead of parental rights).

[57] See infra notes 64-69 and accompanying text.

[58] See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (nude dancing); Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (flag burning); Police Dep't v. Mosley, 408 U.S. 92, 98-99 (1972) (picketing). To be sure, the Court also has qualified its recognition of expressive conduct, refusing to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

[59] While the distinction between speech and conduct is important, exact categorization is left for another, less introductory paper.

[60] See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 650-51 (2002) (voucher program); Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972) (home schooling); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (public school attendance); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (foreign language instruction). See also Tribe, supra note 56, at 662 ("Most of the prior cases about parental rights to shape children's upbringing had a fairly straightforward First Amendment dimension: They involved choices of the *language* one's children would learn to speak, of the *books* they would read or have read to them, or the *schools* they would attend.").

[61] See Stephen G. Gilles, On Educating Children: A Parentalist Manifesto, 63 U. Chi. L. Rev. 937, 944 (1996).

[62] See id. ("Parents' educational messages to their children . . . should receive a high level of First Amendment protection . . . ."); Michael Stokes Paulsen, Scouts, Families, and Schools, 85 Minn. L. Rev. 1917, 1941-47 (2001) ("The First Amendment question . . . is whether the state's action in any given case abridges the right of parents to control the content of the messages communicated to [their] children . . . .").

rights draws its inspiration both from our information age and from the narratives commonly employed around the concept of parenting. This approach views as expression not only obvious forms of parenting like education, but all forms of parenting. As Part II.A explains, begetting a child often involves the conceptualization of a new person, and always involves novel combination of DNA. As Part II.B shows, childrearing may not always be expression *to* a child, but it is always expression *through* a child. Parenting forms the adult that the child will become—the adult who will bring its parents' messages to the world and to posterity. Thus, procreation and childrearing are expressive and protected under a First Amendment rationale.

A. Procreation Is Expressive

Procreation expresses at least the biological parents' genetic information,[63] if not also profound messages such as affection for a reproductive partner and optimism about the world. This is evident from the biological mechanism of babymaking. Social behaviors and discourses around the topic also tend to show that people regard procreation itself as deeply expressive.

The biology of sexual conception is familiar. The genes carried by sperm combine with the genes carried by an egg at fertilization to form a zygote, and finally—if all goes well—a healthy baby with a new, unique genetic code. The new DNA created through the intentional process of procreation may plausibly be understood as speech protected by the First Amendment. Alternatively, procreation, which gives rise to the new DNA, may be understood as expressive conduct. Scholars and federal courts have recognized that constitutionally protected speech encompasses more than just traditional forms of political and artistic speech.[64] Indeed, following *Roth v. United States*,[65] several federal courts have articulated a definition of speech reflective

[63] Some courts have found the expression of encoded information to be more akin to expressive conduct than pure expression. See, e.g., Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001) (holding that computer code receives less protection than instructional speech because of "functional[ity]" or capacity to "instantly cause a computer to accomplish tasks"). Though restrictions on expressive conduct are subject to less heightened scrutiny than restrictions on pure expression, expressive conduct is nevertheless a category of speech under the First Amendment.

[64] See, e.g., id. at 447-49 (recognizing computer code as speech protected by First Amendment); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974) (explaining self-fulfillment and autonomy rationales for free speech). But cf. Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 301, 304-06 (1992) (arguing that nonpolitical speech "do[es] not lie within the core of the free speech guarantee").

[65] 354 U.S. 476, 484 (1957) (stating that "[a]ll ideas having even the slightest redeeming social importance" are protected by First Amendment).

of the information age: "[I]t is the conveying of *information* that renders instructions 'speech' for purposes of the First Amendment."[66] As such, vessels of information such as computer code—comprehensible only to specialized programmers—are protected speech.[67] If computer code is protected speech, why not intentionally created genetic code?[68] Where nonhuman genes are concerned, at least, the Supreme Court has already suggested that engineered combinations of genes not already found in nature may be protected expressions.[69] Although parents may not necessarily know exactly what their genes will produce, procreation may be thought of as a crude form of innovative genetic script-writing.

In a way, procreation is the most basic type of speech. Whereas the ability to manipulate words or other objects depends on the acquisition of verbal and other skills, the potential ability to pass on genetic information inheres in the fact of existence. This may be an implicit rationale of *Skinner v. Oklahoma*,[70] where the Court found that even the habitually criminal may not be forcibly sterilized under the Constitution.[71] Understanding procreation as fundamentally expressive

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[66] *Corley*, 273 F.3d at 447 (emphasis added).

[67] See id. at 449; Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000); Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1141 (9th Cir. 1999); Karn v. U.S. Dep't of State, 925 F. Supp. 1, 9-10 (D.D.C. 1996).

[68] After all, DNA carries coded information. See A Revolution at 50: DNA Changed the World. Now What?, N.Y. Times, Feb. 25, 2003, at F1 (special supplement on DNA). Similarly, some scholars suggest that genetic experimentation is expressive activity protected by the First Amendment. See, e.g., John B. Attanasio, The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide, 53 U. Chi. L. Rev. 1274, 1291-93 (1986) (suggesting that libertarian position would analogize genetic manipulation of "body and mind" of child to "molding the child through education," which "is closely aligned with [F]irst [A]mendment interests"). While the serious ethical and moral questions with respect to human genetic engineering are beyond the scope of this Note, it is worth noting that the very worries of dystopian eugenics are rooted in recognition that procreation is creative and expressive in nature. Absent the impulse to shape their progeny, people would have little use for human genetic engineering. Genetic engineering only provides greater precision in achieving the deliberate genetic expression that people already practice, albeit through crude and imperfect techniques. Moreover, the particular offensiveness with which many regard human cloning seems directly connected to the expressive implications of cloning. Attanasio, supra, for example, suggests that egalitarians should regard cloning as antithetical to the First Amendment and fundamentally antidemocratic, because it accentuates the ability of some people to dominate forum discussions. Id. at 1292-93. Cloning has also been criticized as sending a message that the cloner is antisocial, narcissistic, presumptuous, and backward-looking. See Leon R. Kass, Editorial, How One Clone Leads to Another, N.Y. Times, Jan. 24, 2003, at A23.

[69] See Diamond v. Chakrabarty, 447 U.S. 303, 309-10 (1980) (finding genetically engineered bacterium patentable).

[70] 316 U.S. 535 (1942).

[71] Id. at 541-42 ("Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and

leads to one explanation of why restrictions on the right to have offspring are generally unconstitutional. If the suppression of verbal expression is highly suspect, so perhaps is the suppression of genetic expression. Conversely, just as one may not be compelled to speak a viewpoint,[72] one may not be coerced into having children.[73]

Indeed, the behavior of would-be parents signals a distinct degree of intention with respect to genetic expression. Sociologists and other scholars have remarked upon the drastic lengths infertile and nonheterosexual couples go to have their own biological babies instead of adopting.[74] One would think that if the primary aim of having and raising children were affection, or contribution to the welfare of a child, or social altruism, people would find it just as expedient to, respectively, settle for pets, adopt children, or contribute to charities. When the primary aim of having and raising children is recognized as expressing one's genes and values to and through children, the obsession with having one's "own" children seems less curious. The desire to replicate one's genes, to control a child's development, and to optimize the likelihood that one's intended "messages" to the world and for posterity will be communicated as intended may also explain in part why adopting parents so greatly prefer infants of their own racial background to older children of a different racial background.[75]

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devastating effects."). While Justice Douglas's opinion rested on equal protection grounds, *Skinner* is recognized as constitutionalizing the right to procreation. See Helen M. Alvaré, The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective, 40 Harv. J. on Legis. 1, 35 (2003) (characterizing *Skinner* as example of case that appears to grant a positive right to procreate); Erwin Chemerinsky, The Rhetoric of Constitutional Law, 100 Mich. L. Rev. 2008, 2011 n.12 (2002) (citing *Skinner* as "recognizing a fundamental right to procreate"). See also P.K. Runkles-Pearson, Note, The Changing Relations of Family and the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike, 77 N.Y.U. L. Rev. 833, 856 (2002) (noting that *Skinner* "emphasized the sanctity" of the right to make reproductive choices).

72 See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631-35, 642 (1943) (prohibiting compulsory flag salute as compelled speech).

73 See, e.g., Stenberg v. Carhart, 530 U.S. 914, 936-38 (2000) (declaring unconstitutional Nebraska statute banning partial birth abortions); Hodgson v. Minnesota, 497 U.S. 417 (1990) (holding unconstitutional statutory requirement that both parents be notified of minor's intent to obtain abortion); Roe v. Wade, 410 U.S. 113, 153-54 (1973) (holding that constitutional right to privacy includes decision to terminate pregnancy).

74 See Eric A. Posner & Richard A. Posner, The Demand for Human Cloning, 27 Hofstra L. Rev. 579, 582 (1999) ("People love children, particularly their own; so adoption is rarely considered a perfect substitute for having natural children, even though the natural route will often be more costly for the mother.").

75 See Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 215 (1995) ("Most parents probably feel great satisfaction in having children who 'take after' them. Bringing into the world children who bear their likenesses gives many people . . . the comfort of achieving a form of immortality passed down through the generations."); see also Posner & Posner, supra note 74, at 582 ("Parents enjoy noticing physical and mental resemblances

This genetic perspective of procreation is not always obvious where babies are made the "old-fashioned" way. It is surely true that some people have children without ever consciously thinking about the biological consequences. However, common experience suggests that many people at some point think about the genetic implications of pairing with a partner. Some might deliberately avoid those who possess or are likely to possess "bad" genetic traits, such as a family history of mental illness, cancer, alcoholism, etc. Others may behave more proactively, choosing their mates at least in part for "positive" genetic traits, hoping that their children will inherit their mates' high IQ, kind disposition, startling eyes, or athletic prowess. Or, they may have many children with the same partner, hoping to increase their chances of hitting the genetic jackpot.[76] In certain communities, too, premarital and prenatal screening for genetic diseases is common practice.[77]

The genetic perspective of procreation is more obvious where babies are born with the aid of technology, arrangements that are increasingly common in contemporary society.[78] When a woman, for example, goes to a sperm bank to be artificially inseminated, her criteria for selecting her genetic complement are nakedly exposed as she chooses among donor profiles. When medically infertile couples seek egg or sperm donors for in vitro fertilization, they also select among the available options according to genetic preferences.[79]

It may be unlikely that the expression of genetic information and value inculcation will reflect a parent's intent perfectly. But then, this

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between their children and themselves and thinking of their children as conferring upon themselves a kind of immortality.").

[76] For example, some couples try again and again for a son or daughter. In earlier times, parents often had many children, in part because the mortality rate was so high, in the hopes that some of the children would be strongly constituted and survive.

[77] Certain Jewish communities encourage testing so that two carriers of the same genetic disease, such as Tay-Sachs, can have this information before deciding to marry and have a family. Where two carriers choose to have a child together, prenatal diagnosis may be employed. If the fetus is affected, the couple may consider therapeutic abortion. See Nat'l Tay-Sachs & Allied Diseases Ass'n of Del. Valley, What Is Tay-Sachs Disease?, at http://www.tay-sachs.org/taysachs.php (last visited May 14, 2003); see also All Things Considered: Pre-Implantation Genetic Diagnosis (Nat'l Pub. Radio broadcast, Sept. 29, 1998) (discussing new procedure allowing doctors to detect genetic diseases before pregnancy), available at http://discover.npr.org/features/feature.jhtml?wfId=1033010.

[78] The use of fertility procedures in the United States increased by twenty-seven percent between 1996 and 1998; one current estimate is that 50,000 in vitro fertilization babies are born annually. Justine Durrell, Can the Law Handle Human Cloning?, Trial, Oct. 2002, at 24, 27.

[79] For example, one woman with the gene for Alzheimer's disease avoided passing the gene on to her baby by having her eggs screened and selected in a lab. See Yury Verlinsky et al., Preimplantation Diagnosis for Early-Onset Alzheimer Disease Caused by V717L Mutation, 287 JAMA 1018, 1019 (2002).

does not really differ from other forms of speech conventionally recognized as expressive. An artist may mix various paints, hoping to create a canvas of crimson. Just because she ends up with an orange or brown composition instead does not diminish the expressive nature of her endeavor. Not surprisingly, writers who are also parents have made the connection between parenting and authorship explicit.[80] Procreation—the creation of new DNA—is fundamentally expressive.

B. Childrearing Is Expressive

The expressive nature of parenting does not cease once a child is born. As noted, the educative function of a parent is clearly expressive.[81] The expressive nature of childrearing, however, is not confined to formal educational choices alone. The choices parents make shape children into the adults they become; even seemingly trivial decisions often have cumulative and profound effects. Many parents know this and make childrearing decisions based on how they would like their children to turn out.[82]

Psychologists maintain that children—particularly young children—are strongly influenced by their caretakers and their entire environment.[83] As they grow older and begin to express opinions, much of what children express is a parroting of what their parents tell

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[80] See Barbara Jones, Heedless Love, in Wanting a Child 9, 13 (Jill Bialosky & Helen Schulman eds., 1998) (defining "conception" not as physical birth, but as mother-to-be's imagination of what her child will be like: "The irrevocable moment in becoming a parent is not the moment you conceive a child; it's the moment you conceive of her."); Bob Shacochis, Missing Children, in Wanting a Child, supra, at 40, 40-41 (remarking that his "literary and biological clocks had apparently been set to the same mean time, synchronized to similar imperatives"); Marly Swick, The Ghost Mother, in Wanting a Child, supra, at 120, 133 (describing teenager whose baby she adopted as "[a] ghost mother hired to author a child under my own name"); cf. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) (defining "author" as person who created and shepherded entire work to "give[ ] visible expression" to his or her ideas).

[81] See supra notes 60-62 and accompanying text.

[82] The titles of parenting guides themselves illustrate this point. See, e.g., Foster Cline & Jim Fay, Parenting Teens with Love and Logic: Preparing Adolescents for Responsible Adulthood (1993); Morgan Simone Daleo, Curriculum of Love: Cultivating the Spiritual Nature of Children (1996).

[83] See generally Kenneth Kaye, The Mental and Social Life of Babies (1982) (arguing that "[s]ymbolic representation, language, and thought could not emerge . . . without a special kind of fit between special adult behavior and infant behavior"); Saul Feinman, Emotional Expression, Social Referencing, and Preparedness for Learning in Early Infancy—Mother Knows Best, but Sometimes I Know Better, in The Development of Expressive Behavior 291, 314 (Gail Zivin ed., 1985) (describing biological boundaries within which parental and social referencing influences infant behavior and emotional expression).

them.[84] Indeed, every choice a caretaker makes to expose or to refuse to expose a child to stimuli molds that child's character.[85]

The point, however, is not that parents are successfully able to mold their children to their exact will. The point is that parenting is a process by which parents can *try* to inculcate, influence, and implore their children to be the way they would like them to be. It is a way through which parents can attempt to maintain a voice in the future.[86] Through verbal and nonverbal communication *to* their children, parents communicate messages to society at large and the future *through* their children. Parenting—both procreation and childrearing—can be likened to an authorial endeavor.

The manner in which the Supreme Court discusses parental rights also suggests an implicit recognition that parenting is expressive. In parental rights challenges, the Court has attempted to stretch substantive due process to accommodate relationships not founded on biology or affinity. The Court has suggested that the *functional* relationship between caretaker and child, though subsidiary to traditional relationships, can give rise to claims of parental rights.[87] It is a matter "beyond debate" that the functional role of parenting is "primar[ily] . . . in the *upbringing* of their children."[88] If a caretaker has done the work of upbringing, then there may be a claim of parental rights. Regardless of whether parents ever consciously con-

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[84] See, e.g., Richard G. Niemi & M. Kent Jennings, Issues and Inheritance in the Formation of Party Identification, 35 Am. J. Pol. Sci. 970, 970 (1991) (concluding that despite other variables, parents play major role in determining initial political direction of their offspring); James E. Prather & Marvin K. Hoffman, The Impact of Parental Party Preference: Fine Tuning an Old Idea 9 (Sept. 1, 2001) (unpublished paper presented at the American Political Science Association Annual Meeting) (concluding that party preference is influenced by parental preference and current status to same degree), available at http://pro.harvard.edu/papers/037/037008HoffmanMar.pdf.

CBS's show "Kids Say the Darndest Things," hosted by Bill Cosby, was based on the humorous value of seeing children present opinions that are clearly lifted from bits and pieces of adult sayings, often out of their original context. See generally Bill Cosby, Kids Say the Darndest Things (1999); Art Linkletter, New Kids Say the Darndest Things (1977).

[85] Signs of American acceptance of the plasticity of children are commonplace and abundant. For example, antismoking commercials remind parents that even if children do not seem to listen, they absorb parental messages. See Steph Lawler, Mothering the Self 1 (2000) (observing that "contemporary Euroamericans" share belief "so powerful it might almost be said to be axiomatic—that our selves are, at least to some degree, 'produced' by our parents"); Marilyn Strathern, Reproducing the Future 165 (1992) ("The reproductive model plays off heredity and development through a contrast between the relationships implied in parenting and ancestry and the individuality that must be claimed by and for the child as the outcome of these relationships.").

[86] See supra note 75 and accompanying text.

[87] See Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977) (finding that caretaker relationships are valuable to society by promoting desirable way of life through instruction of children).

[88] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (emphasis added).

template the expressive dimension of parenting, this aspect seems undeniably to inform parental rights jurisprudence. Yet, as the struggle in *Michael H.* illustrates, recognition of parental rights based on the functional relationship between parent and child is not an inexorable conclusion of substantive due process analysis.[89] Nor does substantive due process analysis provide a particularly compelling explanation of why only some functional relationships give rise to parental rights. A teacher or a neighbor might function in important ways as a parent in relation to a child, but presumably not have any parental rights. The fit between parental rights jurisprudence and substantive due process as a theoretical justification is uneasy.

Rather, because parents have great influence over their children, and because parents often consciously use this power to mold their children into adults who fit their own ideals, both having and rearing a child is expressive. As the locus of constitutional parental rights, the First Amendment thus appears to be a plausible alternative to substantive due process.

III
BALANCING EXPRESSIVE AND SOCIETAL INTERESTS: THE AUTHORIAL PARENT PARADIGM

The First Amendment may guarantee a certain freedom in whether to have children, and how to rear them. However, it leaves open a host of vital questions. Why should a person have a judicially enforceable *right* to expression through any particular human being? To which human beings should such a right attach? Why should a parent's right to expressive parenting trump any other person's right (including that of the child herself) to express values through a particular child? Why should a parent's nearly exclusive control over the expressive choices he makes with respect to a particular child ever cease, as it surely does when a child reaches the age of majority, if not sooner? Why, before the expiration of parental rights, might certain state regulations be constitutional, and others not?

While a First Amendment theory of parental rights might make sense in light of the expressive nature of parenting,[90] it must be fur-

[89] See supra notes 23-28 and accompanying text.

[90] Simply because parenting is expressive does not necessarily mean that parental rights can be equated with other expressive conduct or subject to the identical First Amendment standards and tests. Parenting might be understood as a different sort of expression, one that is more relational than other forms of expression. Cf. Radhika Rao, What's So Strange About Human Cloning?, 53 Hastings L.J. 1007, 1012 (2002) (advancing relational conception of privacy). A speaker may speak without a listener, as may a writer write without readers, though the absence of an audience likely makes the act of expression less

ther developed to fully explain the characteristics of parental rights jurisprudence. A complete, coherent account of parental rights must tackle the societal interests in regulating the expression of parental rights.[91] This Part attempts to provide such an account by proposing an intellectual property model of parental rights. Under the authorial parent paradigm, societal interests that may constrain the expressive interests of parents assert themselves just as they do in the copyright regime. The state grants copyrights as a way of giving authors an incentive to produce work. The societal goal of producing more original works is reached by temporarily curtailing speech that would make free use of the copyrighted works. Similarly, the state recognizes parental rights as a way of stimulating childbearing and childrearing. The needs of reproducing a particular form of society shapes the scope of parental rights.

Part III.A examines the demands democratic society places on its children, as articulated in ongoing debates on school choice and the

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satisfying. A parent, in contrast, cannot parent without a child. See Roderick M. Hills, Jr., The Constitutional Rights of Private Governments, 78 N.Y.U. L. Rev. 144, 197-98 (2003) (discussing family as example of private association that helps individuals to self-actualize in unique ways). Childbearing and childrearing must involve a child. The child is both medium for and recipient of parental expressiveness.

The distinction between parenting-as-expression and other forms of expression, however, need not be overdrawn. After all, the First Amendment is also cabined by competing societal interests. Right-to-speech cases often weigh the interests of the listener against those of the speaker. See Hill v. Colorado, 530 U.S. 703, 718 & n.25 (2000) (constraining First Amendment right to protest abortion with rights of those seeking medical treatment to be protected from potential harm resulting from sidewalk counseling); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736-38 (1970) (finding private citizens' right to be free from unwanted mail outweighs senders' right to communicate).

[91] It is necessary in any analysis of parental rights, of course, to consider the child. This Note considers that the child's interest is largely subsumed by those of either the parents or the state. Most child-centric models consider children's interests as independent of both those of parents and the state. See, e.g., Woodhouse, supra note 18, at 1114-15 (characterizing presumption that parents have right to live through their children as "at best, unnecessary or, at worst, oppressive"). Indeed, parents and children may be at odds and have conflicts of interest. However, translating this notion from theory into legal practice is fraught with difficulties. See Guggenheim, supra note 8, at 632-35 (critiquing "best interest of the child" standard). Whatever interests children may have that are distinct from those of their caretakers and of the state as *parens patriae* are hard to discern—particularly for younger children. Certainly, it cannot be simply what children say they want or prefer. By definition, minors are those deemed too immature to make important legal decisions for themselves. Only in certain cases, for purposes such as abortion, may a person under eighteen years of age be deemed a mature minor and permitted to make decisions contrary to the wishes of her guardian. See id. at 632. Since the state's interest in the production of autonomous individuals is largely coterminous with the interests of children themselves, at least as against contrary inclinations of parents, this Part concentrates on society's interests in children. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (arguing that society's interest in protecting children's welfare is "no mere corporate concern of official authority . . . . [but] the interest of youth itself").

relationship between education and the liberal state, as well as in Supreme Court opinions. These societal interests are independent of parents' expressive interests in children, and where the two diverge, they are in tension. Part III.B shows how copyright mediates a similar tension in intellectual property. Part III.C then sketches out a framework for conceiving parental rights and for determining when one interest might trump the other.

A. The Needs of a Reproducing Democratic Society

Debates on school choice and Supreme Court opinions expound the notion that the state has an interest in children as a sort of social good or necessity. Perpetuation of a given social order requires that certain key characteristics be cultivated in successive generations through childbearing and childrearing. Supreme Court precedent (as well as parental-choice advocates) further indicate a deeply rooted—albeit contestable—belief that a fundamental requirement of the democratic order is pluralism,[92] and that pluralism in successive generations is achieved by having *parents*, rather than state institutions, teach their children diverse perspectives.

The past two decades have seen a vigorous debate over education and parental choice. Yet curiously, the contests over home-schooling, private schools, and voucher systems have not been about the ends, but the means. Both opponents and supporters of parental choice agree on the premise that children are the basis for societal regeneration, and that preparing children for citizenship is critical. They also agree that it is imperative that children be imbued with democratic values. Where they primarily diverge is on whether parental choice adequately can furnish this result.

In one camp, scholars such as Amy Gutmann and Meira Levinson argue that parents should have no right to control their children's education because the larger polity can justify requiring all children to learn a common set of democratic values that only professionals can provide.[93] Only public education, they argue, can ensure that children will be exposed to and learn to respect ways of life other than those favored by their own families.[94] Supporters of parental choice agree

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92 Unless one believes that nature has nothing to do with future behavior, genetic heterogeneity may be indispensable for cultivating pluralism.

93 See generally Amy Gutmann, Democratic Education (1987); Meira Levinson, The Demands of Liberal Education (1999).

94 Distrust of parents—the fear that they will teach their children to be intolerant, violent, treacherous, etc.—underlies some of the clamor against private alternatives to compulsory public education. These are the same worries that propel movements to censor books or quash fringe groups. They are not without some basis, but preemptive restraints of expression are fundamentally at odds with the spirit and values that animate the First

that "the health of civil society depends crucially on the formation, development, and training of capable and decent persons who are concerned with and motivated by the common good," but argue that private schools and home schooling can "'advanc[e] the democratic ethos'" just as well as public schools.[95]

The notion that democracy depends on how children are born and raised is also embedded in Supreme Court opinions on parental rights. The Court has stated that while children are not "mere creature[s] of the State,"[96] society depends on reproduction and parenting for the production of citizenry necessary for its perpetuation. In *Prince v. Massachusetts*,[97] Justice Rutledge expounded on behalf of the Court: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[98]

What is implied by the Court's observation depends on one's perception of (and aspirations for) the societal structure and values of the United States. For the Court, at least, one of the chief distinguishing characteristics of American society is that it is a democracy. As such, it can be argued that the United States requires its children not only to grow into healthy and self-sufficient adults, but to mature into an adult population reflecting a plurality of views, with the ability to exchange such views in political dialogue.

For the Court, the desirability of pluralism stems from its instrumental value to the continuance of the political order.[99] Hence, in

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Amendment and that underlie the foundation of the United States. And yet, the argument against parental choice may implicitly recognize that a certain degree of parental autonomy over childrearing is an effective ingredient to a heterogeneous and meaningful democracy. One of the ways public schools teach children to respect a diverse society is simply to expose them to a diverse student body. A diverse student body flows from a collection of individual families. Indeed, this nod to parental autonomy may be inevitable. Even where public education is compulsory, so long as parents have custodial privileges, parental influence is unavoidable. See Merry Jean Chan, Performing Well in School: Situational Poetics and Moral Education in a Shanghai Junior Middle School (1997) (unpublished A.B. thesis, Harvard University) (on file with *New York University Law Review*) (showing that social trends partly derailed moral education agenda of school); see also Martha Minow, Keynote: Before and After *Pierce*: A Colloquium on Parents, Children, Religion and Schools, 78 U. Det. Mercy L. Rev. 407, 421-22 (2001) (arguing that system of exclusively private education might not occasion any loss in pluralism of education).

95 Richard W. Garnett, The Right Questions About School Choice: Education, Religious Freedom, and the Common Good, 23 Cardozo L. Rev. 1281, 1300 (2002) (quoting Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 183 (1999)).

96 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

97 321 U.S. 158 (1944).

98 Id. at 168.

99 See Minow, supra note 94, at 409-13 (discussing pluralism as theme in Court's parental rights jurisprudence). Of course, scholars have also presented characteristics

Meyer, the Court held that it was unconstitutional to forbid "the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents."[100] Foreign-born parents should have the choice to transmit their diverse beliefs and values to their children, and effective transmission may only be possible through their mother tongues. Even if the United States could be made stronger by "foster[ing] a homogeneous people with American ideals prepared readily to understand current discussions of civic matters"[101]—an idea supported by "great genius[es]" such as Plato[102]—such a "relation between individual and State [is] wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such [homogenizing] restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."[103] The Court disagreed that mere knowledge of a foreign language made a child inimical to the interests of the United States.[104]

Pierce likewise emphasized the need for a heterogeneous populace.[105] In affirming an injunction of Oregon's Compulsory Education Act,[106] which made not sending one's children or wards to public school a criminal misdemeanor, Justice McReynolds wrote: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to *standardize* its children by forcing them to accept instruction from public teachers only."[107] The Court distinguished liberty as it might be conceived in other nations from liberty as it was conceived in the United States and enshrined in the Constitution: democratic and essentially pluralist. Moreover, the Court emphasized its view that parents were necessary to achieving a heterogeneous population. It is not directly "within the

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other than pluralism as essential to democracy. See Lawler, supra note 85, at 37 (individuality); Valerie Walkerdine & Helen Lucey, Democracy in the Kitchen: Regulating Mothers and Socializing Daughters 2 (1989) (diversity); Annette Ruth Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. Mich. J.L. Reform 683, 706-07 (2001) (autonomy).

100 Meyer v. Nebraska, 262 U.S. 390, 398 (1923).

101 Id. at 402.

102 Id. at 401-02.

103 Id. at 402.

104 Id. at 403.

105 See Minow, supra note 94, at 409 (arguing that "even a superficial reading" of *Pierce* reveals that "relations between groups and the proper ambit of pluralism framed the case").

106 For the full text of the statute, see Pierce v. Society of Sisters, 268 U.S. 510, 530 n.* (1925).

107 Id. at 535 (emphasis added).

competency of the State" to ensure that the American populace is diverse.[108]

B. *The Analogy to Copyright*

American copyright[109] offers a fruitful, though inexact, analogy by which to understand and think about parental rights.[110] Similarities between the role copyright plays in the field of intellectual property and the role parental rights play in family law are apparent when parenting is understood as a sort of authorship.[111] This Part shows how the current state of parental rights may be explained by analogy to copyright.

Society has an interest in the circulation of new and different ideas, an interest that depends on the exercise of individuals' expressive rights.[112] Simply because people have expressive rights, however, does not guarantee that they will exercise them in a manner in keeping with societal needs and interests. Copyright, originally granted only to literary works but now flexibly granted to a wide

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[108] Id.

[109] The Constitution endows Congress with the power to confer "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art I, § 8, cl. 8. This power is conceived of as serving a singular, utilitarian purpose: "To promote the Progress of Science and useful Arts." Id.

[110] Copyright, as opposed to patent, is especially analogous to parental rights because copyrights protect original expressions while patents protect products that are useful primarily for work. See Adam D. Moore, Introduction to Intellectual Property: Moral, Legal, and International Dilemmas 1, 3 (Adam D. Moore ed., 1997).

[111] For another suggestion of the interrelation of parental rights and intellectual property, see Yochai Benkler's article on the role of the First Amendment in an information economy. Yochai Benkler, Siren Songs and Amish Children: Autonomy, Information, and Law, 76 N.Y.U. L. Rev. 23, 46-48 (2001) (discussing conflict of autonomy and democracy in parental control of information reaching children). Law and economics scholars grappling with whether and how to shift the burdens of parenting from mothers to fathers, employers, or the state, have also suggested that parental rights might be fruitfully analogized to copyright. See Rolf George, On the External Benefits of Children, in Kindred Matters: Rethinking the Philosophy of the Family 209, 215 (Diana Tietjens Meyers et al. eds., 1993) ("We should begin to think of a parental right to an abstract property in analogy to the property that is protected by copyright."); cf. Mary Anne Case, How High the Apple Pie? A Few Troubling Questions About Where, Why and How the Burden of Care For Children Should Be Shifted, 76 Chi.-Kent L. Rev. 1753, 1780 (2001) (criticizing analogy's usefulness in informing distributional questions, but acknowledging that "we already do have something like a copyright in children—for a period of approximately eighteen years we allow parents, like authors, a great deal of control (although not absolute control—compare fair use and minimum education requirements) over their offspring, literal or literary").

[112] See, e.g., Robert A. Gorman & Jane C. Ginsburg, Copyright: Cases and Materials 13-14 (5th ed. 1999) ("As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end." (citing H.R. Rep. No. 60-2222 (1909))).

range of works of authorship,[113] mediates the tension between free expression and societal interests.

The idea behind copyright is that granting authors exclusive property rights to their writings gives them incentive to put in the effort to express their ideas in writing, which in turn makes ideas publicly accessible. Copyright is distinct from the physical thing to which it attaches.[114] It does not provide a property right to one's idea, but rights of recognition to, control of,[115] and profit from one's particular manifestation of an idea.[116] In fact, if there is no way to separate the expressive element from the idea in a work, then the work is not eligible for copyright protection. Granting such a work copyright protection would be in effect granting the author control over an idea.[117] Since every facet of a single idea may produce new ideas, each of which spawn many expressions, granting an author control over an idea would impoverish the commons. The ultimate purpose of the copyright—to serve society—always must remain in focus. Indeed, prominent scholars have argued that the tool of copyright is unconstitutionally wielded when its terms are shifted (i.e., extended or shortened greatly) such that free speech is actually impeded and the public

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113 These include musical works and lyrics; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings, and architectural works. 17 U.S.C. § 102(a) (2000). Computer code has been deemed protectible even though a computer program as a whole is functional, despite the fact that "nonfunctionality" is one of the requirements for copyright eligibility. Moore, supra note 110, at 3. The subject matter of copyright protection is defined as "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." § 102(a); see Moore, supra note 110, at 2. What matters is that the work has the hallmarks of a copyrightable work: expressiveness, originality, nonfunctionality, and the potential for dissemination. See Moore, supra note 110, at 2-3. The threshold for originality is fairly low. It does not mean that the work must be novel, ingenious, or interesting. It merely means that the particular work "owes its origin" to the author. See id. at 2 ("The domain of copyright is expression.").

114 See 17 U.S.C. § 202 (2000) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.")

115 Subject to restrictions (notably, fair use, first sale, and limited duration doctrines), copyright includes rights to reproduction, adaptation or derivation, distribution, public display, and public performance. 17 U.S.C. § 106 (2000); Moore, supra note 110, at 3-4.

116 See 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea . . . concept, [or] principle . . . regardless of the form in which it is described, explained, illustrated, or embodied . . . ."); Moore, supra note 110, at 3 ("[T]he abstract idea, or *res*, of intellectual property is not protected. Author's rights only extend over the actual concrete expression and the derivatives of the expression—not to the abstract ideas themselves.").

117 Moore, supra note 110, at 3.

domain's growth diminished.[118] Copyright is a utilitarian device for calibrating the production of expression to meet societal needs or desires.[119]

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[118] The Sonny Bono Copyright Term Extension Act of 1998 (CTEA), 17 U.S.C. § 302 (2000), extended the term of the copyright to life of the author plus seventy years. § 302(a). Commentators have argued that recent shifts of copyright's terms are unconstitutional because they actually impede free speech and shrink the public domain. See Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1 (2001) (arguing that recent developments in copyright law should be subject to rigorous scrutiny because of their increasing burden on free expression); see also Rebecca Tushnet, Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation, 42 B.C. L. Rev. 1 (2000) (arguing that copyright laws pose serious First Amendment problems requiring careful balance between encouraging contemporaneous speech and restricting future expression). The Supreme Court held in Eldred v. Ashcroft that the CTEA does not violate the First Amendment. 123 S. Ct. 769, 777, 788 & n.23 (2003). However, the Court did not discount the possibility that *some* alteration might. Id. at 789-90.

Copyright's term was originally fourteen years, with an option to extend by another fourteen years. Copyright Act of May 31, 1790, 1 Stat. 124 (repealed 1831). Although this Note does not seek to make a perfect analogy between copyright and parental rights, it is interesting to note that this term very roughly approximates the age when children rise into adolescence and psychological, physical, and legal maturity. For a brief history summarizing the expanding terms of the copyright, see J.A. Lorengo, What's Good for the Goose is Good for the Gander: An Argument for the Consistent Interpretation of the Patent and Copyright Clause, 85 J. Pat. & Trademark Off. Soc'y 51, 53 (2003).

[119] Natural rights theory offers another justification for copyright. See Edwin C. Hettinger, Justifying Intellectual Property, in Intellectual Property: Moral, Legal, and International Dilemmas, supra note 110, at 17, 25 (1997) (noting that if property rights in things created were always appropriate reward for labor, then parents would deserve property rights in their children). Moral and privacy theories also provide justifications. Id. at 19-20, 28-30 (exploring moral rights and privacy interests implicated in intellectual property). Under a moral rights conception, property rights are ordained by natural law, rather than quid pro quo. Property rights are due the author because his or her work is an "imprint[ ] of the author's personality on the common stock of the world"; it is an emanation of the author. Mark Rose, Authors and Owners: The Invention of Copyright 114 (1993). However, these theories do not explain why copyright should not be perpetual.

Recently, the American copyright regime has undergone two major changes that arguably diminish its utilitarian character. In addition to the copyright extension, see supra note 118, in 1988 the United States signed the Berne Convention for the Protection of Literary and Artistic Works, as revised in Paris on July 24, 1971, which recognizes copyright as a matter of moral right. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.); Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6bis, 1161 U.N.T.S. 1, 36. However, the United States did not explicitly adopt moral rights language of the Berne Convention. See Cynthia Esworthy, National Endowment for the Arts, From Monty Python to Leona Helmsley: A Guide to the Visual Artists Rights Act (1997), at http://www.nea.gov/artforms/Manage/VARA2.html (last visited May 14, 2003) (pointing out that while American courts have traditionally recognized artists' moral rights, United States evaded issue of formal moral rights protection when it adopted the Berne Convention).

C. *The Authorial Parent*

Parental rights may be understood to operate, like copyright, as a device that gives incentives for the production of a sort of expression (in)valuable to society: procreation and childrearing. Society is interested in the production of citizens and regards parenting as the primary source for their production. The authorial parent paradigm accounts for parental rights as a grant tailored to promote parenting.

As a descriptive matter, current U.S. practice might be understood in the following manner: A person who evidences intention to procreate, and does so, is given an original allocation of parental rights to the child. In the same way, an author of an article is given original copyright to the article, even though the final product may reflect the input of many. These parental rights are recognized as an incentive for the work of parenting, which society values and wishes to encourage in a certain measure. In limited ways, such rights may be forfeited or transferred. The rights are maintained or earned by those who perform the duties of childrearing. These rights are not to the child, per se, but to the exclusive ability to try to express one's values to and through the child.[120] These rights expire when the child reaches the age of majority or is otherwise emancipated.

A system that relies on decentralized parenting to achieve heterogeneity and regards the parent as "the guarantor of . . . the liberal order"[121] must ensure that people choose to have and rear children. Whether or not there is a biological imperative to do so,[122] some proportion of the U.S. population lacks the ability to have and rear children, or conditions (e.g., social or economic) are such that they are able or compelled to override desires to reproduce.[123] Some people remain childless by genuine choice,[124] while an advancing career or

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120 See supra notes 81-89 and accompanying text.

121 See Lawler, supra note 85, at 39 ("Despite their differences, what both 'progressive' and 'conservative' discourses share is an emphasis on the family as the guarantor of social order.").

122 Feminists have been among those who have argued that there is no such biological imperative. See, e.g., Randi Locke, Choosing Childlessness, in Childless by Choice: A Feminist Anthology 31, 32 (Irene Reti ed., 1992) (stating that she, at least, did "not have the genuine maternal instincts").

123 See, e.g., Anne-Marie Ambert, An International Perspective on Parenting: Social Change and Social Constructs, 56 J. Marriage & Fam. 529, 530 (1994) (arguing that "linkage between what we conceive to be the nature of childhood and that of parenting is based less on the natural unavoidability of parents for children's survival and well-being as on society's structures and socioeconomic requisites").

124 Michele Patenaude, On Not Having Children, in Childless by Choice: A Feminist Anthology, supra note 122, at 35, 36 (indicating that fifteen percent of Americans do not want children). According to the National Survey of Family Growth, voluntary childlessness among childless women from ages fifteen to forty-four who have married at least once

the failure to find a partner during fertile years may force others into such a "choice."[125] Sociologist Kieran Bonner has explained that the American culture of consumerism militates strongly against the choice to have children.[126] Though some people may regard having children as "priceless," there is still a cost to parenting, and it is high.[127] Some incentive is necessary to calibrate the costs of childbearing and childrearing to society's needs for "citizen production."[128] The right to expressively parent is one form of that incentive. The authorial parent paradigm accounts for the way first rights to a child are currently generated and assigned. Biological parents receive first rights because

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has risen from 12.4% in 1973/1976 to 25.0% in 1990. Joyce C. Abma & Linda S. Peterson, Nat'l Ctr. for Health Stat., Voluntary Childlessness Among U.S. Women: Recent Trends and Determinants (1995), http://www.cpc.unc.edu/pubs/paa_papers/1995/abma.html#Table1.

125 See Sylvia Ann Hewlett, Creating a Life: Professional Women and the Quest for Children 86 & 310 n.1 (2002) (finding in survey of over 1600 "high-achieving" women that roughly half of those making more than $100,000 annually were childless after age forty, most against their wishes). Of course, studies of this sort have been highly criticized as a backlash against feminism. E.g., Michelle Goldberg, A Woman's Place, Salon, Apr. 23, 2002, at http://www.salon.com/mwt/feature/2002/04/23/childless_women/.

126 Kieran Bonner, Power and Parenting 138-39 (1998). In Bonner's words,

> [C]hoosing childlessness is seen to be an increasingly attractive lifestyle option for some married couples. It is one of the ways adaptability and flexibility, the virtues [some] consider[ ] crucial for functioning well, have entered into intimate relations. . . . Choosing parenthood, from [a certain] perspective, is analogous to choosing a restrictive state, a playpen rather than free access to the whole house.

Id.

127 On average, a two-parent family with an income of less than $38,000 per year spends a total of $121,230 to raise a child until he or she reaches eighteen years of age. Children's Defense Fund, What It Costs to Raise a Child (to Age 18), as of May 2001, at http://www.childrensdefense.org/factsfigures_costchild.htm (last visited May 14, 2003). A two-parent family with an income of over $64,000 will spend about twice as much. Id. By some estimates, what parents pay is already publicly subsidized by as much as thirty-eight percent. Case, supra note 111, at 1775.

128 Most people would probably agree that there is currently neither a noticeable overpopulation nor underpopulation problem in the United States. Under the authorial parent paradigm, one of the reasons—though clearly not the only reason—for the apparent equilibrium is that parental rights have been calibrated appropriately. That is, there are enough benefits to childbearing and childrearing to keep people interested in having children at a particular rate. Cf. Patenaude, supra note 124, at 35 (recalling her assumption as young woman, now since disproved, that "reproductive emancipation"—right to abortion and access to contraceptives—would lead many women to remain childless, and that "America . . . would soon reach zero population growth, then less-than-zero. Sometime around the year 2000, the government, in order to boost sagging birth rates, would start programs to entice women into bearing children—money, rewards, favors, preferences, free trips to Hawaii."). One might expect to see, then, that societies with overpopulation problems, at least those with accessible contraception and abortion techniques, tend to have broader grants of parental rights (e.g., the right or expectation of exacting support from children) than societies without such problems.

they create a child—a new set of DNA.[129] (Indeed, under the authorial parent paradigm, there is a strong argument that those who clone do not have parental rights over the clone, since they are not creating any original expression, but just copying.)[130] If intent to parent the specific child is not shown, then despite the contribution, parental rights do not vest. In the case of a woman carrying a fetus, intent to parent is presumed from the woman's choice to have the baby instead of aborting it.[131] In the case of a man, intent to parent is shown by acknowledgement of paternity, marriage to the biological mother, and/or some show of significant support during pregnancy and/or after birth. If a man forfeits or waives his parental rights, only the woman retains parental rights, and vice versa. Whoever has sole parental rights may divide and transfer parental rights, say, for example, in allowing a partner to adopt the child.[132]

Supreme Court cases on parental rights have certainly emphasized the bargain- or grant-like nature of parental rights. Cases involving unwed fathers show that an initial allocation of parental rights adheres at procreation, provided there is indication that procreation was intended. In *Quilloin v. Walcott*,[133] the Court decided an unwed father's appeal objecting to the adoption of his eleven-year-old son by the husband of the child's mother.[134] The adoption laws at issue stipulated that a child born in wedlock could be adopted only with the consent of each living parent who had not surrendered rights in the child voluntarily or been adjudicated an unfit parent.[135] That is, the biological mother and her legal spouse at the time of birth were presumed to have conceived (of) the child, and thus entitled to parental rights to the child. However, in the case of a child born out of wedlock, only the unwed mother was considered a legal parent with the right to veto adoption;[136] the unwed father had no parental rights unless he "legitimate[d] his offspring, either by marrying the mother

129 Perhaps this explanation offers one reason for the enduring significance of blood relations in our increasingly functionalist world.

130 See Leon R. Kass, The President's Council on Bioethics: Human Cloning and Human Dignity: An Ethical Inquiry—Executive Summary, 18 Issues L. & Med. 167, 170 (2002) ("The notion of cloning raises issues about identity and individuality, the meaning of having children, the difference between procreation and manufacture, and the relationship between the generations."); Rao, supra note 90, at 1012 (arguing that relational privacy view of parental rights also does not protect cloning because cloning is solitary affair).

131 The presumption is rebuttable.

132 Theoretically, there could be multiple parents, even though the rights typically originate in sets of two. The details would be determined by state legislatures.

133 434 U.S. 246 (1978).

134 Id. at 247.

135 Id. at 248.

136 Id. at 248.

and acknowledging the child as his own, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father."[137] The Supreme Court denied Mr. Quilloin's appeal and upheld the constitutionality of the Georgia adoption laws against his due process and equal protection challenges.[138] The Court noted that the appellant had failed to act as a father toward his children:

> [H]e has never exercised actual or legal custody over his child, and thus has never shouldered any significant *responsibility* with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child.[139]

In light of these findings, the Court suggested that Mr. Quilloin did not have a parent-child relationship, had not put in the work to get the rewards he was seeking, and therefore, his parental rights had not been violated.[140] Indeed, the Court suggested he had no standing.[141] The Court easily distinguished unwed fathers from married fathers, as a general rule, because married fathers had made an ascertainable commitment to a marriage, and presumably to the children resulting from the marriage.[142]

Similar reasoning led the Court to uphold an adoption order in *Lehr v. Robertson*.[143] Mr. Lehr challenged the adoption of his biological daughter by the husband of the child's mother on the grounds that he had not received notice.[144] The Court ruled that Mr. Lehr had no parental rights.[145] The contribution of genes to a child entitled a biological father to the first opportunity to claim parental rights over that child—to continue to shape that new person.[146] In the words of the Court, "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[147] Enormous though the biological contribution might be, it alone, however, would not suffice to secure parental rights because there was no showing of intent to

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137 Id. at 248-49.

138 Id. at 256.

139 Id. (emphasis added).

140 See id.

141 See id. at 254 (describing trial court's decision that Mr. Quilloin lacked standing to object to adoption because his legitimization petition had been denied).

142 Clearly, the presumption that marriage equals consent to children is less and less supportable in the current world.

143 463 U.S. 248 (1983).

144 Id. at 250.

145 Id. at 262.

146 Id.

147 Id.

parent.[148] A woman could show her intent to parent by the choice of carrying a fetus to term; a man must show a comparable intent in order to secure his parental rights.

> *If* he grasps that opportunity and accepts some measure of *responsibility* for the child's *future*, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.[149]

Since Mr. Lehr had never supported his daughter and rarely saw her, he had passed up his "unique, inchoate opportunity,"[150] and his potential parental rights never vested.[151]

More recently, in *Michael H. v. Gerald D.*, where the biological father had maintained a relationship with the child, a majority of the Court would have recognized some set of parental rights (i.e., visitation rights) of the biological father, even though a plurality of the Court held that the mother's husband at the time of conception and birth had a *superior* parental claim.[152]

Understanding parental rights as the quid pro quo for parental obligations provides a sound justification for state termination of parental rights. Parenting is like continuous authorship, where each day of caretaking returns a period of parental rights. Psychological parenting subsequent to biological procreation or legal adoption maintains parental rights.[153] On the other hand, a parent who ceases to care for her child would forfeit at least some parental rights. A parent who wants to stop caring for her child could give up those parental rights by putting the child up for adoption. The Supreme Court cases also display an understanding that the original allocation of parental rights may be lost if parents do not continue to parent in ways necessary to produce competent citizens.[154] The cases have

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148 Id.

149 Id. (emphases added).

150 Appell, supra note 99, at 693.

151 Id. at 692-93.

152 491 U.S. 110 (1989); see Appell, supra note 99, at 693.

153 Vanessa L. Warzynski, Comment, Termination of Parental Rights: The "Psychological Parent" Standard, 39 Vill. L. Rev. 737, 751 (1994) (characterizing Court's decisions in favor of psychological parents as recognizing child's right to psychological-parent relationships).

154 For a similar treatment of the unwed fathers cases, see Appell, supra note 99, at 691-94.

Contrast this "public family" theory with the "autonomous family" theory. The "autonomous family" theory treats autonomy as an end itself and as a natural right. It derives family autonomy (e.g., parental rights to determine the way a child will be brought up) from individual autonomy. See id. at 707-09.

framed parental rights in the language of "desert"; parental rights function as the incentive or reward for doing the work of nurturing and taking care of a child.[155]

In *Meyer v. Nebraska*, the Court laid down a quid pro quo between the state and the aspiring parent: "*Corresponding* to the *right* of control, it is the natural *duty* of the parent to give his children education suitable to their station in life."[156] In *Stanley v. Illinois*,[157] the Court held that Illinois law violated the Equal Protection Clause by depriving unwed fathers of parental rights.[158] In that case, Mr. Stanley lived with and supported his biological children and their mother for the eighteen years preceding her death.[159] However, when the biological mother of his children died, under Illinois law the children became wards of the state and were appointed guardians by the state court.[160] The Supreme Court wrote that while many unwed fathers might be irresponsible and actual strangers to their biological children, not all unwed fathers were.[161] In fact, Mr. Stanley appeared to "*deserv[e]* . . . custody of his offspring."[162] The matter of desert seemed to stem from the Court's assumption that it was not inevitable that a child would be harmed by living with a unwed father, and the state could not prove the contrary.[163] And although the Court did not explicitly say so, it might have ruled in favor of the father because he had steadfastly acknowledged the children as biologically his own. In any event, Mr. Stanley had a constitutional right to have this matter decided by the lower courts.[164] An unwed father has the right to a fitness hearing even if he has done no more than contribute to the

155 See Barbara Bennett Woodhouse, Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard, 33 Fam. L.Q. 815, 816 (1999) ("Along with rights of custody come responsibilities: the duties to feed, clothe, house, educate, protect, and supervise the child.").

156 262 U.S. 390, 400 (1923) (emphases added).

157 405 U.S. 645 (1972).

158 Id. at 658.

159 Id. at 646.

160 Id.

161 Id. at 654.

162 Id. (emphasis added).

163 See id. at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father . . . . [T]he state's statutory purpose would have been furthered by leaving custody in him.").

164 Id. at 657. The Court's ruling meant that regardless of whether Mr. Stanley had cared for his biological children, he was entitled to a hearing to determine his fitness as a parent, so long as Illinois law allowed such a hearing for unmarried mothers, divorced parents, and married parents.

conception, because he has provided the child with genetic material.[165] However, this right may lapse when abandoned.

Similarly, in *Caban v. Mohammed*,[166] the Court held that the unwed biological father had parental rights because he had "established a substantial relationship"[167] with his biological children. Despite not being married to his children's mother, he had lived with them and their mother as a family for several years.[168] He had acknowledged himself as his children's father both by signing his name as father on their birth certificates and by caring for and supporting them.[169] Because he had taken action to vest his parental rights, the fact that the mother of these children had remarried did not deprive him of his rights.[170]

These Supreme Court cases reflect a notion that parental rights are not rights innate to every human being; they must be earned.[171] Parental rights are distinct from most personal rights arising out of individual autonomy because they are by nature not individual, but *relational*.[172] As the Court itself has put it, "the *relationship* between parent and child is constitutionally protected."[173] Not only must parental rights be earned, they must be earned on an ongoing basis. Parental rights to a child exist only as reciprocation for care of and exercise of duty toward a child.[174] Parental rights are lost when the caretaking stops, as when a person abandons, neglects, or abuses a child.[175]

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165 See Shoshana L. Gillers, Note, A Labor Theory of Legal Parenthood, 110 Yale L.J. 691, 699-700 (2001) (summarizing genetic model of parental rights).

166 441 U.S. 380 (1972).

167 Id. at 393.

168 Id. at 389.

169 Id. at 382.

170 Id. at 382-94.

171 As this Note argues, parental rights to a child are most commonly earned through genetic contribution to and subsequent nurturing of that child. Appell, supra note 99, at 690-91.

172 See id. at 697-98 (explaining that parental rights are "distinct from other decisional privacy rights that involve decisionmaking for oneself within or outside a relationship"). Of course, this Note offers an interpretation of parental rights that is not rooted in privacy.

173 Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (emphasis added).

174 But see Appell, supra note 99, at 702 ("Although parental rights are relational—in the sense that they protect decisions made by parents for their children—they are not mutual. Children do not share corresponding decisionmaking rights."). Nor do children in the United States have legal duties to support their parents.

175 These conditions are grounds for the state to intervene. If these conditions are proven, parental rights may be terminated formally. Complete termination of parental rights permanently severs the legal parent-child relationship. See Martin Guggenheim et al., The Rights of Families 175 (1996) (listing abandonment, repeated or unusually severe acts of neglect or abuse, and parental incapacity or inability to care for children among

As this line of cases particularly makes evident, the concept of reciprocity between parent and state underlies the Court's understanding of parental rights.[176] This structuring of parental rights as a sort of "quid pro quo"[177] or "social bargain" with the state has long been entrenched in the American approach to parental rights. In colonial times, when physical labor drove the economy, the reward parents received for having children was rights to their children's potential and actual labor: Parental rights included rights to a child's earnings.[178] Yet such parental rights to a child were conditioned not only on the parents' work begetting the child, but on the fulfillment of duties such as the training of the child to be a "literate, religious, and economically productive" citizen.[179] The state granted parental rights to those who prepared the next generation of citizens.

Admittedly, there is a certain appearance of insularity or circularity to this social bargain. One might well ask how the reward for rearing one's child could be the right to rear that child. The quandary is resolved by recognizing that childrearing is indeed both a right and a duty. There are pleasures and difficulties, rewards and sacrifices, benefits and costs to parenting. Oftentimes, these are simply two faces to the same Janus-faced act. For example, one might say that a child needs to be taught basic literacy. The child and society benefit from that education. Designing and executing the education of the child costs money and effort. From one view, the parent who provides these services and goods sacrifices time, energy, and money. From a different angle, however, the person who gets the right to provide

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conditions most commonly seen in state laws justifying complete termination of parental rights).

176 Appell, supra note 99, at 685 ("The current model [of parental rights] holds that mothers earn parental status by gestation and birthing while fathers earn [it] by caring for the born child or marrying the mother. Persons who earn this status retain it, until they voluntarily relinquish the status or prove to be unfit.").

177 See Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 Va. L. Rev. 2401, 2430 (1995) ("[The responsibilities of parents] are induced by a quid pro quo: compensation that includes, in addition to financial rewards, broad grants of authority and discretion that enhance reputation and self-esteem."). This Note adds to the list of "compensation" compiled by Scott and Scott the opportunity to try to inculcate one's values in another human being and to give lasting expression to one's genes and beliefs.

178 Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 3 (1994) ("Since children were viewed as important economic producers, the courts became principally involved in issues of the custody and control of children when they were asked to approve contracts for indenture or to resolve conflicts regarding child labor."). Even now, despite highly publicized disputes between child entertainers, such as Macaulay Culkin, and their parents, parents are legally entitled to their children's earnings (just as parents are liable for their children's support) in many jurisdictions. See, e.g., Scheller v. Bowery Sav. Bank, 630 N.Y.S.2d 62, 64 (App. Div. 1995) (citing Schonberger v. Culbertson, 247 N.Y.S. 180, 182 (App. Div. 1931)).

179 Mason, supra note 178, at 7.

these services and goods has the unique opportunity to shape the child's outlook and personality. This opportunity is the basis for legally enforceable parental rights.

The authorial parent paradigm does not detract from the beauty or nobility of parenting.[180] There is nothing inherently wrong or manipulative about wanting to influence someone or to be, in some sense, a creator. The greatness of a Thomas Pynchon or a Steven Spielberg is not diminished even if he is partly motivated by the knowledge that he will retain control over the dissemination of his expression for some period of time.[181] In any event, by seeing parental rights as expressive interests earned through service to society, the authorial parent paradigm provides parental rights a grounding in the First Amendment, a grounding that is assuredly less problematic than Fourteenth Amendment unenumerated privacy rights.

This Note supports the observation that parental rights in America have developed according to a property-based model.[182] However, this Note argues that parental rights have been treated not as pure property rights, but as a variant of intellectual property rights.[183] The distinction should be made clear. Significant and

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[180] See Case, supra note 111, at 1779 (discussing possibility of viewing children as poems rather than Porsches). "The voluntary production of both poetry and children can be at once a source of pleasure and a site of intense effort to those who do it and, if it is well done, a source of positive externalities for others." Id.

[181] Cf. George, supra note 111, at 214-15 ("[I]t appears to be absurd to argue against copyright . . . on the grounds that really dedicated writers would write anyway . . . . [But] it is demanded that parents should provide a gratis service to the rest of society as a matter of duty.").

[182] See Woodhouse, supra note 18, at 1038-50 (giving brief history of property-based view of parental rights); Jessica A. Graf, Note, Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement, 30 Suffolk U. L. Rev. 81, 85-86 & n.17 (1996) (characterizing decisions such as *May v. Anderson*, 345 U.S. 528 (1953), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as expounding on theories of parental rights "hinged on notions of property and ownership"). But see Mason, supra note 178, at xii (arguing that children were never treated as property and that it has merely become popular to say they were); Richard A. Posner, Sex and Reason 410 (1992) (arguing that paid adoption does not constitute "baby selling" but alienation of parental rights).

[183] Woodhouse has identified a limited set of rights she considers to be encompassed in the term "child custody":

> the right to physical possession of the child; to decide where the child will live and with whom the child will associate; to collect the child's earnings; to control the child's religious and secular education; to make medical decisions; and to grant and withhold permission to travel, worship, work, and marry.

Woodhouse, supra note 155, at 816. Writers often equate property rights with complete ownership. Woodhouse, for example, recognizes property rights as a bundle including the right to exclusive possession and the right to use. Woodhouse, supra note 18, at 1113. Nonetheless, she treats property rights as complete ownership, without any possibility of

thoughtful family law scholarship has been developed in response to the ownership model of parental rights.[184] Understandably, discussion of property rights in the context of human beings evokes connotations of a master-slave relationship in which one person imposes his or her will on another without regard for that person's welfare.[185] But an intellectual property right conception of parental rights under the authorial parent paradigm does not reduce children to chattel. "Parental rights" to a child are not merely rhetorically distinct from "owning" a child. Parents do not have absolute rights over their children, body, mind, and soul.[186] Parental rights are to the expression (ultimately successful or not) of certain genes, mannerisms, and values through the unique vessel of a child.

As property rights,[187] expressive parental rights may be waived, transferred,[188] or lost—as where people give their children up for adoption, or lose parental rights due to abuse or neglect of their chil-

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separating strands of the property rights bundle. Id. at 1037 ("'Who owns the child? If the parent owns him—mind, body and soul—we must adopt one line of argument; if, as a free-will human being, he owns himself, we must adopt another.'" (quoting Kate Douglas Wiggin, Children's Rights, 12 Scribner's Mag. 242, 242 (1892))).

184 Indeed, the language of children's rights used at the turn of the twentieth century to circumscribe parental rights arose to contest a perceived legal notion of children as property, without rights. See, e.g., Woodhouse, supra note 18, at 1052 ("Children's rights, when set up against parents' rights, operated both as standards for parental behavior and as limitations on parental power. Parental failure to live up to these standards violated children's rights and justified community intervention.").

185 One commentator discusses moral objections to the idea that one's body could be owned by another:

> Treating the body as property is, in some views, inherently wrong. It carries the historical stigma of slavery, the imprisonment of debtors and husbands' dominion over wives. But the opposition here is directed largely at the idea that one person's body could become another person's property, and as such, it is fundamentally misguided.

Kermit Roosevelt III, The Newest Property: Reproductive Technologies and the Concept of Parenthood, 39 Santa Clara L. Rev. 79, 80 (1998).

186 See supra note 183.

187 See Mason, supra note 178, at xii ("Children were not considered property under common law [in the colonial era], as it has become fashionable to expound, but a child's labor was a valuable resource to parents and other custodial adults."); supra notes 182-84 and accompanying text. There is an important distinction between adjudicating rights in the rarefied realm of courts and legal writing, and how we relate to things in the real world, even if the two are closely interrelated. See generally Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Penn. L. Rev. 1503 (2000) (arguing that law should take into account expression of purposes and values). Even most lawyers probably think of owning a parcel of land as owning a parcel of land, rather than having a select bundle of rights to control that land vis-à-vis other people.

188 For an argument in favor of permitting legal sale of parental rights, see Posner, supra note 182, at 409-17 (1992). Judge Posner calls the term "baby selling" a misnomer, since what is sold are parental rights to the child and not the child herself. Parental rights are a bundle of rights constituted differently and more narrowly than full ownership rights. See id. at 410.

dren. These rights may also be divided and shared, as where a parent asks a biologically unrelated person to raise the child and imbue the child with ideas.[189] The nonbiological parent in this scenario would have a strong claim for authorship rights as a coauthor.[190] However, since there is an original allocation of rights, parental rights must be attained by transfer of some sort. A stranger—independent of a parent's abandonment of his parental rights or independent of a parent's invitation—could not claim anything more than extralegal, emotional devotion simply by exerting influence on a child.[191]

This conceptual framework for understanding parental rights explains why these rights are eminently amenable to state regulation, and also provides some guidance as to the limits of state regulation: Parental expressive rights are circumscribed by and balanced against societal interests in children. The Supreme Court has held that the inviolability of a "parent's claim to control of the child"[192] ends when the existence or essential welfare of a child is imperiled, according to general societal standards.[193] In *Prince*, the Court explained that in

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189 The authorial parent approach may help to resolve the current confusion in lower courts about what rights functional (nonbiological) parents have to the biological children of their former nonspousal partners. Compare In re Custody of H.S.K.-K., 533 N.W.2d 419, 436 (Wis. 1995) (affirming equitable powers of court to award visitation rights to lesbian partner of biological mother if parent-like relationship with child could be proven), with Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (refusing to award custody to lesbian partner of biological mother based on functional definition of parenthood). In copyright disputes, it is "only where [the] dominant author intends to be sharing authorship that joint authorship will result." Fisher v. Klein, 16 U.S.P.Q.2d (BNA) 1795, 1798 (S.D.N.Y. 1990).

190 Note that children might be thought of as "joint works," in copyright parlance. "A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (2000). In coauthorship disputes, federal courts have relied on two criteria to determine whether a claimant is indeed a coauthor entitled to some portion of the copyright. The courts look for both substantial contribution and intent to coauthor. See Thompson v. Larson, 147 F.3d 195 (2d Cir. 1998) (holding that dramaturg's contributions to musical Rent did not constitute coauthorship, which requires that both contributions be copyrightable in their own right and that authors had intent of coauthorship status at creation). Determining intent is often the trickier task. The best objective manifestation of shared intent is obviously a contract stating whether the parties intend to be coauthors. See Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 1999) (holding that Islamic consultant was not joint author of movie "Malcolm X"). In the parental rights context, legal marriage or adoption might serve as suitable proxies for the contract. But of course, where there is no such factor from which to presume intent, lower courts will need to make fact-intensive inquiries. See id.

191 See Childress v. Taylor, 945 F.2d 500, 504 (2d Cir. 1991) (distinguishing "true collaborators in the creative process" from those who simply "render[ ] some form of assistance" and holding that only former are coauthors).

192 Prince v. Massachusetts, 321 U.S. 158, 169 (1944).

193 See id. at 168 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It

order to "secure" the societal interest in children, the state could use a "broad range" of regulations to limit parental discretion that might "imped[e]" this goal.[194] It was of the greatest imperative that "children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[195] The Court explicitly recognized "[t]he parent's conflict with the state over control of the child and his training."[196] The Court also noted that the purer the expressive interest in parenting, as with a parent's determination of her children's religious orientation, the more cautious the Court needed to be in allowing state interference.[197]

The authorial parent paradigm explains why government may constitutionally regulate vaccinations,[198] medical care, education, etc. Insofar as they may impinge on parents' expressive parental rights, such regulations nevertheless may be constitutional if necessary to achieve the compelling state interest of a functioning citizenry. For example, while a would-be parent has the right to procreate, the government may limit his choice of partners by prohibiting incest where pairings of recessive DNA are likely to yield impaired children who can never grow into fully functional citizens.[199] A parent may have the right to determine whom his child spends time with, but this right

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may secure this against impeding restraints and dangers within a broad range of selection.").

194 Id.

195 Id. at 165.

196 Id.

197 Id.

198 The Court writes:

> [T]he rights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways . . . . Thus, [a parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

Id. at 166-67 (citations omitted).

199 See Harry D. Krause et al., Family Law: Cases, Comments and Questions 77 (4th ed. 1998) ("All fifty states and the District of Columbia prohibit marriages between parent and child, siblings, aunt and nephew, and uncle and niece. Nearly thirty states ban first cousin marriage."). Although fear of genetic problems from incestuous unions seems to be the primary motivation behind modern incest laws, there are of course many justifications for the incest taboo. Margaret Mead argues, for example, that freedom from sexual entanglements in the close family circle enable children to develop affectionate bonds. See, e.g., Margaret Mead, Incest, in 7 Int'l Encyclopedia of Soc. Sci. 115-22 (David L. Sills ed., 1968).

is limited by the state's determination that a child who is never exposed to a range of relationships and people will become socially stunted and incapable of any degree of self-determination.[200]

Regulations more broadly curtailing essentially expressive aspects of parental rights are more suspect (as content- or viewpoint-based regulations) and should be subjected to greater scrutiny. A governmental regulation requiring all children to learn English might be justified as necessary to the ultimate purpose of helping all citizens to functionally participate in society. But a governmental regulation prohibiting children from learning any language other than English, such as the one in *Meyer*,[201] or compelling parents to teach their children about abstinence, would likely go too far.[202]

Courts and agencies mistakenly may understand the "best interest of the child" standard to mean that they have the discretion to promote what, in their opinion, is "best" for a given child. In fact, as *Troxel* suggests, only the converse is constitutional. Court and agency interference with parenting is constitutional only when they seek to insure that a baseline of the child's needs has been met.[203] The authorial parent paradigm explains the origins of this deference to parental prerogatives, and makes the deference explicit. This model presents a First Amendment alternative to substantive due process—and its attendant problems[204]—as the grounding of parental rights.

CONCLUSION

Structural parallels can be made between American parental rights doctrine and copyright doctrine. Both sets of rights come into

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200 Such arguments, often relying on social and psychological research, have been made about various relationships. E.g., Cooper v. Cooper, 491 A.2d 606, 621 (N.J. 1984) (Schreiber, J., concurring) (father-son relationship); Albright v. State ex rel. Fetters, 421 A.2d 157, 160 (Pa. 1980) (sibling relationship).

201 Meyer v. Nebraska, 262 U.S. 390, 96-97 (1923).

202 Indeed, one may conceive that there has been a sort of "taking" at the point that a regulation constitutes a warping of the fundamental expressive nature of parental rights. Since the Constitution requires just compensation for takings, including takings of intellectual property, and since parental rights are invaluable, one might conclude that the Constitution forbids governmental takings of parental rights. See generally Rochelle C. Dreyfuss, IP at War: Private Rights vs. the Public Interest, Supplement to Address at 2002 Meeting of the Intellectual Property Law Section of the New York State Bar Association (discussing United States treatment of intellectual property right as property right requiring compensation in event of taking) (on file with *New York University Law Review*). This explains why the government may only procure parental rights when parents give their rights up, even though it has plenty of room to regulate child welfare. For a discussion on whether government could prospectively eliminate parental rights, see supra note 8.

203 Troxel v. Granville, 530 U.S. 57, 67 (2000).

204 See supra Part I.

existence as a reward for expressive activity deemed socially useful. Without disputing that there are many other lenses through which to view parenting, this Note argues that the expressive aspect of parenting is one appropriate constitutional basis for parental rights. Parental rights should be reconceived as intellectual property rights vis-à-vis a child—rights whose content is limited by state interests in the growth of children into functioning citizens. Conceptualizing parental rights in this fashion is consistent with parental rights precedent.

This Note has only begun the work of fleshing out the authorial parent paradigm and exploring its implications. Even a more complete development of the model ultimately would not make easy the difficult decisions judges must make in parental rights cases. However, conceiving of parents as authors contributes by providing a familiar framework—free from the difficulties attending substantive due process—for making those decisions. Rooting parental rights in the First Amendment should alleviate some of the reservations the Supreme Court has about taking parental rights cases, and allow it to make decisions that provide better guidance.