"PARENT" IS A VERB:
ALLOCATING FAMILIAL RIGHTS AND RESPONSIBILITIES

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I. INTRODUCTION

Obergefell v. Hodges highlights two contrasting views of family. The majority opinion focuses on self-definition; the dissent on procreation.[1] Writing for the majority, Justice Kennedy stressed personal choice, noting that "choices about marriage shape an individual's destiny."[2] He quoted the Supreme Judicial Court of Massachusetts's poetic assertion that "marriage fulfills yearnings for security, safe haven, and connection that expresses our common humanity . . . the decision whether and whom to marry is among life's momentous acts of self-definition."[3]

Chief Justice Roberts viewed marriage differently. He saw it as a solution to a biological imperative.[4] In his dissent, he argued that marriage naturally evolved in response to a fundamental social need to provide children with two parents who are dedicated to raising them together in an enduring, stable partnership.[5] In support, he invoked Cicero: "For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next,

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[1] *Compare* Obergefell v. Hodges, 576 U.S. 644, 667 (2015) (explaining that marriage "dignifies couples who 'wish to define themselves by their commitment to each other'," (quoting United States. v. Windsor 570 U.S. 744, 766)), *with id.* at 689 (explaining marriage exits to "ensur[e] that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship").

[2] *Obergefell*, 576 U.S. at 666.

[3] *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

[4] *Id.* at 689 ("[Marriage] arose in the nature of things to meet a vital need.").

[5] *Id*.

that between parents and children; then we find one home, with everything in common."[6]

Both perspectives are overly idealistic. People marry for all sorts of prosaic reasons. Nearly two-thirds of married or co-habitating adults cite companionship as their primary motivation, while one in ten reference convenience,[7] and less than a third mention children.[8] The reality of marriage often has little to do with either self-definition or supporting procreation.

Still, *Obergefell*'s competing interpretations of family do focus squarely on children's welfare. The Court held that marriage protects children and their families, while simultaneously deriving its significance from "the related rights of childrearing, procreation, and education."[9] Thus, marriage creates a permanent, stable foundation crucial for the welfare of children.[10] But Chief Justice Robert's dissent framed marriage more pessimistically. Quoting Political Scientist James Q. Wilson, it called marriage "a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."[11] Whether protecting children is what provides meaning in a marriage, or marriage is the solution for the challenge of protecting children, the majority opinion and Robert's dissent in *Obergefell* both agree that children and marriage are inextricably linked.

However, public opinion diverges significantly from both views in *Obergefell*. Over 70% of Americans accept unmarried parents raising children together.[12] Even more approve of single parents raising children.[13] Only a quarter believe marriage is necessary for a fulfilling life,[14] and two-thirds are either pessimistic or indifferent about the institution of marriage.[15] And just as both sides in *Obergefell* ignored the realities of marriage, so too they ignored the realities of today's families. Contemporary family structures have shifted dramatically over the last decades. In 1970, two-thirds of adults under fifty lived with a spouse and a child or children.

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[6] *Id*. (Roberts, C.J., dissenting) (quoting M. TULLIUS CICERO, DE OFFICIIS 1.54. (W. Miller, transl. 1913) (internal quotation marks omitted)).
[7] *See* JULIANA MENASCE HOROWITZ, NIKKI GRAF, & GRETCHEN LIVINGSTON, MARRIAGE AND COHABITATION IN THE U.S. 31 (Pew Rsch. Ctr. 2019).
[8] *Id*.
[9] Obergefell v. Hodges, 576 U.S. 644, 668 (2015).
[10] *Id*.
[11] *Id*. at 690 (Roberts, C.J., dissenting).
[12] Kim Parker & Rachel Minkin, *Public Has Mixed Views on the Modern American Family* 17, PEW RSCH. CTR. (Sept. 14, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/ST_2023.09.14_Modern-Family_Report.pdf.
[13] *Id*.
[14] *Id*. at 32.
[15] *Id*. at 10.

Today, just over a third do.[16] Nearly a quarter of American families now consist of children with single or unmarried parents.[17] And about 2.3 million children in the United States are being raised by adults who are not their legal parents, primarily by grandparents, other relatives, friends, or foster parents.[18]

The Supreme Court has yet to fully address these evolving family dynamics. The concern in *Obergefell*—that having unmarried same-sex parents "harm[s] and humiliate[s]" children because they perceive their families as "somehow lesser"[19]— applies equally well to all the various non-traditional family environments. Defining the legal role and responsibilities of adults who parent, and how or whether that connects to marriage or family, remain significant challenges. Historically, these are challenges the Court has primarily (though not exclusively) left to the States.[20]

This Note examines whether we should distinguish parents from other custodial figures. It argues that simple divisions among parenting types (e.g., legal, de facto, third party) are inadequate. Courts are increasingly recognizing complex familial structures. As a result, the question of whether nontraditional parental custodians can be legal parents is insufficient,[21] largely because it does not reflect the varied structures of contemporary families.

For over a century, the Supreme Court has recognized parents' right to raise children as a fundamental liberty interest under the Fourteenth Amendment.[22] It determined that this interest derives from "the historic . . . sanctity . . . traditionally accorded to the relationships that develop within

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[16] Caroline Aragão et al., *The Modern American Family: Key Trends in Marriage and Family Life*, PEW RSCH. CTR. Sept. 14, 2023), https://www.pewresearch.org/social-trends/2023/09/14/the-modern-american-family/.
[17] *Id*.
[18] Laura Radel et al., *Children Living Apart from Their Parents: Highlights from the National Survey of Children in Nonparental Care*, U.S. DEP'T HEALTH & HUMAN SERV., (May 2016), https://www.aspe.hhs.gov/sites/default/files/migrated_legacy_files/146232/NSCNC.pdf.
[19] *Obergefell*, 576 U.S. 644, 668 (2015) ("Without the recognition, stability, and predictability that marriage offers . . . children suffer the stigma of knowing that their families are somehow lesser.").
[20] Haaland v. Brackeen, 599 U.S. 255, 276-77 (2023) ("[R]esponsibility for regulating marriage and child custody remains primarily with the States"); *see also* Sosna v. Iowa, 419 U.S. 393, 404 (1975); Moore v Sims, 442 U.S. 415, 435 (1979)); Troxel v. Granville 530 U.S. 57, 91-93 (2000) (Scalia, J., dissenting).
[21] C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (holding that de facto parents can be considered legal parents); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (same); Conover v. Conover, 141 A.3d 31 (Md. 2016) (same); *but see* Jones v. Barlow, 154 P.3d 808 (Utah 2007) (rejecting the idea of de facto parents); Stadter v. Siperko, 661 S.E.2d 494 (Va. Ct. App. 2008) (same); White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (same).
[22] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

the unitary family."[23] But recent shifts in its approach to unenumerated rights, as well as to unconventional state-led parenting decisions, challenge these constitutional protections.[24] Does the Fourteenth Amendment still protect parental rights? Do we need it to?

This Note proposes an alternative approach for courts, one that sidesteps recent judicial challenges to unenumerated liberty interests. Instead of viewing parental powers, prerogatives, and obligations as a unified bundle held by two parents in the unitary family, it suggests disaggregating them. These rights and responsibilities could then be distributed individually to relevant persons occupying different parenting roles in a child's life.[25] Part II contrasts federally recognized parenting types with state approaches. Part III outlines a state law-based method to understanding parenting. Part IV discusses the advantages and potential counterarguments to this approach. Part V concludes by highlighting the benefits of a disaggregated and distributed approach to parental rights and responsibilities.

II. PARENTS AND THEIR UNENUMERATED RIGHTS

In 1972, the Supreme Court identified three reasons why familial bonds matter both personally and for society at large: everyday familial interactions create deep emotional connections; families fundamentally shape children's values and morality; and a family's "blood relationship[s]."[26] While the Court later clarified that blood bonds alone do not determine parental rights,[27] its basic conception of family has evolved

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[23] Michael H. v. Gerald D., 491 U.S. 110, 123-34 (1989) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition," (quoting Moore v. East Cleveland, 431 U.S. 494, 530 (1977))).

[24] *Troxel*, 530 U.S. at 80; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 333 (2022); Dep't of State v. Muñoz, 602 U.S. 899 (2024) (quoting Washington v. Glucksberg, 521 U.S. 702, 702 (1997)).

[25] Lehr v. Robinson, 463 U.S. 248, 268 (1983) (holding that states can assign parents different legal rights if they have established differing "custodial, personal, or financial relationship[s]" with the child); *see also* Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & LAW 505, 516 (1998); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 312 (2007); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 439 (2008).

[26] Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972).

[27] Lehr v. Robinson, 463 U.S. 248, 267-68 (1983) ("[I]f one parent has an established custodial relationship with the child and the other parent . . . [does not], the Equal Protection Clause does not prevent a State from according the two parents' different legal rights."); s*ee also* Fiallo v. Bell, 430 U.S. 787 (1977) (holding that biological fathers of children born out of wedlock do not *eo ipso* have protected parental rights); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (same); Caban v. Mohammed, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."); *In re* A.L., No. E083244, 2024 Cal.

little over the ensuing half-century.[28] It still cleaves mainly to the traditional view of family comprising the child and two co-parents.

For example, shortly after the Court agreed that genetics do not determine parental rights, it rejected a child's request to recognize both her biological father and her stepfather as her parents. It did so because "the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[29] The Court held and continues to assume that a child can have no more than two parents, even as it recognizes that lower courts no longer fully support that view.[30]

Lower courts have recognized that multiple important and nurturing developmental relationships can support the "best interest of the child."[31,32] In doing so, they have acknowledged various parenting roles beyond traditional biological, adoptive, or foster relationships. These additional parenting types include *intended*, *common-law*, and *by estoppel*, as well as *de facto*, *psychological*, and *third-party*. The first three categories slightly extend the traditional notion of family, while the latter three reflect non-traditional family structures.

Intended parents are those who have agreed to permanent parenting rights and responsibilities. This designation applies primarily in the context of assisted reproduction.[33] *Common-law* parents provide "affection and nurturance on a continuing basis" to the child.[34] They have a "wanted child" relationship with the child, and their community recognizes them as the parents.[35] An unmarried couple raising a child conceived by artificial insemination are common-law parents.[36] *Parents by estoppel* act as parents and present themselves as such, even though they are not the biological or

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App. Unpub. LEXIS 7055, at *36 (Nov. 7, 2024) (noting that "mere" biological fathers are not "presumed" fathers).

[28] *See* Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1486 (2014).

[29] Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).

[30] United States v. Henning, 344 U.S. 66, 77-78 (1952) (holding that it would "accept" lower courts' determinations of "a continuing parental relationship" between a mother and her foster-parented child, even though that "ordinarily . . . the foster parent bears the parental relationship when the natural parent has ceased to be such in truth and fact"); *see also Michael H*., 491 U.S. at 130 (holding that "it is a question of legislative policy and not constitutional law" for states to determine parental status).

[31] Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. REV. 8, 2347-2359 (2017).

[32] Reno v. Flores, 507 U.S. 292, 303-304 (1993). (The Supreme Court has held that "best interests of the child" is the appropriate criterion for settling custody disputes.); *see also* Santosky v. Kramer, 455 U.S. 745 *passim* (1982); Abbott v. Abbott, 560 U.S. 1, 15 (2010)).

[33] *See* Johnson v. Calvert, 851 P.2d 776, 782-83 (Cal. 1993) *abrogated by* Chatterjee v. King, 280 P.3d 283; *In re* Parentage of L.B., 122 P.3d 161, 169 (Wash. 2005).

[34] 1 Child Custody and Visitation § 1.03 (2024).

[35] *Id.*

[36] *See In re* T.P.S., 978 N.E.2d 1070 (Ill. App. Ct. 2012).

adoptive parents. This category includes persons who believe the child they are raising is biologically theirs.[37]

Admittedly, these categories do not have sharp boundaries. They reflect judicial attempts to maintain a traditional family structure despite atypical circumstances. Importantly, parents who are intended, common law, or parents by estoppel are on equal legal footing with biological or adoptive parents.[38]

In contrast, *de facto*, *psychological*, and *third-party parents* are legally subordinate to legal parents. *De facto* parenthood requires the legal parent's consent.[39] It involves living with the child, assuming all parental obligations without expectation of financial compensation, and forming a parent-child bond.[40] *Psychological* parents meet the child's psychosocial needs through daily interaction, companionship, and support, resulting in the deep emotional connection normally found in families.[41] It too requires consent of the legal parent.[42] *Third-party* parents, like grandparents or other relatives, have accepted significant caregiving responsibilities. But they lack permission from legal parents to form a parental-type bond with the child. Third-party parentage generally requires exceptional or extraordinary circumstances in which legal parental custody runs counter to the child's best interests.[43]

In each of these categories, the "parents" are making decisions regarding the child's welfare largely as they see fit. The Supreme Court recognized the parental right "to establish a home and bring up children" as an unenumerated liberty interest established by the Fourteenth Amendment more than a century ago.[44] It reaffirmed this right in 1925, 1944, 1972, 1978, 1979, 1982, and 1997.[45] It reaffirmed it again most recently in 2000 when the Court noted that "the interest of parents in the care, custody, and control

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[37] Palmer v. Lambert-Shaw, 2023 D.C. Super. LEXIS 40 at *20-21 (D.C. 2023).
[38] *Id*. at *10-14.
[39] Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513, 515 (2024) (discussing RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(a)(3) (AM. L. INST., Revised Tentative Draft No. 4, 2022)).
[40] *In re* Parentage of Scarlett Z.-D., 28 N.E.3d 776, 789 (Ill. 2015) (referencing Holtzman v. Knott (*In re* H.S.H-K), 533 N.W.2d 419, 435-36 (Wis. 1995)); s*ee also* D.C. CODE § 16-831.01 (2024); DEL. CODE ANN tit. 13, § 8-201(C) (2024); VT. STAT. tit. 15C, § 501 (2024).
[41] *In re* Parentage of L.B., 122 P.3d 161, 167-69 (Wash. 2005).
[42] JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973).
[43] Basciano v. Foster, 284 A.3d 1116, 1138 (Md. App. 2022) (referencing *In re* Adoption/Guardianship of Rashawn H. 937 A.2d 177, 190 (Md. 2007)); s*ee also In re* Nicholas H., 46 P.3d 932 (Cal. 2002) (awarding custody of a child to a man who was neither the biological father nor married to his mother).
[44] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[45] Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Prince v. Massachusetts, 321 U.S. 158, 188 (1944); Stanley v. Illinois, 405 U.S. 645,651 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J.R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 745 (1982); Washington v. Glucksberg, 521 U.S. 702, 702 (1997).

of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[46]

But, despite these reaffirmations, Justice Thomas has hinted that the Constitution might not protect unenumerated parental rights.[47] Recently, and in close stride with Justice Thomas, the Court emphasized that the Constitution only protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[48] Even though multi-generational and non-traditional families were common in early America,[49] many contemporary living arrangements do lack obvious deep roots in the nation's history. These include the same-sex marriages that *Obergefell* recognized.[50] If parental rights are not protected by the Constitution, then non-traditional parenting figures—even if legally recognized—might not have the right to parent the child under their care.

Given these challenges, courts should adopt a different approach to parenting. This approach would sidestep judicial conversations challenging parents' unenumerated liberty interests. The Supreme Court has maintained that domestic relations fall within the "virtually exclusive province of the States."[51] This assignment dates to the 1850s, when the Court noted that states alone governed divorce.[52] More to the point, in 1890, the Court held that adjudicating parent-child relationships belongs exclusively to states as

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[46] Troxel v. Granville 530 U.S. 57, 65 (2000).
[47] *Id*. at 80 (Thomas, J., concurring); *see also* Dobbs v. Jackson Women's Health Org. 597 U.S. 215, 333 (2022) (Thomas, J., concurring).
[48] Dep't of State v. Muñoz, 602 U.S. 899, 910 (2024) (quoting *Glucksberg*, 521 U.S. at 720 (internal quotation marks omitted)).
[49] John Demos, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY (1970) (analyzing in detail everyday life in colonial United States); Steven Mintz & Susan Kellogg, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988) (examining the changing definition of "family" in the United States from early settlers to the 1980's).
[50] Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing that same-sex couples have the right to marry).
[51] Sosna v. Iowa, 419 U.S. 393, 404 (1975). Exceptions include parents under protection (18 U.S.C. § 3524) and federal court intervention in Indigenous courts in cases involving child custody under certain circumstances (25 U.S.C. § 1914).
[52] Barber v. Barber, 62 U.S. 582 (1858); *see also* Simms v. Simms, 175 U.S. 162, 167 (1899) (noting that all domestic relations belong to the laws of the States); Pennoyer v. Neff, 95 U.S. 714, 734-735 (1878) (affirming that States have the absolute right to prescribe the conditions for marriage and its dissolution). Appeals from the Supreme Court of the Philippines provide an exception to these rulings in cases that involve more than $25,000, per the PHILIPPINE ORGANIC ACT, ch. 1369, § 10; 32 STAT. 691, 695 (1902). De La Rama v. De La Rama, 201 U.S. 303, 309 (1906).

well.[53] Later Court intervention has focused mostly on ensuring fairness in state proceedings.[54]

Importantly, despite the Supreme Court's insistence on tying its understanding of family to "history and tradition,"[55] the Court has also acknowledged that the parenting landscape has changed. It conceded that "the nationwide enactment" of what it calls "nonparental visitation statutes" is likely due (at least partially) to "States' recognition of . . . the[] changing realities of the American family."[56] It further conceded that "because grandparents and other relatives undertake duties of a parental nature in many households," states are promoting child welfare when they protect those "third-party" relationships.[57]

But at the same time, the Court opined that recognizing "third-party" parental rights comes with "an obvious cost," for it "can . . . burden . . . the traditional parent-child relationship."[58] Thus far, the Court continues to "presume[e] that fit parents act in the best interest of" the child without addressing how or whether the Fourteenth Amendment might protect third-party caregivers who are also effectively functioning as parents.[59] It has continued to maintain that states are "eminently more suited" to "handl[e] issues that arise out of conflicts over . . . child custody"[60] because states have developed "special proficiency . . . over the past century and a half in handling [such] issues."[61]

Because the Supreme Court explicitly gives states control of domestic relations, perhaps it is less essential that it recognize third-party parenting as an unenumerated constitutional right, or that it recognize any parenting

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[53] *In re* Burrus, 136 U.S. 586, 593-94 (1890); *see also* Moore v. Sims, 442 U.S. 415 (1979) (holding that federal district courts should not exercise jurisdiction over a suit challenging the constitutionality of a state statute concerning the parent-child relationship absent extraordinary circumstances); Boggs v. Boggs, 520 U.S. 833, 848 (1997) (reiterating that adjudicating parent and child relationships belongs to the states).

[54] M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that the Fourteenth Amendment prevents states from denying parental rights based on the ability to pay for court transcription costs); Santosky v. Kramer, 455 U.S. 745 (1982) (holding that due process requires clear and convincing evidence to terminate parental rights).

[55] Michael H. v. Gerald D., 491 U.S. 110, 123 (1989); *see also* Stanley v. Illinois, 405 U.S. 645,651 (1972); Quilloin v. Walcott, 434 U.S. 246, 254-55 (1978); Caban v. Mohammed, 441 U.S. 380, 389 (1979); Lehr v. Robinson, 463, U.S. 248, 361 (1983).

[56] Troxel v. Granville 530 U.S. 57, 64 (2000).

[57] *Id.*

[58] *Id*. at 65.

[59] *Id.* at 68 (denying grandparent visitation in line with the mother's preference); Smith v. Org. of Foster Families for Equal & Reform, 431 U.S. 816 (1977) (declining to determine whether foster parents had a liberty interest). The Court has not recognized other third-party caregivers as parents.

[60] Amkenbrandt v. Richards, 504 U.S. 689, 704 (1992).

[61] *Id.*; *see also* Santosky v. Kramer, 455 U.S. 745, 771 (1982) (Rhenquist, J., dissenting) ("[L]eaving the States free to experiment with various remedies has produced novel approaches and promising progress.")

relationship as protected. In other words, if parenting is no longer protected, then there likely will be little impact on how particular parenting decisions are ultimately adjudicated under the "best interest of the child" standard.

III. THE PROVINCE OF THE STATES

The various parenting types described above belie the complex family structures of contemporary life. These divisions thus may not be sustainable. As Justice Kennedy noted in his Troxel dissent, "the conventional nuclear family . . . is simply not the structure or prevailing condition in many households. . . . [F]or many[,] . . . a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood."[62]

A. Quasi-Parents

Third-party adults often assume parenting responsibilities for children who are not biologically related in the United States.[63] These parental relationships are common in Black, Latino, Asian American, Indigenous, and rural communities, which are far more likely to include multi-generational households.[64] Currently, six million children in the United States live with grandparents.[65] And, in some areas of the country, over 40% of households are multi-generational.[66]

Solangel Maldonado defines these extended familial relations as *quasi-parental*.[67] Quasi-parents assume "responsibilities that [lead] . . . to a significant emotional bond with the child," without expectation of payment, either with the legal parent's permission or due to the parent's inability or unwillingness to meet their responsibilities.[68] But quasi-parents need not live with the child nor provide the same or more care than the legal parent.[69] They engage in some of the tasks of parenthood but do not perform them

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[62] Troxel v. Granville, 530 U.S. 57, 98 (Kennedy, J., dissenting); *see also* Katharine T. Bartlett*, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879-83 (1984).
[63] Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 869 (2003).
[64] *See, e.g.*, *The Return of the Multi-Generational Family Household*, PEW RSCH. CTR. (Mar. 18, 2010), https://www.pewresearch.org/social-trends/2010/03/18/the-return-of-the-multi-generational-family-household/.
[65] Chanell Washington et al., *In 2020, 7.2% of U.S. Family Households Were Multigenerational*, U.S. CENSUS BUREAU, (June 13, 2023). https://www.census.gov/library/stories/2023/06/several-generations-under-one-roof.html.
[66] *Id.*
[67] Maldonado, *supra* note 63, at 912.
[68] *Id.*
[69] *Id.*

all. Such tasks may include preparing meals, supervising peer relationships, supporting extracurricular activities, or correcting the child's behavior.[70]

Several states have implicitly recognized quasi-parenting through statutes or case law. Colorado allows nonparents to request allocation of some parental responsibilities after physically taking care of the child for six months or longer.[71] South Dakota permits third parties to petition the court for visitation rights if they have "otherwise formed a significant and substantial relationship" with the child.[72] And the North Carolina Supreme Court recognized that to serve the child's best interests, parents may need to transfer custody of the child to others temporarily.[73] Such transfers may be appropriate during military deployment, illness, or while seeking work, for example.[74]

In contrast to the Supreme Court, the California Court of Appeals has held that a child can in fact have more than one father, concluding that "where a child truly has three parents, . . . depriving her of one of them would be detrimental to her."[75] California, Connecticut, Maine, and Vermont also allow for more than two persons to be parents to a single child.[76] Taken together, these state positions imply that parenting need not be an all-or-nothing legal designation. Sometimes parenting, or quasi-parenting, is distributed over multiple people, who accomplish all the parenting duties collectively.

B. Unbundling Parental Rights and Responsibilities

This notion of distributed parenting also dovetails with state statutory codes that independently list the various parental duties. Such examples include financial support, education, medical decision-making, travel

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[70] *Id.* at 913.
[71] COLO. REV. STAT. § 14-10-123(1)(c) (2024).
[72] S.D. CODIFIED LAWS § 25-5-29 (2024).
[73] Price v. Howard, 484 S.E.2d 528, 537 (N.C. 1997).
[74] *Id.*
[75] C.A. v. C.P., 240 Cal. Rptr. 3d 38, 40 (Ct. App. 2018); *see also* Smith v. Cole, 553 So. 2d 847 (La. 1989) (holding that a biological father must provide child support even though the child was born when he was separated from the mother, and the husband of the child's mother was legally the child's parent); Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. 2007) (holding that the biological father has parental rights, even though the mother's partner legally adopted the children).
[76] CAL. FAM. CODE § 7612(c) (2024); CAL. FAM. CODE § 8617 (2024); CONN. GEN. STAT. § 46B-475(c) (2024); ME. STAT. tit. 19-A, § 1853(2) (2024); VT. STAT. ANN. tit. 15C, § 206(b) (2024); *see also* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 40-42 (2008) (arguing that family law can and should accommodate multi-parent families); Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2561 n.3 (2022) (analyzing cases concerning multi-parent families).

oversight, inheritance, social security survival benefits, child disability benefits, and visitation rights, to name only some.[77]

State courts could also unbundle their sets of parental rights and responsibilities. They could distribute them individually and separately to the relevant persons occupying different parental roles in a child's life. The Supreme Court has recognized that states can assign different legal rights to the parents of a child.[78] This is permissible if the parents have established different "custodial, personal, or financial relationship[s]" with the child.[79]

Biological parents in divorce can be given various exclusive, joint, and independent rights. For example, a Texas family court found such a separation of rights was in the child's best interest.[80] While both parents shared some rights and duties equally, it gave the mother a set of exclusive rights, subject to certain limitations. These included choosing the child's home, directing his education, and applying for and holding his passport. She also had the joint right to consent to medical treatment and the independent right to represent the child in legal proceedings.[81] The father had no right to choose the home or direct education. He had to surrender any passport in child's name and could not travel internationally with child. However, he had the joint right to consent to medical treatment and the same independent right to represent the child in legal proceedings.[82]

Similarly, Vermont courts can make "split custody" awards. These give some decision-making authority to the noncustodial parent.[83] The Vermont Supreme Court has upheld awarding physical childrearing responsibilities to the mother but legal, medical, and educational decision-making to the father.[84] These sorts of split custody arrangements can also include persons who are not legal parents. And California statutory code allows for "permanent custody plans."[85] These agreements let guardians provide

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[77] For example, 42 U.S.C. § 402(d) (2024) defines a child's insurance benefits; 42 U.S.C. § 1381 et seq. (2024) provides benefits for disabled children from low-income families. And in Kentucky, KY. REV. STAT. ANN. § 159.010 (2024) delineates education requirements; KY. REV. STAT. ANN. § 214.185 (2024) defines medical decision-making; KY. REV. STAT. ANN. § 405.021 (2024) provides for grandparent visitation; KY. REV. STAT. ANN. § 625.090 (2024); and KY. REV. STAT. ANN. ch. 199 (2024) discuss termination of parental rights; KY. REV. STAT. ANN. ch. 387 (2024) outlines the process for appointing third party guardians.
[78] Lehr v. Robinson, 463 U.S. 248, 261 (1983).
[79] *Id.* at 267-68.
[80] *In re* Okolo*,* 2017 Tex. Dist. LEXIS 24837, *3.
[81] *Id*. at *9-13.
[82] *Id.* at *13.
[83] Lee v. Ogilbee, 198 A.3d 1277, 1285 (Vt. 2018).
[84] Shea v. Metcalf, 712 A.2d 887, 890-91 (Vt. 1998); *see also* Chase v. Bowen 945 A.2d 901 (Vt. 2008) (upholding the award of sole physical custody to the mother and sole legal responsibility to the father).
[85] CAL. WELF. & INST. CODE § 366.25(a)(3) (2024).

continuity of care for a child while also keeping biological parents engaged in the child's life.[86]

All these approaches mirror family law's recent "functional turn."[87] This evolution in legal thinking has led authorities to move beyond traditional requirements like marriage or blood bonds and to recognize new "frameworks" for familial bonds that reflect "actual family relationships."[88] Focusing on parenting acts rather than "traditional" relationships provides a more nuanced framework for legal decision-making.[89]

The unbundling approach adumbrated here does not fully resolve the legal status of non-traditional parents, quasi-parents, or third-party guardians as compared to biological or adoptive parents. But it does reduce the urgency for such clarification. It also sidesteps recent challenges to unenumerated liberty rights by basing parental rights in state law rather than constitutional interpretation. Consequently, this approach is better than current practices. It prioritizes the child's interests when allocating rights and responsibilities and considers caregiver relationships with each other secondarily. It also emphasizes the primary activities of parenting over more abstract and "poetic" family affiliations.

IV. CHALLENGES TO DISTRIBUTED PARENTAL RIGHTS

The legal acknowledgment of multiple caregivers better reflects modern family structures. It recognizes the diverse roles adults play in children's lives while also supporting non-traditional family arrangements. Nevertheless, this approach faces challenges. First, this approach may be unnecessary. Courts across the United States are continuing to expand constitutional definitions of parenthood.[90] Their increased focus on parenthood's social dimensions could also influence constitutional interpretation.[91] These actions alone might substitute for any legal framework for dividing parental rights and responsibilities.

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[86] *Id.*
[87] Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 319 (2020).
[88] *Id.*
[89] NeJaime, *supra* note 39, at 555.
[90] E.N. v. T.R., 255 A.3d 1 (Md. 2021) (holding that a third party can establish de facto parentage even with two legal parents so long as the legal parents' consent); Kinnett v. Kinnett, 366 So. 3d 25 (La. 2023) (holding that the Louisiana constitution provided no fundamental right for a biological father to parent a child whose mother was married and living with another man at the time of the child's birth); *see also* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 Colum. L. Rev. 319, 323 (2023).
[91] C.G. v. J. H., 193 A.3d 891 (Pa. 2018) (holding that a third party could establish standing as a parent, depending on the parties' intentions); Pitts v. Moore, 90 A.3d 1169 (Me. 2014) (holding that de facto parents can be awarded all the same rights as responsibilities as biological or adoptive parents); In the Int. of E.F.K., No. 01-24-00120-CV, 2024 Tex. App. LEXIS 4942 (Tex. App. July 16, 2024) (noting that while parental rights are

Yet, recent Supreme Court decisions do suggest increased scrutiny of unenumerated rights.[92] Given this, state-based systems for allocating rights and responsibilities could prove more resilient. They could also provide immediate and more flexible protection for diverse family structures.

In their recent analysis of all electronically recorded non-traditional parentage decisions from 1980 to 2021, Courtney Joslin and Douglas NeJaime found that most cases reflected families struggling to find the best way to care for their children, while simultaneously trying to cope with substance misuse, mental illness, physical disabilities, poverty, incarceration, or death.[93] These are not the "typical" custody disputes that arise post-dissolution, even for non-traditional families.[94]

Consider, for instance, *C.S. v. J.B.* There, the Pennsylvania Superior Court awarded shared custody to a mother and her daughter's paternal grandmother.[95] The daughter's twin brother had suffocated and died while in the mother's care.[96] The mother then pleaded guilty to involuntary manslaughter.[97] While incarcerated, the maternal and paternal grandparents shared custody of the daughter.[98] Upon her release from prison, the mother sued for primary physical custody.[99] She also asked for partial shared custody with the child's father and paternal grandparents as well.[100] After learning that the father was effectively unhoused after his own release from prison, the mother revised her custody petition.[101] She then requested weekend custody for the paternal grandparents.[102]

However, the daughter preferred shared custody between her paternal grandmother and biological mother.[103] The court noted that the daughter had adapted to many difficult circumstances. These included her twin's death, her youngest brother's adoption, her father's incarceration and drug misuse, her father's abusive relationship with her mother, her mother's series of unstable relationships with other men, and her father's thievery. She coped

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constitutional, they are not absolute and can be trumped by the best interest of the child); Conover v. Conover, 141 A.3d 31 (2016) (holding that de facto parents have the same standing as biological parents regarding custody); s*ee also* Joslin & NeJaime, *supra* note 90, at 330-362.

[92] *See* discussion *infra* Part III.

[93] Joslin & NeJaime, *supra* note 90, at 356-383.

[94] *Id.* at 370.

[95] C.S. v. J.B., No. 1534 WDA 2016, 2017 WL 1326513, at *5 (Pa. Super. Apr. 11, 2017).

[96] *Id.* at *1.

[97] *Id.*

[98] *Id.* at *2.

[99] *Id.*

[100] *Id.* *1.

[101] *C.S.*, 2017 WL 1326513, at *1.

[102] *Id.*

[103] *Id.* at *4.

due to her paternal grandmother's care.[104] The court also recognized that the daughter enjoyed time with her mother and other siblings.[105] Therefore, it affirmed shared custody between one grandparent and her mother, given the daughter's expressed preferences and the court's analysis of the best interest of the child.[106]

Sharing custody between two sets of grandparents and sharing custody between a grandparent and a mother are both creative, non-traditional solutions for parental oversight. Both decisions responded to a complex set of factors, each of which needed to be weighed against the others to discern the best solution for the immediate circumstances. This sort of flexible and imaginative decision-making suits courts closest to the facts. More importantly, the Supreme Court's lofty reflections on marriage and parental rights provide little practical guidance to lower courts facing a more complex reality. For these courts often must construct new family structures from whole cloth after the foundation for more conventional family relationships has completely disintegrated.

Nevertheless, some commentators have worried that shuttling a child among several recognized parents is not in the child's best interest.[107] This could be especially concerning if parents disagree among themselves on how to rear their child.[108] But we now know that this worry lacks empirical foundation.[109] Joslin and NeJaime's case analysis demonstrated that "speculative concerns about the effects of multi-parent recognition are either misplaced or overstated."[110] They underscored that courts have already been accommodating multi-parent families for quite some time.[111] Crucially, their research revealed that courts consistently prioritize maintaining children's existing living arrangements with their primary caregivers,[112] while simultaneously preserving relationships with biological or legal parents.[113] Joslin and NeJaime concluded that these decisions

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[104] *Id.* at *3.
[105] *Id.* at *4.
[106] *Id.* at *5.
[107] *See* Elizabeth A. Pfenson, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2023 (2013); *see also* Joslin & NeJaime, *supra* note 76, at 2562 (listing articles examining multi-parenthood since 2010).
[108] Joslin & NeJaime, *supra* note 76, at 2565 (referencing Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for A National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105, 121-22 (2021)).
[109] Joslin & NeJaime, *supra* note 90, at 319.
[110] Joslin & NeJaime, *supra* note 76, at 2566.
[111] *Id.* at 2565; *see also* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 495 (2014) ("It is increasingly the case that . . . nonbiological parents are treated as full and equal legal parents.").
[112] Joslin & NeJaime, *supra* note 90, at 328.
[113] *Id.* at 327.

"[made] children's lives more stable and secure, not less."[114] They urged that it is time to stop debating whether multiple parents should be legally recognized and instead focus on how best to implement such recognition.[115] This Note informs the latter concern.

Second, there is a risk this approach might lead to excessive court intervention in family decision-making. This overinvolvement could potentially diminish parental rights. Consider the worry expressed in *Hawkins v. Grese*.[116] There, the court feared that legally recognizing quasi-parenting relationships would open a "Pandora's box" of "unintended" and "profound consequences."[117] It surmised that it would effectively eliminate "the constitutional presumption of parental fitness" by a "death of a thousand cuts."[118] Biological and adoptive parents would fear that any "ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed anyone not related to . . . [the] child" could claim equal parental rights, just because they have somehow "bond[ed]" with the child.[119]

In response to these concerns, the court held that only biological procreation or legal adoption could determine parenthood.[120] Therefore, the former same-sex partner of a biological mother was not a parent because the partner had never formally adopted the child.[121] This was true even though the partners could not legally marry at the time of their relationship; the couple intentionally used artificial insemination to have a child together; and the partner raised the child together with the biological mother for nine years.[122]

Interestingly, the court used *Obergefell* to bolster its emphasis on marriage creating parental relationships.[123] But more notably, the court held that biological or adoptive parents' rights will outweigh the best interest of the child if the dispute is between a parent and a "third party," even if the third party has "a legitimate [caregiving] interest."[124]

This decision aligns with previous Supreme Court rulings. In *Reno v. Flores*, the Court held that that "the 'best interests of the child' is not the legal standard that governs [the exercise of] . . . custody: So long as certain minimum requirements of child care are met, the interests of the child may

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[114] *Id.* at 328.
[115] Joslin & NeJaime, *supra* note 76, at 2566.
[116] Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).
[117] *Id.* at 448.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 446.
[121] Hawkins, 809 S.E.2d at 448.
[122] *Id.* at 443.
[123] *Id.* at 448.
[124] *Id.* at 451.

be subordinated."[125] In a similar vein, in *H.L. v. Matheson*, the Court upheld Utah's law requiring doctors to notify the parents of unmarried minor girls seeking abortion over the girls' objections because it served "a significant state interest."[126]

In contrast to *Hawkins v. Greese*, *C.S. v. J.B.* pointed out that the mother never mentioned her child's best interests in her recitation of reasons for why she should receive custody.[127] She argued that she was the mother and that the child should be with her brothers and sisters.[128] She asserted that a child should be raised by a parent over a grandparent and that not moving back and forth between two homes is more stable.[129] She disregarded the child's expressed preference for dual custody, claiming that her daughter "would adapt because . . . [she] is so good at adapting to things."[130] Finally, she showed no "concern whatsoever" for how the child would be affected by losing the stable care of the only two consistent parental figures she had ever known.[131]

The mother appealed the shared custody decision, claiming the court should have presumed she was a fit parent whose decisions therefore would serve her daughter's best interests.[132] The court responded that "other factors which have a significant impact on the wellbeing of the child can justify a finding in favor of the non-parent, even though the parent has not been shown to have been unfit."[133] Unlike the ruling in *Hawkins v. Grese*, it concluded that "the best interest of the child trumps the biological parent's right to custody."[134]

Though *C.S. v. J.B* does not delineate the parental rights between the two named custodial parents, one can certainly envision that the rights might be neither equally distributed nor equally shared. One can easily understand why the grandmother might have exclusive rights to oversee the daughter's education, housing, travel, and social activities, with perhaps joint rights with the mother regarding medical care and legal affairs. One can also understand why this distribution could be in the best interest of the child (as well as perhaps the best interest of the mother).

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[125] Reno v. Flores, 507 U.S. 292, 304 (1993); *see also* Troxel v. Granville, 530 U.S. 57 (2000) (holding that parents can control whether the child interacts with grandparents); Quilloin v. Walcott, 434 U.S. 246 (1978) (holding that the best interest of the child is not the sole criterion for decisions when the child's interests conflict with the parents).
[126] H.L. v. Matheson, 450 U.S. 398, 411 (1981).
[127] C.S. v. J.B., No. 1534 WDA 2016, 2017 WL 1326513, *2 (Pa. Super. Apr. 11, 2017).
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at *3.
[133] C.S., 2017 WL1326513, at 5.
[134] *Id.*

Because courts can and do intervene in family matters, and because such matters are often complex, messy, substandard, and context-dependent, courts need nuanced guidelines. The unbundling approach argued for here offers just this sort of subtlety. Courts might still displace appropriate parental decisions under the guise of distributing rights. But clear statutory guidelines, coupled with data-driven analyses of what comprises a child's best interests, could mitigate risks of judicial overreach. Clinging to romantic visions of how families should be—instead of fully embracing how diverse contemporary family structures actually are—does not serve our nation's youth. Nor does it support those struggling to raise them, often in troubling circumstances.

V. CONCLUSION

Unbundling parental rights and responsibilities creates a more flexible and nuanced legal framework that recognizes the varied roles adults play in children's lives. This approach allows courts to adapt to changing family structures without having to define them or adjudicate their viability. Grounding parental rights in state statutes and prioritizing the child's best interests provide a pragmatic solution to evolving family dynamics and potential shifts in constitutional interpretation.

Concerns about judicial overreach and the diminishment of parental rights are valid but can be addressed through careful statutory construction and data-driven decision-making. Ultimately, the unbundling approach offers a promising path in an era of increasingly diverse family structures. It will ensure that the law can effectively protect and support a child's well-being, regardless of family configuration.