Functional Parents, Functional Constitutional Law

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Douglas NeJaime, *The Constitution of Parenthood*, 72 **Stan. L. Rev.** 261 (2020).

For most of us who are parents, being permanently excluded from our children's lives would be an unimaginable tragedy. Yet for non-biological parents—including many gay and lesbian parents—this outcome has long been a possibility. Because at least one member of a same-sex couple typically lacks a biological relationship to their children, the legal status of such functional, but non-biological, parents has historically often been uncertain. Even today, in some states, such parents can be deemed "legal strangers" to their children—no matter how long the parental relationship, or how much the parent and child desire to preserve it. In these circumstances, a finding of lack of parental status is the equivalent of a termination of parental rights—but without any required showing of parental deficiency, and indeed even in the face of substantial likely harm to the child.

While the stakes of such parentage rights cases are high—adjudicating rights "far more precious than any property right"—they have, unlike LGBT marriage rights, primarily been addressed outside of the constitutional domain. Even as LGBT advocates and scholars have quietly succeeded in transforming the family law landscape in many states with respect to non-biological parents, questions regarding the constitutional rights of such parents have remained mostly absent from constitutional debates about LGBT rights. Indeed, constitutional arguments have most often been raised in litigation by biological parents seeking to *oppose* the recognition of non-biological parents' rights. As such, despite the outpouring of constitutional scholarship on issues of marriage equality, constitutional law as a discipline has had relatively little to say on the issue of non-biological parents' rights.

In *The Constitution of Parenthood*, Douglas NeJaime takes up the work of making the case that the relationship of non-biological parents to their children ought to be afforded constitutional protection. As NeJaime notes, these constitutional arguments will not matter for all non-biological parents, some of whom already possess parental status under state family law. Thus, some non-biological parents will find relief in state family law doctrines such as equitable parenthood or, in the wake of marriage equality, the marital presumption. Others may be able to obtain a step- or second-parent adoption, affording full secure parental rights. But for those that fall outside of these family law protections—either because their state lacks them or because practical or financial considerations make them inaccessible—a backstop of constitutional protections remains vitally important.

As NeJaime observes, the idea of protecting parental bonds via substantive due process is hardly novel. Parental rights are among the oldest and most consistently affirmed substantive due process rights recognized by the Supreme Court, forming the foundation for modern substantive due process doctrine. Thus, the key question for non-biological parents is what defines the constitutional boundaries of who will be deemed a parent entitled to such protections. Is biology (or adoption) a necessary prerequisite to constitutional recognition as a parent, or is it functional parenthood that matters?

Through a careful and detailed analysis of varied threads of constitutional law doctrine, NeJaime makes the case that functional parenthood should indeed matter, and that biology or adoption is not the *sine qua non* of constitutionally protected parental relationships. As NeJaime points out, some of the earliest due process cases adjudicating parental rights in fact dealt with functional parents, such as extended relatives raising children. While the case law concerning the rights of biological fathers has been muddled and arguably inconsistent, it too has included an important functional component, requiring a level of functional parenting for protections to attach. *Obergefell v. Hodges* and *Pavan v. Smith* have directly recognized the rights of LGBT parents (albeit through the lens of marriage), despite recognition that such

parents may lack biological relationships to their children. Even cases that are often cited *against* functional parents' constitutional rights, such as the foster care case of *Smith v. OFFER*, are far more equivocal than they are remembered today, offering considerable support for the idea that functional characteristics matter in defining family.

NeJaime's analysis of the relevant considerations is comprehensive, and too detailed to fully encapsulate in a short review. But one important aspect of that analysis bears emphasis, as it arises not from existing constitutional law doctrine, but rather from the longstanding family law strategies that have *already* succeeded in shifting understandings of parentage toward functional criteria. As NeJaime observes, while such legislative and common law reforms have typically not rested explicitly on constitutional law (though they have sometimes been constitutionally inflected), they have shifted background understandings in ways that are important to the constitutional analysis. In short, widespread shifts in understandings of what a parent *is*—away from biology alone, and towards functional criteria—ought to inform our understandings of what parents qualify for constitutional protections, and the centrality (or lack thereof) of biology to that determination.

NeJaime also makes clear that he does not view the constitutional argument that he develops in *The Constitution of Parenthood* as superseding family law approaches to protecting functional non-biological parents' rights, but rather as complementing and integrating with them. As NeJaime observes, it is unrealistic to think that the Supreme Court will imminently take up the issue of non-biological parents' rights and issue a sweeping holding affording such parents protections. But the Supreme Court is hardly the only constitutional adjudicator that matters, and constitutional arguments can shape the terms of the debate, even outside of the courts themselves. Thus, NeJaime envisions such arguments playing out across a host of different contexts, including state and lower federal courts, state legislatures, and law reform organizations.

In a discipline with an often almost obsessive focus on the Supreme Court, we ought to take heed of the messier, more complicated model that NeJaime puts forward for constitutional transformation. The reality is that constitutional change often happens in precisely the way that NeJaime suggests: through incremental state and lower federal court decisions, constitutionally inflected legislative change, and gradual concomitant shifts in public perceptions of the content of equality and rights. This process is often iterative, self-referential, and non-linear, and yet may lead to profound shifts in on-the-ground constitutional meaning. As scholars (including NeJaime himself, as well as other scholars, like Reva Siegel, Robert Post, and Lani Guinier) have observed, this is a much more realistic model of how effective constitutional change happens than the Supreme Court-centric model that typically takes center stage. We miss much of what is important, both as scholars and as advocates, if our focus is only on the narrow slice of constitutional lawmaking that takes place at the United States Supreme Court.

Such a multi-faceted and multi-sited account of constitutional change is not only more realistic, it is also arguably in this case more just. Parental rights are critically important, but often implicate the rights of others in ways that do not lend themselves to the "all or nothing" approach to rights that too often pervades disputes over constitutional rights. As NeJaime observes, children may have important interests that come into play in disputes involving functional parents (both for and against functional parent recognition), and there may be countervailing group-based equality concerns (such as, for example, race or class concerns in the context of foster care parents whose claims might adversely implicate the rights of minority and poor parents). Thus, NeJaime expressly contemplates that case by case adjudication, and constitutionally inflected legislative reform, may have a major role to play in protecting functional parents' rights, permitting the type of weighing or balancing of individual circumstances that rarely is the province of United States Supreme Court decision-making.

In short, NeJaime offers a compelling case for the constitutional rights of non-biological functional parents. But both the genesis and the effectuation of this right that he envisions is far from a top-down, all or nothing constitutional rights affair. Rather, NeJaime takes seriously the insights of democratic constitutionalism (and its close cousins demosprudence and descriptive popular constitutionalism) to offer a much richer, messier account of why and how substantive due process ought to protect non-biological functional parents. His account is worth reading, both for its careful exposition of why we ought to constitutionally protect functional parents and for the roadmap it provides for

thinking about functional constitutional change.

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