A RIGHT DEFINED BY A DUTY: THE ORIGINAL UNDERSTANDING OF PARENTAL RIGHTS

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INTRODUCTION:

One of the most interesting debates occurring among lawyers today involves parental rights. After years of relative anonymity, parental rights are increasingly defended in litigation and discussed in academia. The rise of parental rights coincides with a movement in the entire judiciary towards originalism as the accepted theory of interpreting the Constitution. This provides an interesting context in which to explore the scope of parental rights. The process of unearthing the original meaning of parental rights touches on nearly every interpretive question in originalism and provides an excellent case study for establishing that theory. How far does originalism go in establishing parental rights as such? What are the boundaries of parental rights as understood from an originalist perspective? Does an originalist understanding of judicial authority include the authority to uphold and enforce parental rights? And how much, if at all, should judges account for the evolving family demographics in America? These are some of the most pressing questions in the realm of parental rights and ones that I will address in this paper.

In Part I of this paper, I give a brief philosophical defense of originalism. Having a clear understanding of why judges should use originalism also provides a standard for making interpretive decisions later on in the paper. Next, Part II examines the various constitutional provisions that might encompass parental rights and looks for the most natural place to ground parental rights. Part III explores the historical understanding of parental rights beginning with the English common law and tracing its meaning through the Reconstruction Era. Continuing in this historical vein, Part IV examines the deprivation of parental rights during slavery and Reconstruction, looking for evidence from the ratification debates that this issue animated the passage of the Fourteenth Amendment. Returning to the realm of theory, Part V defends the judiciary's ability to enforce parental rights as an original matter and settles on a scope-of-the-rights analysis as the best form of judicial analysis. Finally, Part VI answers whether expected application should play a role in implementing parental rights in modern America.

I: THE PHILOSOPHICAL BASIS OF ORIGINALISM

Originalism is a relatively new, but rapidly evolving theory of interpretation. Born in response to judicial activism and intending to result in more constrained judicial decisions,[1] recent originalist scholars have attempted to provide a moral justification for its legitimacy.[2] The most persuasive argument for the morality of originalism is Professor Joel Alicea's which predicates originalism upon the nature of political authority.

Political authority exists so that men—who are social beings—can coordinate their movements to achieve the common good.[3] To give an over-used example, someone must use political authority to create traffic laws so that people can travel safely. Who, exactly, wields this authority? The argument from popular sovereignty reasons that the people of a political community hold all legitimate political authority and they can choose to invest it in whatever government they think is best suited to secure their wellbeing.[4] In America, the people have chosen a democratic republic; their political authority is expressed in the Constitution and the government it constitutes. It follows, then, that the Constitution must be understood in the way the people understood it.[5] The judge who substitutes his own understanding or desires for that of the people's undermines their political authority by contradicting the source of his authority: the people.

It would be a mistake, however, to think that because judges are bound by the original meaning of the Constitution they are not called upon to make moral, prudential judgments. The meaning of the Constitution is not always clear, and judges must decide their cases somehow. Some scholars have argued that judges should use their understanding of the natural law to fill these gaps.[6] Though these scholars sometimes reject the originalist label, their arguments have a clear originalist basis. They argue that the Constitution's "sweeping generalities and famous ambiguities" leave "ample space for substantive moral readings that promote peace, justice, abundance, heath, and safety" and that the people left judges free to supply such moral meaning.[7] These authors point to early case decisions to justify their position that a broad, moralistic reading of the Constitution coincides with the document's original meaning.[8] Although a

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1. Keith E. Wittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–600 (2004).

2. Lee Strang, Jeffrey Pojanowski, and Kevin Walsh, for example, have provided a defense of the moral legitimacy of originalism. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 4–5 (2022).

3. *Id.* at 19–20.

4. *Id.* at 25–26, 29.

5. *Id.* at 44–45.

6. *See generally* ADRIAN VERMUELE, COMMON GOOD CONSTITUTIONALISM (2022).

7. *Id.* at 38.

8. Vermuele uses *McCulloch v. Maryland* as an example of the "expansive reading" of the Commerce Clause that allowed for the judges to incorporate moral principles into the law. *Id.* at 40.

tempting prospect, the natural law should not generally be used as an independent, extrinsic source of law by which to decide cases. The historical argument that the American people have granted judges the power to decide cases according to their personal understandings of natural law is relatively weak, as evidenced by the reluctance of these scholars to even call themselves originalist. The Constitution is quite clearly an instrument of limited government, and bestows only limited power on the branches, including the judiciary.[9] As will be discussed in depth below, the realm of parental rights may be one area where the natural law plays a more dominant role as a historical source, but it does not serve as an extrinsic source of law.

II: LOCATING PARENTAL RIGHTS IN THE CONSTITUTION

If parental rights are implicit in the constitution and worthy of protection, where exactly are they found? Justice Scalia suggested that "a right of parents to direct the upbringing of their children" is one of "the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'"[10] While the Ninth Amendment has been largely ignored by modern courts and was famously ridiculed in the not-so-distant past as an "ink blot,"[11] disrespect is not a principled factor in determining the meaning of the Constitution. More originalist scholarship is needed on the content of Ninth Amendment rights, but one scholar suggests that the Ninth Amendment "encompasses the natural rights of humanity" such as the unalienable rights referred to in the Declaration of Independence.[12] If so, the rights of parents over their children may be one of these "natural rights." A second option for finding parental rights in the Constitution was suggested by Justice Thomas in the *Troxel* case when he hinted that they belong in the Privileges and Immunities Clause.[13] Some scholars have suggested that this Clause "guarantees protection for those rights peculiar to citizens—i.e., those rights considered essential to citizenship."[14] Others add that it should also include fundamental rights that cannot be abridged.[15] Justice

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The principles of Constitutional interpretation embedded in that case allowed the Court to "develop[] the law of federal powers over time to, in practice, all but equate federal power with the expansive police power of the states to promote health, safety, and morals—a conception drawn straight from the classical law." *Id.*

9. J. Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 78 (2019). An argument could be made that the people in the states allocated public authority to their state governments in a different manner than they did to the federal government. If so, state judges may have a different scope of authority and may be obliged to consult the natural law.

10. Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

11. *See* Daniel Witte, People v. Bennett*: Analytic Approaches to Recognizing a Fundamental Parental Right under the Ninth Amendment*, 1996 BYU L. REV. 183, 208 (1996).

12. *Id.* at 210.

13. *Troxel*, 530 U.S. at n.80 (Thomas, J., dissenting).

14. Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of Higher Law*, 3 TEX. REV. L. & POL. 225, 262 (1999).

15. *Id.*

Thomas has a more specific understanding of the Clause. He suggests that it protects those "fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons."[16] Justice Thomas traced the phrase "privileges or immunities" to the 1606 Charter of Virginia, which referred to the rights of Englishmen.[17] He also confirmed that the debates at the time of the passage of the Fourteenth Amendment reflected this understanding.[18]

So, do judges interpret the Ninth Amendment or the Fourteenth Amendment when deciding a parental rights case? As a logical and textual matter, there is good reason to prefer the Fourteenth Amendment. The Ninth Amendment merely explains that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[19] It does not give judges permission to enforce the unenumerated rights nor does it require the government to respect them. In contrast, the Fourteenth Amendment declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[20] Here is a clear expression of the people's authority that certain rights should not be abridged by the government. Accordingly, the best originalist argument for parental rights would flow from the Fourteenth, rather than the Ninth, Amendment.

III. HISTORICAL UNDERSTANDING OF PARENTAL RIGHTS

A. Dictionaries

The Privileges and Immunities Clause, Justice Thomas explained, refers to the common law rights of Englishmen.[21] Historical research shows that the public understanding of parental rights remained unchanged from the English common law until at least the Reconstruction era. According to this strain of thought, parental rights were grounded in the natural law as understood in the Christian tradition and sprang from duties that the parents owed their children.

Parental rights are unique because they are not mentioned specifically in the Constitution. Therefore, the traditional tools of textual interpretation are not as helpful as when there is a specific sentence or clause to parse. However, dictionaries still provide valuable information on how the English common law viewed parents. The New and Complete Dictionary of the English Language from 1775 merely defines a parent as a "father, a mother."[22] A father is he "by whom the son or daughter is begotten" and a mother is a "woman that has born a child."[23] These definitions are fairly obvious, but a dictionary from a few

16. Saenz v. Roe, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting).

17. *Id.* at 523.

18. *Id.* at 526.

19. U.S. CONST. amend. IX.

20. U.S. CONST. amend. XIV, § 1.

21. *See supra* Part II.

22. 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 402(1st ed. 1775).

23. *Id.*

years later adds more interesting commentary. According to this 1781 dictionary, parents are "properly only the father and mother of children; but it is often, and especially in the Scripture, applied to all those of near kindred, especially by blood in a direct line; strict commands are laid upon children, to obey, honour, and respect their parents."[24] The dictionary then goes on to contrast this view with Jewish and "heathen" views of parents.[25] This immediate reference to Christian scripture in a dictionary illustrates how important Christianity was to the common understanding of the role of the parent.

Moving to the Reconstruction era, contemporary dictionaries reveal largely the same understanding of the parental role. A parent is "[h]e that begets or she that bears young; a father or a mother. The duty of parents to provide for the maintenance of their children is a principle of natural law. . . ."[26] This passage is particularly interesting because it grounds parental duties in the natural law rather than relying entirely upon scripture. Of course, this understanding of the origins of parental rights is compatible with the earlier scriptural basis since the natural law is actually God's law for man revealed through human nature and understood through reason. Thus, there is both a natural and a religious basis to parental authority.

B. Legal Treatises

Moving into the realm of treatises, the preeminent legal text on the English Common Law is Blackstone's Commentaries.[27] According to Blackstone, parents owed their children duties of maintenance, protection, and education.[28] Rather than framing the relationship in terms of rights, he focused on the obligations of parents. This framing shows the purpose of any rights given to parents: to enable them to fulfil their duties to their children. Blackstone also described the bond between parent and child as "the most universal relation in nature," once more tying the family back to natural law.[29] A treatise from the Reconstruction era written by Thomas Cooley also supported the idea that the Christian idea of the family is important to understanding the scope of parental rights. He wrote that the "best features of the common law, and *especially those which regard the family and social relations*," were improved by Christianity

24. THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 413 (18th ed. 1781).

25. *Id.*

26. JOSEPH E. WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE 1034 (Boston, Hickling, Swan & Brewer 1860).

27. Schick v. United States, 195 U.S. 65, 69 (1904).

28. Brief of Amicus Curiae Alabama Center for Law and Liberty in Support of Defendant-Appellants Seeking Reversal at 8, Eknes-Tucker v. Governor of Alabama, (No. 22-11707) (11th Cir. July 5, 2022), 2022 WL 2669135.

29. Witte, *supra* note 11, at 190.

and the teachings of Scripture.[30] Once again, Christianity is explicitly mentioned as a source of understanding not just parental rights, but also as having an effect on the law of family relationships. Both these treaties align with the dictionaries in giving both a religious and a natural basis to parental rights. Additionally, Blackstone adds the idea that parental rights spring from the duties they owe their children.

C. Contemporaneous Writings

Contemporaneous writings from various sources reveal the public expectations of parental duties and rights. A hallmark of many writings from the early 1700s is that a parent's responsibility for his child is both God-given as well as natural. The prevailing view was that the parent and child owed each other respective duties, grounded in nature and confirmed by the law of God.[31] Thus, one father wrote to his daughter that she must take special care of the children that "[p]rovidence designedly puts into our hands altogether helpless and ignorant: to shew [*sic*] us from the very first our great duty as parents; namely, that we ought to employ our understandings, and use the best industry, for the preservation and welfare of our offspring."[32] A typical sermon from this time reminds parents to bring their children to church, to teach them to worship God privately at home, to teach their children religious truths, and to govern their children prudently.[33] There is a religious element to family relationships because parents will answer to God for how they raise their children.[34] This gives an added element of gravity to the already heavy responsibility parents bear for their children's behavior.[35]

Another common theme from early writings on the family is that children are by nature limited in reason, and parents are responsible for the formation of

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30. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 471 (2d ed., 1871) (emphasis added).

31. For instance, one father heavily stressed the importance of parents being a role model to their children. Parents should "[u]nderstand [them]selves what [they] would have [their] Children understand; be [them]selves what [they] would have them be; and do [them]selves what [they] would have them practice." JOHN TAYLOR, THE VALUE OF A CHILD; OR, MOTIVES TO THE GOOD EDUCATION OF CHILDREN 25 (London, J. Waugh 1753). Children, on the other hand, were admonished to be respectful and obedient to their parents. One handbook from the time instructed children, "[n]ever speak to [] your parents [without some title of respect] . . . . Go not out of doors without your parents leave . . . ." THE SCHOOL OF GOOD MANNERS 5 (Eleazer Moody ed., 1795). *See also* THOMAS PERCIVAL, A FATHER'S INSTRUCTIONS; CONSISTING OF MORAL TALES, FABLES, AND REFLECTIONS; DESIGNED TO PROMOTE THE LOVE OF VIRTUE, A TASTE FOR KNOWLEDGE, AND AN EARLY ACQUAINTANCE WITH THE WORKS OF NATURE 4 (9th ed. 1800) (writing that a mother merits "every sentiment of respect . . . your warmest gratitude, esteem, and veneration").

32. TAYLOR, *supra* note 31, at 4–5.

33. JOHN BARNARD, A CALL TO PARENTS, AND CHILDREN 7 (Boston, T. Fleet 1737).

34. *Id.* at 35. This is why it should be "the great Concern of Parents, that their Children may be such as truly know, and serve God." *Id.* at 4.

35. *Id.* at 36–37. Parents must answer directly to their communities for their children's behavior and were held responsible for any harm their child did to the community.

their child's mind. As one father from the time explained, "when the body of man is brought forth, his mind, his better part, is, in a sense, still unborn. It belongs to us [parents] to light the understandings of our children; to excite them to proper action; to moderate and direct their passions. . . ."[36] Parents, and especially fathers, were expected to direct their child's rationality. One sermon described a father as the "King in his House; the Rule and Government thereof is laid upon him; and his great Care should be to rule his Household well, that it may be a well ordered and governed Society."[37] A well-ordered society is one in which the members follow the rules not just out of blind obedience but from a place of understanding.

Philosophical writings from the time also bolster the view of parents as incarnations of God's authority over children. John Locke explained that "all parents were, by the law of nature, 'under an obligation to preserve, nourish, and educate the children' they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them."[38] The same elements that were evident in Blackstone's commentaries appear here. Parents owe certain duties to their children: namely, to provide them an education, to nurture them to maturity, and to provide for their wellbeing. These duties are natural to man, and their contents can be discerned through the natural law in the Christian tradition. The rights of parents reflect these duties by giving parents the space and discretion necessary to fulfill them. Finally, these parental obligations are sacred because parents (and particularly fathers) are images of God's authority to their children and will ultimately answer to God Himself for how they raised their children.

D. Case Law

Returning to the legal context, early court cases reveal how these parental duties were translated into parental rights. Put simply, the right of the parent over a child extends to the actions necessary for the parent to fulfill his duties to his child. Take a case in equity dealing with the parent-child relationship. In this case, three brothers contracted to divide their father's property equally among themselves regardless of how he disposed of the property in his will. When the court examined the contract, it refused to enforce it because it violated the father's authority over his children. The court emphasized that children owed their parents obedience and respect.[39] This was not only a "natural duty," but necessary for the peace of "families, and consequently of society," such that any agreement which threatened proper relationships among family members would be "unfit for discussion even in a Court of Equity."[40] In other words, the father's duty to rule his household translated into a court-protected right to bestow his property among his family as he wished.

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36. TAYLOR, *supra* note 31, at 5.

37. BARNARD, *supra* note 33, at 26.

38. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 123 (Ian Shapiro ed., 2003).

39. Nelson v. Nelson, 1 Va. (1 Wash.) 136, 137 (1792).

40. *Id.*

A number of cases on public school curricula further demonstrate that up until the Reconstruction Era, a parent's rights over his child sprang from his duties to that child. A case from 1874, for instance, involved a teacher punishing a child for not studying geography against the father's wishes.[41] The court in Wisconsin found that the parent had a right to control his child's education, a right that coincides with the parent's duty to educate his child.[42] A court in Illinois a year later came to a similar conclusion when the public school expelled a student for failing to take bookkeeping despite her parent's express prohibition on the subject. The court wrote:

> Parents and guardians are under the responsibility of preparing children intrusted [*sic*] to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions.[43]

In other words, because the parent has the duty of raising and educating his child, the law gives the parent rights over the child's education so the parent can fulfil his duty.

Another interesting feature of the law at the time was the different duties and responsibilities it imposed upon mothers and fathers. A case from Pennsylvania expresses most clearly the logic behind this differentiated treatment. The case involved a mother suing to recover medical expenses for her adult son who was injured by a carriage driver. The court prohibited recovery, writing that "[a] father is bound by law to support and educate his children, and is entitled to the correlative right of service, but a mother not being bound to the duty of maintenance, is not entitled to the correlative right of service. . . ."[44] Aside from confirming that the parental rights are correlatives to parental duties, this case emphasizes that parental rights and duties should vary depending on whether the mother or the father claims them. The differing views of maternal and paternal rights is to be expected given the natural law and scriptural basis for parental rights.

IV. THE HISTORICAL MOMENT: PARENTAL RIGHTS DURING RECONSTRUCTION

Given this general philosophical understanding of parent-child relationships, what was the position of families at the ratification of the Fourteenth Amendment? The plight of recently freed slaves is a powerful testimony to why a constitutional amendment was necessary to protect what should have been well-established rights. Of course, during slavery, slave

41. Morrow v. Wood, 35 Wis. 59 (1874).

42 *Id.* at 62–63.

43. Rulison v. Post, 79 Ill. 567, 573 (1875).

44. Fairmount & Arch St. Passenger Ry. Co. v. Stutler, 54 Pa. 375, 378 (1867). Such differentiation may be uncomfortable to a modern audience's ears, but as Justice Thomas so aptly explained, the Constitution does not forbid everything that we find "intensely undesirable." Bennis v. Michigan, 516 U.S. 442, 454 (1996) (Thomas, J., concurring).

families could be separated at will by their masters. Before the Reconstruction Amendments, slaves were not allowed to "marry, establish a home[, or] bring up children."[45] Unsurprisingly, "When formerly enslaved people narrated their lives, whether in the 1860s or in the 1930s, slavery's violence to the connections between parents and children loomed large in their accounts."[46] Thus, restoring parent-child relationships was an extremely important element of post-slavery life. One account of a newly freedwoman, Rose Herera, explains how important her quest to find her children was after emancipation. Rose's biographer writes:

> Her refusal to abandon and forget [her children] and her commitment to recovering them focus a spotlight on a crucial aspect of what freedom meant to newly emancipated people: the restoration of families shredded by kidnapping, sale, and forced migration. The quest to unite with long-lost loved ones was *central* to the meaning of freedom.[47]

The reunification of families put an end to the reality parents endured in the days of slavery that their "chillun b'long to ev'ybody but [them]."[48] Even more importantly, parental rights refuted the racist claim that slaves were incapable of parenting their own children. Some pro-slavery advocates saw slaves as "figurative children and black people as a childish race, an indignity that justified the denial of parental rights to adult slaves."[49] By regaining parental rights, freedmen were able to establish themselves as equal in reason and dignity to their former masters.

The attempt to find family members was a widespread concern after emancipation. Newly freed slaves placed descriptions of family members in local newspapers, asked government officials for advice, and worked with church leaders to try to locate their family members.[50] But the struggles did not end with finding children. In New Orleans, for example, the *Daily Picayune* newspaper ran an account of a trial in which a freedwoman sued her former master to get her children back.[51] Despite her best efforts, the court decided the former slave owner was a better guardian for her children and only granted the mother visitation rights (which were later revoked).[52] Unsurprisingly, Union officials at the time acknowledged that civilian courts were in such disarray that a freedman's only hope of receiving justice was through military authorities.[53]

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45. David Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 HARV. J.L. & PUB. POL'Y 815, 818 (2001).

46. CATHERINE A. JONES, INTIMATE RECONSTRUCTIONS: CHILDREN IN POSTEMANCIPATION VIRGINIA 47 (2015).

47. ADAM ROTHMAN, BEYOND FREEDOM'S REACH: A KIDNAPPING IN THE TWILIGHT OF SLAVERY 119 (2015).

48. *Id.* at 121.

49. *Id.* at 120.

50. *Id.* at 119.

51. *Id*. at 129–30.

52. *Id.*

53. *Id.* at 124.

These problems were widespread, and the concrete political steps taken to address them show that legislators were aware of the problem. The federal government took a step towards restoring parental rights when it declared "all freedpeople cohabiting as husband and wife were legally married, and the children of such unions legitimate . . . ."[54] Parents petitioned the government offices daily for help recovering their children, and the government helped where it could.[55] But even the Freedmen's Bureau, established to help former slaves adjust to their new lives, could be an obstacle to reunification. Officials from the bureau refused to help freedmen if they suspected them of failing their parental obligations. The policy of the Bureau was that "[n]either whites nor blacks can be allowed to abandon their proper occupations, to desert their families or roam in idleness . . . ."[56] While obviously intended to protect children from dissolute parents, the policy allowed officials to keep children away from their parents for pretextual reasons.

Additionally, there was a danger of children slipping back into a new form of slavery. Former slaveowners who lived with children would force those children to work for them instead of returning the children to their families or letting them attend school.[57] Even when parents were reunited with their children, both parent and child were forced to work for their former masters under abusive contracts. The former slave owners would often undermine parental authority in these contracts, claiming the right to punish former slaves' children as well as demanding certain behavior from both the former slaves and their children.[58]

While not as explicitly voiced as some other concerns, these parent-child abuses were raised as reasons why the Fourteenth Amendment was necessary. Certainly, "the framers of the Fourteenth Amendment were particularly disturbed by the content of post-Thirteenth Amendment 'apprenticeship' statutes, which violated parental rights by allowing minors to be forced to live with and work for their former masters."[59] During the debates, Representative Donnelly decried the black codes that instituted a new form of slavery by binding a child "against his wish to a master" and selling him into "virtual slavery."[60] While more evidence on this topic would be helpful, what evidence does exist indicates that the Fourteenth Amendment was intended to restore the "[m]arital, parental, and familial rights" that were guaranteed common law liberties and which slaves were deprived of even after emancipation.[61]

V. ENFORCING PARENTAL RIGHTS: THE JUDICIARY'S AUTHORITY TO ENFORCE

54. JONES, *supra* note 46, at 49.

55. *See* ROTHMAN, *supra* note 47, at 120'.

56. JONES, *supra* note 46, at 41–42.

57. ROTHMAN, *supra* note 47, at 122–23.

58. JONES, *supra* note 46, at 65.

59. Smolin, *supra* note 45, at 819.

60. *Id.* at 819 n. 25 (citing CONG. GLOBE, 39th Cong. 1st Sess. 588–89 (1866) (statement of Rep. Donnelly)).

61. *Id.* at 819.

PARENTAL RIGHTS AND METHODS OF ANALYSIS

Given this background on the scope of parental rights, a few points should be evident. First, parental rights were a recognized common law right. Second, the scope of parental rights is determined by the duty of parents to raise their children according to the natural law and Christianity. Last, the Fourteenth Amendment incorporated that right into the Constitution via the Privileges and Immunities Clause in order to address the injustices visited upon recently freed slaves.

The next question, then, is how judges are to enforce these rights, if at all. In one parental rights case, Justice Scalia opined that judges could not actually enforce unenumerated rights, even if those rights were real and deserving of protection.[62] This rather unconventional take is not mandated by the philosophy of originalism, however. Originalism confines the authority of judges to that given to them by the people in the Constitution.[63] While judges are not lawmakers, they do have authority to interpret the law, and this includes enforcing rights that are clearly granted in the Constitution. Justice Scalia's reticence to allow judges to enforce unenumerated rights may spring from his distrust of judges rather than a principled view of the scope of their authority granted by the American people.

If judges are required to enforce parental rights, the follow-up question is how judges should do that practically. In the past, Justice Thomas suggested using strict scrutiny (and hence the tiers of scrutiny) for what he called "fundamental rights," which would include parental rights.[64] But the tiers of scrutiny have been attacked by originalist scholars in recent years. As one author succinctly explains it, "the Constitution, as originally understood, makes no mention of judicial scrutiny requirements. The first mention of such standards first appeared as a footnote."[65] The most prominent alternative to tiers of scrutiny is a scope-of-the-rights approach. Under this approach, judges must determine the scope of the right and if the particular action falls into the scope, then the action is completely protected: no weighing of interests, no exceptions.[66] Another option could be to use presumptions, a type of burden of proof, for or against the government depending on the claim in question.[67] For instance, when the national government is infringing on people's rights, the courts would apply a presumption of liberty, while state governments would

62. Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

63. *See supra* Part I.

64. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

65. F. Lee Francis, *Who Decides: What the Constitution Says About Parental Authority and the Rights of Minor Children to Seek Gender Transition Treatment*, 46 S. ILL. U. L.J. 535, 562 (2022). The tiers of scrutiny—rational basis review, intermediate scrutiny, and strict scrutiny—are applied to various rights depending on how fundamental or important those rights are deemed to be. *See generally* Alicea & Ohlendorf, *supra* note 9.

66. *Id.* at 74.

67. Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 775, 777 (2020).

receive a presumption of democracy in favor of the validity of the statute.[68] In deciding which method is best, one must be guided by the principles behind originalism and its moral justifications.

As explained above, judges are morally obliged to interpret the Constitution according to its original public meaning.[69] However, the judges are not required to uncover that meaning in one particular way or to use particular language to explain the meaning of the right. I think this is an area where originalism no longer supplies answers and where judges are called upon to make a prudential judgment about how to find the rights and then enforce them. A prudent judge could use any of the three methods mentioned above to implement the original public meaning, but I think that all three ultimately boil down to a scope-of-the-right approach.

To begin, the originalist arguments against using tiers of scrutiny are often irrelevant under the political authority justification for originalism. One argument against tiers of scrutiny is that they were not applied at the founding, and they have a shoddy history.[70] Again, originalism does not morally require judges to use the same tools of interpretation as early judges as long as they uncover the same meaning. Additionally, an argument can also be made that courts historically balanced rights against governmental interests.[71] As to the second point, a method does not need to be rejected out of hand merely because it was developed in bad faith or has been abused by others. Another argument against tiers of scrutiny is that the Constitution does not rank rights and interests of the government and therefore the public meaning cannot possibly be discovered through the tiered-scrutiny approach.[72] To the extent that the tiered approach requires a pre-judgment of whether the claim will succeed, this is a fair critique. However, if the history reveals that some rights were respected more than others and this was reflected in different types of protection, then a tiered approach may be appropriate.

The fact of the matter is that judges can use any method of analysis, including tiers of scrutiny, to discern cases pertaining to parental rights. Most modes of analysis would involve significant overlap and on closer inspection converge into a discussion of the scope of the right. For instance, assume the case involves educational control over the child. The judge will always need to consult history for specifics of how much authority a parent held over his child's education. The same would be true when it comes to medical or religious decisions for the child. Sometimes the history will provide a clear answer, and sometimes not, but the common law should be the starting point in determining whether the parent had a duty and hence a right in the particular matter.

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68. *Id.* at 778.

69. *See supra* Part I.

70. Alicea & Ohlendorf, *supra* note 9, at 77.

71. *See, e.g.*, People v. Philips (N.Y. Ct. Gen. Sess. June 14, 1813), *printed in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 5-114 (1813). In this case, the Court weighed the interests of public peace and morality against a priest's refusal to break the seal of confession and testify.

72. Alicea & Ohlendorf, *supra* note 9, at 78.

From this point, the terminology may diverge depending on the mode of analysis, but the inquiry would not. Given the obvious importance of parental rights, judges using tiers of scrutiny would most likely describe them as fundamental and meriting strict scrutiny. In using this language, the judge would still be referring to a right that has a discernable, public meaning. Even when the judge is "balancing" the parental right against the government's interest, he would be looking for the areas and situations in which the right is supreme and cannot be restricted. Similarly, judges could use the presumption-based approach to adjudicate parental rights claims. The judge would approach the issue with a presumption of liberty or democracy depending on which government was involved, but this would be just another way of getting at the original meaning of the right. The presumptions could reflect how treasured the right was and when the government was allowed to intrude upon that right. This method does not per se threaten to obscure the original meaning. Finally, the judges could use a scope-of-the-right approach. They would try to discern the exact content of parental rights and whether the action in question fits within that right.

Ultimately, however, even the scope-of-the-right approach involves deciding whether the right of the parent to educate their child, or whatever right is at stake, can be restricted or not. And if the government *can* restrict the right, then history should still have a say in determining to what extent those restrictions are legitimate (thus taking us back into the tiered realm). In many ways, using the scope-of-the-right approach is the most straightforward way of thinking about this issue, but it still requires nuance. And while it may be a prudent mode of analysis to aid judges in thinking about parental rights, it is not mandated by the Constitution or the theory of originalism.

VI. EXPECTED APPLICATION VERSUS EVOLVING MEANING

A discussion of parental rights would not be complete without addressing the obvious linguistic difficulty in this area. *Who* is a parent? While the dictionaries are quite clear that a parent is a mother or father and that mothers and fathers are the biological parents of children, the world today is not so cut and dry. As a practical matter, non-traditional family arrangements are more and more common each day with single motherhood, unconventional family arrangements, and "nonfamily" households comprised of unmarried adults all on the rise.[73] Even twenty years ago, Justice O'Connor said it was nearly impossible to speak of an "average American family" and the decline of traditional nuclear families have only accelerated since then.[74] Given modern America's demographics, is it possible to use the eighteenth century—or even the nineteenth century—view of a family as the legal paradigm?

A second difficulty with the realm of parental and family rights is that the words could be interpreted as having an evolving meaning. Take the word "papers" in the Fourth Amendment, for example. Most originalists would agree

73. David Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 791–92 (2002).

74. Troxel v. Granville, 530 U.S. 57, 63 (2000).

that papers can now include electronic documents. There is a logic to the word that conveys meaning even in new circumstances. Similarly, an argument could be made that words like "parent" and "family" should include relationships between gay couples and their adopted or surrogate children, "throuples" that live together, or other unconventional relationships.[75] Should the expected application of the words confine a judge's interpretation in this area and leave these new relationships out?

Yes. In deciding parental rights, the expected application of the Clause should serve as a guide in interpreting the Constitution and determining the scope of the right. Threaded throughout the entire common law understanding of parents and family, including into the Reconstruction Era, is the stubborn fact that parental relationships were viewed through the lens of the natural law and the Christian tradition. Words like "papers," "commerce," and the like may very well have evolving meanings such that the expected application of those words are largely irrelevant in modern society. But the concepts of parent, child, and family are not so fickle. They refer to a human person who has a distinct and (according to the natural law) *unchanging* nature. They describe relationships that are identifiable, inevitable, and enduring. Every child has a father and mother regardless of whether the law chooses to recognize that fact or not. Changing the meaning of father, mother, and child to include non-traditional family structures would not be enlarging the meaning of the words; it would be distorting them. Judges are tasked with enforcing the original public meaning and non-traditional family structures are undeniably outside that original understanding. Any judge who tries to enlarge the parental rights beyond the nuclear family is exceeding his authority.

In addition to the constraints of natural law, the role and rights of parents have always had a religions dimension in the common law and the American tradition. Parental rights are derived from God because He entrusts children to their parents' care and holds parents to account for how they raise their children. Parents, on the other hand, were seen as physical representations of God's authority over children and as such their authority was respected by the political government. The religious element explains why parental authority over their children was respected, even revered. And this religious dimension is limited to the traditional family: a father, a mother, and the children. Modern arrangements that directly contradict this structure (and which are condemned by that religious tradition) cannot logically be included in the original public meaning of the words.

CONCLUSION

In conclusion, originalism provides substantial answers to modern legal debates about the scope and importance of parental rights. Given the English

75. *See, e.g.*, Becky Pemberton, *Thrice and Nice: Polyamorous Throuple Get 'Married' and Plan to Start a Family—Despite Some Relatives Refusing to Attend Their Big Day*, THE SUN (Feb. 6, 2020, 3:54 PM), https://bit.ly/3VATRLp; Phil Norris & Lydia Patrick, *Woman in a Throuple Wants Three-Way Marriage with Her Tinder Fiance and College Flame*, WALESONLINE (May 7, 2022, 8:05 AM), https://bit.ly/3Fs5pL5.

common law rights of parents and the unbroken respect for parental rights through the Reconstruction Era, the fact that parental rights are a privilege or immunity of citizenship is well-established. Judges are required to enforce these rights when the government tramples upon them and should do so through a nuanced, scope-of-the-rights analysis. Finally, the constitutional rights of parents must be limited to the natural, traditional family in order to adhere to the original public meaning. While statutes or constitutional amendments may say otherwise, the Constitution on its own cannot conflate traditional family structures with modern deviations. Admittedly, much more research could be done in this area to confirm this understanding of parental rights. But the beauty of originalism is that it accommodates such imperfect knowledge and judges can always reconsider their positions when better history comes to light. Given the fraught nature of this topic, bias may be more tempting than in less controversial areas. However, if originalism is to be useful as a theory, it must be capable of answering fraught social questions as well as mundane ones. In this case, originalism has provided more complete, systematic, and logical answers to the question of parental rights than any other theory could, even if those answers are not popular today.