**Constitutional Parents’ Rights and the Transformation of Parenthood**

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***Abstract***

*This Article argues that constitutional parents’ rights are essential to understanding parenthood law’s transformation to recognize non-traditional families. Such families, which include families formed through assisted reproductive technologies, LGBTQ+ families, and families in which non-parental caregivers perform parental roles, require the recognition of a non-parent’s relationship with the child. Yet the constitutionalization of parents’ rights—by granting parents the right to exclude non-parents from accessing parental rights and responsibilities—makes it harder for a non-parent to form a relationship with a child over a parent’s objection. Because constitutional law thus situates parenthood as an exclusive status, law-reform efforts have focused not on extending parental rights and responsibilities to non-parents but on expanding the legal definition of parenthood itself. In that way, parenthood has, perhaps counterintuitively, become more inclusive. This means that constitutional parents’ rights have not only made parenthood law a site of deep contestation over children’s interests and parental authority but also equality. This Article makes this argument by using English law, from which American family law descends but where parents’ rights are not similarly constitutionalized, as a comparative foil.*

*This Article makes three significant contributions to existing literature. First, it explains how the constitutionalization of parents’ rights structures parenthood law and what that means for the recognition of non-traditional families. Second, it offers a different perspective on parents’ rights by showing how a focus on parents’ interests can contribute to a progressive emphasis on the equality of non-traditional families. Last, by using English law as a refractive lens for understanding American law it offers a novel method for doing comparative law.*

**Introduction**

Parenthood law has become a site of contestation and change. Social developments, including family formation through assisted reproductive technologies (ART),[[1]](#footnote-1) LGBTQ+ families,[[2]](#footnote-2) and the greater recognition of non-parental caregivers performing parental roles,[[3]](#footnote-3) have contributed to these shifts. This is visible in family law developments at the state-level[[4]](#footnote-4) as well as in the agendas of prominent civil rights organizations.[[5]](#footnote-5) Such non-traditional families[[6]](#footnote-6) have been shifting the legal bases of parenthood which had focused on birth, marriage, and genetics to principles of intent, the commitment to raise a child and function, the conduct of raising the child.[[7]](#footnote-7) As families that do not adhere to the traditional notion of two heterosexual, married parents raising biological children become the norm,[[8]](#footnote-8) the stakes for the legal recognition of non-traditional families have never been higher.

At the same time, constitutional parents’ rights have been at the heart of debates in law and politics. Parents’ rights have been invoked in politically charged controversies ranging from school education,[[9]](#footnote-9) gender-affirming care for transgender youth,[[10]](#footnote-10) vaccinations,[[11]](#footnote-11) and abortion care for minors.[[12]](#footnote-12) Some scholars have recently argued that this rhetoric represents “retrenchment by diversion” since it employs parents’ right to subordinate the equality claims of disadvantaged groups.[[13]](#footnote-13) The legal academy has also seen debates about family law’s focus on parents’ rights instead of children’s interests, with some arguing for a shift towards the latter.[[14]](#footnote-14) Scholars working on the child welfare system, which has historically had a disproportionate impact on poor families and families of color,[[15]](#footnote-15) have suggested that parents’ rights can be relied on as a bulwark against State interference.[[16]](#footnote-16)

Parenthood and constitutional parents’ rights are thus two big issues in the law of parent-child relationships, yet existing scholarship has surprisingly not explored how they relate to one another. Scholars have generally viewed parents’ rights and parenthood as distinct concepts.[[17]](#footnote-17) Others have focused on how constitutional parents’ rights may set the definitional boundaries of parenthood but have not looked at how they shape the overall structure of parenthood law.[[18]](#footnote-18)

I fill this glaring gap by arguing that constitutional parents’ rights have important implications for how parenthood law evolves to recognize non-traditional families. In such families, apart from the ‘parent,’ who is generally a biological parent,[[19]](#footnote-19) there is always a ‘non-parent,’ often a non-biological parent[[20]](#footnote-20) or a third party,[[21]](#footnote-21) who seeks a relationship with the child.The constitutionalization of parents’ rights, which includes the right to exclude non-parents, raises the stakes of parental recognition and makes it harder to allocate parental rights and responsibilities, such as custody and visitation, to non-parents. However, constitutional law also situates parenthood as an exclusive status, leading to a focus on the expansion of parental statuses to recognize ‘non-parents’ as ‘parents’ in non-traditional families. Consequently, parenthood, perhaps counterintuitively, also becomes more inclusive. Therefore, constitutional parents’ rights make parenthood law a site of deep contestation over not only children’s interests and parental authority but also equality.

In the U.S. parents’ rights were constitutionalized by the Supreme Court under the Fourteenth Amendment of the Constitution.[[22]](#footnote-22) Constitutionalization elevates a legal right from mere ordinary law to a fundamental norm that limits State action.[[23]](#footnote-23) Constitutional parents’ rights in family law, however, not only impose limits on State interference into the family, but also apply horizontally between parents and non-parents. This is central to the recognition non-traditional families which involve the interests of the ‘parent’, the child, the State and a ‘non-parent’ who is seeking to establish a relationship with the child. Constitutional parents’ rights make the identity of the parent extremely salient thereby enhancing the significance of *parental status*. Moreover, if the parent objects to the child’s relationship with a non-parent, in the exercise of their right to exclude, the State must defer to the parent, thus sharpening the distinction between parents and non-parents, and emphasizing *deference*. Therefore, constitutionalization enhances the strength of parents’ rights.

To better understand how this dynamic shapes American parenthood law’s recognition of non-traditional families, I use English[[24]](#footnote-24) law as a foil to reflect on and clarify American law. In using comparison as a refractive lens, I ask different questions and shed greater light on aspects of American law that are not obvious from a lone focus on domestic law.[[25]](#footnote-25) This choice stems from the fact that American family law descends from English common law.[[26]](#footnote-26) Yet, unlike the U.S., parents’ rights in England have not been similarly constitutionalized and, therefore, remain weak.[[27]](#footnote-27) Consequently, the status and deference dynamic visible in American law is absent in English law. Comparing the regimes highlights two key features of American parenthood law.[[28]](#footnote-28)

*First*, American law lays greater emphasis on the status of parenthood and parental rights and responsibilities remain linked to this status. English law, in comparison, pays less regard to parental status and is more concerned with the allocation of parental rights and responsibilities, which are delinked from parental status.[[29]](#footnote-29) In American law, the emphasis on parental status explains the growth of functional parent doctrines that remain absent in English law.[[30]](#footnote-30) *Second*, the distinction between parents and non-parents is central to American parenthood law.[[31]](#footnote-31) To address non-parents’ relationships with children, American states maintain separate, more demanding legal regimes for third-party custody and visitation.[[32]](#footnote-32) English law is less concerned with the distinction between parents and non-parents, and instead creates paths for categories of non-parents to access rights and responsibilities.[[33]](#footnote-33)

It is important to note that developments over the course of the twentieth century have made children’s interests significant in both jurisdictions.[[34]](#footnote-34) However, as scholars have pointed out, the constitutionalization of parents’ rights in the U.S., has meant that children’s interests are not the primary consideration in American family law but are often trumped by, or sometimes have to be balanced with parents’ rights.[[35]](#footnote-35) In contrast, due to weak parents’ rights, children’s interests remain more pronounced in English law.[[36]](#footnote-36)

In the U.S., due to strong parents’ rights, parental rights and responsibilities cannot be allocated to non-parents merely based on children’s interests but they should either occupy a functional parental status or meet the higher requirements of third party laws. By comparison, weak parents’ rights mean that English law pays less attention to status and directly allocates parental rights and responsibilities based almost entirely on children’s interests.[[37]](#footnote-37) This does not mean that English courts sometimes do not show an implicit preference for parental status, even when arguing in terms of children’s interests.[[38]](#footnote-38) Similarly, the interests of children remain significant in the U.S. as well. In fact, family law scholars often justify the creation of new statuses in children’s interests.[[39]](#footnote-39) However, constitutionalization and the consequent strength of parents’ rights means that the relative significance of parental statuses and children’s interests varies.

Comparing the two regimes highlights important normative implications. Constitutional parents’ rights mean that American law is generally more rigid about allocating parental rights and responsibilities to non-parents since such allocation threatens the rights of parents.[[40]](#footnote-40) Since parental rights and responsibilities are linked to status, whether as ‘parents’ or ‘third parties,’ these rights often cannot be easily disaggregated amongst a broad set of claimants.[[41]](#footnote-41) By contrast, weak parents’ rights, less regard to status, and an exclusive focus on children’s interests mean that it is easier for English law to preserve the child’s relationships with various individuals through its flexible statutory rules.[[42]](#footnote-42) Thus, non-biological parents may find it easier to acquire rights and responsibilities, and, on average, non-parental caregivers may be better able to preserve relationships with the child.

This may give the impression that constitutional parents’ rights generally make it harder to recognize non-traditional families. Yet, there is a paradox. Constitutional and strong, parents’ rights have meant that the law has begun to center the equality interests of diverse families in shaping family law.[[43]](#footnote-43) Much is at stake in determining who a parent is, and these determinations have been shaped by equality commitments. Equality-based arguments in parenthood law have a long history. One can see such arguments in a previous generation of cases about unmarried fathers.[[44]](#footnote-44) Today, they cut across claims made by diverse non-traditional families. I argue that these equality-based arguments arise, in part, from an emphasis on parental status. This is because linking the allocation of parental rights and responsibilities to parental status perpetuates inequalities in the allocation of parental rights and responsibilities by creating the possibility of exclusion and inclusion. Ironically, this emphasis on status also makes parental inequalities more visible, and consequently, in addition to children’s interests, reform efforts also focus on the equality of non-traditional families. In some states, these equality-based arguments are contributing to developments in parenthood law including expanded principles of intent, legal parenthood based on conduct, as well as the possibility of multi-parent families.[[45]](#footnote-45)

In contrast, equality-based arguments remain largely absent in English law, and consequently, legal parenthood is more rigid. Hence, even though non-biological parents or non-parental caregivers may find it easier to acquire some parental rights and responsibilities, paths to legal parenthood remain inflexible. This is visible in how English law does not recognize legal parenthood based on conduct or the possibility of more than two legal parents, as well as in inflexible rules around ARTs like surrogacy.

Concretely, for American law, equality-based arguments create greater paths for non-biological parents in LGBTQ+ families or for those relying on ART to achieve legal parenthood. These requirements, however, often focus on principles of intent and the existence of an expressive parent-child relationship, which may exclude categories of third-party caregivers such as relatives who may not share an intimate relationship with the child’s legal parent, and whose relationships with the child may not necessarily qualify as parental. Accordingly, given the law’s inability to disaggregate parental rights and responsibilities, these caregivers may have little chance of preserving their relationships with the child if the parent objects. Such families are often disproportionately marginalized including families going through crisis, families of color, and poor families. To recognize a diverse set of non-traditional families states should maintain doctrinal paths that lie across the spectrum from conferring complete legal parenthood to recognizing statuses that confer more limited parental rights and responsibilities.[[46]](#footnote-46)

Understanding the impact of constitutionalizing parents’ rights also helps us reflect more broadly on the implications of constitutionalizing legal rights and their downstream impact on the development of law, especially family law. Scholarship on constitutional rights and judicial adjudication has focused on indeterminacy and the difficulties of rights enforcement,[[47]](#footnote-47) the tendency of rights to subordinate, legitimate that subordination, and promote alienation,[[48]](#footnote-48) democratic deficits in judicial rights-adjudication,[[49]](#footnote-49) and rights-talk’s tendency to create social conflicts.[[50]](#footnote-50) However, scholars rarely look at how constitutionalizing a legal right can transform a body of law. Moreover, they rarely attend to family law. I highlight a different perspective on how we can think about rights by showing how constitutional parents’ rights structure parenthood law by introducing rigidities and flexibilities in the recognition of non-traditional families, thus both limiting and expanding the possibilities of legal change.

This account of parents’ rights contributing to equality-based arguments differs from existing scholarly accounts of such rights, which focus on how they may undermine equality for disadvantaged groups or undercut the interests of children.[[51]](#footnote-51) Instead, in my account, parents’ rights may, in part, contribute to progressive trends, such as the greater recognition of non-traditional families. Therefore, I identify a distinctive way of thinking about parents’ rights.

Moreover, literature on comparative law often marginalizes family law due to the Savignian view that it represents the spirit of a nation’s people and, therefore, does not make for meaningful comparison and normative evaluation.[[52]](#footnote-52) This contributes to and builds on the broader marginalization of family law in the legal academy.[[53]](#footnote-53) However, this dogmatic view is now outdated and belies the law’s experience in recent decades. Similar functional developments, such as the rise of non-traditional families and the circulation of common legal concepts based on constitutionalization and human rights, have meant that family law frameworks in different countries show strikingly common features.[[54]](#footnote-54) This is particularly visible in the law of parent-child relationships.

Unlike traditional comparative law literature that focuses on explaining divergences,[[55]](#footnote-55) I use comparison as a tool of refraction to reflect on, ask new questions, and better understand the domestic legal system. While existing scholarship has focused on American and English family law, it rarely undertakes meaningful comparative work and almost never focuses on granular legal doctrine.[[56]](#footnote-56) By bringing these two regimes in conversation with one another in the way that I do, I present a new template for doing comparative work.

This Article proceeds in five parts. Part I gives a brief account of parenthood law’s evolution and the constitutionalization of parents’ rights. It argues how constitutional and strong parents’ rights enhance the significance of parental status and emphasize deference to that status. Part II explains the English law of parenthood and details how parents’ rights have not been similarly constitutionalized in England and, therefore, remain weak. Part III compares American law with English law to highlight two key features of American law – the emphasis on parenthood compared to the allocation of parental rights and responsibilities and the need to distinguish between parents and non-parents. Parts IV and V build on the comparative work in Part III to highlight two significant normative implications. Part IV shows how rigidities in the allocation of parental rights and responsibilities may make it harder to preserve children’s relationships with various adults. Part V points to a paradox, where an emphasis on parental status contributes to equality-based arguments for non-traditional families that have led to progressive trends, including facilitating plural paths to legal parenthood and the possibility of multi-parent families. I finally conclude by identifying a few concrete implications for the recognition of non-traditional families.

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   According to the Department of Health and Human Services, in 2021 86,146 infants were conceived through ART, primarily in vitro fertilization, U.S. Dep. of Health and Human Services, Fact Sheet: In Vitro Fertilization (IVF) Use Across the United States (2024), https://www.hhs.gov/about/news/2024/03/13/fact-sheet-in-vitro-fertilization-ivf-use-across-united-states.html. This data does not include figures on donor insemination which may be a larger number due to higher prevalence. [↑](#footnote-ref-1)
2. According to the U.S. Census Bureau fifteen percent of the 1.1 million same-sex couples had at least one child in their household in 2019, United States Census Bureau, Same-Sex Couples Are More Likely to Adopt or Foster Children, https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html. [↑](#footnote-ref-2)
3. According to the U.S. Census Bureau in 2019 around 2,966,000 children were living with neither parent of which 1,577,000 were living with grandparents only, and around 9.9% of all children lived in multi-generational households, Lydia R. Anderson, Paul F. Hemez & Rose M. Kreider, *Living Arrangements of Children: 2019*, United States Census Bureau 3, 10 (2022). [↑](#footnote-ref-3)
4. For an overview of such laws across states see *Parental Recognition Laws*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/recognition/parenting (last visited July 7, 2024). For how these developments span political divides, see Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 Colum. L. Rev. 319, 345 (2023); Clare Huntington, *Pragmatic Family Law*, 136 Harv. L. Rev. 1501, 1534 (2022). [↑](#footnote-ref-4)
5. Leading civil rights organizations focus on parenthood law reform, *see Relationships at Risk: Why We Need to Update State Parentage Laws to Protect Children and Families*, Movement Advancement Project (2023), https://www.mapresearch.org/2023-parentage-report (last visited Jan. 20, 2025); *Establishing Legal Parent-Child Relationships*, American Civil Liberties Union, https://www.aclu.org/issues/lgbtq-rights/lgbtq-parenting/establishing-legal-parent-child-relationships (last visited Jan. 20, 2025); *Assisted Reproduction*, Center for Reproductive Rights, https://reproductiverights.org/our-issues/assisted-reproduction/ (last visited Jan 20, 2025). [↑](#footnote-ref-5)
6. I am conscious that the term ‘non-traditional families’ might contribute to the idea of a hierarchy of families, however, that is not my intention. I merely use it as a convenient way to refer to all families that do not adhere to the heterosexual family model and the norm of biological reproduction. [↑](#footnote-ref-6)
7. *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L. J. 2260 (2016) [hereinafter, NeJaime, Nature]; Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185 (2016) [hereinafter, NeJaime, Marriage Equality]. Adoption is indeed another way of establishing a legal parent-child relationships for non-parents and remains an important legal tool for LGBTQ+ individuals to form families. However, the kinds of situations I am interested in are distinct from adoption since they involve recognition of existing families rather than the placement of children in new families. [↑](#footnote-ref-7)
8. *The Modern American Family: Key Trends in Marriage and Family Life*, Pew Research Centre, https://www.pewresearch.org/social-trends/2023/09/14/the-modern-american-family/ (2023). [↑](#footnote-ref-8)
9. In recent years several states have passed parents’ rights bills that seek to control what can be taught at schools, *see* Education Power for Parents: A State Legislation Tracker, https://datavisualizations.heritage.org/education/education-power-for-parents-a-state-legislation-tracker/ (last visited Jan. 20, 2025). For a critique of such laws see LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 Yale L. J. 2139 (2022). *See also* Maxine Eichner, *Who Should Control Children’s Education: Parents, Children, and the State*, 75 U. Cin. L. Rev. 1339 (2006). [↑](#footnote-ref-9)
10. Katie Eyer, *Anti-Transgender Constitutional Law*, 77 Vand. L. Rev. 1113 (2024); Mary Ziegler, Maxine Eichner & Naomi Cahn, *The New Law and Politics of Parental Rights*, 123 Mich. L. Rev. 41-43 (forthcoming 2024). [↑](#footnote-ref-10)
11. Leigh Johnson, *My Body, Your Choice: The Conflict between Children’s Bodily Autonomy and Parental Rights in the Age of Vaccine Resistance*, 89 U. Chi. L. Rev. 1605 (2022). [↑](#footnote-ref-11)
12. *Parental Involvement in Minor’s Abortion: State Laws and Policies*, Guttmacher, https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions (last visited Jan. 20, 2025); for an analysis of the issues see Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights after Dobbs*, 132 Yale L. J. [i] (2022). [↑](#footnote-ref-12)
13. Ziegler, Eichner, & Cahn, *supra* note 10, at 3-6. [↑](#footnote-ref-13)
14. For a focus on children’s interests, *see* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 Yale L. J. 1448 (2017) [hereinafter, Dailey & Rosenbury, New Law]; Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 Duke L.J. 75 (2021). *But* *see* Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 Fordham L. Rev. 2529 (2021) [hereinafter, Huntington & Scott, Enduring Importance]; Clare Huntington & Elizabeth Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, Mich. L. Rev. 1371 (2020) for a defence of parents’ rights and attempts to reconceptualize parents’ rights as being in children’s interests as part of a broader framework of child-wellbeing. These efforts are, however, normative and the law in practice may not necessarily reflect the same understanding. [↑](#footnote-ref-14)
15. *See generally* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families – and How Abolition Can Build a Safer World (2022). [↑](#footnote-ref-15)
16. Cynthia Godsoe, *Racing & Erasing Parental Rights*, Bost. U. L. Rev. (forthcoming); Huntington and Scott, Enduring Importance, *supra* note 14, at 2532-33. [↑](#footnote-ref-16)
17. *See generally* Emily Buss, *“Parental” Rights Essay*, 88 Va. L. Rev. 635 (2002); Douglas NeJaime, *Parents in Fact*, 91 U. Chi. L. Rev. 513 (2024);for a discussion see *infra* Part IB. [↑](#footnote-ref-17)
18. *See, e.g.,* Joanna L. Grossman, *Constitutional Parentage* 32 Const. Comment. 307 (2017); Michael J. Higdon, *Constitutional Parenthood*, 103 Iowa L. Rev. 1483 (2018). [↑](#footnote-ref-18)
19. Traditional bases of parenthood may also include men who are treated as fathers due to the marital presumption even though they may not be genetically related to the child. [↑](#footnote-ref-19)
20. Non-biological parents usually refer to parents in heterosexual families who opt for ART or in same-sex families which often necessarily have a parent who is not biologically related to the child. [↑](#footnote-ref-20)
21. Third parties are generally non-parental caregivers such as grandparents or relatives who may care for the child or perform parental roles. Stepparents in blended families, where adults may come into the child’s life due to their parents’ relationship with that person, may also perform similar parental roles. [↑](#footnote-ref-21)
22. *Infra* Part IB. [↑](#footnote-ref-22)
23. Of course, ordinary legal rights can also be strong and can limit State action, but constitutional law represents superior law to which ordinary law must necessarily conform to, Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 323, 324-35 (2009). For an account of how U.S. constitutional law generally approaches rights adjudication, *see* Jamal Greene, *Rights as Trumps The Supreme Court 2017 Term: Foreword*, 132 Harv. L. Rev. 28 (2018). [↑](#footnote-ref-23)
24. While England is part of the United Kingdom of Great Britain and Northern Ireland (comprising England, Scotland, Wales, and Northern Ireland) family laws differ in each jurisdiction. I exclusively focus on family law in England. [↑](#footnote-ref-24)
25. Mary Ann Glendon, The Transformation of Family Law: State, Law and the Family in the United States and Western Europe 4 (1989). [↑](#footnote-ref-25)
26. *See generally* Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985); Hendrik Hartog, Man and Wife in America: A History (2000); Janet Halley, *What Is Family Law?: A Genealogy Part I*, Yale J. L. & Human. (2013). [↑](#footnote-ref-26)
27. While the United Kingdom does not have a written constitution it is governed by a broad set of constitutional rules dispersed across various documents as well as constitutional conventions, *see generally* N. W. Barber, The United Kingdom Constitution: An Introduction (2021). For why parents’ rights remain weak, see *infra* Part IIB. [↑](#footnote-ref-27)
28. While ‘parentage’ generally refers to genetic parents in English law, American law often uses ‘parentage’ and ‘parenthood’ interchangeably. ‘Parentage’ often refers to legal parents, while ‘parenthood’ is used more broadly to also refer to parents who enjoy certain rights and responsibilities but may not be legal parents. To avoid confusion, I do not use the term ‘parentage’ and only use the term ‘parenthood’. I use the term ‘legal parenthood’ when I specifically emphasize legal parents. I use the term ‘parental rights and responsibilities’ to broadly refer to the various decision-making and child-related rights and obligations that the law confers upon parents. I use the term ‘parents’ rights’ to specifically refer to the rights parents possess as legal parents, including when these rights are constitutionalized. [↑](#footnote-ref-28)
29. This may be broadly true for European jurisdictions, *see generally* Social Parenthood in Comparative Perspective (Clare Huntington, Courtney G. Joslin & Christiane Von Bary eds., 2023). [↑](#footnote-ref-29)
30. *Infra* Part III. [↑](#footnote-ref-30)
31. *Infra* Part III. [↑](#footnote-ref-31)
32. *Infra* Part III. [↑](#footnote-ref-32)
33. *Infra* Part III. [↑](#footnote-ref-33)
34. *See generally* Stephen Cretney, Family Law in the Twentieth Century: A History (2005) & Mary Ann Mason, From Father’s Property to Children’s Rights (1994). [↑](#footnote-ref-34)
35. *See generally* Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1991) [hereinafter, Woodhouse, Who Owns]; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 Cardozo L. Rev. 1747 (1992); James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 Cal L. Rev. 1371 (1994); Samantha Godwin, *Against Parental Rights*, 47 Colum. Hum. Rts. L. Rev. 1 (2015). The United States is amongst the only countries in the world that has not ratified the United Nations Convention on the Rights of the Child, for debates around ratification see Soo Jee Lee, *A Child’s Voice Vs. a Parents’ Control: Resolving Tension Between the Convention on the Rights of the Child U.s. Law*, 117 Colum. L. Rev. 687 (2017); for a historical perspective on debates around children's rights see Martha Minow, *What Ever Happened to Children’s Rights*, 80 Minn. L. Rev. 267 (1995). [↑](#footnote-ref-35)
36. *See generally* The Law Commission (Law Com. No. 172) Family Law: Review of Child Law – Guardianship and Custody (1988) [hereinafter, Law Commission Report]; The Law Commission (Working Paper No. 91) Family Law Review of Child Law: Guardianship (1985) [hereinafter, Law Commission Working Paper]. [↑](#footnote-ref-36)
37. *Infra* Part II. [↑](#footnote-ref-37)
38. *Infra* Part IV. [↑](#footnote-ref-38)
39. *See, e.g.,* Courtney G. Joslin, *Protecting Children: Marriage Gender, and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177 (2009); Jessica Feinberg, *Whither the Functional Parent: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 Brook. L. Rev. 55 (2017). [↑](#footnote-ref-39)
40. *Infra* Part IV. [↑](#footnote-ref-40)
41. *Infra* Part IV. [↑](#footnote-ref-41)
42. *Infra* Part IV. [↑](#footnote-ref-42)
43. *Infra* Part V. [↑](#footnote-ref-43)
44. *Infra* Parts I & V. [↑](#footnote-ref-44)
45. *Infra* Part V. [↑](#footnote-ref-45)
46. *Infra* Part VC. [↑](#footnote-ref-46)
47. *See generally* Mark Tushnet, *Essay on Rights*, 62 Tex. L. Rev. 1363 (1983); Mark Tushnet, *The Critique of Rights*, 47 S.M.U. L. Rev. 23 (1993). [↑](#footnote-ref-47)
48. Many of these critiques were made by critical legal studies scholars in the 1980s, for a summary see Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 Wm. & Mary L. Rev. 713, 719-21 (2011). [↑](#footnote-ref-48)
49. *See generally* Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L. J. 1346 (2005). [↑](#footnote-ref-49)
50. *See generally* Jamal Greene, How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart (2021); Mary Ann Glendon, Rights Talk, (1993). [↑](#footnote-ref-50)
51. *See, e.g.,* Ziegler, Eichner, & Cahn, *supra* note 10; Dailey and Rosenbury, New Law, *supra* note 14. [↑](#footnote-ref-51)
52. Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law 30-31 (1977). [↑](#footnote-ref-52)
53. Janet Halley, *What Is Family Law?: A Genealogy Part II*, Yale. J. L. & Human. 284-85 (2013). [↑](#footnote-ref-53)
54. On the functional method in comparative law, *see generally* Ralf Michaels, *The Functional Method of Comparative Law*, *in* The Oxford Handbook of Comparative Law 345 (Mathias Reimann & Reinhard Zimmermann eds., 2nd edn., 2019).For how common concepts and similar developments can enable comparative family law, *see* David Bradley, *Comparative Law, Family Law and Common Law*, 23 Oxford J. Legal Stud. 127, 145 (2003); David Bradley, *A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics*, Oxford U. Compar. L. F. 4 (2005), https://ouclf.law.ox.ac.uk/a-note-on-comparative-family-law-problems-perspectives-issues-and-politics/#fn76sym (last visited Jan. 20, 2025). [↑](#footnote-ref-54)
55. Therefore, another way of comparing American and English law would be to attempt to explain the divergences in American law. For scholarship that focuses on comparative legal cultures, *see*, *e.g.,* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 Yale L.J. 1151 (2003). [↑](#footnote-ref-55)
56. Edited volumes often focus on English and American law but rarely undertake meaningful comparative analysis, *see,* *e.g.,* Huntington, Joslin, and Bary, *supra* note 29; Family Law in Britain and America in the New Century (John Eekelaar ed., 2016); Cross Currents: Family Law and Policy in the United States and England (Sanford N. Katz, John Eekleaar, Mavis Maclean eds., 2000). For exceptions from this trend see Emily Buss & Mavis Maclean, *Law and Child Development in the UK and the US*, 6 J. Children’s Services 236 (2011) and for older work see Glendon, *supra* note 25. [↑](#footnote-ref-56)