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NONGENDERED CHILDCARE PARENTAGE

Jeffrey A. Parness*

INTRODUCTION

In the United States today, self-identified women increasingly can become childcare parents without giving birth, without genetic ties, and without formal adoption. Self-identified men increasingly can become childcare parents without marriages to those giving birth, without genetic ties, and without formal adoption. Furthermore, legal parentage more frequently arises other than at birth. Parentage under current law can be founded on preconception acts, on acts occurring during another person’s pregnancy, and on acts occurring long after birth to another. Further, parenthood is becoming available to those whose gender self-identity changes and to those who do not gender identify. With the (r)evolution in parentage under law, it is time that federal and state lawmakers embrace nongendered childcare parentage. Uses of gendered terms like husband, wife, biological dad, and birth mom are not only misleading, but also offensive and, at times, unconstitutional.1

The American Law Institute (ALI), with its 2002 Principles on Family Dissolution,2 and the National Conference of Commissioners on Uniform State Laws (NCCUSL), with its Uniform Parentage Acts (UPAs),3 have only somewhat recognized the changing nature of American families and the

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1. Outside of childcare parentage, some gendered terms may need to remain, as where physical characteristics remain relevant. Consider, for example, the ongoing debate over transgender athletes in sports. See Hecox v. Little, 479 F. Supp. 3d 930, 943–44 (2020) (discussing state statute generally barring transgender and disgender women from participating on women’s sports teams).
3. See UNIF. PARENTAGE ACT Prefatory Note 1–2 (UNIF. L. COMM’N 2017). The 2000 UPA was slightly modified in 2002. Id.
diminishing import of gender to childcare parentage. They have urged some significant nongendered parentage law reforms in the past two decades.\(^4\) American state lawmakers have responded, albeit slowly, by moving away a bit from laws solely defining parents by public definitions of gender.\(^5\) Additional changes are needed.

Noted academics have also urged parentage law reforms. Professor Courtney Megan Cahill "envisioned what it would mean for constitutional law to accommodate and incorporate the new maternity."\(^6\) She rejects contemporary "constitutional maternity" with its "paradigmatic mother: a singular and obvious woman in whom biological, social, and legal motherhood converge[,]"\(^7\) that is, "the woman who bears the child."\(^8\) Professor Cahill opines that the current federal constitutional maternity doctrine embodying "certain, uncomplicated, basic, and obvious" maternity\(^9\) should yield to a new constitutional maternity that tracks constitutional paternity in that it is "multidimensional" and not "a matter of incontestable fact.\(^10\)

Professor Cahill envisions that a new maternity can emerge from contemporary state family law developments where there exists "an image of motherhood that is more in line with contemporary constitutional commitments to sex, gender, and sexual orientation equality."\(^11\) She observes that state family

\(^4\) See id.; see also AM. L. INST., supra note 2, § 6.03 (For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex . . . ) (emphasis added). Childcare parentage interests implicate a federal constitutional right. Troxel v. Granville, 530 U.S. 57, 65-66 (2000). In Troxel, the majority recognized "the fundamental right of parents to make decisions concerning the care, custody and control of their children." Id. Similarly, Justice Souter recognized "that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." Id. at 77 (Souter, J., concurring).


\(^6\) Courtney Megan Cahill, The New Maternity, HARV. L. REV. 2221, 2232 (2020).

\(^7\) Id. at 2225.

\(^8\) Id. at 2227.

\(^9\) Id. at 2242.

\(^10\) Id. at 2302. She argues further that there should no longer be "singular and monolithic maternity." Id. at 2302.

\(^11\) Id. at 2232.
laws can prompt, over time, "trickle-up maternity," by transforming "constitutional maternity and its mainstream mother."

Other academics push for a new paternity. As with maternity, paternity usually contemplates parentage at the time of birth, but for sperm donors rather than birthgivers. Professor Purvis envisions "a clearer theory of constitutionalizing fathers" which rejects "gendered, parental stereotypes," resulting in constitutionalizing "fathers across the law." Albeit with a different vision, Professor Hendricks urges new paternity laws should not "disregard the mother’s existing parental rights" and should not transfer "too much power from women to men" by employing the "principle of genetic entitlement."

These articles, in focusing on maternity and paternity, reflect the terminology still generally employed in American laws addressing those entitled to childcare parentage. Yet, as noted by the NCCUSL, there is a decreasing sense in employing these terms, as well as other gendered terms like wife, husband, mother and father. Further, there is decreasing sense in chiefly focusing on laws designating childcare parentage at birth, as normally do the terms maternity and paternity.

12. Id. at 2289.
13. Id. at 2292. Trickle up federal constitutional parentage has been urged elsewhere. See, e.g., Douglas NeJaime, The Constitution of Parenthood, 72 STAN. L. REV. 261, 264 (2020) (opining that the federal constitutional due process protections of parent-child relationships should embody "a functional vision of parenthood," wherein state law reforms provide "multiple paths for nonbiological parents to attain legal status"); Douglas NeJaime, The Nature of Parenthood, 126 YALE L.J. 2260, 2347 (2017) [hereinafter NeJaime, Nature of Parenthood] (arguing federal constitutional equal protection requires some recognition of nonbiological parents); Michael J. Higdon, Constitutional Parenthood, 103 IOWA L. REV. 1483, 1538 (2018) (arguing that the constitutional definition of parent should include both "biology and intent," so that "psychological parentage" (i.e., no biological ties) itself should not be accorded "constitutional protections associated with legal parenthood"); Joanna Grossman, Constitutional Parentage, 32 CONST. COMENT. 307, 308 (2017) (exploring "four modern contexts in which constitutional parental rights and parentage laws are most likely to cross paths - non-marital childbirth, sperm donation, surrogacy, and lesbian co-parenting").
17. See UNIF. PARENTAGE ACT Prefatory Note 1–2 (UNIF. L. COMM’N 2017).
18. Herein, the focus will be on childcare parents, who are the persons holding the federal constitutional right, under the U.S. Supreme Court’s ruling in Troxel. Thus, the article does not address parentage for purposes like child support, recovery in tort, or asset distribution in probate. Though often unrecognized, state parentage laws differ significantly in these varying legal settings, as with persons who are parents in support or probate cases but not in childcare cases. See Parness, supra note 5, § 7.
Legal parenthood is increasingly established preconception, postconception but prebirth, or long after birth, both for children born of sexual procreation and for children born of assisted reproduction. Thus, there can be an expecting legal parent, whose parenthood under law is contingent upon a later live birth or upon later parental-like conduct. And there can be an existing legal parent, whose parenthood is recognized preconception, postconception but prebirth, at birth, or long after birth.

State childcare parentage laws, as Professor Cahill notes, are increasingly "complicated, contingent and unknowable." They can operate before or after a child is born, and not just at birth. They can also operate without embodying public definitions of gender. Whether these state laws ever "trickle-up" to federal constitutional due process, parentage law reforms should embrace nongendered parenthood, which can arise before or after a child's birth and can change over time without death, termination of existing parental rights, or formal adoption.

NONGENDERED CHILDCARE PARENTAGE LAW REFORMS

Childcare parentage law reforms should continue for some time, with the legal (r)evolution more fully reflecting "multidimensional" childcare parenthood, accommodating the growth in assisted reproduction births, and recognizing the changing nature of and fluidity in families. In undertaking further legal reforms, which might prompt "trickle-up" parentage, lawmakers in the United States should employ the following guidelines.

Federal Constitutional Childcare Parentage

State law makers should recognize that there may not soon be federal lawmaking that expands the childcare parents who are afforded constitutional due process interests. They should realize that the U.S. Supreme Court will likely

19. Cahill, supra note 6, at 2224.

20. Comparably, gender neutral terms are needed where legal parenthood does not involve care, custody, and control of children, as in support, tort, and probate cases. Note that parenthood can vary as definitions are contextual. For example, a child support parent often is not a childcare parent. And a parent in a probate proceeding often is not a childcare parent. See, e.g., N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004) ("[T]he biological relationship between a father and his offspring – even if unwanted and unacknowledged – remains constitutionally sufficient to support ... child support requirements."); In re Scarlett Z.-D., 2015 IL 117904, ¶¶ 52–53 (explaining "equitable adoption" operates in probate, but not childcare or settings when assessing legal parenthood). Gender neutral terms were added in the 2019 amendments to the NCCUSL's Uniform Probate Code. UNIF. PROB. CODE § 2-302(a) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2019) (eliminating reference to "his" or "her" will).
continue to entertain equal protection claims involving state childcare parentage laws.

As to new federal laws expanding those with protected parental childcare interests, there are Article I issues arising with congressional initiatives, given the Tenth Amendment. There are also Article III subject matter jurisdiction barriers.

For legislative authority, Professor Patterson provides a concise explanation of congressional limits. She observes:

Some federal activity in the family law realm is unavoidable and even desirable . . .

The federal attention can become pernicious, however, if federal program requirements demand changes in state law that could disrupt the fabric of family law and policy in a state. Because family policy is closely connected to community norms and local social cohesion, such disruptions can have deleterious social effects that were neither anticipated nor desired by Congress. These disruptions can be, and sometimes are, avoided by a less prescriptive federal approach . . . 21

So, there can be some federal program requirements defining who are childcare parents with due process rights involving the “care, custody, and control” of children.22 But any mandates must not significantly disrupt state family law policies, however much they may differ interstate. Such federal mandates, with “a less prescriptive federal approach,” appear, for example, in the congressional prerequisites on voluntary parentage acknowledgments (VAPs) for state participation in federal welfare subsidy programs. 23

For judicial authority, the Supreme Court has frowned upon federal courts undertaking “divorce and alimony decrees and child custody orders.”24 It explained:

Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor

21. Elizabeth G. Patterson, Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law, 25 GA. STATE U. L. REV. 397, 399 (2008). Beyond Congress’s Article I spending power which Patterson referenced, see id. at 400, Congress also has the power to “enforce” due process protections. See U.S CONST. amend. XIV, § 5.


compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals . . .

This position has been read to foreclose federal courts from considering parentage law issues necessary for child custody decrees. The Sixth Circuit noted that "if the plaintiff requests that a federal court determine who should have care for and control a child, then the request is outside the jurisdiction of the federal courts." Federal judicial reluctance to determine who should care for and control a child at times extends beyond child custody decisions for particular children. Unfortunately, the reticence extends to deciding who generally should possess due process parental "care, custody, and control" interests. However, the Ackenbrandt court's concerns over a state court's relationship with local and state organizations and "special proficiency" are not implicated when resolving childcare due process interests. Resolving constitutional issues involving who possesses childcare interests would not mean federal courts are "entangling" themselves in questions of state law. In fact, the issue of who possesses federal constitutional due process parental childcare interests is exclusively a federal law question, not unlike the issues of who possesses the right to contraception, abortion, and marriage, issues that have been preemptively addressed by the Supreme Court.

25. Id. at 703-04.
26. See, e.g., Chevalier v. Estate of Barnhart, 803 F.3d 789, 795-97 (6th Cir. 2015) (reviewing its own precedents and those of "sibling circuits").
27. Id. at 797. However, what constitutes a request for a childcare determination is sometimes difficult. See, e.g., McCormick v. Franklin Cty. Ct., 2020 WL 4334886, *2 (S.D. Ohio 2020) ("[T]he domestic-relations exception must be applied narrowly . . . . This dividing line, however, is not always clear.").
29. Id.
Contemporary federal judicial reluctance to define childcare parents has its roots in early Supreme Court precedents. In 1890, the Court said:

The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States, nor any authority of the United States, has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its Constitution.33

While those possessing federal parental childcare interests are today chiefly defined by state courts and legislatures, some Supreme Court precedents, primarily Lehr,34 Michael H.,35 and Troxel,36 shape these definitions. Consider several of the opinions in Troxel where state-recognized parental interests trumped state concerns regarding the maintenance of beneficial child-grandparent relationships. In dissent, Justice Stevens said: "It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this."37 He noted a few Supreme Court precedents, including one indicating that it is best to leave "matters involving competing and multifaceted social and policy decisions" to "local decisionmaking," which he deemed to mean that "caution" for the Court was "never more essential than in the realm of family and intimate relations."38 He did not explain why the court was not as cautious regarding such family relations areas as contraception, abortion, and marriage.39

33. Ex parte Burnus, 136 U.S. 586, 593–94, 597 (1890)(denying jurisdiction in a child custody dispute between a father of a child born in wedlock and maternal grandparents which arose after the mother’s death).
34. Lehr v. Robertson, 463 U.S. 248, 249–50, 267–68 (1983) (limiting the definition of parental childcare interests to parents that have not abandoned their child).
36. Troxel v. Granville, 530 U.S. 57, 66–67 (2000) (plurality finding nonparent state child visitation statute allowing any person to petition a court for visitation violated “the fundamental right of parents to make decisions regarding the care, custody and control of their children”). Cf. id. at 92 (Scalia, J., dissenting) (stating Court’s precedent holding “substantive constitutional right of parents to direct the upbringing of their children” should not extend “to this new context” albeit not yet urging these precedents be overruled).
37. Troxel, 530 U.S. at 90 (Stevens, J., dissenting).
38. Id. at 90 n.10 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992).
39. See generally id. at 80–91.
Justice Scalia, also dissenting in *Troxel*, deemed “state legislatures” far better suited than the Court to craft definitions of parents possessing the “unenumerated parental rights” recognized in federal constitutional precedents, which he “would not now overrule.” Further, Justice Kennedy, also in dissent, recognized that one fit parent’s federal constitutional childcare rights might be limited by “a *de facto* parent” doctrine, where the “family courts in the 50 States . . . are best situated to consider the unpredictable, yet inevitable, issues that arise.” This observation was founded on the preexisting limits on diversity subject matter jurisdiction regarding divorce, alimony, and child custody decrees.

Similar statements appear beyond dissents and outside of grandparent visitation cases. In *Lehr*, an adoption case, a majority of the Supreme Court simply observed that in “the vast majority of cases,” state laws govern “the legal problems arising from the parent-child relationship.”

In the presumptive spousal parent setting in *Michael H.*, the Supreme Court, per a plurality opinion, found that it is “a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.”

In a property setting involving “a conflict between federal and state rules for the allocation of a federal entitlement,” the Supreme Court observed that a state “family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests” before such a state law can be overridden.

In the past, as Professor Cahill notes, the harms caused by interstate parentage law variations may not have been major. Today, there is major damage. New and quite diverse forms of genetic and nongenetic parentage have risen sharply, particularly with the increases in the numbers of nonmarital

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40. Id. at 92–93 (Scalia, J., dissenting).
41. Id. at 101 (Kennedy, J., dissenting) (citing *Ankenbrandt* v. Richards, 504 U.S. 698, 703–04 (1992)).
42. More particularly, Justice Kennedy relied upon *Ankenbrandt*, where the Court was only concerned with the long history of absence of federal court subject matter jurisdiction over divorce, alimony, and child custody decrees, and the special state court proficiencies to monitor compliance with such decrees, but not with the absence of federal court authority to define federal constitutional rightsholders. See *Ankenbrandt*, 504 U.S. at 703–04.
46. See Cahill, supra note 6, at 2227–29.
children, children born of assisted reproduction technologies, and children "informally" adopted. Applying these forms often involves the need to consider interstate conduct. The interstate conduct may have little or nothing to do with anticipation of, or projections about, parentage. Or, the interstate conduct leading to conception and birth may have everything to do with future parentage, as with forum shopping to avoid restrictive state surrogacy laws. In both settings, there is often some uncertainty as to who is a childcare parent in a parentage dispute. Uncertainties on parentage establishment norms can be greatly diminished if the Supreme Court elaborated further on who can secure childcare parentage. Unfortunately, such guidance does not appear imminent.

As reluctance on further constitutionalizing parenthood under substantive due process will likely continue, "clear and substantial" federal interests in state childcare parentage laws have been recognized when equal protection is denied. So, some state spousal parentage laws that explicitly recognize only the husbands

47. Cahill, supra note 6, at 2233 ("In the 1960s and 1970s, five to seventeen percent of all U.S. births were to unmarried women. In 2018, that number was around forty percent.").


49. See Jeffrey A. Parness, Illinois Childcare Parentage Law (R)Evolution, 51 LOY. U. CHI. L.J. 911, 919–943 (2020) (discussing “informal adoption” and the rise of presumed or de facto parenthood doctrines). Herein, “informal adoptions” most significantly include recognitions of a second parent for a child with a single parent where the second parent is on equal footing with the existing legal parent and achieves parental status, without formal adoption.

50. Consider, for example, a heterosexual married couple which moves interstate at a time when both spouses, or perhaps only the husband, is unaware of the pregnancy, where the norms on spousal parent presumption and its override differ between the states. See, e.g., Parness, supra note 49, at 920–23 (discussing the differing American state spousal parent laws, as well as the differing 1973, 2000, and 2017 UPA approaches to spousal parentage).

51. See, e.g., Peter Nicolas, Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy, 89 WASH. L. REV. 1235, 1239–49 (2014) (describing how two men from Washington State chose Oregon as the place to have their child with the aid of a surrogate).

52. Uncertainty can be mitigated substantially by careful planning. See, e.g., id. at 1260, 1299 (“Our surrogacy contract was drafted, negotiated and signed within Oregon, and set forth criteria designed to prevent ever having to enforce the contract within Washington State. We had thus successfully circumvented Washington State’s criminal prohibition on compensated surrogacy agreements, while at the same time laying the groundwork for having our parent-child relationship recognized by Washington State.”)
of birth mothers, and thus not wives of birth mothers, as childcare parents at the time of birth have already properly fallen in lower federal courts under the Equal Protection Clause. These cases sometimes follow Supreme Court precedents invalidating state laws denying equal treatment of same-sex female couples and opposite sex couples.

Additionally, some state lawmakers have recognized the need for equality, as when they extend spousal parentage to some self-identified female spouses of those giving birth, make available voluntary parentage acknowledgements to some self-identified women, and recognize non-surrogacy assisted reproduction opportunities beyond opposite sex married couples.

Whether parentage establishment norms continue to be substantially guided by state lawmakers, they should more frequently recognize nongendered parenthood. Additionally, they should expressly address choice of law issues arising when parentage disputes involve multistate conduct.

53. See, e.g., ALA. CODE § 26-17-204(a)(1) (child "born during the marriage"). Some state laws recognize husbands as expecting legal parents when their wives conceive during the marriage. See, e.g., MICH. COMP. LAWS § 722.1433(e) (2021) (marriage at time of conception or birth). Similarly, expecting legal parentage can arise for husbands when they are simply married to birth mothers during pregnancies. See, e.g., ARIZ. REV. STAT. § 25-814(a)(1) (2020) (marriage "at any time in the ten months preceding the birth").

54. See, e.g., Henderson v. Box, 947 F.3d 482, 487 (7th Cir. 2020) (same-sex female spouses are both legal parents of child seemingly born to one spouse of assisted reproduction); McLaughlin v. Jones, 401 P.3d 492, 495–98 (Ariz. 2017) (finding that marital paternity presumption applies to female spouse of assisted reproduction birth mother).

Such laws have also been changed via statutory amendments. See, e.g., VT. STAT. tit. 15C, § 401(a)(1) (2021) ("person" married to birth mother is a childcare parent); WASH. REV. CODE § 26.26A.155(1)(a)(1) (2018) ("individual" is a presumed parent of a child born to the "woman who gave birth" to whom the individual is "married").

55. See, e.g., Henderson, 947 F.3d at 484, 487 (relying on Supreme Court precedent in Obergefell and Pavan to hold Indiana’s statutory presumption that a man was the father of child born or conceived in wedlock while denying the same presumption to same-sex married female couples violated the Equal Protection clause). Given the current laws on maternity reviewed by Professor Cahill, same-sex married male couples, utilizing assisted reproduction in the absence of formal adoption, may well be treated differently in some settings than self-identified same-sex female and heterosexual couples in sexual procreation births. Notably, in Henderson, the court emphasized that its ruling did “not decide what parental rights and duties (if any) biological fathers such as sperm donors have with respect to the children of female-female marriages.” Henderson, 947 F.3d at 488.

56. See, e.g., N.H. REV. STAT. ANN. § 168-B:2(v)(2015) (person is a presumed parent); 15 R.I. GEN. LAWS § 15-8.1-401(a) (2020) (individual is a presumed parent); VT. STAT. ANN. tit. 15C, § 308 (2021) (person can challenge acknowledgement or denial of parentage).


There are increasing numbers of people who are expecting or existing legal parents, but who do not bear, or have biological ties with, their children. For them, the terms maternity and paternity seem ill-suited, especially as their parentage often arises at times other than at birth. As well, the terms woman, husband, and wife seem ill-suited for legal parentage as gender identities are not, and need not be, relevant. The requirements indicating such identities offend those who do not gender identify or who self-identify differently over time. Thus, Professor Cahill’s call for a new maternity, and Professors Purvis and Hendricks’s call for fatherhood reforms, should be rephrased while their calls for new parental childcare laws should be heeded. The nongendered approaches to legal parentage by the NCCUSL in the 2017 UPA should guide American lawmakers.

A quick review of a few state childcare parentage laws reveals how some state laws are unnecessarily gendered while their counterparts elsewhere contain no gender identifications. As well, the review exposes the equal protection difficulties with some current gendered parentage laws.

As to preconception childcare parentage, expecting parents (i.e., parentage contingent upon birth) under some laws now include self-identified women and men who have contracted for future parenthood in either non-surrogacy assisted reproduction pacts, usually with their current partners who agree to bear children with whom they will co-parent, or in surrogacy pacts with those not then their

59. Maternity, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/maternity (last visited Mar. 12, 2021) (defining maternity, when used as an adjective, as “being or providing care during and immediately before and after childbirth,” “designed for wear during pregnancy,” or “effective for the period close to and including childbirth”).

60. Paternal, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/paternal#other-words (last visited Mar. 12, 2021) (defining paternity, when used as an adjective, as “received or inherited from one’s male parent” or “related through one’s father”).

61. Compare UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2017) (“A woman who gave birth to a child and an . . . intended parent [via a non-surrogacy assisted reproduction pact] . . . may sign an acknowledgment of parentage to establish the parentage”), and UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM’N 2017) (presumed parentage for “individual” married to birth mother at the time of birth), with UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2000) (“The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity.”), and UNIF. PARENTAGE ACT § 201, 204 (UNIF. L. COMM’N 2000) (“mother-child” and “father-child” relationships established, with marital paternity presumption for a “man”).

62. See, e.g., DEL. CODE ANN. tit. 13, § 8-704(a) (2021) (“Consent by a woman and an unintended parent of child conceived via assisted reproduction must be in a record signed by the woman and the intended parent.”); WY0. STAT. ANN. § 14-2-904(a) (2020) (similar); see also Parness, supra note 49, at 939–41 (discussing non-surrogacy assisted reproduction under
partners who agree to forego their own parenthood while recognizing the future parenthood in these self-identified women and men.63 Elsewhere, preconception childcare parentage laws are rightly nongendered.64

As to postconception but prebirth childcare parentage, expecting parents under some laws now include self-identified women and men whose spouses will conceive and/or bear the couple’s children during the marriage65 and self-identified women and men who sign voluntary paternity acknowledgment forms.66 Elsewhere, postconception but prebirth expecting parentage laws are rightly nongendered.67

As to at-birth childcare parentage, existing legal parents under some laws now include self-identified women and men whose spouses have borne children68 and self-identified men who sign a voluntary paternity agreement who...
acknowledgment form at birth. Elsewhere, similar at birth existing childcare parentage laws are rightly nongendered.

As to childcare parentage long after birth, existing parents include self-identified women and men who reside with children and their other legal parents while holding out the children as their own, or who developed parental-like relationships with children with the support of at least one other parent. Elsewhere, such parentage laws are rightly nongendered.

The terms maternity and paternity, often employed to describe parentage established at the time of birth, as well as the terms mother, father, wife, and husband, should be fully replaced in state parentage laws by gender neutral terms, like parent, person, individual, or spouse. Professor Cahill recognizes the difficulties under current state parentage laws arising for people whose own gender identity views are “exceptional,” including people who do not gender identify. She urges that all laws should respect those with non-ordinary characteristics. Replacement of gendered terms will mitigate the confusion.

69. See, e.g., 750 ILL. COMP. STAT. 46/302(a) (2021) (“[T]he man seeking to establish his parentage . . . .”).
70. See supra note 67 and accompanying text.
71. See, e.g., COLO. REV. STAT. § 19-4-105 (“A man is presumed to be the natural father of a child if . . . he receives the child into his home and openly holds out the child as his natural child.”); see also Parness, supra note 49, at 928–932 (discussing hold out and residency parentage).
72. See, e.g., DEL. CODE ANN. tit. 13, § 8-201(a)-(c) (2021) (providing that a parent-child relationship can be established by a man or woman by meeting certain factors to attain “de facto parent status”); see also Parness, supra note 49, at 932–38 (discussing de facto and similar parentage norms).
74. But cf. Stephen J. Ware, Paternalism or Gender-Neutrality, 52 CONN. L. REV. 537, 537 (arguing “paternalism” should be used “when emphasizing the important relevance of gender or otherwise trying to convey a gendered meaning”). However, paternalism is never needed as the use of a term with “gendered meaning” can be overcome by language like genetic donor, biological parent, or individual giving birth.
75. See Cahill, supra note 6, at 2296–97 (“[T]he new maternity could also challenge other forms of transgender and gender-identity discrimination that rely on the notion of real biological difference between the sexes . . . .”).
76. See id. at 2252–58, 2296 (demonstrating that current parentage laws founded on “maternal certainty” are problematic and arguing these laws discriminate against transgendered people because they constitute “an unconstitutional stereotype” based on a “refusal to respect exceptional cases”).
over terminology as well as much constitutional equality litigation. Thus, for example, self-identified women and nongendered persons will no longer need to be deemed husbands under spousal paternity laws or sign voluntary acknowledgments of paternity prompted by their egg donations in assisted reproduction settings. Alterations of childcare parentage terms should include replacing Mother’s Day and Father’s Day with Parents’ Day, as this change would recognize there could be multiple mothers, multiple fathers, or nongendered parents for a single child. Nongendered parentage laws will respect people with non-ordinary characteristics while not altering the underlying substantive law policies on who should be a childcare parent.

**Choosing Between Conflicting Parentage Laws**

In moving toward nongendered state childcare parentage laws, choice of law issues merit greater attention. Parentage establishment effective at the time of birth often is dependent upon laws tied to a singular point in time, the date of birth, and to a certain place, the situs of the birth. The date and situs are normally beyond dispute. Establishment is accomplished via birth certificate recognition, which might reflect the person giving birth and the presumed spousal parent, or the person giving birth and VAP parent who executed the VAP with the birthgiver at the birthing center.

But parentage establishment at the time of birth can also depend, as noted, on conduct occurring before conception, as with intended parents in anticipated assisted reproduction births (both non-surrogacy and surrogacy). Parentage establishment at birth can also depend upon postconception but prebirth conduct, as with voluntary parentage acknowledgments. Finally, parentage establishment can depend upon conduct occurring long after birth, as with residency/hold out and de facto parentage. In all these settings, there can be relevant conduct in several American states (and/or foreign nations). Where the parentage establishment laws of interested governments differ, the choice of a childcare parentage law must be made by a court adjudicating a parentage dispute.

77. Some state laws already speak of spousal parentage presumptions in gender neutral terms. See, e.g., supra note 54, 56 and accompanying text.


Unfortunately, such a court frequently just looks to its own laws even though much or all of the important conduct occurred elsewhere.

Choice of forum law is typically driven by state parentage acts following the two most recent UPAs. This reliance on the UPAs is misguided even though it does avoid difficult choice of law analyses and prompts efficiency and certainty. State laws should explicitly reflect that the court deciding a parentage dispute has the authority (if not the constitutional obligation) to choose to apply the law of another jurisdiction, even when this prompts some uncertainty.

The misguided reliance on the UPA’s strict choice of forum law approach, assuming no full faith and credit obligations, is exemplified in the new Rhode Island Uniform Parentage Act, effective January 1, 2021. Under the Act, the “state shall give full faith and credit to a determination of parentage and to an

80. See, e.g., UNIF. PARENTAGE ACT §§ 103(b), 105 (UNIF. L. COMM’N 2000) (each declares that a court adjudicating childcare parentage “shall apply” its own law). The 2000 UPA made local law applicable to “every determination of parentage.” Id. at 103(a). Section 103(a) was amended in 2002 to make local law applicable to “determination of parentage” because the 2000 UPA language was “excessively broad and could conflict with other state laws, such as those governing probate issues,” a recognition that outside of childcare parentage, parents may be differently defined. UNIF. PARENTAGE ACT § 103(a) advisory committee’s note to 2002 amendment (UNIF. L. COMM’N 2002); see, e.g., In re Scarlett Z.-D., 2015 IL 117904, ¶¶ 52–53 (explaining “equitable adoption” operates in probate, but not childcare or settings when assessing legal parentage). Even here, state law may deem that conduct occurring in a jurisdiction outside the place of birth can sometimes prompt the law of that jurisdiction to govern issues of childcare parentage. For instance, consider choice of law issues where the sexual intercourse or assisted reproduction agreement prompting birth occurred outside the state of birth, see, e.g., Nicolas, supra note 51, at 1256, as well as issues involving voluntary parentage acknowledgments occurring outside the state of birth, Jeffery A. Parness, Challenges in Handling Imprecise Parentage Matters, 28 J. AM. ACAD. MARRI. LAWS. 139, 150–52 (2015).

81. See Jeffrey A. Parness, Faithful Parents: Choice of Childcare Parentage Laws, 70 MERCER L. REV. 325, 327–32 (2019) for a discussion on how state lawmakers may not to recognize possible applications of other states’ laws on childcare parentage. The 2017 UPA, however, follows the current (2008) Uniform Interstate Foreign Support Law (UIFSA) which rejects the earlier UIFSA (1996) provision that invites courts determining parentage for support purposes to apply sometimes their own rules on choice of law. Compare UNIF. PARENTAGE ACT § 105 (UNIF. L. COMM’N 2017), with UNIF. INTERSTATE FAM. SUPPORT ACT § 303 (UNIF. L. COMM’N 2008). Choice of parentage law analyses should differ in the support and custody contexts. In support cases, the child will typically reside in the forum state and require aid there. In custody cases, often the alleged parent is noncustodial, undertook most or all conduct (as with residency and hold out or developing a parental-like relationship) outside the forum, and had no chance to override the custodial parent’s decision to relocate to the forum with the child.

82. Current uncertainties sometimes prompt significant (and hopefully for intended parents, correct) forum shopping. See Nicolas, supra note 51, at 1239–45.

acknowledgement of parentage from another state if the determination or acknowledgement is valid and effective in accordance with the law of the other state.\textsuperscript{84} In the absence of such credit, the Act directs the courts to "apply the law of ... Rhode Island to adjudicate parentage."\textsuperscript{85} Thus, Rhode Island laws on de facto parentage would apply in a Rhode Island case\textsuperscript{86} wherein an individual claims to be a de facto parent of a child\textsuperscript{87} who was recently relocated to Rhode Island solely by the custodial parent, even though the individual seeking de facto parenthood exclusively developed a parent-child relationship in Illinois, whose laws do not recognize de facto parenthood.\textsuperscript{88}

Seemingly, the Rhode Island statute that prefers applying its own laws to cases involving parentage adjudications might also apply (assuming no full faith and credit duties) in cases seeking to disestablish parentage. Thus, a custodial parent who relocates with a child from Illinois to Rhode Island could seek to undo, under Rhode Island norms, an Illinois voluntary parentage acknowledgement (itself entitled to full faith and credit),\textsuperscript{89} or a marital parentage presumption arising from an Illinois marriage and birth (seemingly not entitled to full faith and credit),\textsuperscript{90} even though the acts relevant to disestablishing parenthood all occurred in Illinois. Here, as with de facto parentage establishment, the laws of Rhode Island and Illinois may differ significantly.\textsuperscript{91}

\textsuperscript{84.} \textit{Id.} § 15-8.1-115.
\textsuperscript{85.} \textit{Id.} § 15-8.1-103(b). However, Section 105 of the 2017 UPA goes on to say that the application of forum law "does not depend on (1) the place of birth of the child; or (2) the past or present residence of the child." \textit{UNIF. PARENTAGE ACT} §§ 103(b), 105 (\textit{UNIF. L. COMM'N} 2000).
\textsuperscript{86.} 15 R.I. GEN. LAWS § 15-8.1-103(b).
\textsuperscript{87.} \textit{Id.} § 15-8.1-501.
\textsuperscript{88.} \textit{In re Scarlett Z.-D.}, 2015 IL 117904, ¶ 45.
\textsuperscript{89.} 15 R.I. GEN. LAWS § 15-8.1-115 (providing that Rhode Island shall give full faith and credit to an acknowledgment of parentage from another state if it is valid and effective in accordance with the law of the other state). Yet, it seems the VAP challenge laws of the other state would not receive credit, as credit is just given in Rhode Island to the initial establishment since only it embodies an earlier state record. \textit{See id.; see also Parness} & Saxe, \textit{supra} note 23, at 185-203 (discussing the differing state VAP challenge laws).
\textsuperscript{90.} \textit{See} 28 U.S.C. § 1738A(a) ("[E]very State shall enforce ... any custody determination ... made consistently with the provisions of this section by a court of another State"). A marital parentage presumption in Illinois does not prompt, by itself, a "determination" by a "court," as needed under the Rhode Island full faith and credit directive. 15 R.I. GEN. LAWS § 15-8.1-115.
\textsuperscript{91.} Illinois childcare parentage laws, substantially revised in 2015, are significantly founded on the 2000 UPA, while the Rhode Island childcare parentage laws chiefly follow the 2017 UPA. \textit{See Parness, supra} note 49, at 913 (discussing how Illinois childcare parentage laws, substantially revised in 2015, are significantly founded on the 2000 UPA); Julie Moreau, \textit{Changes to State Parenting Laws Help Fill the Gaps for Same-Sex Couples}, NBC NEWS (Aug. 1, 2020, 1:30 AM), https://www.nbcnews.com/feature/nbc-out/changes-state-parenting-laws
CONCLUSION

State childcare parentage laws are in dire need of reforms. But a new approach to maternity or paternity, or to wives, husbands, women, or men as parents, is not needed. Rather, what is necessary is what Professor Cahill calls “a sex-neutral concept” of parenthood. Increasingly, as Professor Cahill notes, childcare parentage under law not only is “multidimensional” and “complicated,” but also comes without any ties to gender identity. This approach is taken in the 2017 UPA and in recent ALI pronouncements. New laws should speak just to parenthood, not to maternity and paternity, not to mother and father, not to husband and wife.

Further, new laws must better recognize that contingent parentage for children now living could have arisen either preconception or postconception but prebirth. And new laws should reflect that existing parents can first be recognized long after birth, without formal adoptions or terminations of parental rights.

Childcare parentage laws should explicitly recognize that both expecting and existing legal parentage can vary over time for the same child. Finally, they should expressly address the choice of law issues that increasingly arise where conduct relevant to “multidimensional” parenthood occurs in several states.

92. Cahill, supra note 6, at 2294.

93. Id. at 2221; see, e.g., 750 ILL. COMP. STAT. 46/204(a)(1) (2021) (recognizing parentage in the spouse, not the husband, of a woman giving birth); VT. STAT. 15C, § 301 (2021) (providing voluntary acknowledgement of parentage, not an acknowledgement of paternity, as demonstrated by the reference to “person” signing with birth mother).