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Federal Constitutional Childcare Interests and Superior Parental Rights in Illinois

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Federal Constitutional Childcare Parents

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California law, like nature itself, makes no provision for dual parenthood.[1]

Court may find…more than two persons with a claim to parentage…if…recognizing only two parents would be detrimental to the child.[2]

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[1] Michael H. v. Gerald D., 491 U.S 110, 118 (1989)(J. Scalia, joined by The Chief Justice, J. O'Connor and J. Kennedy) [hereinafter Michael H.]. Compare id. at 162 (J. White, joined by J. Brennan, dissenting)("it is hardly rare in this world of divorce and remarriage for a child to live with the father to whom her mother is married, and still have a relationship with her biological father.")

[2] Cal. Fam. Code 7612(c) (effective in 2013). See also Me. Rev. Stat. tit. 19-A, 1853 (effective July 2016) ("a court may determine that a child has more than 2 parents"). Precedents have also permitted three childcare parents in the absence of statute. See, e.g., In re M.W., 292 P.3d 1158 (Col. App. 2012) (psychological parent shares custody with two biological parents); Jacob v. Shultz-Jacob, 923 A-2d 473 (Pa. Super. 2007) (custody shared between birth

I. Introduction

In context, the first quote, from a U.S. Supreme Court opinion, concluded there could be no dual paternity in California for federal constitutional childcare purposes. Such childcare encompasses the principle that parents, as defined by state law, have superior rights, under the federal constitution, to the "care, custody and control" of their children.[3] The second quote, from a more recent California statute, recognizes there can be dual or triple paternity or maternity, though nature alone usually does not allow a second biological father or mother.[4] Thus, this quote suggests that "nature itself" need not always accompany a finding of legal parentage outside of formal adoption. It allows function to supplement (or trump) actual or

mother, her same sex partner and the sperm donor who served as a parent in an AHR birth); and T.E.B. v. C.A.B., 74 A.3d 170, 177-8 (Pa. Super. 2013) (shared custody to biological father, presumptive father (i.e., husband) and birth mother).

[3] Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) [hereinafter Troxel]. See also id. At 77 (J. Souter, concurring) ("We have long 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 87 (J. Stevens, dissenting) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children"); and id. at 95 (J. Kennedy, dissenting) ("there is a beginning point that commands general, perhaps unanimous, agreements in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determined, without undue interference by the state, how best to raise nurture and educate the child. The parental right stems from the liberty interest protected by the Due Process Clause of the Fourteenth Amendment.").

[4] With unnatural help, in limited settings there can be dual paternity or maternity. See, e.g., Charles P. Kindregan, Jr. and Maureen McBrien, Assisted Reproductive Technology, at 42 (American Bar Association, Section of Family Law, 2011) [hereinafter Kindregan and McBrien] (describing "blended intrauterine insemination process," with a few cases) and Yehezkel Margalit, Orrie Levy, and John Loike, "The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Personhood," 37 Harvard J. of Law & Gender 107, 131 (2014) (describing technologies allowing a child to be born with "the genetic material of three men and three women"). As the statute references "persons" with parentage claims, it also embodies the possibility of triple maternity, triple paternity, or three parents who each are unaligned with a particular gender. Here too nature alone does not by itself prompt parentage under law. Consider, e.g., mitochondrial replacement therapy [involving nuclear DNA from an original egg and mitochondrial DNA from a donor egg] to prompt a childbirth wherein the intended parents are lesbian couples who are not egg donors. See, e.g., Amy B. Leiser, Note, "Parentage Disputes in the Age of Mitochondrial Replacement Therapy," 104 Georgetown L.J. (2016).

presumed biological ties (e.g., marital paternity presumptions) as an avenue to legal parentage, as well as invites legal parentage by agreement.

Functional and contractual parents are proliferating in the United States, both in and outside of "dual parenthood." Today, in California and elsewhere "nature itself" now does not foreclose the possibility of not only three parents for a child, but also of only two female parents or only two male parents, where some or all have no biological ties to the child.

The quotes, as well, suggest that American state lawmakers control parenthood issues for purposes of determining federal constitutional childcare. As these federal constitutional parental childcare rights are fundamental, they cannot be easily overridden by the state legislators or judges even if their quite achievable goal is to protect the child by serving the child's best interest.[5] Parents defined by state law hold significantly-protected federal constitutional childcare rights.[6] Of course, state parental childcare rights can extend, though not limit, federal constitutional parental childcare.[7]

[5] See, e.g., Troxel, 530 U.S. at 72-73 (plurality opinion) ("As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.").

[6] Federal constitutional childcare rights have been read to encompass custodial interests, so that once custody of a child has been awarded to one parent, the other parent has no federal constitutional childcare rights in visitation. Uwadiegwu v. Dept. of Soc. Serv., 91 F. Supp. 3d 391 (E.D.N.Y 2015) (noncustodial parent also has no federal constitutional right to intimate association with his/her child where there was no termination of parental rights, i.e., "no wholesale relinquishment" of parent's rights with respect to his/her child and where there was a visitation opportunity that was not "arbitrary, shocking, or egregious," though the noncustodial parent would need to travel from New York to Mississippi in order to visit).

[7] See, e.g., Callender v. Skiles, 591 N.W. 2d 182 (Iowa 1999) (following dissent in Michael H. by finding putative biological father has waivable Iowa constitutional right to challenge paternity presumption favoring husband of birth mother where her marriage remains intact) [hereinafter Callender] and In Interest of J.W.T., 872 S.W. 3d 189, 198 (Texas 1994) (Texas constitution protects against denying all putative fathers standing to sue in paternity regarding a child born into a marriage between others).

Left unexplained is how federal constitutional rightsholders[8] came to be largely defined by state laws.[9] Typically federal (often U.S. Supreme Court) precedents define federal constitutional rightsholders,[10] as well as the substantive and enforcement aspects of the federal constitutional rights. There is general uniformity nationwide, per federal cases, among the criminally accused,[11] gun toters,[12] and abortion seekers[13] who possess and enforce the same

[8] Herein the term "rightholders" is employed, though not typically used by courts or commentators. While state courts often speak of "standing" to seek court-ordered childcare, that term is often confusing. See, e.g., Daniel Townsend, "Who Should Define Injuries for Article III Standing?", 66 Stanford Law Review Online 76, 77 (Dec. 16, 2015) (reviewing U.S. Supreme Court precedents requiring that a plaintiff suing to enjoin unconstitutional governmental action "be injured in order to have standing").

[9] These laws often chiefly originate in statutes and judicial precedents. Seldom do these state parentage laws arise via state constitutional law directives. But see, e.g., Callender, 591 N.W. 2d at 192.

[10] For an excellent review of how the U.S. Supreme Court has defined federal constitutional rightsholders, especially as to corporations, aliens and felons, see Zoë Robinson, "Constitutional Personhood," _George Washington Law Review _(forthcoming 2016), draft available at SSRN.com/abstract=2580271 (outlining a unified approach for federal constitutional personhood determinations) [hereinafter Constitutional Personhood].

[11] See, e.g., The right of the criminally accused to a Sixth Amendment jury trial applies to state criminal cases. See, e.g., Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989). Yet, it is inapplicable to "petty crimes," though there can be exceptions under federal constitutional precedents. See, e.g., Bado v. U.S., 120 A. 3d 50, (D.C. App. 2015), reh. en banc ordered, 125 A. 3d 1119 (D.C. App. 2015).

[12] See, e.g., McDonald v. City of Chicago, 561 U.S. 742 (2010) (Second Amendment right to bear arms applicable to states) [hereinafter McDonald]; District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (people holding the right to bear arms "unambiguously refers to all members of the political community, not an unspecified subset"); and Walker v. U.S., 800 F.3d 720 (5th Cr. 2015) (person possessing right to bear arms can lose it by becoming a felon and not having federal civil rights restored, per 18 U.S.C. 921(a)(20)).

[13] See, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (states cannot place "substantial obstacles" in paths of those seeking abortions) [hereinafter Casey] and Hodgson v. Minnesota, 497 U.S. 471, 424 (1990) (minors have abortion right though exercise of the right can be subject to some state regulation, including prior parental notice or, in the alternative, obtaining a judicial bypass of this notice requirement).

federal constitutional rights.[14] Thus, for example, a woman who has a right to abort does not vary much from state to state.[15]

Why are the requisites for federal constitutional childcaretakers largely left to state lawmakers? Both U.S. Supreme Court and Congressional explanations, when offered, fail to justify the extreme deference and the resulting significant interstate variations as to who is a parent for federal constitutional parental childcare purposes. These very broad variations in who possesses fundamental federal constitutional rights are unique to the childcare setting, thus causing many problems for children and for those who care for them. These problems would be mitigated if childcaretakers, like the criminally accused, gun toters, and abortion seekers, were more precisely defined by federal lawmakers. Greater precision should be provided by the U.S. Supreme Court, not Congress. New precedents should address a few open questions that would prompt more complete uniformity on who constitute federal constitutional parental childcaretakers.[16] This paper explores these questions that implicate

[14] Certainly, those possessing federal constitutional rights may have those rights limited in particular contexts, as with adults who choose to work in settings involving drug, interdiction or need to carry a firearm, National Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989), or with public school children participating in extracurricular activities, Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[15] See, e.g., Casey at 899 (while all women have the right, state can regulate differently the exercises of the right by women under the age of 18). There are different state laws regulating access to abortion by all rightsholders, which are often criticized. See, e.g., Katherine Shaw and Alex Stein, "Abortion, Informed Consent and Regulatory Spillover," 91 Indiana Law Journal- (2016) (found at ssrn.com/abstract=2679373).

[16] Recognizing "the difficulty of deciding between more gradually building a solid foundation for the recognition of new constitutional rights and immediately addressing serious indignities and other harms," Lawrence H. Tribe, "Equal Dignity: Speaking its Name," 129 Harvard Law Review Forum 16, 24 (2015), this paper posits that current variations in American state childcare parent laws are causing "impermissible geographic variations in the meaning of federal law." Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) [hereinafter Obergefell]).

biological, functional and/or contractual legal parents, as well as how their resolution by the U.S. Supreme Court would benefit childcaretakers, their children, and us all.[17]

II. The Few Federal Constraints on State Parental Childcare Laws

No doubt, there are federal constitutional limits, via U.S. Supreme Court precedents, on state parentage laws that prompt in federal constitutional parental childcare rights. And, there are some Congressional enactments further unifying parental childcare interests across the country. Yet sharp interstate contrasts are expanding quickly without significant interventions by federal lawmakers. To date there has been no perceived "major damage" to "clear and substantial" federal interests in the increasing state parental childcare variations.[18] Federal lawmakers are seemingly content (or at least silent) for now on the differing state law definitions of parents who possess federal constitutional childcare rights. The federal constitution itself, the U.S. Supreme Court or Congress might each constrain state parental childcare lawmaking.

A. The Federal Constitution

Within the federal constitutional Bill of Rights there is no explicit recognition of parental childcare interests or of Congressional authority to define such interests. For enumerated rights

[17] Concededly, not everyone laments the current broad lawmaking authority over parental childcare now vested in American state lawmakers. See, e.g., Samantha Godwin, "Against Parental Rights," 47 Columbia Human Rights Review 1, 81 (2015) ("Ending due process-based constitutional rights for parents would free up the states to consider different parental rights regimes.").

[18] Hisquierdo, 439 U.S. at 581-581 (citing Yazell, 382 U.S. at 352).

like speech,[19] press,[20] and religion,[21] the constitution is silent on affirmative Congressional authority (though it constrains that authority). For the Civil Rights Amendments on involuntary servitude,[22] equal protection,[23] due process,[24] and voting,[25] the federal constitution provides that Congress has the affirmative power "to enforce by appropriate legislation."[26]

So whether or not Congress has any say on enforcement of federal constitutional rights, be they enumerated or unemerated, the rightholders and the rights they hold are largely determined by the U.S. Supreme Court precedents. As to rightsholders, the constitution itself provides some direction to the court, as certain rights are held by "the people"[27] while others are held by "citizens"[28] or by persons.[29] The constitution provides no explicit direction when rights spring from limits on governmental authority (e.g., no abridgement of free speech[30] or

[19] U.S. Const. amend. I.

[20] U.S. Const. amend. I.

[21] U.S. Const. amend. I.

[22] U.S. Const. amend. XIII, §1.

[23] U.S. Const. amend. XIV, §1

[24] U.S. Const. amend. XIV, §1

[25] U.S. Const. amend. XV, §1.

[26] U.S. Const. amend XIII, §2; amend. XIV, §2

[27] See, e.g., U.S. Const. amend. IV (unreasonable search and seizure).

[28] See, e.g., U.S. Const. amend. XV, §1 (vote).

[29] See, e.g., U.S. Const. amend. V (double jeopardy, self-incrimination, and due process, among others).

[30] U.S. Const. amend. I.

religious practice[31]).[32] Of course, high court precedents on rightsholders sometimes surprise, as when free speech rights were accorded to corporations.[33]

All federal constitutional rights are "the supreme Law of the Land," binding upon "judges in every State."[34] For these rights, generally the rightsholders, the rights held, and the enforcement avenues vary insignificantly interstate. There are some differences between the states on the federal constitutional rights of those "accused" criminally,[35] those contesting illegal searches,[36] and those with family-related privacy interests in abortion[37] and marriage.[38]

Yet for one federal constitutional right, the rightsholders - though neither the protections afforded by the right nor the enforcement of the right – significantly differ

[31] U.S. Const. amend. I

[32] For another review of the varying explicit federal constitutional approaches to federal constitutional rights holders, see Constitutional Personhood, at 10-13.

[33] See, e.g., Citizens United v. Federal Election Commission, 558 U.S. 310, 365 (2010) (recognizing First Amendment speech protections for corporations) and Kent Greenfield, "In Defense of Corporate Persons," 30 Constitutional Commentary 309, 310 (2015) (reviewing criticisms while urging corporate personhood needs "a more nuanced analysis" and suggesting "adjustments in corporate governance rather than constitutional law").

[34] U.S. Const. art. VI.

[35] U.S. Const. amend. VI, as read in Duncan v. State of Louisiana, 391 U.S. 145,149 (1968) ("Because we believe the trial by jury in criminal cases is fundamental . . . we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which-were they to be tried in a federal court-would come within the Sixth Amendment's guarantee.").

[36] U.S. Const. amend. IV, as read in Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in searched auto with no ownership interest in the auto or in property seized from the auto had no legitimate expectation of privacy; Fourth Amendment rights are personal and enforceable only by those whose rights were infringed). See also New Jersey v. T.L.O., 469 U.S. 325, 338-343 (while distinguishing prisoners who "retain no legitimate expectations of privacy in their cells," per Ingraham v. Wright, 430 U.S. 651, 669 (1977), finding school children have some such expectations, to be defined by the court via a "reasonableness standard" that applies nationwide).

[37] Compare, e.g., 750 ILCS/1 et seq. (parents of unemancipated minor to be notified prior to minor's abortion) with Miss. Code 41-41-53 (consent of both parents before abortion performed unemancipated minor).

[38] Compare, e.g., Colorado Code 14-2-106 (male over 16 can marry with consent of both parents) with Arkansas Code 9-11-102 (male over 17 can marry with parent consent).

interstate. The relatively uniform federal constitutional approaches to the attributes of parental childcare rights[39] contrasts sharply with the allowance of interstate variations in defining the parents possessing such rights. The U.S. Supreme Court recognizes broad discretion in the states to define federal constitutional parental childcare rightsholders, resulting in varying state law definitions of parentage for federal constitutional childcare purposes.

B. U.S. Supreme Court Precedents

While the leeway afforded state lawmakers is broad, their discretion to define federal childcare parents is not boundless. A few U.S. Supreme Court precedents do limit state definitional authority. Thus, to date, all women who bear children as a result of sex are parents at birth with federal constitutional childcare interests.[40] However, all men who, via sex, impregnate women who later bear children are not necessarily such parents. Where birth mothers are unmarried, biological fathers only have a federally-protected opportunity interest in establishing parenthood in order to be heard later on childcare,[41] with the establishment requisites largely left to state lawmakers.[42] The requisites on exercising childcare parenthood

[39] See, e.g., Troxel, 530 U.S. at 65 (parental childcare rights when grandparents seek visitation).

[40] See, e.g., Nguyen v. INS, 533 U.S. 53 (2001) (no equal protection violation in treating biologically-tied men and women differently in parentage laws on childcare).

[41] Lehr v. Robertson, 463 U.S. 248, 256 (1983) (in most cases state laws determine child custody issues). [hereinafter Lehr].

[42] See, e.g., Lehr, 463 U.S. at 256 ("rules governing . . . child custody . . . vary from state to state") [hereinafter Lehr].

opportunities vary significantly interstate.[43] Incidentally, often legal parenthood under state law varies intrastate in different contexts, as with who are parents for crimes and for child support.[44]

For children born of adulterous sex to married birth mothers, under U.S. Supreme Court precedents, states have discretion regarding whether to afford biological fathers any parental childcare.[45] Where states afford such opportunities notwithstanding marital paternity presumptions, their requisites differ.[46] For example, least one state generally denies any parental childcare rights to such biological fathers, so that a biological father has no standing to rebut a marital paternity presumption.[47] Another state, however, recognizes state constitutional parental childcare rights in such a biological father.[48]

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[43] See, e.g., Mary Beck, "Toward a National Putative Father Registry Database," 25 Harv. J. L. & Pub. Policy 1031, 1057–1068 (2002) (variations in state uses of putative father registries in adoption cases involving required notices to unwed biological fathers).

[44] See, e.g., State v. Paradis, 10 A. 3d 695 (Maine 2010) (biological father with no childcare opportunity may nevertheless be prosecuted for sexual acts as a parent to his child/victim) and N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004) (biological father, "no matter how removed he may be emotionally from the child," may still have "duties of support under state law" for the child whose children are placed for adoption by their mothers

[45] The U.S. Supreme Court recognized such discretion in Michael H., 491 U.S. at 131 (Scalia, J., plurality opinion) (as long as a state law serves "a legitimate end by rational means"). Since Michael H., where the unwed biological father was generally then not permitted under California law to seek to rebut a marital paternity presumption favored by the married couple, id. at 124, even where the biological father had "an established parental relationship," id. at 123, California law has changed so as to allow now some such rebuttals by unwed biological fathers, per Cal. Family Code 7541 (a).

[46] See, e.g., Paula Roberts, "Truth and Consequences: Part II, Questioning the Paternity of Marital Children," 37 Family Law Quarterly 55 (2003), including "Appendix F: Recent State Statutes Allowing Paternity Disestablishments of Marital Children," 37 Family Law Quarterly 94 (2003).

[47] See, e.g., Strauser v. Stahr, 726 A. 2d 1052, 1055 (Pa. 1999) (no rebuttal by unwed biological father where marriage continues) [hereinafter Strauser].

[48] See, e.g., Callender, 591 N.W. 2d at 190 (unwed biological father has "a liberty interest in challenging paternity" under Iowa constitution). Marital presumption statutes are reviewed in June Carbone and Naomi Cahn, "Marriage, Parentage and Child Support," 45 Family Law Quarterly 219, 222-228 (2011).

Broad state lawmaking discretion on defining those with federal parental childcare rights emanates, in particular, from three major U.S. Supreme Court precedents. One is Lehr v. Robertson, where an unwed biological father of a child born of sex to an unwed mother sought to participate in an adoption proceeding on behalf of the mother's new husband.[49] There, the court recognized that state lawmakers could vary in their norms on denying such a father any participation right and veto power. While the court recognized that the "intangible fibers that connect parent and child" via biology "are sufficiently vital to merit constitutional protection in appropriate cases," it concluded that in "the vast majority of cases, state law determines the final outcome" when resolving "the legal problems arising from the parent-child relationship."[50] Before and since Lehr, American states have varied regarding the participation rights of unwed biological fathers in formal adoption proceedings.[51]

Another precedent is Michael H. v. Gerald D., where an unwed biological father of a child born of sex to a married woman sought to undo the state marital paternity presumption favoring the husband.[52] The court ruled that California could deny, as it then did, the biological father any opportunity interest in establishing childcare parentage, at least where the state

[49] Lehr, 463 U.S. at 250.

[50] Lehr, 463 U.S. at 256, citing Yazell, 382 U.S. at 351-3 and by saying "rules governing . . . child custody are generally specified in statutory enactments that vary from state to state." In Yazell, where no federal constitutional protections were asserted, the court found "no need for uniformity and that solicitude for state interests, particularly in the field of family . . . should be overridden by the federal courts only where clear and substantial interests of the National Government . . . will suffer major damage if state law is applied." Yazell, 382 U.S. at 352

[51] See, e.g., Jeffrey A. Parness, "Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness," 5 Journal of Law and Family Studies 223 (2003) (critically reviewing state laws).

[52] Michael H., 491 U.S. at 113.

desired to promote the married couple's wish to remain an intact nuclear family. While California public policy has since changed,[53] in Pennsylvania a comparable biological father can be thwarted in his legal parentage pursuit by an intact nuclear family.[54] Both before and since Michael H., American states have varied in their approaches to establishing as well as disestablishing marital parentage presumptions.[55]

The third high court precedent is Troxel v. Granville, where the attributes of superior parental rights were at issue, and not the norms for establishing such rights.[56] The case involved grandparents who sought a court order on grandparent-grandchild visits over parental objections.[57] In limiting judicial opportunity to override parental desires, a few opinions of a splintered court recognized broad state lawmaking discretion on parentage and parental-like classes. There was mention of child visitation laws benefitting third parties (i.e., nonparents)

[53] Cal. Family Code 7541(a) (rebutted with "evidence based on blood tests").

[54] Strauser, 726 A. 2d at 1054 (biological fathers cannot seek to rebut marital presumption favoring paternity in husband as long as marriage is intact and spouses want to maintain presumption).

[55] As to establishment, marital parentage presumptions can be based on birth or conception during marriage, as in 750 ILCS 45/5 (a). As to disestablishment, marital parentage presumptions may only be rebuttable by the wife or husband, as in Oregon Stat. 109.070 (1)(b) and (2) and Utah Code 78-B-607(1) (assuming a commitment to stay married and raising the child as an issue of the marriage), or may be subject to rebuttal by the biological father, as recognized in In re Parentage of John M., 817 N.E. 2d 500 (Ill. 2004) (though standards are unclear) and in Interest of Waites, 152 So. 3d 306 (Miss. 2014) (biological father can seek custody as long as no abandonment, unfitness or the like). Recently, marital parentage presumptions in childcare settings have been applied by some lower courts to lesbian spouses of birth mothers, even when the relevant statutes speak of husbands and presumed biological ties. See, e.g., In re D.S., 143 Cal. Rptr. 3d 918, 924 (Cal. Ct. App. 2012).

[56] Troxel, 530 U.S. at 60. An earlier U.S. Supreme Court precedent in a case involving a childcare dispute between a parent and a grandparent had suggested there could be no federal law on establishing parental rights. Ex Parte Burrus, 136 U.S. 586, 594 (1890) ("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.").

[57] Troxel, 530 U.S. at 61

via "gradations,"[58] as well as of possible "de facto" parenthood,[59] a parentage establishment norm involving neither biological ties nor formal adoption.[60] Before and since Troxel, American state de facto (and comparable) parentage laws vary with respect to defining who become federal constitutional childcare parents.[61]

There are significant interstate variations today in both parentage establishment and disestablishment norms relevant to federal constitutional parental childcare rights. Parentage establishment norms go by varying terms, including not only de facto parent, but also equitable adoption, presumed parent, and parent by estoppel.[62] Similarly, for parentage disestablishment there are differing terms, including rebuttal and recission, usually depending on how parentage was initially established.[63]

While there are distinct state law norms on establishing and disestablishing legal parentage relevant to federal constitutional parental childcare, generally the holders of other federal constitutional rights are uniform across state borders. The criminally accused, whose

[58] Troxel, 530 U.S. at 93 (J. Scalia, dissenting)

[59] Troxel, 530 U.S. at 101 (J. Kennedy, dissenting) (recognized by J. Scalia, in dissent, as a possible, but ill-advised, "judicially crafted definition" of a federal constitutional childcare parent, id. at 92)

[60] See, e.g., D.C. Code tit. 13, 16-831.01(1) (single parent's "agreement" and residency in same household) and Del. Code tit, 13, 8-201(c) (exercise of "parental responsibility "with" support and consent of the child's parent").

[61] See, e.g., Jeffrey A. Parness, "Parentage Law (R)Evolution: The Key Questions," 59 Wayne Law Review 743, 752-763 (2013) [hereinafter Parentage Law (R)Evolution]. Of course, beyond Troxel there can be additional state constitutional law protections of parental childcare interests. See, e.g., Hawk v. Hawk, 855 S.W. 2d 573 (Tenn. 1993) (state constitutional right to privacy in parenting decisions).

[62] See, e.g., Parentage Law (R)evolution, at 752-763.

[63] Marital paternity presumptions are often subject to rebuttal, as in 750 ILCS 45/5(b), while voluntary paternity acknowledgments are subject to recission, as driven by federal welfare subsidy policies found in 42 U.S.C. 666(a)(5)(D).

rights include effective assistance of counsel, trial by jury, and speedy trial, [64] are not varied widely interstate.[65] Nor are there generally major interstate differences in religious practioners;[66] those subject only to reasonable searches;[67] and gun toters.[68]

The U.S. Supreme Court is capable of crafting norms on federal constitutional parental childcare rightsholders. With state terminations of existing parental childcare interests, the high court has actively in set uniform federal constitutional norms.[69] It cannot be that federal constitutional childcare rightsholders necessarily must be left to state law definitions (e.g., per the Tenth Amendment reservation of rights) since other personal privacy rightsholders, as with the abortion,[70] contraception,[71] sexual conduct,[72] and marriage,[73] have been substantially federalized by U.S. Supreme Court precedents.[74]

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[64] U.S. Const. amend. VI.

[65] See, e.g., Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial right applies in state criminal cases).

[66] U.S. Const. amend. I, as read in Cantwell v. Connecticut, 310 U.S. 296, 302 (like Congress, states may not enact laws prohibiting the free exercise of religion).

[67] U.S. Const. amend. IV, as read in Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applicable in state criminal case) and Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (guidelines on when counsel must be available for parents facing state initiatives to terminate parental rights).

[68] U.S. Const. amend. II, as read in McDonald, 561 U.S. at 767.

[69] See, e.g., Santosky v. Kramer, 455 U.S. 745, 796 (1982) (clear and convincing evidence needed to prove child "permanently neglected") and Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (guidelines on when counsel must be made available for parents facing state initiatives to terminate parental rights).

[70] See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

[71] See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965).

[72] See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986).

[73] See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[74] Granted, not all federal constitutional childcare rights holders have been explicitly deemed subject to state law definitions. To date the U.S. Supreme Court has not directly addressed childcare rights when children are born of

C. Congressional Enactments

The broad discretion held by American state lawmakers regarding parentage prompting federal constitutional parental childcare[75] generally has not been limited much by Congress.[76] Congressional enforcement authority might be employed, however.[77] Yet its reach is narrow. Enforcement authority is only legitimate when employed to remedy and deter Fourteenth Amendment violations, even if prophylactic in that the legislation prohibits "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[78] But such authority cannot work "a substantive change in the governing law,"[79] meaning there can be no "substantive redefinition" of U.S. Supreme Court precedents on Fourteenth Amendment rights.[80] As well, Congressional exercise of this enforcement authority requires "a relevant history and pattern of constitutional violations."[81]

assisted reproduction. See, e.g., Kimberly M. Mutcherson, "Procreative Pluralism," 30 Berkeley J. of Gender, Law & Justice 22 (2015) (argues for federal constitutional protections of assisted reproduction, though distinguishing non-coital procreation between those wishing to procreate and parent and those wishing to procreate for profit).

[75] Dean David D. Meyer recognized "the [federal] Constitution's substantial indifference to how states assign parent status." "Partners, Care Givers, and the Constitutional Substance of Parenthood," at 55, in "Reconceiving the Family," Robin Fretwell Wilson, editor (2006).

[76] On what Congress has done (and should do) regarding family status determinations, see, e.g., Courtney G. Joslin, "Federalism and Family Status," 90 Indiana Law Journal 787 (2015).

[77] U.S. Const. amend. XIV, §5.

[78] Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000).

[79] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[80] Tennessee v. Lane, 541 U.S. 509, 519 (2004) [hereinafter Lane].

[81] Lane, 541 U.S. at 521 (citing Bd. of Trustees v. Garrett, 531 U.S. 356, 368 (2001) and Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999)).

Congressional authority regarding federal expenditures also could be used to help unify federal constitutional parent childcare norms.[82] Congressional concerns regarding federally-subsidized state welfare assistance has already led to uniform voluntary paternity acknowledgement standards across the country.[83] But here, reimbursements of expended federal welfare dollars were the targets, rather than establishments of more uniform parentage norms.[84]

Congressional authority regarding interstate commerce,[85] and perhaps other acts having significant implications nationally,[86] might also be employed, as with establishing guidelines for sperm banks and assisted reproduction clinics providing services for people from throughout the country.[87] Yet such guidance may not (and likely could not, per the aforementioned limited enforcement authority) address uniform parental childcare norms that include children born of sex.[88]

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[82] U.S. Const. art. I, §8 (congressional taxing and spending authority).

[83] See, e.g., For Those Not John Edwards, at 56 (states have applied the Congressional guidelines on voluntary parentage acknowledgements both in and outside of welfare settings).

[84] For Those Not John Edwards, at 56-59.

[85] U.S. Const. art. I, §8

[86] Consider, e.g., U.S. Const. art. I, §8 (Congress shall "make all laws . . . necessary and proper for carrying into execution" the specifically enumerated legislative powers).

[87] For how such guidelines might operate, see, e.g., Andrea Preisler, "Assisted Reproductive Technology: The Dangers of an Unregulated Market and the Need for Reform," 15 DePaul Journal of Health Care Law 213 (2013) and Benjamin B. Williams, "Screening for Children: Choice and Chance in the 'Wild West' of Reproductive Medicine," 79 George Washington Law Review 1305 (2011).

[88] Reviews of how Congress has already utilized its legislative authority in enforcement, spending, and interstate commerce matters to unify family laws in the United States appear in Ann Laquer Estin, "Sharing Governance: Family Law in Congress and the States," 18 Cornell Journal of Law and Public Policy 267(2009) (concluding that while Congress has substantial authority over family law matters, it should limit its national family legislation to subjects for which there is broad political consensus and strong state support). See also Elizabeth G. Patterson,

III. The Failure to Justify Deferrals to State Lawmaking on Federal Constitutional Childcare Parents

The U.S. Supreme Court has often recognized federal constitutional parental childcare as "fundamental."[89] Yet the court has not clearly explained why the rightsholders for this right are substantially defined by state lawmakers. The state laws on rightsholders, typically male for now (though this is changing given expanding uses of assisted reproduction, including surrogacy), frequently differ. Husbands of birth mothers vary in their federally protected childcare interests per state presumed parent laws.[90] So do unwed biological fathers who conceive children by consensual sex with married women.[91] State laws on childcare rightsholders vary widely today for both parentage establishment and disestablishment.[92]

"Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law," 25 Georgia State University Law Review 397 (2008) (reviewing Congressional initiatives conditioning the receipt of federal funds on family law mandates) [hereinafter Unintended Consequences].

[89] See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("fundamental rights and interests" include "the traditional interest of parents with respect to religious upbringing"); Santosky v. Kramer, 455 U.S. 745,753 (1982) ("fundamental liberty interest of natural parents in the care, custody and management of their child"); and Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("fundamental rights and liberty interests" include the right "to direct the education and upbringing of one's children"). See also Hawk v. Hawk, 855 S.W. 3d 573, 578-579 (Tenn. 1993) (reviewing other U.S. Supreme Court precedents, though employing a state constitutional privacy analysis to find application of the Grandparents' Visitation Act in the case was unconstitutional).

[90] For example, the state laws on the marital presumptions recognizing husbands as legal fathers vary in their establishment standards. Compare, e.g., Nev. Stat. 126.051 (1)(a) (husband is presumed father of child "born during the marriage"), Mass. Gen. Laws ch. 64, 6(a)(1) (similar) and Ind. Code 31-14-7-1 (B) (similar) to Mo. Code, Family Law 5-1027(c)(1) (presumed father is "man to whom" child's "mother was married at the time of conception") and Ariz. Rev. Stat. 25-814(A)(1) (presumed father is man to whom birth mother was married at any time in the ten months immediately preceding birth).

[91] For example, where their mates are married to other men, state laws on the rebutting of the marital paternity presumptions favoring husbands by biological fathers vary. Compare, e.g., In re Jesusa V., 85 P.3d 2(Cal. 2004) (biological father and husband can each be presumed fathers, often prompting a judicial decision on which presumption should be maintained) [hereinafter Jesusa V.] to Utah Code 78B-15-607(1) (biological father cannot challenge marital paternity presumption where husband and wife are committed to raising "the child as issue of the marriage").

[92] Besides supra notes 46 (marital parentage presumptions), 53-55 (marital parentage presumptions), and 61-62 (de facto, presumed, and equitable parentage), see, e.g., Jeffrey A. Parness and Zachary Townsend, "For Those Not John

Explanatory failures by the U.S. Supreme Court are illustrated with observations from the 2000 Troxel case on parental childcare where grandparents sought court-ordered child visitation over parental objection. Court statements recognizing broad state lawmaking authority on parentage prompting federal constitutional childcare are made without significant judicial elaborations on policy and without judicial references to relevant precedents. 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."[93] He noted a few high court precedents, including one saying it is best to leave "matters involving competing and multifaceted social and policy decisions" to "local decisionmaking," which he deemed meant that "caution" for the court was "never more essential than in the realm of family and intimate relations."[94] He did not explain why the high court was not as cautious regarding the family relations areas of abortion and contraception.

Justice Scalia, also in dissent, 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").[95]

Edwards: More and Better Paternity Acknowledgments at Birth," 40 Univ. of Baltimore L.Rev. 53 (2010) (demonstrating differences in American state laws on establishing and recognizing voluntary paternity acknowledgments) [hereinafter For Those Not John Edwards].

[93] Troxel, 530 U.S. at 90.

[94] Troxel, 530 U.S. at 91 and n. 10 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)).

[95] Troxel, 530 U.S. at 92-3.

And Justice Kennedy, 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."[96] This observation was founded on the preexisting diversity subject matter jurisdiction limit on federal district courts issuing divorce, alimony, or child custody decrees.[97]

Similar statements appear beyond in dissents and grandparent visitation settings. In an adoption case, a U.S. Supreme Court majority simply observed that in "the vast majority of cases," state laws govern "the legal problems arising from the parent-child relationship."[98] In a property setting involving "a conflict between federal and state rules for the allocation of a federal entitlement," a U.S. Supreme Court majority observed state "family and family-property law" must do "major damage" to "clear and substantial federal interests" before such a law will be overridden.[99] While perhaps in the past the harms caused by interstate parentage law variations were not "major," today there is "major damage" as new forms of biological and

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[96] Troxel, 530 U.S. at 101 (citing Ankenbrandt v. Richards, 504 U.S. 689, 703-4 (1992) [hereinafter Ankenbrandt]).

[97] Justice Kennedy, more particularly, relied upon Ankenbrandt, id., a diversity jurisdiction case, to opine: the federal constitutional childcare protections "must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 states confront these factual variations [i.e., in cases between strangers and de facto parents seeking court-ordered childcare over existing parents' objections] each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." Troxel, 530 U.S. at 100-101.

In Ankenbrandt, Id., 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, and not with the absence of federal court authority to define federal constitutional rights holders. Ankenbrandt, 504 U.S. at 703-704.

[98]Lehr, 463 U.S. at 256.

[99] Hisquierdo v. Hisquierdo, 439 U.S. 572, 581-582 (1979) (citing U.S. v. Yazell, 382 U.S. 341, 352 (1966) [hereinafter Yazell]). See also Rose v. Rose, 481 U.S. 619, 625 (1987) (employing same language from these two cases in a different property setting) and Hillman v. Maretta, 133 S. Ct. 1943, 1950 (2013) (employing Hisquierdo in a different property setting).

nonbiological parentage have risen sharply, particularly with the increases in the numbers of nonmartial children,[100] children born of assisted reproduction technologies[101], and children "informally" adopted.[102]

Commentaries on these high court pronouncements on deference generally are unsatisfactory and often conclusory.[103] One author wrote:

> 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.[104]

[100] See, e.g., Katherine K. Baker, "Bionomativity and the Construction of Parenthood," 42 Georgia Law Review 649, 652 n. 9 (2008); Elizabeth Wildsmith, Nicole R. Steward-Streng and Jenniefer Manlove, 2011 Child Trends, Nov. 2011 (www.childtrends.org) ("In 2009, 41 percent of all births (about 1.7 million) occurred outside of marriage, compared with 18 percent of all births in 1990 and just 11 percent of all births in 1970,"); and Joyce A. Martin et al., National Vital Statistics Reports, U.S. Ctrs. for Disease Control and Prevention, at 38-40, (Jan. 15, 2015), http://cdc.gov/nchs/data/nvsr64_01.pdf.

[101] On the history of assisted human reproduction (and recent growth in free private sperm donation), see Note, "Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation," 54 William and Mary Law Review 1715, 1719-1725 (2013). On the increases in assisted human reproduction on a "do it yourself basis, making governmental regulation more difficult, see, e.g., A.A.B. v. B.O.C., 112 So. 3d 761 (Fla. App. 2d 2013).

[102] Herein, "informal adoptions" most significantly include recognitions of a second part for a child with a single parent where the second parent is on equal footing with the established parent and achieves parental status without formal adoption through parental-like acts, utilizing such doctrines as presumed or de facto parenthood. On the rise of such doctrines, see, e.g., Parentage Law (R) Evolution, at 753-763.

[103] See, e.g, Katherine K. Baker, "Marriage and Parenthood as Statutes and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights," 71 Ohio State Law Journal 127, 151 (2010) ("few people guestion the state's ability to honor, or not, surrogacy contracts; to recognize, or not second-parent adoption; and to determine, for the most part, who is entitled to parental status").

[104]"Unintended Consequences," at 399. See also id. at 433 (in limiting federal lawmaking on family matters the U.S. Supreme Court recognizes "community morality, order and cohesion").

Yet the avoidance of "deleterious social effects" that upset "community norms and local social cohesion" is not so important as to preclude federal constitutional norms on rightsholders implicating "family policy" in such realms as abortion, sexual conduct and same sex marriage.[105]

In a 1992 ruling, often relied upon in judicial opinions where public policy explanations are otherwise wanting, the U.S. Supreme Court did articulate a cogent rationale for limiting federal district court subject matter jurisdiction in certain "family policy" cases. It deemed such jurisdiction could not be exercised when "divorce and alimony decrees and child custody orders" are sought. It explained:

> Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor 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. [106]

Yet the more particular articulation of who are federal constitutional childcare rightholders, without determining which parent has custody, visitation, parenting time or the like, should prompt no concerns over later monitoring; implicate no ties to local government organizations; and, require no judicial expertise developed only in state courts.

[105] Other critics of the "less prescriptive federal approach" to family law issues focus on matters outside of federal constitutional childcare parents. See, e.g., Courtney G. Joslin, "The Perils of Family Law Localism," 48 U.C. Davis Law Review 623 (2014) (reviewing the critics).

[106] Id. at 703-704.

This rationale from 1992 sometimes is read too generally and taken out of context. Thus, a U.S. Court of Appeals in 2015 declared: "And if plaintiff requests that a federal court determine who should have care and control of a child, then that request is outside the jurisdiction of the federal courts."[107] Yet it recognized, as well, that the 1992 precedent was limited to barriers to federal court resolutions of who should have custody as only here would there often be "continuing judicial supervision of a volatile family situation" and the "deployment of social workers to monitor compliance."[108] Fact dependent issues of who should be awarded childcare differ from general norms on who can seek childcare. With the latter, there is no need for continuing jurisdiction or deployment of social workers.

IV. The Results of and the Problems With Deferring to State Lawmaking

A. The Results

The absence of federal laws significantly limiting state lawmaking on who may be federal constitutional parental childcaretakers has resulted in a proliferation of widely varying state parentage laws relevant to federal constitutional childcare. Divergence arises, in part, due to the varied separation of powers approaches to state judicial common lawmaking when statutes are wholly silent or incomplete,[109] as they often are, as well as to varied approaches to

[107] Chevalier v. Estate of Barnhart, 803 F. 3d 789, 797 (6th Cir. 2015) [hereinafter Chevalier].

[108] Chevalier, 803 F. 3d at 794 (citing Ankenbrandt, 504 U.S. at 703-704). See also Alexander v. Rosen, 804 F. 3d 1203 (6th Cir. 2015) (Chevalier deemed applicable to a narrow range of cases, including those involving who gets child custody and the calculation of child support payments).

[109] Compare, e.g., Pitts v. Moore, 2014 ME 59, ¶¶ 18-19 (while "parenthood is meant to be defined by the Legislature," after 13 years of noting a statutory need for a de facto parent doctrine, several justices conclude "we must provide some guide") (plurality opinion) [hereinafter Pitts] to Moreau v. Sylvester, 2014 VT 31, ¶¶ 25-26 (declining to formulate a nonstatutory de facto parent doctrine though courts elsewhere filled the "perceived vacuum") [hereinafter Moreau]. Effective July 1, 2016, a new Parentage Act took effect in Maine. 19-A Maine Stat. 1831 et. seq.

recognizing state constitutional parental childcare rights.[110] Beyond these variations there are significant interstate differences in the substantive parentage childcare laws grounded on biological ties to children, functional parenthood, and contractual parentage.

i. Biological Ties

On the import of biological ties for childcare purposes, state law variations appear both in and outside of assisted human reproduction (AHR) settings. For AHR involving surrogates, that is, women giving birth who do not intend to parent, including women who utilize the eggs of other women who do intend to parent, the surrogates may or may not be the legal parents at birth. Some states effectively allow preconception waivers of any parental rights by surrogates,[111] as well as adoptions of any future children by intended parents, who may or may

[110] See, e.g., Jensen v. Cunningham, 250 P. 3d 465, 483-4 (Utah 2011) (state constitutional due process liberty interest of a parent "to maintain ties to his or her child," which includes "a fundamental right to make decisions concerning the care and control of their children"); Callender v. Skiles, 591 N.W. 2d 182, 190 (Iowa 1999) (unwed biological father of child born of sex to a woman married to another had an Iowa constitutional due process "liberty" interest in challenging husband's paternity); and LP v. LF, 338 P. 3d 908, 921 (Wyoming 2014) (decling to adopt de facto parentage or parentage by estoppel doctrine, "leaving instead that important policy decision to the Wyoming Legislature"). On when state constitutions will more likely be read to provide broader protections of individual rights, see, e.g., Hodes & Nauser, MDs, P.A. v. Schmidt, 2016 WL 2755297 (Kansas 2016) (coextensive interpretations of federal and state constitutions generally occur "only when the provisions themselves are similar").

[111] See, e.g., Fla. 742.15 (1) and (2) (C) ("prior to engaging in gestational surrogacy, a binding and enforceable gestational contract shall be made "wherein typically a "gestational surrogate agrees to relinquish any parental rights upon the child's birth"); 750 ILCS 47/25 (b) (2) and (c) (1) (ii) (similar); and N.H. Stat. 168-B:16 (I) ("before the procedure to impregnate the surrogate," the surrogate agreement is "judicially preauthorized"). Where the gestational surrogates are married, sometimes their spouses may also contractually waive any parental rights prior to conception. See, e.g., 750 ILCS 47/25(b)(2)(i) ("gestational surrogacy contract" shall be executed by the "gestational surrogate's husband") and N.H. Stat. 168-B:4 (husband of gestational surrogate only secures parental rights if the requirements of N.H. Stat. 168-B:16-27 are met); Fla. Stat. 742.13 (7) (gestational surrogacy contract between "gestational surrogate and the commissioning couple"); and Fla. Stat. 742.15 (c) ("gestational surrogate agrees to relinquish any parental rights upon the child's birth").

not need to have been married [112] or to have contributed genetic material prompting birth.[113] Other states deny enforcement of surrogacy pacts.[114]

For AHR where the birth mothers intend to parent, their husbands may or may not be legal parents, depending on whether their sperm was employed.[115] For AHR births to unwed mothers, sperm donors who intend to parent any later born child may or may not be legal parents if relevant statutes otherwise bar paternity for such donors.[116]

Biological ties also prompt variations in state parentage laws when children are born of sex. While presumed biological ties in husbands whose wives give birth generally result in legal paternity,[117] the timing of the necessary marriage differs interstate. State legislators have

[112] See, e.g., Nevada Stat. 126. 045.

[113] See, e.g., 750 ILCS 47/20 (b) (where there are 2 intended parents, at least one must contribute gametes) and Fla. Stat. 742.15 (2)(e) (gestational surrogate must agree to "assume parental responsibilities . . . if it is determined that neither of the commissioning couple is the genetic parent").

[114] See, e.g., Mich. Comp. Laws 722.855; Ariz. Stat. 25-218 (A); and Indiana Code 31-20-1-1. For a review of the "wide spectrum of legal regimes" on surrogacy in the United States, see Peter Nicolas, "Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy," 89 Washington L. Rev. 1235, 1239 – 1245 (2014) [hereinafter Nicolas].

[115] See, e.g., 750 ILCS 40/3 (differing consent requirements for husbands who are and are not the sperm donors). Thus husbands in nonsurrogacy AHR settings may not always be presumed biological fathers of children born to their wives. Elsewhere, husbands are presumed fathers if they consent in the same way, regarless of whether or not their sperm was used. See, e.g., Maryland Code, Estates and Trusts 1-206(b), employed in a divorce/child support setting in Sieglein v. Schmidt, 120 A. 3d 790 (Md. 2015).

[116] Compare, e.g., Steven S. v. Deborah D., 127 Cal. App. 4th 319, 326 (Cal. 2d 2005) (no paternity for sperm donor regardless of intent) to C.O. v. W.S., 639 N.E. 2d 523, 525 (Ohio Comm. Pleas 1994) and In interest of R.C., 775 P. 2d 27, 35 (Colo. 1989) [hereinafter R.C.].

[117] On marital paternity presumptions generally, see e.g., Carbone and Cahn, "Marriage, Parentage and Child Support," 45 Family Law Quarterly 219 (2011). The varying state laws are described in Gartner v. Iowa Dept. of Public Health, 830 N.W. 2d 335, 354 n.1 (Iowa 2013).

alternatively used the timing of marriage relative to conception, pregnancy and/or birth.[118] Further, there are variations in the standing of those who can disestablish parentage by challenging marital parentage presumptions.[119]

ii. Functional Parenthood

As to functional parenthood for federal childcare purposes, where there are parental-like acts and where there need not be either biological ties or any parentage contract, state laws vary in naming the doctrines. There are statutes and judicial precedents on, e.g., de facto parents and presumed parents.[120]

More importantly, there are widely varying standards on functional parenthood. For example, some state laws on "presumed" parentage outside of marriage require residency with the child since birth,[121] while others require no minimum period of household residency[122] or no household residency at all.[123] Some state laws recognize a functional parent where there

[118] Compare, e.g., Nev. Stat. 126.051 (a)("born during marriage") to Mo. Code, Family Law 5-1027 (c)(1) (married at time of conception) and Ariz. Stat. 25-814 (A)(1) ("married at any time" in the ten months immediately preceding the birth).

[119] Compare, e.g., B.C. v. J.S.U., 158 So. 2d 464 (Ala. Civ. App. 2014) (biological father of child born to woman married to another man cannot assert parentage when husband persists in his presumption of paternity) and Strauser v. Stahr, 726 A. 2d 1052 (Pa. 1999) (similar) to Jesusa V., 85 P.3d at 11 (both husband and biological father of child born to wife can be "presumed" parents, where court often must rebut one of the two presumptions) and In re Waites, 152 So. 3d 306 (Miss. 2014) (for child born into marriage, unwed biological father nevertheless entitled to "natural parent presumption").

[120] See, e.g., Parentage Law (R)Evolution, at 752-763 (overview of evolving state parentage laws). In Delaware, there are statutory parents both via presumptions, Del. Code tit. 13, 8-204(5), and de facto status, Del. Code tit. 13, 8-201 (c).

[121] See, e.g., Texas Code 160.204 (a)(5) and Wash. Code 26.26 116 (2).

[122] See, e.g., Mont. Code. 40-6-105 (d)(1) (receipt into home), Colorado Stat. 19-4-105 (1)(d) (similar) and N.J. Stat. 9:14-43 (a)(4) (similar).

[123] See, e.g., Alabama Code 26-17-204 (a)(5) (presumed parent establishes "a significant parental relationship").

already exist, and will remain, two other parents under law.[124] Incidentally, in settings where neither biological ties nor earlier functioning as a parent result in current childcare opportunities, child support obligations still can be imposed.[125]

iii. Contractual Parentage

As to contractual parentage for childcare purposes, there are also varied state laws. With AHR nonsurrogacy, some state statutes speak to both marital and nonmarital settings,[126] while others expressly address only the consent of a husband in writing to parenthood when his wife seeks to deliver a child born with anonymously-donated sperm.[127] When statutes are not comprehensive of all AHR nonsurrogacy births, courts can extend contractual parentage opportunities, as with unwed sperm donors who are recognized as childcare parents[128] and with husbands recognized as childcare parents when their wives conceive without medical assistance via sperm donated by one known to the married couple.[129] Other states have

[124] See, e.g., California Family Code 7612 (c) (if failure to recognize three parents would be "detrimental to the child") and Maine Stat. 1851 (1), 1881 (1)(A), 1891(3) (parents include birth mother, husband as presumed parent, and de facto parent [via, e.g., residence, consistent "caretaking" and "bonded and dependent relationship"], together with Maine Stat. 1891 (5) (adjudication of de facto parentage "does not disestablish the parentage" of others).

[125] See, e.g., N.E. v. Hedges, 391 F. 3d 832, 836 (6th Cir. 2004) and Baby A., 944 So. 2d 380 (Fla. App. 2006).

[126] See, e.g., Ohio Code 3111.89 ("non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child she intends to raise as her child" through using "the semen of a man who is not her husband"). "Due process safeguards," however, may prompt some sperm donors under the statue to be fathers under. See, e.g., C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Comm. Pl., Cuyahoga Cty., 1994) [hereinafter C.O.]. See also Maine Stat. 1921 et seq. (assisted reproduction outside marital setting) and Maine Stat. 1931 et seq. (gestational carrier agreements), as well as California Family Code 7613 (AHR outside surrogacy) and California Family Code 7962 (AHR with gestational carriers).

[127] See, e.g., 750 ILCS 40/3(a) (per (b), sperm donor not treated as "natural father" unless his wife is inseminated) and Arkansas Code 9-10-201 (A). .

[128] See, e.g., Breit v. Mason 718 S.E. 2d 482 (Va. App. 2011).

[129] See, e.g., Engelking v. Engelking, 982 N.E. 2d 326 (Ind. App. 2013) (relying on a husband's "voluntary consent" to artificial insemination as well as the statute on a "child of the marriage").

statutes outside marital settings, as when unwed women can secure legal parentage via an AHR birth where sperm donors generally are not parents under law.

In AHR surrogacy settings, some state laws explicitly allow husbands of projected surrogates to consent in writing to an absence of future legal paternity.[130] Some state laws allow nonegg or nonsemen donors to become legal parents via surrogacy pacts,[131] while others do not.[132] Some state laws prohibit surrogacy contracts altogether.[133] Some states allow men alone to become legal parents via AHR surrogacy.[134] On the range of state laws, one judge, upon reviewing existing laws and commentaries, concluded:

> Beyond the mere fact that there is no clear majority approach to surrogacy among the states that have acted, many states still have said virtually nothing on the topic. Among those that have acted, the legislative approach varies significantly from state to state.[135]

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[130] See, e.g., Arkansas Code 9-10-201 (b)-(c).

[131] See, e.g., Nevada. Stat. 126. 045 (only two persons in "a valid marriage" may "contract with a surrogate"); Florida Stat. 742.15; and 750 ILCS 47/20(b) (where there are 2 intended parents, at least one must contribute gametes and there must be "a medical need"). See also In re Baby S., 2015 WL 7432454 (Pa. Super. 2015) (nonegg donor is legal mother of child born to surrogate though there was no statute on point).

[132] See, e.g., In re T.J.S., 16 A. 3d 386 (N.J. Super. App. 2011) (wife of sperm donor who employed a surrogate needed to adopt to become a parent under law as she was not an ovum donor), aff'd. by equally divided court, 54 A. 3d 263 (N.J. 2012).

[133] See, e.g., Mich. Comp. Laws 722.855; Arizona Stat. 25-218(A) (no person may enter into a "surrogate parentage contract"); and Indiana Code 31-20-1-1.

[134] See, e.g., Arkansas Code 9-10-201 (unwed sperm donors can utilize surrogates) and In re Roberto D.B, 923 A.2d 115 (Md. 2007) (similar). Compare In re Paternity and Maternity of Infant T., 991 N.E.2d 596 (Ind. App. 2013) (unwed sperm donor can disestablish paternity of surrogate's husband who consented to disestablishment, but could not disestablish maternity of surrogate who gave birth even though she too had agreed to disestablishment; court reasoned there would otherwise be no legal second parent).

[135] In re Paternity of F.T.R., 833 N.W. 2d 634, 656 (Wisc. 2013) (C.J. Abrahamson, concurring). American state surrogacy laws are reviewed in Leora I. Gabrey, Note, "Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme," 45 Columbia Journal of Law and Social Problems 415 (2012); Joseph F. Morrissey, "Surrogacy: The Process, the Law and the Contracts," 51 Willamette Law Review 459, 486-503 (2015); and Kindregan and McBrien, at 157-203 (also reviewing international surrogacy laws, at 203-211).

Outside of AHR, there are significant variations in state laws on contracts involving legal parenthood. Thus, only some state laws afford legal parenthood to a second parent where an existing single parent expressly supports and consents to the second parent's earlier childcaretaking.[136] Only some states afford legal parenthood to a second parent arising from, at best, a single parent's passive acquiescence.[137]

B. The Problems

Should federal constitutional childcare rightsholders, now guided by widely varying state law norms on parentage establishment and disestablishment, continue to be so different? The answer is no if one believes equality principles demand that federal constitutional childcare rightsholders should be comparably defined regardless of where they live.[138] Beyond equality, current American state law differences have prompted other significant problems. One problem is that many Americans do not understand the import of the broad state parentage lawmaking discretion and the resulting interstate variations in parental childcare opportunities (and responsibilities). Like Maury Povich, many believe that legal parentage depends only upon

[136] See, e.g., Del. Code. tit. 13, 8-201 (c) (de facto parent where there is the "support and consent" of the child's single parent), as read in Bancroft v. Jameson, 19 A. 3d 730, 750 (Del. Fam. Ct. 2010) (statute is unconstitutional if read to allow a de facto parent where there already exist two fit parents)[hereinafter Bancroft]. Compare Barone v. Chapman Cleland, 10 N.Y. S. 3d 380 (N.Y. Sup. App. 4th 2015) (same sex partner of birth mother has no childcare interest as "equitable estoppel" does not bar mother's superior childcare rights when partnership dissolves, though partner had co-parented for some time with the birth mother's consent).

[137] See, e.g., S.Y. v. S.B., 134 Cal. Rptr. 1, 3 and II (Cal. Ct. App. 2012) (employing Cal. Family Code 7611 (d), presumed second parent need not be intended by existing parent to "obtain any legal rights," but any second parent must have received child into the home and openly held out the child as one's own).

[138] The interstate variations on who are parents in childcare settings seemingly are subject to Fifth Amendment Due Process analysis, where the focus would likely be on Congressional failures regarding comparably situated child caretakers (and not on U.S. Supreme Court failures).

biology or formal adoption. While over time a better understanding might develop, there are further problems.

Many Americans do not understand that, from state to state, differing terms can have comparable meanings and similar terms can have differing meanings. For example, de facto parenthood in one state can be comparable to presumed parenthood in a second state, while presumed parenthood can have varied meanings in different states.[139] New U.S. Supreme Court precedents on federal constitutional childcare parents likely will prompt more unified approaches to American state parental childcare nomenclature.

Another problem involves the uncertainties about legal parentage when people move across borders where very different parentage norms apply. For example, a person can meet the de facto parent norm in State A, followed by the child's move to State B where there is no such norm. Typically in a later childcare dispute in State B, a court in State B will apply the parentage laws of State B though most, if not all, of the childcare relevant to any de facto parentage in the person left behind in State A occurred in State A.[140] As legal parentage norms untied to biology and formal adoption become more widespread and better known, savvy

[139] See, e.g., Parentage Law (R)Evolution, at 752-763 and Gartner v. Iowa Department of Public Health, 2013 WL 1856789, n.1 (Iowa 2013) (demonstrating 3 separate categories of American state statutes on parentage presumption).

[140] See, e.g., Jeffrey A. Parness, "Choosing Among Imprecise American State Parentage Laws," 76 Louisiana Law Review 481 (2015) (criticizing this approach and suggesting ways state courts should employ their choice of law principles when parentage norms differ between interested states).

lawyers will likely prompt their clients to make forum shopping moves for such purposes as avoiding shared childcare or child support.[141]

Other problems spring from state law variations on those possessing federal parental childcare rights. Many family members, even if they understand their own state parentage laws and even with no crossborder moves, remain uncertain as to who is a parent. Unlike parentage arising from marriage, a birth certificate, a voluntary parentage acknowledgement, or a formal adoption, de facto legal parentage and its like are imprecise in that they arise from such occurrences as "parental-like" acts or "bonded and dependent relationships," which must be judicially assessed after the fact.[142] There will often be great uncertainty about how judges will rule in particular cases, even if the fuzzy legal norms on imprecise parentage are known. Subjectivity reigns, with few objective standards like those existing in formal adoption settings (e.g., certain criminal convictions stand as absolute barriers).[143] Uncertainty as to parentage often will make more difficult the very personal decisions on matters like estate planning, gifts, religious upbringing, schooling, and marriage. New federal norms can mitigate, if not eliminate, this uncertainty.[144]

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[141] See, e.g., Nicolas, at 1238-1239 ("we had to look outside of the state" for "a more favorable atmosphere for surrogacy").

[142] See, e.g., Del. Code tit. 13, 8-201 (c) (de facto parent status). See also Ala. Code 26-17-204 (a)(5) (presumed parent provides "emotional and financial support") and Wash. Code 26.26.116 (2)(presumed parent holds out child "as her own").

[143] For an argument on the need for more objective standards in imprecise parentage settings, see Jeffrey A. Parness, "Formalities for Informal Adoptions," 43 Capital Univ. L. Rev. 373 (2015) [hereinafter Informal Adoptions].

[144] On how lawyers and judges can better handle claims implicating imprecise parentage laws, See Jeffery A. Parness, "Challenges in Handling Imprecise Parentage Matters," 28 Journal of the American Academy of Matrimonial Lawyers 401 (2015).

Legal parentage uncertaintiescan arise even when parties have earlier agreed on parentage. Such uncertainty, for example, pervades assisted reproduction settings, as well as settings involving childcare agreements for children born of sex. In the absence of unifying federal norms, states vary in their approaches to agreements involving future parentage.[145] Not all state courts in all settings enforce childcare pacts even where the best interests of children will be promoted. Some state courts deny enforcement simply because the legislatures have not affirmatively acted to recognize such agreements, though such pacts have not been deemed invalid by statute.[146] Significant uncertainties on possible enforcement will continue until General Assemblies act. Major nationwide variations will likely remain until supreme federal laws operate. Clearly, the parentage standardization initiatives of the Uniform Commission,[147] the America Bar Association[148] and the American Law Institute[149] have not prompted significant interstate agreements

[145] Compare, e.g., Arkansas Code 9-10-201(b)-(c) (use of surrogate mothers allowed) to Michigan Comp. Laws 722.855 ("surrogate contract is void and unenforceable").

[146] Consider, e.g., the differing judicial approaches to recognizing de facto parent status in the absence of legislation. See Pitts, 2014 ME at ¶¶18-19 (plurality opinion), where the court said:

> Parenthood is meant to be defined by the legislature . . . although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference . . . In the absence of Legislative action . . . we must provide some guidance.

Compare Moreau, 2014 VT at ¶¶25 and 26 (declining the opportunity to formulate a nonstatutory de facto parent doctrine as "the Legislature is better equipped"). And see LP v. LF, 338 P.3d 908, 921 (Wyoming 2014) (declining to adopt common law de facto parentage or parentage by estoppel).

[147] See, e.g., The Uniform Parentage Act, promulgated in 1973, revised in 2000, and amended in 2003, available at www.uniformlaws.org

[148] See, e.g., The Model Act Governing Assisted Reproductive Technology, approved by the American Bar Association House of Delegates in February 2008 and reviewed in Kindregan and McBrien, at 371-400.

[149] See, e.g., The American Law Institute, Principles of Law, Family Dissolution: Analysis and Recommendations (2000), whose impact was assessed in Robin Fretwell Wilson and Michael Clisham, "American Law Institute's

V. Possible New Congressional Limits on State Lawmaking

Greater certainty about legal parentage may not be wholly dependent upon a unified federal constitutional approach to federal childcare rightsholders. Congress could redo the voluntary paternity acknowledgement process so as to (more) clearly include only men who actually have, or reasonably believe they have, biological ties to the acknowledged children.[150] Congress could also make acknowledgements more easily rescindable where there are no biological ties, as by eliminating or extending the current 60 day period for rescissions in the absence of fraud, duress or mistake of fact.[151]

Congress could, in the alternative, expand the voluntary acknowledgement process to include certain men and women with no biological ties, establishing a new form of informal adoption, especially for children born of sex to unwed mothers or born of AHR to a woman in a same-sex relationship.[152]

The Congressional acknowledgement process was largely developed to secure greater reimbursements of governmental welfare aid expended to birth mothers on behalf of their children.[153] This goal could be extended to reimbursements from the children's nonbiological

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Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?", 42 Family Law Quarterly 573 (2008) (finding no significant effect to date).

[150] Currently state laws and their acknowledgment forms vary on whether signers must affirmatively express beliefs as to likely biological ties. For Those Not John Edwards, at 72-73.

[151] 42 U.S.C. 666(a) (5) (D) (ii) (I)-(II).

[152] See, e.g., Leslie Joan Harris, "Voluntary Acknowledgments of Parentage for Same-Sex Couples", 20 J. Gender Social Policy & Law 467 (2012) and Jayna Morse Cacioppo, Note, "Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?", 38 Indiana Law Review 479 (2005).

[153] For Those Not John Edwards, at 56-59.

parental-like figures who are not full legal parents, at least while they continue to act in parental-like ways. As suggested by one voice in Troxel, there could be gradations of nonparents as well as carefully crafted parentage definitions.[154]

Such Congressional revamps, however, are ill-advised. New constraints on acknowledgments and easier rescission standards would often harm children and upset settled familial expectations. New expansions of acknowledgement opportunities may not prompt greater welfare payment reimbursements, but prompt the circumvention of child protection safeguards attending formal adoptions.[155]

Beyond welfare reimbursements, states have (wisely) chosen to employ the Congressional voluntary acknowledgment processes for children whose birth mothers have not sought, and will not likely seek, welfare assistance.[156] To date, there have emerged no proposed model codes or uniform laws in these settings that could prompt greater national uniformity.

Some posit that greater certainty on legal parentage may be attained by explicit Congressional expansions of its voluntary acknowledgement process to children with no ties to governmental welfare, as well as to parental-like figures with no biological or formal adoptive ties. Yet nationalization of such parentage norms outside of federal constitutional judicial precedents seemingly is foreclosed by the Article I and other limits on Congressional authority,

[154] Troxel, 560 U.S. at 92-93 (Scalia, J., dissenting).

[155] See, e.g., Informal Adoptions, at 403-404.

[156] For Those Not John Edwards, at 63-87 (comparing state voluntary acknowledgment laws).

as well as by the related Tenth Amendment's reservation of certain powers to the states.[157] Parents of, and parental-like figures for, children, who were born of sex, who have not benefitted personally from public assistance programs, and who have always lived in a single state where conception and birth occurred, are not so tied to interstate commerce that Congressional power is constitutionally authorized. Congressional enforcement of federal constitutional rights,[158] with the rights defined by U.S. Supreme Court precedents, typically cannot encompass statutory expansions of the rights or the rightsholders.[159]

Comparably, Congressional action nationalizing the norms on parentage presumptions arising from marriage is inadvisable for now, even if constitutionally authorized. Fourteenth Amendment Congressional enforcement authority may be available to limit the otherwise applicable state parentage presumption laws. For example, this authority may be used, via procedural law reforms, to better secure the federal constitutional paternity opportunity interests of unwed biological fathers in children born of sex to mothers then married to others. But the exercise of such authority now would disrupt current state judicial child custody and support powers. As well, such authority involving the interests of unwed biological fathers in children born of sex to unwed mothers is ill-advised. When the Supreme Court further clarifies the substantive interests of biological fathers of children born of sex that it first recognized in Lehr, Congressional enforcement action would then be more appropriate.

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[157] Supra notes 76-88

[158] U.S. Const. amend. XIV, §5.

[159] Supra notes 77-81 and accompanying text.

By contrast, Congress can and should act now to establish norms guiding medical professionals and others providing assisted human reproduction (AHR) services. While the federal constitutional limits on parentage contracts in AHR settings remain unclear,[160] with continuing uncertainties on matters like waivers of the abortion rights, federal statutory standards on AHR medical providers, counsellors and other service providers, and on information gathering attending AHR services, are now both needed and authorized under the Commerce Clause.[161]

VI. Possible New U.S. Supreme Court Limits on State Lawmaking

A. New Parentage Norms

If Congressional action addressing the current uncertain and differing state parentage establishment and disestablishment norms is constitutionally foreclosed, unwise or otherwise unavailable, the U.S. Supreme Court can act to unify further federal childcare norms across the country by limiting the current broad state lawmaking on federal constitutional childcare rightsholders.[162] Some problems arising from the interstate variations on legal parentage would dissipate if the court resolved a few major issues.

[160] The state laws on surrogacy pacts (both traditional and gestational) vary widely and continue to evolve as these agreements increase in numbers. See, e.g., Mark Strasser, "Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law," 18 Journal of Health Care Law and Policy 85 (2015). See also supra note 132.

[161] See, e.g., Cheffer v. Reno, 55 F. 3d 1517, 1520-1 (11th Cir. 1995) (reproductive services are commercial activities subject to Congressional regulation).

[162] On the possible bases for Supreme Court action in AHR, see e.g., Kimberly M. Mutcherson, "Procreative Pluralism," 30 Berkeley J. Gender Law and Justice 22 (2015) (suggesting "justice framework" rather than liberty/autonomy or equality framework, with federal constitutional protections different for those in non-coital reproduction who do or do not procreate for profit).

One major issue is whether a male sperm donor in an AHR setting has the same paternity opportunity interest for parenthood as does a male whose consensual sex prompts the birth of his biological offspring.[163] If there are similar interests, related questions involve how and when these interests may be asserted;[164] how and when these interests might be waived, including whether valid preconception, or postconception but prebirth, waivers may be undertaken;[165] and, given the Michael H. precedent, whether any paternity opportunity interest in the male sperm donor can always be foreclosed if there is a resulting birth into an intact family (be it same or opposite sex)?[166] Sperm contribution via sex might be differentiated as here – unlike AHR settings – future pregnancy, birth and childcare motivate the contribution less often.

[163] See, e.g., C.O., at 525 (AHR sperm donor afforded "due process safeguards" where he and birth mother agreed preimplantation "that there would be a relationship between the donor and the child") and R.C., 775 P. 3d at 35 (declining to decide if statute on lack of paternity in a sperm donor in an AHR setting infringed upon a federal constitutional childcare interest where the donor had both a preconception intent to parent and postbirth contact with the child). Compare Adoption of a Minor, 29 N.E. 3d 830, 836 (Mass. 2015) (notice of and consent to adoption by same sex partner of the birth mother in AHR setting is not required for known sperm donor who only may have a theoretical basis to attempt to establish parentage in the future"). The nature of such a paternity opportunity interest, i.e., a fundamental right or a right subject to state override as long as laws are rational, and not arbitrary, is subject to some debate. See, e.g., In re Adoption of J.S., 2014 UT 51, ¶58 (2014).

[164] See, e.g., In re K.M.H., 169 P. 3d 1025, 1040-1041 (Kansas 2007) (no substantive due process infringement if sperm donor's paternity opportunity interest in a child born to an unwed birth mother is made dependent upon a writing signed by donor and mother).

[165] See, e.g., Szfranski v. Dunston, 34 N.E. 3d 1132, ¶139 (Ill. App. 1st 2015) (oral contract between ex-girlfriend and ex-boyfriend regarding cryopreserved pre-embryos upheld; ex-girlfriend awarded "sole custody and control").

[166] See, e.g., In re Adoption of Minor, 29 N.E. 3d 830 (Mass. 2015) (while recognizing such a donor may sue in paternity, not commenting upon the likely result of such a suit; but finding that such a donor – even if an uncle, cousin, or other family member whose sperm was utilized by a married lesbian couple – was not automatically entitled to notice of a proposed adoption by the birth mother's spouse).

Comparably, in AHR settings might ovum donation prompt parentage opportunity interests for the donor, especially, but perhaps not just,[167] where the donor was in a marital or substantially similar relationship with the birth mother and where there was a preimplantation agreement on dual parentage?

Another major issue is whether a birth mother has federal constitutional parental childcare interests if she delivers a child born of assisted reproduction. If an assisted reproduction birth mother always has such interest, related questions involve how and when such interests might be waived, including whether preconception,[168] or postconception but prebirth, waivers may be undertaken. Of course, there is the potential for federal constitutional differences between varying assisted reproduction birth mothers, as between mothers who utilized or did not utilize their own eggs[169] and between mothers who are or are not formally contracted gestational carriers.[170]

[167] Compare, e.g., D.M.T. v. T.M.H., 129 So. 3d 320, 346 (Fla. 2013) (distinguishing AHR cases involving lesbian couples where the nonbirth mother was or was not an ovum donor, that is, was or was not a "biological" or "natural" parent).

[168]See, e.g, Frazier v. Goudschaal, 295 P. 3d 542, 555-6 (Kansas 2013) (written coparenting pact between two female partners, where one later delivers an AHR child to be raised by both, is enforceable if the child's best interests are promoted) [hereinafter Frazier].

[169] See, e.g., J.R. v. Utah, 261 F. Supp. 2d 1268, 1293 (D. Utah 2002) (while woman giving birth may be presumed the legal mother at birth, "evidence of genetic consanguinity" must dissolve that presumption in favor of legal parentage for ova and sperm donors, a married couple, so as not to unduly burden and frustrate the donors' "exercise of their constitutionally guaranteed fundamental rights to . . . raise their own children," with these rights originating in both the U.S. and Utah constitutions).

[170] Of course, regardless of what the federal constitution permits, state laws often can further control outcomes. See, e.g., Rosecky v. Schissel, 833 N.W. 2d 634, ¶65 (Wisc. 2013) (surrogacy contract's provisions on voluntary termination of surrogate's parental rights cannot be enforced as contrary to statutory processes for parental rights terminations).

Yet another major issue is whether a current single legal parent may have his/her federal constitutional childcare interests diminished, though not terminated, through the recognition of a new legal parent with comparable federal childcare rights arising from his/her postbirth parental-like acts, even though there are no biological or formal adoptive ties. If such new "de facto" parenthood is possible over a single parent's current objection, as now exists in some states,[171] related questions involve what minimal federal constitutional standards must operate, including what should be the standards on written waivers and on other single parent and de facto parent consensual conduct (as with affirmative agreement or passive acquiescence). Some current state de facto parent standards seemingly are vulnerable to federal constitutional attack[172] as they are quite indefinite and lack explicit requirements on express single parent consent to, or even passive acquiescence in, new "de facto" parenthood in another.[173]

[171] See, e.g., R.M. v T.A., 233 Cal. App. 4th 760, 778 (Cal. App. 4th 2015) (rejecting birth mother's federal constitutional challenge to nonsperm donor's statutory presumed parentage in AHR setting since the court must be "satisfied the parent permitted the person to engage with the child at a level that transforms the interaction into a full, openly acknowledged two parent relationship").

[172] See, e.g., Jeffrey A. Parness, "Constitutional Constraints on Second Parent Laws," 40 Ohio Northern Univ. L. Rev. 811, 837-842 (2014) [hereinafter Constitutional Constraints].

[173] Passive acquiescence of a single parent to de facto parentage in another often arises from a romantic partner's residence with that parent and the child, combined with the partner providing financial resources benefitting the child, who is held out by the partner as the partner's child. See, e.g., Alabama Code 26-17-204 (a)(5) ("presumed" parent); California Family Code 7611 (d) ("presumed" parent); and Minnesota Stat. 257.55. The superior parental rights of the single parent are less likely an obstacle if acquiescence to the establishment of the requirements were expressly stated to constitute implied consent to possible later second parentage per the de facto parent doctrine. See, e.g., Constitutional Constraints, at 840. Also consider Missorui v. McNeeley, 133 S. Ct. 1552, 1566 (2013) (plurality opinion) (recognizing "all 50 states have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the state, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense," with "significant consequences" when consent is withdrawn), though withdrawal of consent to possible de facto parentage should be free of adverse consequences).

A related issue is whether two current parents may have their federal constitutional childcare interests diminished, though not terminated, through the recognition of a third legal parent arising from his/her postbirth parental-like acts, even though there are no biological or formal adoptive ties for the third parent.[174] If a third legal parent is possible over current dual or single parent objections (as due to earlier consent or acquiescence), related questions involve what, if any, minimal federal constitutional standards must operate. For example, if one of two current parents with interests cannot veto any proposed third parent who has the support of the other current federal constitutional childcare parent, are the third parent's childcare interests tethered to (e.g., derivative of) the supporting parent's childcare interests? Does the third parent lose childcare interests when the supporting parent withdraws support, loses childcare interests, or dies? And, must any possible third parent be a family member, like a grandparent or stepparent?

Another federal constitutional issue is whether there may be, automatically or otherwise, a third parent with federal constitutional childcare interests because of his/her prebirth rather than postbirth acts. Prebirth acts might include preconception donations of genetic material in assisted reproduction settings. Prebirth acts might also include three way voluntary acknowledgements, pledges or provisions of financial support for the pregnancy or for the future child, and/or pledges of future childcare, arising from premarital or midmarriage agreements.[175]

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[174] See, e.g., Bancroft, 19 A. 3d at 731 (both federal and state constitutions bar legal recognition of a third childcare parent with no biological or adoptive ties, as it would infringe on the childcare interests of the two existing parents).

[175] See, e.g., Jeffrey A. Parness, "Parentage Prenups and Midnups," 31 Georgia State Law Review 343(2015).

Yet another issue is whether a prospective birth mother, who will be deemed a mother under law when she gives birth, can waive her right to abort.[176] If so, further issues involve whether there can be effective waivers before as well as after conception; whether any waivers operate comparably when conception resulted from sex or assisted reproduction; whether effective waivers can operate in assisted reproduction settings both when her own or another's eggs were used; and, whether effective waivers depend on the prospective mother's marital status, and, if so, whether marital status is relevant at the time of the waiver, conception, or pregnancy. If some waivers of the right to abort are effective, there would be enforcement issues. Can judicial orders forbid abortions due to earlier waivers? Who may to seek such waivers? And, who has standing to enforce (where husbands and intended parents in surrogacy settings may not be similarly treated)?

When litigants seek guidance on these issues, the U.S. Supreme Court should hear their cases.

B. Other New Supreme Court Limits on State Lawmaking Discretion

In addition to further unifying federal constitutional parental childcare in the United States via new parental childcare precedents, the U.S. Supreme Court also could further unify childcare interests via new federal constitutional precedents operating outside of parentage. For example, varying types of nonparents (often called third parties) are now childcare

[176] It was reported that Tagg Romney (son of Mitt) and his wife Jen engaged a surrogate who delivered for them twin sons pursuant to an agreement that if the fetus (contract referenced a "child") was determined "to be physiologically, genetically or chromosomally abnormal," the abortion decision was "to be made by the intended parents." See, e.g., I. Glenn Cohen," The Constitution and the Rights Not To Procreate," 60 Stanford Law Review 1135, 1191-1195 (2008) (a number of reasons why states may be wary about enforcing abortion contracts).

rightsholders under state law. Nonparents are afforded childcare interests under state laws that differ from parental childcare interests. Might there be federal constitutional nonparental childcare interests for grandparents, stepparents or others?[177] Federal constitutional issues on such nonparental childcare include whether blood ties are needed, or are especially important so that, for example, grandparents must be distinguished from stepparents; whether parental consent is necessary, and if so, whether passive acquiescence suffices; and, what is the nature of nonparental conduct required to prompt such interests. As with parental childcare, nonparental childcare laws benefiting grandparents, stepparents, and others[178] now vary significantly interstate.[179]

[177] In M.C. v. Adoption Choices of Colorado, Inc., 2014 COA 161, ¶33 (Col. App. 2014), the court found a prospective adoptive couple had no "protected liberty interest in their relationship with the child they hope to adopt," where an earlier adoption decree was voided [hereinafter M.C.], reversed on other grounds, In Interest of Baby A., 363 P. 3d 193 (Col. 2015).

[178] Some nonparental childcare laws now expressly include siblings and greatgrandparents. See, e.g., 750 ILCS 607 (a-3). Nonparental childcaretakers could also include adult siblings; to date the courts have not spoken of their federal constitutional childcare interests. See, e.g., Jill Elaine Hasday, "Siblings in Law," 65 Vanderbilt L. Rev. 897, 930 (2012) ("Lastly, states should consider whether full of half-siblings separated by divorce, the end of a nonmarital relationship, or a parent's death will have an enforceable right to contact, communication and visitation unless a court determines that such connection would be contrary to the best interests of one or more siblings.") [hereinafter Hasday].

[179] See, e.g., Jeff Atkinson, "Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation or Custody of Children," 47 Family Law Quarterly 1(2013).

The U.S. Supreme Court might also consider the federal constitutional interests of children in certain adult childcare,[180] or in maintaining certain sibling relationships.[181] Here, the rightsholders would be children who have interests in receiving love, affection, and childcare.

Relatedly, per new precedents, children may be deemed federal constitutional rightsholders as to information regarding their biological roots, thereby allowing for more intelligent decisions about health care, procreation and the like. Thus, for example, when children born of sex are formally adopted, or about to be adopted by foster parents or others where the biological fathers are unknown, state officers could be obligated to secure and maintain information on those with biological ties for later use by the children, at least for certain purposes like medical decisionmaking.[182] For now, generally there are no such state

[180] See, e.g., Michael H., 491 U.S. at 130 (the U.S. Supreme Court has not "had occasion to declare whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her relationship"). Frazier, at 557 (deeming that denial to children with two parents opportunities to continue their childcare by a nonparent under law "impinges upon the children's constitutional rights"); M.C., at ¶53 (child has no liberty interest in continuing relationship with prospective adoptive couple); and In Re Adoption of I.B., 19 N.E. 3d 784, 791 (Ind. App. 2014) (children have "liberty interest in preserving the integrity and stability of their existing familial relationship" with maternal grandmother who was statutorily ineligible to adopt, but where statute was unconstitutional as applied).

[181] See, e.g., In re Adoption of I.B., 19 N.E. 3d 784, 791 (Ind. App. 2014) (siblings have "a liberty interest in preserving the integrity and stability of their existing familial relationship and are entitled to be free from arbitrary state action affecting that relationship"). But see In re Meridian H., 798 N.W. 2d 96, 99 (Neb. 2011) (no federal or state constitutional right, to date, involving continuing sibling relationships, as where one sibling is placed in foster care and two siblings are adopted) and In re Luke, 221 Cal. App. 4th 1082 (Cal. App. 3d 2013) (no constitutional protection of sibling relationships over custodial parent's objection). Often constitutional interests are not even raised. See, e.g., B.L.M. v. A.M., 381 S.W. 3d 319, 321 (Ky. App. 2012). General support of a child's interest in a continuing sibling or sibling-like relationship is found in James G. Dwyer, The Relationship Rights of Children (Cambridge Univ. Press 2006) and Hasday, supra note 178.

[182] See, e.g., Ronald K. Henry, "The Innocent Third Party: Victims of Paternity Fraud," 40 Family Law Quarterly 51, 68 (2006) ("The child's best and only interest in paternity establishment lies in finding that child's biological father. That child needs to know his or her genetic heritage for medical purposes.").

laws. There are few duties on governmental officials to identify unknown (usually male) biological parents whose children are placed for formal adoption.[183]

VII. Conclusion

U.S. Supreme Court precedents recognize federal constitutional childcare rights in parents that may not be easily diminished or eliminated under law. Yet these childcare rightsholders are mainly defined by state laws, which vary widely on parentage and which can be dependent upon biological ties, functional parenthood, or contracts. Deference to state lawmaking here is unique as no other federal constitutional rights depend on state law definitions of rightsholders. This deference has led to many problems which cannot be, or should not be, addressed by Congress. The U.S. Supreme Court should soon answer several important questions about federal childcare parents. This would reduce current problems and recognize federal constitutional childcare rightsholders under national norms as exist for all other federal constitutional rightsholders.

[183] See, e.g., Jeffrey A. Parness, "Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity," 53 Oklahoma L. Rev. 345 (2000) (reviewing federal substantive and procedural due process protections of unwed biological fathers in their children and suggesting how expanded procedural protections can deter the unwarranted abortions of male parental rights in adoptions proceedings.