St. John's Law Review

Volume 90
Number 4 *Volume 90, Winter 2016, Number 4*

Article 4

April 2017

Federal Constitutional Childcare Parents

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FEDERAL CONSTITUTIONAL CHILDCARE PARENTS

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> California law, like nature itself, makes no provision for dual fatherhood.[1]
>
> [A] court may find . . . more than two persons with a claim to parentage . . . if . . . recognizing only two parents would be detrimental to the child.[2]

INTRODUCTION

In context, the first quote, from a United States 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 United States Constitution, to the "care, custody, and control" of their children.[3]

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[1] Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion). *Cf. id.* at 162 (White, J., joined by Brennan, J., 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) (West, Westlaw through 2016 Reg. Sess. and ch. 8 of 2015–2016 2d Exec. Sess.); *see also* ME. REV. STAT. ANN. tit. 19-a, § 1853 (Westlaw through 2015 2d Reg. Sess. of the 127th Leg.) ("[A] court may determine that a child has more than 2 parents."). Case law has also permitted three childcare parents in the absence of statute. *See, e.g.*, *In re* M.W., 292 P.3d 1158, 1162 (Colo. App. 2012) (concluding psychological parent shared custody with two biological parents); T.E.B. v. C.A.B., 2013 PA Super 211, 74 A.3d 170, 178–79 (finding shared custody between biological father, presumptive father—the husband—and birth mother); Jacob v. Shultz-Jacob, 2007 PA Super 118, ¶¶ 21–26, 923 A.2d 473, 481–82 (concluding custody shared between birth mother, her same-sex partner, and the sperm donor who served as a parent in an assisted human reproduction birth).

[3] Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion); *see also id.* at 77 (Souter, J., concurring) ("We have long recognized that a parent's interests in

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 presumed biological ties—for example, marital paternity presumptions—as an avenue to legal parentage, and invites legal parentage by agreement.

Functional and contractual parents are proliferating in the United States, both in and outside of "dual parenthood."[5] Today, in California and elsewhere, "nature itself" 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.[6]

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the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."); *id.* at 87 (Stevens, J., dissenting) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children . . . ."); *id.* at 95 (Kennedy, J., dissenting) ("[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.").

[4] With unnatural help, there can be dual paternity or maternity in limited settings. *See, e.g.*, CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 42 (2d ed. 2011) (describing the "blended intrauterine insemination" process with a few cases); *see also* Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 131–32 (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 contemplates the possibility of triple maternity, triple paternity, or three parents who each are unaligned with a particular gender. Here, too, nature alone does not itself prompt parentage under law. Consider, for example, mitochondrial replacement therapy, which involves 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 GEO. L.J. 413, 416–17 (2016).

[5] *See generally* CTRS. FOR DISEASE CONTROL & PREVENTION, 2013 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT (2015), http://www.cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf.

[6] *See* Margalit et al., *supra* note 4, at 110–11.

The quotes also 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 state legislators or judges even if their quite reasonable goal is to protect the child by serving the child's best interests.[7] Parents defined by state law hold significantly protected federal constitutional childcare rights.[8] Of course, state parental childcare rights can extend, though not limit, federal constitutional parental childcare.[9]

Left unexplained is how federal constitutional rightsholders[10] came to be largely defined by state laws.[11] Typically, federal—often Supreme Court—precedents define federal constitutional rightsholders,[12] as well as the substantive

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[7] *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.").

[8] 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 to visitation. Uwadiegwu v. Dep't of Soc. Servs., 91 F. Supp. 3d 391, 398 (E.D.N.Y. 2015) (finding noncustodial parent has no federal constitutional right to intimate association with his or her child where there was no termination of parental rights, that is, no "wholesale relinquishment" of the parent's rights with respect to his or her child and where there was a visitation opportunity that was not "shocking, arbitrary, and egregious," though the noncustodial parent would need to travel from New York to Mississippi to visit).

[9] *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (following dissent in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and finding putative biological father has waivable Iowa constitutional right to challenge paternity presumption favoring husband of birth mother where her marriage remains intact); In Interest of J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (holding that the Texas Constitution protects against denying all putative fathers standing to sue in paternity regarding a child born into a marriage between others).

[10] Herein the term "rightsholders" 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?*, 68 STAN. L. REV. ONLINE 76, 77 (2015) (reviewing U.S. Supreme Court precedents requiring that a plaintiff suing to enjoin unconstitutional governmental action "be injured in order to have standing").

[11] 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.

[12] For an excellent review of how the Supreme Court has defined federal constitutional rightsholders, especially as to corporations, aliens, and felons, see Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605, 619 (2016) (outlining a unified approach for federal constitutional personhood determinations).

and enforcement aspects of such constitutional rights. There is general uniformity nationwide, per federal cases, among the criminally accused,[13] gun toters,[14] and abortion seekers[15] who possess and enforce the same federal constitutional rights.[16] Thus, for example, the definition of which women have a right to abort does not vary much from state to state.[17]

Why are the requisites for federal constitutional child caretakers largely left to state lawmakers? Both 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, causing many problems for children and those who care for them. These problems would be mitigated if child caretakers, like the criminally accused, gun owners, and abortion seekers, were more precisely defined by federal

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[13] The right of the criminally accused to a Sixth Amendment jury trial applies to state criminal cases. Yet, it is inapplicable to "petty crimes," though there can be exceptions under federal constitutional precedents. *See, e.g.*, Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 n.4 (1989); *cf.* Bado v. United States, 120 A.3d 50, 63 (D.C. Cir.), *vacated*, 125 A.3d 1119 (D.C. Cir. 2015) (per curiam) (mem.).

[14] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding Second Amendment right to bear arms is applicable to states); District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (finding "people" holding the right to bear arms "unambiguously refers to all members of the political community, not an unspecified subset"); Walker v. United States, 800 F.3d 720, 727 (6th Cir. 2015) (finding 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)).

[15] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (finding states cannot place a "substantial obstacle" in paths of those seeking abortions); Hodgson v. Minnesota, 497 U.S. 417, 424, 427 (1990) (concluding 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).

[16] Certainly, those possessing federal constitutional rights may have those rights limited in particular contexts, as with adults who choose to work in settings involving drugs, interdiction, or the need to carry a firearm. *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (discussing adults working with public school children participating in extracurricular activities); *see also* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 670–71 (1989).

[17] *See, e.g.*, *Casey*, 505 U.S. at 899 (holding that, while all women have the right to an abortion, the state can regulate differently the exercises of that right by women under the age of eighteen). There are different state laws regulating access to abortion by all rightsholders, which are often criticized. *See, e.g.*, Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L.J. (forthcoming 2016) (manuscript at 4–5), http://ssrn.com/abstract=2679373.

lawmakers. The Supreme Court, not Congress, should provide more precise definitions. New cases should address the open questions that forestall complete uniformity as to who constitutes a federal constitutional parental child caretaker.[18] This Article explores the questions that implicate biological, functional, and contractual legal parents, and how such a resolution by the Supreme Court would benefit child caretakers, their children, and the country overall.[19]

I. THE FEW FEDERAL CONSTRAINTS ON STATE PARENTAL CHILDCARE LAWS

Undoubtedly, the United States Supreme Court has set limits on state parentage laws akin to federal constitutional parental childcare rights. And there are some congressional enactments further unifying parental childcare interests across the country. Still, sharp interstate contrasts are expanding quickly without significant intervention 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.[20] 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 United States Constitution, the Supreme Court, or Congress may each constrain state parental childcare lawmaking.

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[18] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 24 (2015) (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"). This Article posits that current variations in American state childcare parent laws are causing "impermissible geographic variation[s] in the meaning of federal law." Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

[19] Concededly, not everyone laments upon the current broad lawmaking authority over parental childcare now vested in American state lawmakers. Some wish even broader authority. *E.g.*, Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 81 (2015) ("An essential part of long-term reform of American family law should include eroding and ultimately overruling existing case law holding that parents have a constitutionally protected substantive due process right to the custody and control of their children. . . . Ending due process-based constitutional rights for parents would free up the states to consider different parental rights regimes.").

[20] Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)).

A. The Federal Constitution

Within the United States Constitution's Bill of Rights, there is no explicit recognition of parental childcare interests or of congressional authority to define such interests. For enumerated rights like speech,[21] press,[22] and religion,[23] the Constitution is silent on affirmative congressional authority, though it constrains that authority. For the Civil Rights Amendments on involuntary servitude,[24] equal protection,[25] due process,[26] and voting,[27] the Constitution provides that Congress has the affirmative power "to enforce [those rights] . . . by appropriate legislation."[28]

So, whether or not Congress has any say on enforcement of federal constitutional rights, be they enumerated or unenumerated, the Supreme Court largely determines who rightsholders are and what rights they hold.[29] As for who the rightsholders are, the Constitution itself provides some direction to the Court, as certain rights are held by "the people,"[30] while others are held by "citizens"[31] or by persons.[32] The Constitution provides no explicit direction when rights are based in limits on governmental authority.[33]

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

[22] *Id.*

[23] *Id.*

[24] *Id.* amend. XIII, § 1.

[25] *Id.* amend. XIV, § 1.

[26] *Id.*

[27] *Id.* amend. XV, § 1.

[28] *Id.* amend. XIII, § 2; *id.* amend. XV, § 2; *see also id.* amend. XIV, § 5.

[29] Of course, high court precedents on rightsholders are sometimes surprising, as when free speech rights were accorded to corporations. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (recognizing First Amendment speech protections for corporations); Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 312 (2015) (reviewing criticisms while urging that corporate personhood needs "a more nuanced analysis" and suggesting "adjustments in corporate governance rather than constitutional law").

[30] *See, e.g.*, U.S. CONST. amend. IV (unreasonable search and seizure).

[31] *See, e.g.*, *id.* amend. XV, § 1 (voting).

[32] *See, e.g.*, *id.* amend. V (double jeopardy, self-incrimination, and due process, among others).

[33] *Id.* amend. I. (Congress shall not prohibit the free exercise of religion nor abridge the freedom of speech). For another review of the varying explicit federal constitutional approaches to federal constitutional rightsholders, see Robinson, *supra* note 12, at 609–10.

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—but neither the protections afforded by the right nor the enforcement of the right—significantly differ interstate. The relatively uniform federal constitutional approach to the attributes of parental childcare rights[39] contrasts sharply with the proliferation of interstate variations in defining the parents possessing such rights. The Supreme Court recognizes broad discretion in the states to define federal constitutional parental

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[34] U.S. CONST. art. VI, cl. 2.

[35] *Id.* amend. VI; *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("Because we believe that 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; *see* Rakas v. Illinois, 439 U.S. 128, 133–34 (1978) (holding that passengers in a searched automobile, who had no ownership interest in the automobile or in property seized from the automobile, had no legitimate expectation of privacy, and noting that 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, 341–43 (1985) (distinguishing prisoners, who "retain no legitimate expectations of privacy in their cells," from school children (citing Ingraham v. Wright, 430 U.S. 651, 669–70 (1977)), and finding school children have some privacy expectations, to be determined by a court in a given case via a "reasonableness standard" that applies nationwide).

[37] *Compare, e.g.*, 750 ILL. COMP. STAT. ANN. 70/15 (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (providing that parents of unemancipated minor to be notified prior to minor's abortion), *with* MISS. CODE ANN. § 41-41-53 (LEXIS through 2016 Reg. Sess., 1st Extra. Sess., and 2d Extra. Sess.) (stating that consent of both parents are required for abortion performed on an unemancipated minor).

[38] *Compare, e.g.*, ARK. CODE ANN. § 9-11-102 (LEXIS through 2016 2d Extra. Sess., 2016 Fiscal Sess., and 2016 3d Extra. Sess. of the 90th Gen. Assemb.) (establishing that male who is seventeen can marry with parental consent), *with* COLO. REV. STAT. § 14-2-106 (LEXIS through 2016 2d Reg. Sess. of the 70th Gen. Assemb.) (establishing that a male who is sixteen or seventeen can marry with consent of both parents).

[39] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (addressing parental childcare rights when grandparents seek visitation rights).

childcare rightsholders, which has resulted in varying state law definitions of parentage for federal constitutional childcare purposes.[40]

B. United States Supreme Court Precedent

While the leeway afforded to state lawmakers is broad, their given discretion to define federal childcare parents is not boundless. A few Supreme Court precedents do limit state definitional authority.[41] Thus, to date, all women who bear children as a result of sex are parents at birth with federal constitutional childcare interests.[42] 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,[43] with the establishment requisites largely left to state lawmakers.[44] The requisites for exercising childcare parenthood opportunities vary significantly interstate.[45] Incidentally, legal parenthood under state law often varies intrastate, including in contexts where the court must determine parents for child support and for crimes.[46]

The Supreme Court has given states the discretion whether to afford any parental childcare opportunities to biological fathers of children born of adulterous sex.[47] Where states afford

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[40] *See id.* at 73.

[41] *See* Tuan Anh Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 62–64 (2001).

[42] *See, e.g.*, *id.* at 72–73 (holding no equal protection violation in treating biologically tied men and women differently in parentage laws on childcare).

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

[44] *See, e.g.*, *id.* ("Rules governing . . . child custody . . . vary from State to State.").

[45] *See, e.g.*, Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1057–68 (2002) (discussing variations in state uses of putative father registries in adoption cases involving required notices to unwed biological fathers).

[46] *See, e.g.*, N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004) (holding biological father, "no matter how removed he may be emotionally from the child," may still have "duties of support under state law" to a child placed for adoption by his mother); State v. Paradis, 2010 ME 141, ¶ 6, 10 A.3d 695, 696–97 (holding biological father with no childcare opportunity may nevertheless be prosecuted for sexual acts as a parent to his child/victim).

[47] Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (plurality opinion) (recognizing such discretion, as long as a state law serves "a legitimate end by

such opportunities notwithstanding marital paternity presumptions, the associated requirements differ.[48] For example, Pennsylvania is at least one state that generally denies any parental childcare rights to such biological fathers, so that a biological father has no standing to rebut a marital paternity presumption.[49] Iowa, however, recognizes state constitutional parental childcare rights in such a biological father.[50]

Broad state lawmaking discretion in defining those with federal parental childcare rights emanates, in particular, from three major Supreme Court cases. 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 involving the mother's new husband.[51] There, the Court recognized that state lawmakers could vary in their norms on denying such a father any participation right and veto power.[52] 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

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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 some rebuttals by unwed biological fathers. CAL. FAM. CODE § 7541(a) (West, Westlaw through ch. 893 of the 2016 Reg. Sess. and ch. 8 of the 2015–2016 2d Exec. Sess.).

[48] *See, e.g.*, Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55 app. F at 94–95 (2003) (Recent State Statutes Allowing Paternity Disestablishment of Marital Children).

[49] *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052, 1055–56 (Pa. 1999) (holding no rebuttal by unwed biological father where marriage continues).

[50] *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999) (holding unwed biological father has "a liberty interest in challenging paternity" under Iowa Constitution). Marital presumption statutes are reviewed in June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 222–28 (2011).

[51] 463 U.S. 248, 250 (1983).

[52] *See id.* at 267.

parent-child relationship."[53] Before and since *Lehr*, American states have varied regarding the participation rights of unwed biological fathers in formal adoption proceedings.[54]

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.[55] 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 desired to promote the married couple's wish to remain an intact nuclear family.[56] While California public policy has since changed,[57] in Pennsylvania a legal parentage pursuit of a comparable biological father can be thwarted by an intact nuclear family.[58] Both before and since *Michael H.*, American states have varied in their approaches to establishing as well as disestablishing marital parentage presumptions.[59]

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[53] *Id.* at 256. The Court also noted that "[r]ules governing . . . child custody are generally specified in statutory enactments that vary from State to State." *Id.* In *United States v. Yazell*, where no federal constitutional protections were asserted, the Court found "no need for uniformity," and "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 the state law is applied." 382 U.S. 341, 352, 357 (1966).

[54] *See generally* Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUD. 223 (2003) (critically reviewing state laws).

[55] 491 U.S. 110, 113 (1989) (plurality opinion).

[56] *Id.* at 124.

[57] CAL. FAM. CODE § 7541(a) (West, Westlaw through ch. 893 of the 2016 Reg. Sess. and ch. 8 of the 2015–2016 2d Exec. Sess.) (providing that paternity of husband may be rebutted with "evidence based on blood tests").

[58] Strauser v. Stahr, 726 A.2d 1052, 1054 (Pa. 1999) (holding biological fathers cannot seek to rebut marital presumption favoring paternity of husband as long as marriage is intact and spouses want to maintain presumption).

[59] As to establishment, marital parentage presumptions can be based on birth or conception during marriage. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.2114(a) (West, Westlaw through 2016 Reg. Sess. of the 98th Leg.). As to disestablishment, marital parentage presumptions may only be rebuttable by the wife or husband. *See, e.g.*, OR. REV. STAT. ANN. § 109.070(1)(b), (2) (West, Westlaw through 2016 Reg. Sess.); UTAH CODE ANN. § 78B-15-607(1) (West, Westlaw through 2016 3d Spec. Sess.) (assuming a commitment to stay married and to raise the child as an issue of the marriage). In some states, however, in the context of disestablishment, marital parentage presumptions may be subject to rebuttal by the biological father, though standards can be unclear. *See, e.g.*, *In re* Parentage of John M., 817 N.E.2d 500, 506 (Ill. 2004); Waites v. Ritchie (*In re* Waites), 2012-CT-00884-SCT (¶ 14) (Miss. 2014), 152 So. 3d 306, 311 (holding biological father can seek custody as long as no abandonment, unfitness, or the like). Recently, some lower courts have applied

The third Supreme Court precedent is *Troxel v. Granville*, where the attributes of superior parental rights were at issue, rather than the norms for establishing such rights.[60] The case involved grandparents who sought a court order on grandparent-grandchild visits over parental objections.[61] In limiting judicial opportunity to override parental desires, a few opinions of a splintered Court recognized broad state lawmaking discretion on parentage and parent-like classes.[62] There was mention of child visitation laws benefitting third parties, that is, nonparents, via "gradations,"[63] as well as of possible "*de facto*" parenthood,[64] a parentage establishment norm involving neither biological ties nor formal adoption.[65] Before and since *Troxel*, American state de facto and comparable parentage laws vary in defining who becomes federal constitutional childcare parents.[66]

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

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marital parentage presumptions in childcare settings to lesbian spouses of birth mothers, even when the relevant statutes speak of husbands and presumed biological ties. *See, e.g.*, Elizabeth D. v. San Diego Cty. Health & Human Servs. Agency (*In re* D.S.), 143 Cal. Rptr. 3d 918, 924 (Ct. App. 2012).

[60] 530 U.S. 57, 60 (2000) (plurality opinion). An early 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.").

[61] *Troxel*, 530 U.S. at 60.

[62] *Id.* at 93 (Scalia, J., dissenting); *id.* at 101 (Kennedy, J., dissenting).

[63] *Id.* at 93 (Scalia, J., dissenting).

[64] *Id.* at 101 (Kennedy, J., dissenting). Justice Scalia, in dissent, recognized Justice Kennedy's solution as a possible, but ill-advised, "judicially crafted definition" of a federal constitutional childcare parent. *Id.* at 92.

[65] *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (LEXIS through 80 Del. Laws 2016, ch. 430) (exercise of "parental responsibility" with "support and consent of the child's parent"); D.C. CODE § 16-831.01(1) (LEXIS through Dec. 7, 2016) (single parent's "agreement" and residency in same household).

[66] *See, e.g.*, Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752–63 (2013) [hereinafter Parness, *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, 579 (Tenn. 1993) (holding state constitutional right to privacy in parenting decisions).

parent by estoppel.[67] Similarly, for parentage disestablishment there are differing terms, including rebuttal and rescission, usually depending on how parentage was initially established.[68]

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 rights include effective assistance of counsel, trial by jury, and speedy trial,[69] do not vary widely interstate.[70] Nor are there generally major interstate differences in religious practitioners,[71] those subject only to reasonable searches,[72] and gun toters.[73]

The Supreme Court is capable of crafting norms on federal constitutional parental childcare rightsholders. With state terminations of existing parental childcare interests, the Court has actively set uniform federal constitutional norms.[74] It cannot be that federal constitutional childcare rightsholders necessarily must be left to state law definitions per the Tenth Amendment's reservation of powers, since the Supreme Court has substantially federalized other personal privacy rights, including abortion,[75] contraception,[76] sexual conduct,[77] and marriage.[78]

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[67] *See, e.g.*, Parness, *Parentage Law (R)Evolution*, *supra* note 66.

[68] Marital paternity presumptions are often subject to rebuttal. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-814(C) (Westlaw through 2016 2d Reg. Sess. of the 52d Leg.). Voluntary paternity acknowledgments, by contrast, are subject to rescission, as driven by federal welfare subsidy policies found in 42 U.S.C. § 666(a)(5)(D) (2012).

[69] U.S. CONST. amend. VI (like Congress, states may not enact laws abrogating a criminal defendant's Sixth Amendment rights).

[70] *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (holding speedy trial right applies in state criminal cases).

[71] U.S. CONST. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (holding like Congress, states may not enact laws prohibiting the free exercise of religion).

[72] U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643, 657 (1961) (holding exclusionary rule applicable in state criminal cases).

[73] U.S. CONST. amend. II; McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

[74] *See, e.g.*, Santosky II v. Kramer, 455 U.S. 745, 748 (1982) (holding clear and convincing evidence needed to prove child "permanently neglected"); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 30–31 (1981) (holding guidelines on when counsel must be made available for parents facing state initiatives to terminate parental rights).

[75] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

[76] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 503–04 (1965) (White, J., concurring).

C. Congressional Enactments

The broad discretion held by American state lawmakers regarding parentage prompting federal constitutional parental childcare rights[79] generally has not been limited much by Congress.[80] Congressional enforcement authority might be employed, however.[81] 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."[82] But such authority cannot work "a substantive change in the governing law,"[83] meaning there can be no "substantive redefinition" of Supreme Court precedents on Fourteenth Amendment rights.[84] Further, congressional exercise of this enforcement authority requires "a relevant history and pattern of constitutional violations."[85]

Congressional authority regarding federal expenditures could also be used to help unify federal constitutional parent childcare norms.[86] Congressional concerns regarding federally subsidized state welfare assistance has already led to uniform

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[77] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

[78] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015). Granted, not all federal constitutional childcare rightsholders have been explicitly deemed subject to state law definitions. To date, the Supreme Court has not directly addressed childcare rights when children are born of assisted reproduction. *See, e.g.*, Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 25 (2015) (arguing for federal constitutional protections of assisted reproduction, though distinguishing noncoital procreation between those wishing to procreate and parent, and those wishing to procreate for profit).

[79] David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 55 (Robin Fretwell Wilson ed., 2006) (recognizing "the [Federal] Constitution's substantial indifference to how states assign parent status").

[80] On what Congress has done—and should do—regarding family status determinations, see, for example, Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 790–91 (2015).

[81] U.S. CONST. amend. XIV, § 5.

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

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

[84] Tennessee v. Lane, 541 U.S. 509, 520 (2004).

[85] *Id.* at 521 (citing Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001)); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999).

[86] U.S. CONST. art. I, § 8, cl. 1 (congressional taxing and spending authority).

voluntary paternity-acknowledgment standards across the country.[87] But here, reimbursements of expended federal welfare dollars were the targets, rather than the establishment of more uniform parentage norms.[88]

Congressional authority regarding interstate commerce,[89] and perhaps other acts with significant national implications,[90] might also be employed, as with establishing guidelines for sperm banks and assisted reproduction clinics providing services for people from throughout the country.[91] Yet, such guidance may not—and likely could not, per the aforementioned limited enforcement authority of Congress—address uniform parental childcare norms that include children born of sex.[92]

II. THE FAILURE TO JUSTIFY DEFERRAL TO STATE LAWMAKING ON FEDERAL CONSTITUTIONAL CHILDCARE PARENTS

The United States Supreme Court has often recognized the right of federal constitutional parental childcare as "fundamental."[93] Yet, the Court has not clearly explained why

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[87] *See, e.g.*, Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 56 (2010) (explaining that states have applied the congressional guidelines on voluntary parentage acknowledgments both in and outside of welfare settings).

[88] *Id.* at 56–59.

[89] U.S. CONST. art. I, § 8, cl. 3.

[90] *See, e.g.*, *id.* art. I, § 8, cl. 18 ("[Congress shall] make all Laws . . . necessary and proper for carrying into Execution [the specifically enumerated legislative powers]").

[91] *See, e.g.*, Andrea Preisler, Note, *Assisted Reproductive Technology: The Dangers of an Unregulated Market and the Need for Reform*, 15 DEPAUL J. HEALTH CARE L. 213, 214 (2013) (explaining how such guidelines might operate); Benjamin B. Williams, Note, *Screening for Children: Choice and Chance in the "Wild West" of Reproductive Medicine*, 79 GEO. WASH. L. REV. 1305, 1307 (2011).

[92] Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 333–34 (2009) (reviewing how Congress has already utilized its legislative authority in enforcement, spending, and interstate commerce matters to unify family laws in the United States, and 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, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 398–99 (2008) (reviewing congressional initiatives conditioning the receipt of federal funds on family law mandates).

[93] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("[F]undamental rights and liberty interests [include the right] "to direct the education and upbringing of one's children."); Santosky II v. Kramer, 455 U.S. 745,

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 rapidly 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,[94] as do unwed biological fathers who conceive children by consensual sex with married women.[95] State laws on childcare rightsholders vary widely today for both parentage establishment and disestablishment.[96]

Explanatory failures by the Supreme Court abound in the 2000 *Troxel* case on parental childcare where grandparents sought court-ordered child visitation over parental objections. Court statements recognizing broad state lawmaking authority on parentage prompting federal constitutional childcare are

753 (1982) (finding "fundamental liberty interest of natural parents in the care, custody, and management of their child" is protected by the Fourteenth Amendment); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[F]undamental rights and interests [include] the traditional interest of parents with respect to the religious upbringing of their children . . . ."); *see also* Hawk v. Hawk, 855 S.W.2d 573, 578–79 (Tenn. 1993) (reviewing additional Supreme Court precedents, though employing a state constitutional privacy analysis to find application of the Grandparents' Visitation Act in the case was unconstitutional).

[94] For example, the state laws on the marital presumptions recognizing husbands as legal fathers vary in their establishment standards. *Compare, e.g.*, MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1) (West, Westlaw through ch. 295 of the 2016 2d Ann. Sess.) (establishing that husband is presumed father of child "born during the marriage"), *and* NEV. REV. STAT. ANN. § 126.051(1)(a) (West, Westlaw through 78th Reg. Sess. (2015) and 29th Spec. Sess. (2015)) (similar), *with* ARIZ. REV. STAT. ANN. § 25-814(A)(1) (Westlaw through 2016 2d Reg. Sess. of the 52d Leg.) (establishing that the presumed father is the man to whom the birth mother was married at any time in the ten months immediately preceding the birth of the child), *and* MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (West, Westlaw through 2016 legislation) (establishing that presumed father is "man to whom" child's "mother was married at the time of conception").

[95] For example, where their mates are married to other men, state laws on the rebutting by biological fathers of the marital paternity presumptions favoring husbands vary. *Compare, e.g.*, UTAH CODE ANN. § 78B-15-204(1)(a) (West, Westlaw through 2016 3d Spec. Sess.) (presuming that a husband is the father of a child if the child is born during his marriage to the child's mother), *with* L.A. Cty. Dep't of Children & Family Servs. v. Heriberto C. (*In re* Jesusa V.), 85 P.3d 2, 11 (Cal. 2004) (holding biological father and husband can each raise a presumption of paternity, often prompting a judicial decision on which presumption should be maintained).

[96] *See* Parness & Townsend, *supra* note 87, at 63–87 (demonstrating differences in American state laws on establishing and recognizing voluntary paternity acknowledgments); *see also supra* notes 48 (marital parentage presumptions), 57–59 (marital parentage presumptions), 66–67 (de facto, presumed, and equitable parentage) and accompanying text.

made without significant judicial elaboration 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."[97] He noted a few Supreme Court precedents, including one indicating it is best to leave "matters involving competing and multifaceted social and policy decisions" to "local decisionmaking," which he deemed to mean that "caution" for the Court was "never more essential than in the realm of family and intimate relations."[98] He did not explain why the 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 "definition[s] of parents" possessing the "unenumerated parental rights" recognized in federal constitutional precedents, which he "would not now overrule."[99]

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."[100] This observation was founded on the preexisting diversity subject matter jurisdiction limit on federal district courts issuing divorce, alimony, or child custody decrees.[101]

Similar statements appear beyond dissents and outside of grandparent visitation settings. In an adoption case, a majority of the Supreme Court simply observed that in "the vast majority of cases," state laws govern "the legal problems arising from the

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[97] Troxel v. Granville, 530 U.S. 57, 90 (2000) (Stevens, J., dissenting).

[98] *Id.* at 90 n.10 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)).

[99] *Id.* at 92–93 (Scalia, J., dissenting).

[100] *Id.* at 101 (Kennedy, J., dissenting) (citing Ankenbrandt v. Richards, 504 U.S. 689, 703–04 (1992)).

[101] More particularly, Justice Kennedy relied upon *Ankenbrandt*, where the Court was only concerned with the long history of absence of federal court subject matter jurisdiction over divorce, alimony, and child custody decrees, and the special state court proficiencies to monitor compliance with such decrees, and not with the absence of federal court authority to define federal constitutional rightsholders. *Ankenbrandt*, 504 U.S. at 703–04.

parent-child relationship."[102] In a property setting involving "a conflict between federal and state rules for the allocation of a federal entitlement," a 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.[103] 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 nonbiological parentage have risen sharply, particularly with the increases in the numbers of nonmarital children,[104] children born of assisted reproduction technologies,[105] and children "informally" adopted.[106]

Commentaries on these Supreme Court pronouncements on deference to states generally are unsatisfactory and often conclusory.[107] One author wrote:

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[102] Lehr v. Robertson, 463 U.S. 248, 256 (1983).

[103] Hisquierdo v. Hisquierdo, 439 U.S. 572, 581–82 (1979) (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)); s*ee also* Hillman v. Maretta, 133 S. Ct. 1943, 1950 (2013) (employing *Hisquierdo* in a different property setting); Rose v. Rose, 481 U.S. 619, 625 (1987) (employing the same language used in *Hisquierdo* and *Yazell* in a different property setting).

[104] *See, e.g.*, Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 652 n.9 (2008); Joyce A. Martin et al., *Births: Final Data for 2013*, *in* 64 NAT'L VITAL STAT. REP. NO. 1, 38–40 (2015), https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf; ELIZABETH WILDSMITH ET AL., CHILD TRENDS, PUB. NO. 2011-29, CHILDBEARING OUTSIDE OF MARRIAGE: ESTIMATES AND TRENDS IN THE UNITED STATES 1 (2011), http://www.childtrends.org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf ("In 2009, 41 percent of all births (about 1.7 million) occurred outside of marriage, compared with 28 percent of all births in 1990 and just 11 percent of all births in 1970.").

[105] On the history of assisted human reproduction, and the recent growth in free private sperm donation, see Lauren Gill, Note, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1719–25 (2013). On the increases in assisted human reproduction on a "do-it-yourself" basis, making governmental regulation more difficult, see, for example, A.A.B. v. B.O.C., 112 So. 3d 761, 764 (Fla. Dist. Ct. App. 2013).

[106] Herein, "informal adoptions" most significantly include recognitions of a second parent for a child with a single parent where the second parent is on equal footing with the 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, for example, Parness, *Parentage Law (R)Evolution*, *supra* note 66, at 764–65.

[107] *See, e.g.*, Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend To Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 151 (2010) [hereinafter Baker, *Marriage and Parenthood*] (footnote omitted) ("[F]ew people question 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.").

> 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 . . . .[108]

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 law and policy" in such realms as abortion, sexual conduct, and same-sex marriage.[109]

In a 1992 ruling, often relied upon in judicial opinions where public policy explanations are otherwise wanting, the Supreme Court did articulate a cogent rationale for limiting federal district court subject matter jurisdiction in certain "family policy" cases.[110] It deemed such jurisdiction could not be exercised when "divorce and alimony decrees and child custody orders" are sought.[111] 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 . . . .[112]

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[108] Patterson, *supra* note 92, at 399; *see also id.* at 433 (noting that the Supreme Court recognizes "community morality, order, and cohesion" in limiting federal lawmaking on family matters).

[109] 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 L. REV. 623, 626 (2014) (reviewing the critics).

[110] Ankenbrandt v. Richards, 504 U.S. 689 (1992).

[111] *Id.* at 703.

[112] *Id.* at 703–04.

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, nor require judicial expertise developed only in state courts.

This rationale from 1992 sometimes is read too generally and taken out of context. Thus, the United States Court of Appeals for the Sixth Circuit in 2015 declared: "And if the plaintiff requests that a federal court determine who should have care for and control a child, then that request is outside the jurisdiction of the federal courts."[113] Yet, the court also recognized that the 1992 precedent was limited to barriers to federal court resolutions of who should have custody, as only then would there often be "continuing judicial supervision of a volatile family situation" and the "deployment of social workers to monitor compliance."[114] 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.[115]

III. THE RESULTS OF AND THE PROBLEMS WITH DEFERRING LAWMAKING TO STATES

The absence of federal laws significantly limiting state lawmaking on who may be federal constitutional parental child caretakers has resulted in a proliferation of widely varying state parentage laws relevant to federal constitutional childcare. Divergence arises, in part, due to the variation among separation of powers approaches to state judicial common lawmaking when statutes are wholly silent or incomplete,[116] as they often are, as

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

[114] *Id.* at 794, 797 (quoting *Ankenbrandt*, 504 U.S. at 704; Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982)); *see also* Alexander v. Rosen, 804 F.3d 1203, 1205 (6th Cir. 2015) (deeming *Chevalier* applicable to a narrow range of cases, including those involving who gets child custody and the calculation of child support payments).

[115] *Chevalier*, 803 F.3d at 797.

[116] *Compare, e.g.*, Pitts v. Moore, 2014 ME 59, ¶¶ 18–19, 90 A.3d 1169, 1176–77 (plurality opinion) (noting that while "[p]arenthood is meant to be defined by the Legislature," after thirteen years of noting a statutory need for a de facto parent doctrine, three justices concluded "we must provide some guidance"), *with* Moreau v. Sylvester, 2014 VT 31, ¶ 26, 196 Vt. 183, 196, 95 A.3d 416, 425 (declining to formulate a non-statutory de facto parent doctrine and noting that other courts have similarly declined to fill the "perceived vacuum"). A new Parentage Act took effect in

well as to varied approaches to recognizing state constitutional parental childcare rights.[117] 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.[118]

A. 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,[119] as well as

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Maine on July 1, 2016. ME. REV. STAT. ANN. tit. 19-a, §§ 1831–1939 (Westlaw through 2015 2d Reg. Sess. of the 127th Leg.).

[117] *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999) (concluding that an unwed biological father of a child born to a woman married to another man had a constitutional due process "liberty interest" in Iowa when he challenged the husband's paternity); Jensen v. Cunningham, 2011 UT 17, ¶ 73, 250 P.3d 465, 484 (stating that a state constitutional due process liberty interest of parents "to maintain ties to" their children includes "a fundamental right to make decisions concerning the care and control of their children"); LP v. LF, 2014 WY 152, ¶ 57, 338 P.3d 908, 921 (Wyo. 2014) (declining to adopt de facto parentage or the parentage by estoppel doctrine, "instead leaving that important policy decision to the Wyoming Legislature"). For a discussion of when state constitutions will more likely be read to provide broader protections of individual rights, see, for example, Hodes & Nauser, MDs, P.A. v. Schmidt, 368 P.3d 667, 702 (Kan. Ct. App. 2016) (en banc) (Malone, C.J., dissenting) (noting that coextensive interpretations of federal and state constitutions generally occur "only when the provisions themselves are similar"), *review granted* (Apr. 11, 2016).

[118] *See* Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 622–26 (2009).

[119] *See, e.g.*, FLA. STAT. ANN. § 742.15(1), (3)(c) (West, Westlaw through 2016 2d Reg. Sess. of the 24th Leg.) (providing that "[p]rior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made" wherein typically a "gestational surrogate agrees to relinquish any parental rights upon the child's birth"); 750 ILL. COMP. STAT. ANN. 47/25(b)(2), (c)(1)(ii) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (similar); N.H. REV. STAT. ANN. § 168-B:11(A)(II) (Westlaw through ch. 330 of the 2016 Reg. Sess.) ("[The gestational carrier agreement] shall be executed prior to the commencement of any medical procedures to impregnate the gestational carrier."). Where gestational surrogates are married, their spouses may also contractually waive any parental rights prior to conception. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47/25(b)(2)(i) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (providing that "gestational surrogacy contract" shall be executed by the "gestational surrogate's husband").

adoptions of any future children by intended parents, who may not need to have been married[120] but may need to have contributed genetic material prompting birth.[121] Other states decline to enforce surrogacy pacts.[122]

For AHR where a birth mother intends to parent, her husband may or may not be a legal parent, depending on whether his sperm was employed.[123] For AHR births to unwed mothers, sperm donors may be statutorily barred from paternity of any later-born child.[124]

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,[125] the timing of the necessary marriage differs interstate. State legislators have alternatively used the timing of

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[120] *See, e.g.*, NEV. REV. STAT. ANN. § 126.590 (West, Westlaw through 78th Reg. Sess. (2015) and 29th Spec. Sess. (2015)).

[121] *See, e.g.*, FLA. STAT. ANN. § 742.15(3)(e) (West, Westlaw through 2016 2d Reg. Sess. of the 24th Leg.) (stating that the gestational surrogate must agree to "assume parental rights and responsibilities . . . if it is determined that neither member of the commissioning couple is the genetic parent"); 750 ILL. COMP. STAT. ANN. 47/20(b)(1) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (stating that where there are two intended parents, at least one must contribute gametes).

[122] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218(A) (Westlaw through 2016 2d Reg. Sess. of the 52d Leg.); IND. CODE ANN. § 31-20-1-1 (West, Westlaw through 2016 legislation); MICH. COMP. LAWS ANN. § 722.855 (West, Westlaw through 2016 Reg. Sess. of the 98th Leg.). 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 WASH. L. REV. 1235, 1239–45 (2014).

[123] *See, e.g.*, 750 ILL. COMP. STAT. ANN. 40/3 (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (repealed 2017) (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, regardless of whether or not their sperm was used. *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 1-206(b) (West, Westlaw through 2016 legislation) (employed in a divorce and child support setting in *Sieglein v. Schmidt*, 120 A.3d 790, 793–94 (Md. Ct. Spec. App. 2015)).

[124] *Compare, e.g.*, Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Ct. App. 2005) (holding no paternity for sperm donor regardless of intent), *with* In Interest of R.C., 775 P.2d 27, 35 (Colo. 1989) (en banc), *and* C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. Com. Pl. 1994).

[125] On marital paternity presumptions, see Carbone & Cahn, *supra* note 50, at 219, 221–28; *see also* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 345 n.1 (Iowa 2013) (describing varying state laws).

marriage relative to conception, pregnancy, and/or birth.[126] Further, there are variations in the standing of those who can disestablish parentage by challenging marital parentage presumptions.[127]

B. 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, for example, de facto parents and presumed parents.[128]

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,[129] while others require no minimum period of household residency[130] or no household residency at all.[131]

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[126] *Compare, e.g.*, NEV. REV. STAT. ANN. § 126.051 (1)(a) (West, Westlaw through 78th Reg. Sess. (2015) and 29th Spec. Sess. (2015)) (establishing presumption of husband's paternity if child is "born during the marriage"), *with* ARIZ. REV. STAT. ANN. § 25-814(A)(1) (Westlaw through 2016 2d Reg. Sess. of the 52d Leg.) ("married at any time in the ten months immediately preceding the birth"), *and* MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (West, Westlaw through 2016 legislation) (establishing presumption of husband's paternity if he and the child's mother are "married at the time of conception").

[127] *Compare, e.g.*, B.C. v. J.S.U., 158 So. 3d 464, 467 (Ala. Civ. App. 2014) (holding 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, 1055–56 (Pa. 1999) (similar), *with* L.A. Cty. Dep't of Children & Family Servs. v. Heriberto C. (*In re* Jesusa V.), 85 P.3d 2, 11 (Cal. 2004) (holding both husband and biological father of child born to wife can meet criteria for "presumed" paternity, and a court often must decide which one of the two presumptions to sustain), *and* Waites v. Ritchie (*In re* Waites), 2012-CT-00884-SCT (¶ 19) (Miss. 2014), 152 So. 3d 306, 314 (holding that for child born into marriage, unwed biological father nevertheless entitled to "natural-parent presumption").

[128] *See, e.g.*, Parness, *Parentage Law (R)Evolution*, *supra* note 66, 752–63 (providing an overview of evolving state parentage laws). In Delaware, there are statutory parents both via de facto status and presumptions. DEL. CODE ANN. tit. 13, § 8-201(c) (LEXIS through 80 Del. Laws 2016, ch. 430); *id.* § 8-204(a).

[129] *See, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(5) (West, Westlaw through 2015 Reg. Sess. of the 84th Leg.); WASH. REV. CODE ANN. § 26.26.116(2) (West, Westlaw through 2016 Reg. Sess. and 1st Spec. Sess.).

[130] *See, e.g.*, COLO. REV. STAT. § 19-4-105(1)(d) (LEXIS through 2016 2d Reg. Sess. of the 70th Gen. Assemb.) (receipt of child into home); MONT. CODE ANN. § 40-6-105(1)(d) (West, Westlaw through 2015 Legis. Sess.) (similar); N.J. STAT. ANN. § 9:17-43(a)(4) (West, Westlaw through 2016 legislation) (similar).

Some state laws recognize a functional parent where there already exist, and will remain, two other parents under law.[132] Incidentally, in settings where there are biological ties but no earlier functioning as a parent so that there are no childcare opportunities, child support obligations can still be imposed.[133]

C. Contractual Parentage

There are also variations in state laws regarding contractual parentage for childcare purposes. With AHR nonsurrogacy births, some state statutes speak to both marital and nonmarital settings,[134] while others expressly address only the written consent of a husband to parenthood when his wife seeks to deliver a child born with anonymously donated sperm.[135] When statutes do not cover all AHR nonsurrogacy births, courts can extend contractual parentage opportunities, as with unwed sperm donors who are recognized as childcare parents,[136] as well

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[131] *See, e.g.*, ALA. CODE § 26-17-204(a)(5) (Westlaw through 2016 Reg. Sess. and Act 2016-485 of the 2016 1st Spec. Sess.) (stating that a presumed parent establishes "a significant parental relationship").

[132] *See, e.g.*, CAL. FAM. CODE § 7612(c) (West, Westlaw through ch. 893 of the 2016 Reg. Sess. and ch. 8 of the 2015–2016 2d Exec. Sess.) (failing to recognize three parents would be "detrimental to the child"). *See also* ME. REV. STAT. ANN. tit. 19-a, §§ 1851(1), 1881(1)(A), 1891(3)(A)–(C) (Westlaw through 2015 2d Reg. Sess. of the 127th Leg.) (establishing that parents include birth mother, husband as presumed parent, and de facto parent via, for example, residence, consistent "caretaking," and a "bonded and dependent relationship"); *id.* § 1891(5) (adjudication of de facto parentage "does not disestablish the parentage" of others).

[133] *See, e.g.*, N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004); A.S. v. Gift of Life Adoptions, Inc. (*In re* Adoption of Baby A.), 944 So. 2d 380, 395 (Fla. Dist. Ct. App. 2006).

[134] *See, e.g.*, OHIO REV. CODE ANN. §§ 3111.89, 3111.88(C) (West, Westlaw through File 123 of the 131st Gen. Assemb. (2015–2016)) (addressing "non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her child" through using "the semen of a man who is not her husband"). "[D]ue process safeguards," however, may prompt some sperm donors to be fathers under Ohio's statute. C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. Com. Pl. 1994). *See also* CAL. FAM. CODE §§ 7613, 7962 (West, Westlaw through ch. 893 of the 2016 Reg. Sess. and ch. 8 of the 2015–2016 2d Exec. Sess.) (addressing AHR outside surrogacy and AHR with gestational carriers); ME. REV. STAT. ANN. tit. 19-a, §§ 1921–1929, 1931–1939 (Westlaw through 2015 2d Reg. Sess. of the 127th Leg.) (AHR outside marital setting and gestational carrier agreements).

[135] *See, e.g.*, ARK. CODE ANN. § 9-10-201(a) (LEXIS through 2016 2d Extra. Sess., 2016 Fiscal Sess., and 2016 3d Extra. Sess. of the 90th Gen. Assemb.); 750 ILL. COMP. STAT. ANN. 40/3(a), (b) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (repealed 2017) (stating that a sperm donor is not treated as the "natural father" unless his wife is inseminated).

[136] *See, e.g.*, Breit v. Mason, 718 S.E.2d 482, 489 (Va. Ct. App. 2011).

as with husbands recognized as childcare parents when their wives conceive without medical assistance via sperm donated by one known to the married couple.[137] Other states have 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.[138]

In AHR surrogacy settings, some state laws explicitly require husbands of projected surrogates to consent in writing to an absence of future legal paternity.[139] Some state laws allow nonegg or nonsemen donors to become legal parents via surrogacy pacts,[140] while others do not.[141] Some state laws prohibit surrogacy contracts altogether.[142] Some states, under certain circumstances, allow men alone to become legal parents via AHR surrogacy.[143] On the range of state laws, one judge of a state high court, upon reviewing existing laws and

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[137] *See, e.g.*, Engelking v. Engelking, 982 N.E.2d 326, 327–28 (Ind. Ct. App. 2013) (relying on a husband's voluntary consent to artificial insemination as well as the statute on a "child of the marriage").

[138] *See* CONN. GEN. STAT. ANN. § 45a-775 (West, Westlaw through 2016 Feb. Reg. Sess., 2016 May Spec. Sess., and 2016 Sept. Spec. Sess.).

[139] *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47/25(b)(2)(i) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (requiring execution of gestational surrogacy contract by gestational surrogate's husband "prior to the commencement of any medical procedures").

[140] *See, e.g.*, FLA. STAT. ANN. § 742.15 (West, Westlaw through 2016 2d Reg. Sess. of the 24th Leg.); 750 ILL. COMP. STAT. ANN. 47/20(b) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (establishing that where there are two intended parents, at least one must contribute gametes and there must be "a medical need" for gestational surrogacy); *see also In re* Baby S., 2015 PA Super 244, 128 A.3d 296, 306–07 (holding that the nonegg donor was the legal mother of child born to surrogate even though there was no statute on point).

[141] *See, e.g.*, *In re* T.J.S., 16 A.3d 386, 391 (N.J. Super. Ct. App. Div. 2011) (finding that the wife of a 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 an equally divided court*, 54 A.3d 263 (per curiam) (N.J. 2012).

[142] *See, e.g.*, IND. CODE ANN. § 31-20-1-1 (West, Westlaw through 2016 legislation); MICH. COMP. LAWS ANN. § 722.855 (West, Westlaw through 2016 Reg. Sess. of the 98th Leg.).

[143] *See, e.g.*, ARK. CODE ANN. § 9-10-201(c)(1)(B) (LEXIS through 2016 2d Extra. Sess., 2016 Fiscal Sess., and 2016 3d Extra. Sess. of the 90th Gen. Assemb.) (stating that unwed sperm donors can utilize surrogates in which case the child is the legal child of only the unwed sperm donor, that is, the biological father); *In re* Roberto d.B., 923 A.2d 115, 131–32 (Md. 2007) (similar). *Cf. In re* Paternity of Infant T., 991 N.E.2d 596, 597–98 (Ind. Ct. App. 2013) (finding unwed sperm donor could 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, because there would otherwise be no legal second parent).

commentaries, concluded: "Beyond the 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."[144]

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 child caretaking.[145] Only some states grant legal parenthood to a second parent based on a single parent's passive acquiescence.[146]

D. 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? Not if one believes equality principles demand that federal constitutional childcare rightsholders should be comparably defined regardless of where they live.[147] Beyond equality, current

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[144] *In re* F.T.R., 2013 WI 66, ¶ 92, 349 Wis. 2d 84, 129, 833 N.W.2d 634, 656 (Abrahamson, C.J., concurring); *see also* KINDREGAN & MCBRIEN, *supra* note 4, at 157–203, 203–11 (reviewing surrogacy laws in the United States as well as international surrogacy laws); Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 486–503 (2015) (reviewing American state surrogacy laws); Leora I. Gabry, Note, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 421–31 (2012) (reviewing American state surrogacy laws).

[145] *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (LEXIS through 80 Del. Laws 2016, ch. 430) (establishing de facto parent where there is the "support and consent" of the child's single parent); Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (stating that statute is unconstitutional if read to allow a de facto parent where there already exist two fit parents). *But cf.* Barone v. Chapman-Cleland, 10 N.Y.S.3d 380, 381 (N.Y. App. Div. 2015) (holding that same-sex partner of a birth mother having no childcare interest as "equitable estoppel" did not bar mother's superior childcare rights when partnership dissolved, though the partner had co-parented for some time with the birth mother's consent), *rev'd*, *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016).

[146] *See, e.g.*, S.Y. v. S.B., 134 Cal. Rptr. 3d 1, 3, 11 (Ct. App. 2011) (employing § 7611(d) of the California Family Code, and presuming 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).

[147] The interstate variations on who are parents in childcare settings seemingly are subject to a Fifth Amendment Due Process analysis, where the focus would

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, some believe that legal parentage depends only upon biology or formal adoption.[148] While over time a better understanding might develop, there are further problems.

Many Americans do not understand that differing terms can have comparable meanings and similar terms can have differing meanings from state to state. For example, de facto parenthood in one state can be comparable to presumed parenthood in a second state, while presumed parenthood can have a number of meanings across states.[149] New United States Supreme Court precedents on federal constitutional childcare parents likely will unify American state parental childcare nomenclature.

Another problem involves the uncertainties about legal parentage when people move across state 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*.[150] As legal parentage norms untied to biology and formal adoption become more

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likely be on congressional failures regarding comparably situated child caretakers, rather than Supreme Court failures.

[148] *See generally* Janis Prince Inniss, *What Makes a Real Parent?*, EVERYDAY SOCIOLOGY BLOG (Dec. 30, 2007), http://nortonbooks.typepad.com/everydaysociology/2007/12/what-makes-a-re.html.

[149] *See, e.g.*, Parness, *Parentage Law (R)Evolution*, *supra* note 66; *see also* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 345–47, 346 n.1 (Iowa 2013) (demonstrating three separate categories of American state statutes on the parentage presumption).

[150] *See, e.g.*, Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481, 485–86 (2015) [hereinafter Parness, *Imprecise American State Parentage Laws*] (criticizing this approach and suggesting ways state courts should employ their choice-of-law principles when parentage norms differ between interested states).

widespread and better-known, savvy lawyers will likely prompt their clients to make forum-shopping moves for such purposes as avoiding shared childcare or child support.[151]

Other problems spring from state law variations on those possessing federal parental childcare rights. If family members generally understand their own state parentage laws, and even where there are no cross-border moves, many remain uncertain as to who is a parent.[152] Unlike parentage arising from marriage, a birth certificate, a voluntary parentage acknowledgment, or a formal adoption, de facto legal parentage and the like are imprecise in that they arise from such occurrences as "parent-like" acts or "bonded and dependent relationship[s]," which must be judicially assessed after the fact.[153] There will often be great uncertainty about how judges will rule in particular cases, even if the fuzzy legal norms on parentage are known. Subjectivity reigns, with few objective standards like those in formal adoption settings.[154] 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.[155]

Legal parentage uncertainties can 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

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[151] *See, e.g.*, Nicolas, *supra* note 122, at 1238–39 ("[W]e had to look outside of the state in search of a jurisdiction with a more favorable legal atmosphere for surrogacy.").

[152] Parness, *Imprecise American State Parentage Laws*, *supra* note 150, at 484.

[153] *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (LEXIS through 80 Del. Laws 2016, ch. 430) (de facto parent status); *see also* ALA. CODE § 26-17-204(a)(5) (Westlaw through 2016 Reg. Sess. and Act 2016-485 of the 2016 1st Spec. Sess.) (presumed parent provides "emotional and financial support"); WASH. REV. CODE ANN. § 26.26.116(2) (West, Westlaw through 2016 Reg. Sess. and 1st Spec. Sess.) (presumed parent holds out child "as his or her own").

[154] For example, certain criminal convictions are absolute barriers in all adoption settings. For an argument on the need for more objective standards in imprecise parentage settings, see Jeffrey A. Parness, *Formalities for Informal Adoptions*, 43 CAP. U. L. REV. 373, 405 (2015) [hereinafter Parness, *Informal Adoptions*].

[155] For a discussion on how lawyers and judges can better handle claims implicating imprecise parentage laws, see Jeffrey A. Parness, *Challenges in Handling Imprecise Parentage Matters*, 28 J. AM. ACAD. MATRIM. LAW. 139, 148, 155, 160–61 (2015).

absence of unifying federal norms, states vary in their approaches to agreements involving future parentage.[156] Not all state courts in all settings enforce childcare pacts even where the best interests of children will be promoted.[157] 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.[158] 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 Law Commission,[159] the American Bar Association,[160] and the American Law Institute[161] have not prompted significant interstate agreements.

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[156] *Compare, e.g.*, ARK. CODE ANN. § 9-10-201(b)–(c) (LEXIS through 2016 2d Extra. Sess., 2016 Fiscal Sess., and 2016 3d Extra. Sess. of the 90th Gen. Assemb.) (allowing use of surrogate mothers), *with* MICH. COMP. LAWS ANN. § 722.855 (West, Westlaw through 2016 Reg. Sess. of the 98th Leg.) ("A surrogate parentage contract is void and unenforceable . . . .").

[157] MICH. COMP. LAWS ANN. § 722.855 (West, Westlaw through 2016 Reg. Sess. of the 98th Leg.).

[158] Consider, for example, the differing judicial approaches to recognizing de facto parent status in the absence of legislation. *See* Pitts v. Moore, 2014 ME 59, ¶¶ 18–19, 90 A.3d 1169, 1176–77 (plurality opinion) ("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 . . . ."). *Cf.* Moreau v. Sylvester, 2014 VT 31, ¶¶ 25–26, 196 Vt. 183, 195–97, 95 A.3d 416, 424–26 (quoting Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997)) (declining the opportunity to formulate a non-statutory de facto parent doctrine as "the Legislature is better equipped" to do so); *see also* LP v. LF, 2014 WY 152, ¶ 55, 338 P.3d 908, 921 (Wyo. 2014) (declining to adopt common law de facto parentage or parentage by estoppel).

[159] *See* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002).

[160] *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. (AM. BAR ASS'N 2008). For a review of the Model Act Governing Assisted Reproductive Technology, see generally Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601 (2009).

[161] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (AM. LAW INST. 2002); *see also* Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution*, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 611, 613 (2008) (assessing the impact of Principles of the Law of Family Dissolution and finding no significant effect to date).

IV. 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-acknowledgment process so as to more clearly include only men who actually have, or reasonably believe they have, biological ties to the acknowledged children.[162] Congress could also make acknowledgments more easily rescindable where there are no biological ties, as by eliminating or extending the current sixty-day period for rescissions in the absence of fraud, duress, or mistake of fact.[163]

Congress could, in the alternative, expand the voluntary acknowledgment 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.[164]

The congressional acknowledgment process was largely developed to secure greater reimbursements of governmental welfare aid expended to birth mothers on behalf of their children.[165] This goal could be extended to reimbursements from the children's nonbiological parent-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.[166]

Such congressional revamps, however, are ill-advised. New constraints on acknowledgments and easier rescission standards would often harm children and upset settled familial expectations.[167] New expansions of acknowledgment

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[162] Currently, state laws and their acknowledgment forms vary on whether signers must affirmatively express beliefs as to likely biological ties. Parness & Townsend, *supra* note 87, at 72–73.

[163] 42 U.S.C.A. § 666(a)(5)(D)(ii)(I)–(II) (West 2014).

[164] *See, e.g.*, Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 470 (2012); Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 489–91 (2005).

[165] Parness & Townsend, *supra* note 87, at 56–59.

[166] 530 U.S. 57, 92–93 (2000) (Scalia, J., dissenting).

[167] Baker, *Marriage and Parenthood*, *supra* note 107, at 167–69.

opportunities may not prompt greater welfare payment reimbursements, but rather prompt the circumvention of child protection safeguards attending formal adoptions.[168]

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.[169] 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-acknowledgment process to children with no ties to governmental welfare, as well as to parent-like figures with no biological or formal adoptive ties.[170] Yet, nationalization of such parentage norms outside of federal constitutional judicial precedents seemingly is foreclosed by the Article I and other constitutional limits on congressional authority, as well as by the related Tenth Amendment's reservation of certain powers to the states.[171] Parents of, and parent-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.[172] Congressional enforcement of federal constitutional rights,[173] with the rights defined by United States Supreme Court precedents, typically cannot encompass statutory expansions of the rights or the rightsholders.[174]

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[168] *See, e.g.*, Parness, *Informal Adoptions*, *supra* note 154, at 403–04.

[169] Parness & Townsend, *supra* note 87, at 63–87 (comparing state voluntary-acknowledgment laws).

[170] *See, e.g.*, Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1683–90, 1695 (2015); Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 103 (2006); Julia Saladino, *Is a Second Mommy a Good Enough Second Parent?: Why Voluntary Acknowledgments of Paternity Should Be Available to Lesbian Co-Parents*, MOD. AM., Spring 2011, at 2, 5–6.

[171] *See supra* notes 80–92 and accompanying text.

[172] United States v. Lopez, 514 U.S. 549, 564, 566–67 (1995) (holding that a congressional regulation prohibiting the possession of a gun in a gun-free school zone as applied to a local student attending a local school was not within congressional power under the Commerce Clause).

[173] U.S. CONST. amend. XIV, § 5.

[174] *See supra* notes 81–85 and accompanying text.

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 adulterous sex. But, the exercise of such authority now would disrupt current state judicial child custody and support powers. Moreover, such authority involving the interests of unwed biological fathers in children born of sex to unwed mothers is ill-advised. Congressional enforcement action will be more appropriate when the Supreme Court further clarifies the substantive interests of biological fathers that it first recognized in *Lehr*.

By contrast, Congress can and should act now to establish norms guiding medical professionals and others providing AHR services. While the federal constitutional limits on parentage contracts in AHR settings remain unclear,[175] including on matters like waivers of abortion rights, federal statutory standards on AHR medical providers, counselors, and other service providers, and on information gathering attending AHR services, are now both needed and authorized under the Commerce Clause.[176]

V. POSSIBLE NEW UNITED STATES 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

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[175] The state laws on surrogacy pacts, both traditional and gestational, vary widely and continue to evolve as these agreements increase in number. *See, e.g.*, Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. HEALTH CARE L. & POL'Y 85, 85–86 (2015); *see also* sources cited *supra* note 144.

[176] *See, e.g.*, Cheffer v. Reno, 55 F.3d 1517, 1520–21 (11th Cir. 1995) (holding that reproductive services are commercial activities subject to congressional regulation).

unavailable, the United States Supreme Court can act to further unify federal childcare norms across the country by limiting the current broad state lawmaking on federal constitutional childcare rightsholders.[177] Some problems arising from the interstate variations on legal parentage would dissipate if the Court resolved a few major issues.

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.[178] If there are similar interests, related questions involve how and when these interests may be asserted,[179] how and when these interests might be waived—including whether valid preconception, or postconception but prebirth, waivers may be undertaken[180]—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.[181] Sperm

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[177] *See, e.g.*, Mutcherson, *supra* note 78, at 42, 54–55 (discussing possible bases for Supreme Court action in AHR, and 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).

[178] The nature of such a paternity opportunity interest, that is, 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 Interest of R.C., 775 P.2d 27, 35 (Colo. 1989) (en banc) (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 pre-conception intent to parent and post-birth contact with the child); C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. Com. Pl. 1994) (affording "due process safeguards" where AHR sperm donor and birth mother agreed before implantation "that there would be a relationship between the donor and child"). *But see In re* Adoption of a Minor, 29 N.E.3d 830, 836 (Mass. 2015) (holding that 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 may [only] have a theoretical basis to attempt to establish parentage in the future"); *see also* Bolden v. Doe (*In re* Adoption of J.S.), 2014 UT 51, ¶¶ 58–59, 358 P.3d 1009, 1025 (holding that statutes which set forth a "statutory gateway" for unwed biological fathers to assert their parental rights are not subject to strict scrutiny under substantive due process).

[179] *See, e.g.*, *In re* K.M.H., 169 P.3d 1025, 1040–41 (Kan. 2007) (finding no infringement of substantive due process 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).

[180] *See, e.g.*, Szafranski v. Dunston, 2015 IL App (1st) 122975-B, ¶ 139, 34 N.E.3d 1132, 1164 (upholding oral contract between ex-girlfriend and ex-boyfriend regarding cryopreserved pre-embryos; awarding ex-girlfriend "sole custody and control").

[181] *See, e.g.*, *In re Adoption of a Minor*, 29 N.E.3d at 836 (recognizing that such a donor may sue in paternity, not commenting upon the likely result of such a suit, but

contribution via sex might be differentiated as there, unlike AHR settings, future pregnancy, birth, and childcare motivate the contribution less often.

Comparably, in AHR settings, might ovum donation prompt parentage opportunity interests for the donor, especially where, but perhaps not just,[182] the donor was in a marital or substantially similar relationship with the birth mother and where there was a pre-implantation 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 interests, related questions involve how and when such interests might be waived, including whether preconception,[183] 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[184] and between mothers who are or are not formally contracted gestational carriers.[185]

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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).

[182] *See, e.g.*, D.M.T. v. T.M.H., 129 So. 3d 320, 346 (Fla. 2013) (citing T.M.H. v. D.M.T., 79 So. 3d 787, 794 n.6 (Fla. Dist. Ct. App. 2011)) (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).

[183] *See, e.g.*, Frazier v. Goudschaal, 295 P.3d 542, 555–56 (Kan. 2013) (concluding that a written co-parenting 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).

[184] *See, e.g.*, J.R. v. Utah, 261 F. Supp. 2d 1268, 1293 (D. Utah 2002) (holding that while a 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 married donors' "exercise of their constitutionally guaranteed fundamental rights to . . . raise their own children," with these rights originating in both the United States Constitution and Utah's Constitution).

[185] Of course, regardless of what the Federal Constitution permits, state laws often can further control outcomes. *See, e.g.*, *In re* F.T.R., 2013 WI 66, ¶ 65, 349 Wis. 2d 84, 118, 833 N.W.2d 634, 651 (noting that 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 or 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 or 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,[186] 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[187] 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.[188]

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[186] *See, e.g.*, R.M. v. T.A., 182 Cal. Rptr. 3d 836, 850 (Ct. App. 2015) (rejecting birth mother's federal constitutional challenge to non-sperm 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").

[187] *See, e.g.*, Jeffrey A. Parness, *Constitutional Constraints on Second Parent Laws*, 40 OHIO N.U. L. REV. 811, 837–42 (2014) [hereinafter Parness, *Second Parent Laws*].

[188] 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.*, ALA. CODE § 26-17-204(a)(5) (Westlaw through 2016 Reg. Sess. and Act 2016-485 of the 2016 1st Spec. Sess.) ("presumed" parent); CAL. FAM. CODE § 7611(d) (West, Westlaw through ch. 893 of the 2016 Reg. Sess. and ch. 8 of the 2015–2016 2d Exec. Sess.) ("presumed" parent); MINN. STAT. ANN. § 257.55(1) (West, Westlaw through ch. 2 of the 2017 Reg. Sess.) ("presumed" parent). The superior parental rights of the single parent are less likely to be 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.*, Parness, *Second Parent Laws*, *supra* note 187, at 840–41. *Cf.* Missouri v. McNeely, 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 or her postbirth parental-like acts, even though there are no biological or formal adoptive ties for the third parent.[189] If a third legal parent is possible over current dual or single parent objections—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 and derived from the supporting parent's childcare interests? Does the third parent lose childcare interests when the supporting parent withdraws support, loses childcare interests himself, 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 or 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 acknowledgments, 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.[190]

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.[191] If so, further issues involve

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[189] *See, e.g.*, Bancroft v. Jameson, 19 A.3d 730, 731 (Del. Fam. Ct. 2010) (holding that 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).

[190] *See, e.g.*, Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343, 369 (2015).

[191] 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—the contract referenced a "child"—was determined "to be physiologically, genetically or chromosomally abnormal," the abortion decision was "to be made by the intended parents." *Id.* at 346 n.15 (quoting Dave Hoffman, *The Unenforceability of Contracts To Abort*, CONCURRING OPINIONS (Sept. 21, 2012), https://concurringopinions.com/archives/2012/09/the-unenforceability-of-contracts-to-abort.html); *see*

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 seek such waivers? And who has standing to enforce, given that 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 United States 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 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 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?[192] 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 the nature of nonparental conduct required to prompt such

also I. Glenn Cohen, *The Constitution and the Rights Not To Procreate*, 60 STAN. L. REV. 1135, 1191–95 (2008) (laying out a number of reasons why states may be wary about enforcing abortion contracts).

[192] M.C. v. Adoption Choices of Colo., Inc., 2014 COA 161, ¶¶ 33, 42, 369 P.3d 659, 668, 670 (finding that a prospective adoptive couple had no "protected liberty interest in their relationship with the child they hope[d] to adopt," where an earlier adoption decree was voided), *rev'd on other grounds sub nom.* In Interest of Baby A., 2015 CO 72, ¶ 59, 363 P.3d 193, 209.

interests is. As with parental childcare, nonparental childcare laws benefiting grandparents, stepparents, and others[193] now vary significantly interstate.[194]

The Supreme Court might also consider the federal constitutional interests of children in certain adult childcare[195] or in maintaining certain sibling relationships.[196] Here, the rightsholders would be children who have interests in receiving love, affection, and childcare.

Further, per new case law, children may be deemed federal constitutional rightsholders as to information regarding their biological roots, thereby allowing for more intelligent decisions

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[193] Some nonparental childcare laws now expressly include siblings and great-grandparents. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/607(a-3) (West, Westlaw through Act 99-930 of the 2016 Reg. Sess.) (repealed 2016). Nonparental child caretakers can also include adult siblings; to date, the courts have not discussed their federal constitutional childcare interests. *See, e.g.*, Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 930 (2012) ("Lastly, states should consider whether full or 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.").

[194] *See, e.g.*, Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties To Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2–5 (2013).

[195] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (expressing that the U.S. Supreme Court has not "had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship"); *M.C.*, 2014 COA at ¶ 53, 369 P.3d at 671 (holding child has no liberty interest in continuing relationship with prospective adoptive couple); B.B. v. B.C. (*In re* Adoption of I.B.), 19 N.E.3d 784, 791 (Ind. Ct. App. 2014) (concluding that children have a "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), *vacated*, 32 N.E.3d 1164 (Ind. 2015); Frazier v. Goudschaal, 295 P.3d 542, 557 (Kan. 2013) (deeming that denial to children with two parents the opportunities to continue their childcare by a nonparent under law "impinges upon the children's constitutional rights").

[196] *See, e.g.*, *In re Adoption of I.B.*, 19 N.E.3d at 791 (concluding that 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* Sacramento Cty. Dep't of Health & Human Servs. v. Luke H. (*In re* Luke H.), 165 Cal. Rptr. 3d 63, 64–65 (Ct. App. 2013) (finding no constitutional protection of sibling relationships over custodial parent's objection); Nebraska v. Jeffrey H. (*In re* Meridian H.), 798 N.W.2d 96, 99 (Neb. 2011) (finding 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). Often constitutional interests are not even raised. *See, e.g.*, B.L.M. v. A.M., 381 S.W.3d 319, 321 (Ky. Ct. App. 2012); *see also* JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006); Hasday, *supra* note 193 (generally supporting a child's interest in a continuing sibling or sibling-like relationship).

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 decision making.[197] For now, generally there are no such state laws. There are few duties on governmental officials to identify unknown, usually male, biological parents whose children are placed for formal adoption.[198]

CONCLUSION

United States 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 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 that cannot be, or should not be, addressed by Congress. The 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.

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[197] *See, e.g.*, Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 FAM. L.Q. 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.").

[198] *See, e.g.*, Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 345, 348–49 (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 adoption proceedings).