STATE LAWMAKING ON FEDERAL CONSTITUTIONAL CHILDCARE PARENTS: MORE PRINCIPLED ALLOCATIONS OF POWERS AND MORE RATIONAL DISTINCTIONS

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I. INTRODUCTION

Unlike other federal constitutional rightsholders, a parent with the right to exercise "care, custody, and control" over a child is defined by state lawmakers. While federal constitutional childcare parents may be defined by state constitutional law precedents, most often there are combinations of state statutes as well as common law precedents that may be tethered to state statutes. The balance of the General Assembly (or the state legislature) and untethered judicial authority over childcare parentage typically varies both interstate and intrastate depending upon how childcare parentage is established. At times, a childcare parent is defined by biological ties (real or imagined), by contracts, or by earlier histories of significant parental-like acts.

When determining whether to recognize untethered childcare parentage, state courts too frequently rule without considering key principles. Further, when applying state statutes defining federal childcare parents, state courts too frequently rule without recognizing equality issues involving unwarranted distinctions between those acting in parental-like ways. State cases on childcare parentage have proliferated in the last few decades due to both changes in human conduct (including increased marital dissolutions, openly acknowledged same sex couples, cohabiting couples who have children, and grandparents with primary—if not exclusive—childcare duties for the grandchildren) and in technology (including genetic testing related to biological parenthood and new methods, and increasing availability, of assisted reproduction).

This Article reviews how and why there is deference on federal constitutional childcare parentage to state lawmakers; how this deference has not yielded many state constitutional law precedents; the va-

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ried state statutory and common law approaches to recognizing federal constitutional childcare parents; certain key principles which should guide state legislatures and courts in determining who within a state should define childcare parents; and how equality demands sometimes require courts to invalidate irrational approaches to childcare parentage.

The most important consideration regarding guiding principles is that state high courts generally need to defer to state legislators when state statutes clearly define parentage. When there are no such definitions, common lawmaking should reflect related prevailing public policies, like protecting developed and loving familial relationships.

Of course, deference to state legislators is not warranted where there are state constitutional demands on familial privacy, even if founded on imprecise constitutional provisions like due process. State judicial deference to explicit General Assembly definitions of childcare parents is also unwarranted where there exist irrational distinctions between those aspiring to attain parental childcare status. The "sheerest formalism" should not distinguish between would-be parents.[1]

State legislators need to respond quickly when nonconstitutional common law judicial precedents on childcare parents, whether or not tethered to statutes, fail to reflect public sentiments. Further, state legislators need to respond quickly when courts refrain from establishing nonconstitutional common law precedents on childcare parents where new statutes are needed to address voids in written laws. Additionally, legislators need to respond quickly when statutory childcare parentage distinctions are stricken.

II. DEFERENCE TO STATE LAW DEFINITIONS OF FEDERAL CONSTITUTIONAL CHILDCARE PARENTS

State constitutional, statutory, and common law rights are subject to federal constitutional (and other federal) law supremacy, as federal laws are "the supreme Law of the Land," binding upon "Judges in every State."[2] Per the United States Constitution, any federal constitutional rightsholders, the substance of the rights, and rights enforcement are subject to both federal judicial and legislative authority, with variations in the balance sometimes recognized expressly in constitutional text.

Within the federal constitutional Bill of Rights, for enumerated rights like speech, press, and religion, there is nothing expressly said

1. Lehr v. Robertson, 463 U.S. 248, 275 (1983) (White, J., dissenting).
2. U.S. CONST. art. VI.

about affirmative Congressional authority (though it constrains that authority).[3] For the civil rights amendments on involuntary servitude,[4] equal protection,[5] due process,[6] and voting,[7] the federal Constitution provides that Congress has the power "to enforce by appropriate legislation."[8]

Whether or not Congress has any say on enforcement, United States Supreme Court precedents largely determine both federal constitutional rightsholders and the nature of the rights they hold, be they enumerated or unenumerated. As to rightsholders, the Court is occasionally given some direction by the Constitution itself, as certain rights are held by "the people,"[9] while others are held by "citizens"[10] or by "person[s]."[11] At other times, including when rights spring from limits on governmental authority (such as no abridgement of free speech or religious practice),[12] there is no explicit direction.[13] United States Supreme Court precedents on federal constitutional rightsholders sometimes surprise, as when free speech rights were accorded to corporations.[14]

For federal constitutional rights generally, the rightsholders, the rights held, and the enforcement avenues do not vary much interstate. So, there are few differences between the states on the federal constitutional rights of those "accused" criminally,[15] those contesting illegal

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3. U.S. CONST. amend. I.
4. U.S. CONST. amend. XIII, § 1.
5. U.S. CONST. amend. XIV, § 1.
6. *Id*.
7. U.S. CONST. amend. XV, § 1.
8. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV, § 2.
9. *See, e.g.*, U.S. CONST. amend. IV (noting unreasonable search and seizure).
10. *See, e.g.*, U.S. CONST. amend. XV, § 1 (referring to the right to vote); U.S. CONST. amend. XIX, § 1 (referring to the right of women to vote).
11. *See, e.g.*, U.S. CONST. amend. V (referencing double jeopardy, self-incrimination, and due process rights, among others).
12. U.S. CONST. amend. I.
13. For a review of the varying federal constitutional approaches to constitutional rightsholders, see Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605, 605 (2016) (outlining a suggested unified approach).
14. Precedent includes *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (recognizing First Amendment speech protections for corporations). Commentaries include Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 312 (2015) (reviewing criticisms while urging corporate personhood needs "a more nuanced analysis" and suggesting "adjustments in corporate governance rather than constitutional law"), and Margaret M. Blair, *Corporations and Expressive Rights: How the Lines Should Be Drawn,* 65 DEPAUL L. REV. 253, 253 (2016) (noting "a broad-brush grant of expressive rights across the board to all corporations cannot be justified even though it may be appropriate to recognize certain constitutional rights for specific corporations.").
15. U.S. CONST. amend. VI as read in *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

searches,[16] and those with family-related privacy interests in abortion[17] and marriage.[18] Yet for one federal constitutional right, the rightsholders—though neither the protections afforded nor their enforcement—dramatically differ interstate. The relatively uniform federal constitutional approaches to the substantive[19] and enforcement[20] attributes of parental childcare rights contrast sharply with the deference to state lawmaking in defining the parents with such rights.

Broad state lawmaking discretion on defining federal constitutional childcare parents emanates, in particular, from three major United States Supreme Court precedents. One is *Lehr v. Robertson*,[21] where an unwed biological father of a child born of sex to an unwed mother sought to participate in (and have an opportunity to veto) that child's later adoption proceeding pursued by the mother's new husband.[22] There, the Court recognized that state lawmakers could vary their norms on denying such a father any participation rights. While the Court recognized that the "intangible fibers that connect parent and child" via biology "are sufficiently vital to merit constitutional

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cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

16. U.S. CONST. amend. IV as read in *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978) (stating that passengers had no legitimate expectation of privacy in a searched automobile when they did not have ownership interests in the automobile or in property seized from the automobile; 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, 338-43 (1985) (distinguishing prisoners who "retain no legitimate expectations of privacy in their cells," per *Ingraham v. Wright*, 430 U.S. 651, 669 (1977), and finding school children have some such expectations, to be defined by the court via a "reasonableness standard" that applies nationwide).

17. U.S. CONST. amend XIV, as read in *Roe v. Wade*, 410 U.S. 113 (1973) (protecting pregnant women generally), though some pregnant women are distinguished from state to state, as with 750 ILL. COMP. STAT. 70/15 (West 2015) (requiring notice to parents of non-emancipated minor desiring abortion) and MISS. CODE ANN. § 41-41-53 (West 2010) (requiring consent of both parents of non-emancipated minor seeking abortion). *See also* Glenn Harlan Reynolds, *Abortion Amendment 1, and the Future of Procreational Rights Under the Tennessee Constitution*, 83 TENN. L. REV. 69, 69 (2015) (citing Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 25 (Tenn. 2000)) (reviewing how the expansive constitutional abortion right recognized in *Planned Parenthood of Middle Tennessee v. Sundquist* was undone by constitutional amendment and considering what the future holds for independent Tennessee state constitutional procreational rights).

18. U.S. CONST. amend. XIV, as read in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). *Compare* COLO. REV. STAT. ANN. § 14-2-106 (West 2015) (allowing a male who is 16 or 17 years old to marry with consent of both parents), *with* ARK. CODE ANN. § 9-11-102 (West 2006) (allowing a male who is 17 years old to marry with parental consent).

19. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982) (holding that clear and convincing evidence is needed in an involuntary parental rights termination proceeding).

20. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) (elaborating on parental childcare rights when grandparents seek visitation).

21. 463 U.S. 248 (1983).

22. Lehr v. Robertson, 463 U.S. 248, 250 (1983).

protection in appropriate cases," the Court concluded that in "the vast majority of cases, state law determines the final outcome" when resolving "the legal problems arising from the parent-child relationship."[23] Before and since *Lehr*, American states have varied widely on the participation rights of unwed biological fathers in formal adoption proceedings.[24]

Another precedent is *Michael H. v. Gerald D.*,[25] where an unwed biological father of a child born of sex to a married woman sought to undo a state law marital paternity presumption favoring the husband.[26] The Court effectively ruled that California could deny, as it then wished, 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.[27] While California public policy has since changed,[28] in Pennsylvania a comparable biological father can be thwarted in pursuing legal parentage by an intact nuclear family.[29] Both before and since *Michael H.*, American states have varied widely on establishing and disestablishing marital parentage presumptions.[30]

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23. *Lehr*, 463 U.S. at 256 (citing United States v. Yazell, 382 U.S. 341, 351-53 (1966)) (stating that "[r]ules governing . . . child custody are generally specified in statutory enactments that vary from State to State."). In *Yazell*, where no federal constitutional protections were asserted, the court found "no need for uniformity" and that "solicitude for state interests, particularly in the field of family . . . should be overridden by the federal courts only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied." *Yazell*, 382 U.S. at 352, 357.

24. *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) (reviewing state laws critically).

25. 491 U.S. 110 (1989).

26. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality opinion).

27. *Michael H.*, 491 U.S. at 129 (plurality opinion). The ruling was applied to a biological father who had "an established parental relationship." *Id*. at 123.

28. CAL. FAM. CODE § 7541(a) (West 2006) (allowing rebuttal with "evidence based on blood tests").

29. Strauser v. Stahr, 726 A.2d 1052, 1055 (Pa. 1999) (stating that biological fathers cannot seek to rebut a marital presumption favoring paternity in husband as long as marriage is intact and spouses want to maintain presumption) (citations omitted). *See generally* Paula Roberts, *Truth and Consequences: Part II, Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55 (2003), including *Appendix F: Recent State Statutes Allowing Paternity Disestablishments of Marital Children*, 37 FAM. L.Q. 94 (2003).

30. *See, e.g.*, June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 Fam. L.Q. 219 (2011) [hereinafter *Marriage, Parentage, and Child Support*], and Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 346 n.1 (Iowa 2013) (organizing state statutes governing presumptions of parentage into three categories). Recently, marital parentage presumptions in childcare settings have been applied by some courts to lesbian spouses of birth mothers, even where the statutes speak of husbands and presumed biological ties. *See, e.g.*, *In re* D.S., 143 Cal. Rptr. 3d 918, 924 (Cal. Ct. App. 2012) (discussing the rebuttable presumption of maternity regarding same-sex couples), and Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645

The third United States Supreme Court precedent is *Troxel v. Granville*,[31] where the attributes of parental childcare rights were at issue, not the norms for attaining parental childcare rights.[32] Here, grandparents sought a court order on grandparent-grandchild visits over parental objections.[33] In limiting judicial opportunity to override parental desires, a few opinions of a splintered court recognized broad state lawmaking discretion on defining parentage and establishing parental-like classes. There was mention of child visitation laws benefitting third parties (i.e., nonparents) via "gradations,"[34] as well as of possible "de facto" parenthood,[35] a parentage establishment norm involving neither biological ties nor formal adoption.[36] Before and since *Troxel*, American state de facto (and comparable) statutory and common law parentage have varied widely in defining who can become federal constitutional childcare parents.[37]

While state lawmakers have broad leeway, their discretion to define federal childcare parents is not boundless. A few United States Supreme Court precedents limit state definitional authority. Thus, at birth all women who bear children as a result of sex have federally-protected childcare rights.[38] However, all men who, via sex, impregnate women who later bear children are not such parents. Men who impregnate unmarried women have only a federally-protected opportunity interest in establishing parenthood in order to be heard later on

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(S.D. Ind. June 30, 2016) (addressing presumption of maternity brought by a same-sex lesbian couple).

31. 530 U.S. 57 (2000).

32. *Troxel*, 530 U.S. at 60. An earlier United States 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). The Court noted, "[A]s 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." *Burrus*, 136 U.S. at 594.

33. *Troxel*, 530 U.S. at 61.

34. *Id.* at 93 (Scalia, J., dissenting).

35. *Id.* at 101 (Kennedy, J., dissenting). Justice Scalia, in his dissent, also recognized de facto parents as a possible but ill-advised "judicially crafted definition" of a federal constitutional childcare parent. *Id*. at 92-93.

36. *See, e.g.*, D.C. Code Ann. § 16-831.01(1) (West 2001) (noting a single parent's "agreement" and residency in same household), and DEL. CODE ANN. tit. 13 § 8-201(c) (West 2007) (noting the exercise of "parental responsibility" with "support and consent of the child's parent").

37. *See, e.g.*, Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743 (2013) [hereinafter *Parentage Law (R)Evolution*]. Of course, there can be additional state constitutional law protections of parental childcare. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1993) (recognizing the state constitutional right to privacy in parenting decisions).

38. *See, e.g.*, Nguyen v. I.N.S., 533 U.S. 53, 58-59 (2001) (holding that there is no equal protection violation in treating biologically-tied men and women differently in parentage laws on childcare).

childcare,[39] with the establishment requisites largely left to state lawmakers.[40] The requirements for seizing such childcare parenthood opportunities vary significantly interstate.[41]

The broad leeway afforded to state lawmakers by the United States Supreme Court on defining federal constitutional childcare parents has resulted in significant interstate variations in both parentage establishment and parentage disestablishment norms relevant to federal constitutional parental childcare.[42] Parentage establishment norms go by varying terms, including not only de facto parent, but also equitable adoption, presumed parent, and parent by estoppel.[43] The major requisites for establishment vary widely interstate. Similarly, state lawmakers use different terms for parentage disestablishment, including rebuttal and rescission, usually depending on how parentage was established.[44] Again, there are widespread and significant interstate variations.

While states have quite distinct state law norms on establishing and disestablishing legal parentage relevant to federal constitutional parental childcare, as noted, other federal constitutional rightsholders are generally uniform across state borders. The criminally accused, whose rights include effective assistance of counsel, jury trial, and speedy trial,[45] do not vary widely interstate,[46] and neither do religious practitioners[47] or those subject only to reasonable searches.[48]

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39. *Lehr*, 463 U.S. at 256 (stating that in most cases state laws determine child custody issues).

40. *See id.* ("Rules governing . . . child custody . . . vary from State to State.").

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

42. A critique of United States Supreme Court deference to state lawmakers, particularly on the subject of who are federal constitutional childcare parents, appears in Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965 (2017).

43. *See, e.g.*, *Parentage Law (R)Evolution*, *supra* note 37, at 752-63.

44. Marital paternity presumptions are often subject to rebuttal, as in Illinois via 750 ILL. COMP. STAT. 46/205(a) (West 2015), while voluntary paternity acknowledgments are subject to rescission (before 60 days) and challenge (after 60 days), as driven by federal welfare subsidy policies found in 42 U.S.C. § 666(a)(5)(D) (2012), employed in Illinois via 750 ILL. COMP. STAT. 46/307 (West 2015) and 750 ILL. COMP. STAT. 46/308 (West 2015).

45. U.S. CONST. amend. VI.

46. *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (holding that the right to a speedy trial applies in state criminal cases).

47. U.S. CONST. amend. I, as read in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that states, like Congress, may not enact laws prohibiting the free exercise of religion).

48. U.S. Const. amend. IV, as read in *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule in a state criminal case).

The United States Supreme Court can craft definitions of federal constitutional childcare parents.[49] With state terminations of existing parental childcare interests, the court has been quite active in setting uniform federal constitutional norms.[50] It cannot be that federal constitutional childcare rightsholders necessarily must be left to state law definitions (for example, per the Tenth Amendment reservation of rights) since other personal, familial privacy rightsholders, as with the abortion,[51] contraception,[52] sexual conduct,[53] and marriage,[54] have been substantially federalized by United States Supreme Court precedents.[55]

Nevertheless, for now federal constitutional childcare parenthood is left to state legislators and common law judges. This could spur very different approaches to who, within state government, should define childcare parents. Differences in definitional authority, however, would be mitigated if there were similar state constitutional allocations of definitional authority on childcare parentage. Yet, there are no such similarities.

III. VARIED APPROACHES TO LEGISLATIVE AND JUDICIAL DEFINITIONS OF STATE CONSTITUTIONAL RIGHTSHOLDERS

Authority to define childcare parents could be addressed in state constitutions. Similar state constitutional approaches could lessen interstate differences in the allocations of definitional authority. Yet a review of the state constitutions reveals a variety of approaches to authority allocation.

In the United States, neither federal nor state constitutional rights are always formulated exclusively by judges, even when the rights are quite general, as with liberty or property, rather than specific, as with free speech or the self-incrimination privilege. At times,

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49. On how the United States Supreme Court generally should approach issues of federal constitutional personhood in the individual rights arena, see Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605 (2016).

50. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982) (holding that clear and convincing evidence is needed to prove a child is "permanently neglected").

51. *See generally Roe*, 410 U.S. at 113.

52. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

53. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

54. *See generally Obergefell*, 135 S. Ct. at 2584.

55. Granted, not all federal constitutional childcare rightsholders have been explicitly deemed subject to state law definitions. To date, the United States 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 (2015) (arguing for federal constitutional protections of assisted reproduction, though distinguishing non-coital procreation between those wishing to procreate and parent, and those wishing to procreate for profit).

elected legislators are delegated definitional tasks via express constitutional direction, as illustrated by a review of Illinois constitutional rights.

Illinois voters in 2014 approved constitutional amendments altering crime victim rights in criminal cases. Some of the changes appear below (new words are underlined).

> Crime victims, as defined by law, shall have the following rights ~~as provided by law~~:
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> The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process . . . . The victim has standing to assert the rights enumerated in subsection (a) in any court exercising jurisdiction . . . . The court shall promptly rule on a victim's request. The victim does not have party status . . . . Nothing in this Section shall be construed to alter the powers, duties, and responsibilities of the prosecuting attorney ~~The General Assembly may provide by law for the enforcement of this Section~~.[56]

These changes illustrate varied approaches to allocating governmental authority over the holders, the substance, and the enforcement of state constitutional rights. While these amendments left the definition of "crime victims" who possess the enumerated constitutional rights to the General Assembly, they removed the General Assembly's authority to define the rights and to provide for their enforcement.

Elsewhere in the Illinois Bill of Rights, differing approaches to General Assembly authority over defining constitutional rightsholders, establishing constitutional rights, and fashioning constitutional rights enforcement exist. For example, the Bill has three separate explicit anti-discrimination provisions beyond the general equal protection provision. Section eighteen simply forbids "the State or its units of local government and school districts" from denying or abridging equal protection "on account of sex."[57] Seemingly, the courts are left with broad interpretive powers regarding who might be victimized, what constitutes equality denials, and how to pursue enforcement. Comparably, section nineteen frees "[a]ll persons with a physical or mental handicap" from discrimination in both property sales and rentals and in any employer's "hiring and promotion practices."[58] By contrast, while section seventeen protects "[a]ll persons" from discrimination based on "race, color, creed, national ancestry and sex" in both property and employment settings, it also makes these

56. ILL. CONST. art. I, § 8.1(a), (b).
57. ILL. CONST. art. I, § 18.
58. ILL. CONST. art. I, § 19.

rights subject to "reasonable exemptions" and "additional remedies" established by the General Assembly.[59]

The provisions of the Illinois Bill of Rights on religious freedom,[60] speech,[61] assembly,[62] and individual dignity[63] make no reference, directly or implicitly, to General Assembly authority. But the provision on eminent domain requires "just compensation as provided by law."[64] Further, the provision on the right of the individual citizen to keep and bear arms explicitly recognizes that it is "[s]ubject" to "the police power" of the State.[65]

Outside of Illinois, the bills of rights within American state constitutions similarly vary on recognizing General Assembly authority to define rightsholders, establish rights, and facilitate enforcement. Exemplary are other crime victim restitution provisions. Some, but not all, crime victim restitution rights invite legislation to speak to victimhood, to what constitutes restitution, and to how to secure restitution. In Arizona, for example, "a victim of crime" has a right to "receive prompt restitution" from one "convicted of the criminal conduct" causing harm.[66] While the state constitution defines victims, the legislature has "authority to enact substantive and procedural laws to define, implement, preserve and protect" the right.[67] In Connecticut, a victim, defined by law, has a "right to restitution" subject to "enforce[ment]" by the legislature.[68] Idaho has a "self-enacting" provision on crime victim restitution, with both the victim and the right subject to General Assembly definition.[69] In Michigan, crime victims, as defined by law, have restitution rights as defined by law, with those rights also subject to legislative provisions on enforcement.[70] In North Carolina, "victims of crime, as prescribed by law," have a "right as prescribed by law to receive restitution."[71] In Oregon, crime victims have a right "to receive prompt restitution,"[72] though this right is not "intended to create any cause of action for compensation or damages."[73]

59. ILL. CONST. art. I, § 17.
60. ILL. CONST. art. I, § 3.
61. ILL. CONST. art. I, § 4.
62. ILL. CONST. art. I, § 5.
63. ILL. CONST. art. I, § 20.
64. ILL. CONST. art. I, § 15.
65. ILL. CONST. art. I, § 22.
66. ARIZ. CONST. art. II, § 2.1(A)(8).
67. ARIZ. CONST. art. II, § 2.1(D).
68. CONN. CONST. art. XXIX(b)(9).
69. IDAHO CONST. art. I, § 22(7).
70. MICH. CONST. art. I, § 24(1).
71. N.C. CONST. art. I, § 37(1)(c).
72. OR. CONST. art. I, § 42(1)(d).
73. OR. CONST. art. I, § 42(2).

American state constitutions could speak directly to the legislative and judicial roles in defining childcare parents, as they sometimes do regarding crime victims in restitution settings. But they do not, leaving the balance between legislative and judicial definitional authority unclear.

IV. STATE CONSTITUTIONAL CHILDCARE PARENTS

American state childcare parents do not chiefly depend upon federal constitutional parentage definitions. Nor do they depend upon state constitutional definitions. For whatever reasons, state constitutional lawmakers generally have not utilized their powers to define childcare parentage, or even to allocate definitional authority. This reflects somewhat the so-called "lockstep doctrine," whereby state high courts interpreting state constitutional provisions presumptively borrow the analyses within the United States Constitution itself and within United States Supreme Court decisions interpreting comparable federal constitutional provisions. The doctrine continues, even though it is criticized by many as being too deferential to the federal approaches since it stifles the independent thinking contemplated by the federal constitutional reservation of powers to state governments.[74]

Lockstepping within state judicial opinions is especially problematic when state constitutional provisions contain language quite different from their federal constitutional counterparts. In the parentage arena, however, independent state constitutional interpretation is generally not specially invited by explicit state constitutional parentage provisions. Like the federal Constitution, American state constitutions generally fail to speak directly about family matters.

Occasionally, however, there are explicit state constitutional provisions, with no federal constitutional counterparts, that could prompt unique approaches to parental childcare. Some state constitutional provisions address equalities between men and women, including fathers and mothers. For example, Article I of the Declaration of Rights of the Massachusetts Constitution, as amended by Article 106, says "[e]quality under the law shall not be denied or abridged because of sex." In Massachusetts, this means gender classifications are subject to "strict scrutiny," even though they are subject to the lesser "inter-

74. While there is no reverse lockstep doctrine, whereby federal constitutional drafters and interpreters follow closely state constitutional analyses, some have urged federal courts to consider, at times, using state precedents as persuasive in federal constitutional cases. *See, e.g.*, the Honorable Bruce D. Black & Kara L. Kapp, *State Constitutional Law as a Basis for Federal Constitutional Interpretation: The Lessons of the Second Amendment*, 46 N.M. L. REV. 240 (2016).

mediate scrutiny" under federal constitutional law.[75] Thus, there may need to be "strict scrutiny" of any Massachusetts parentage laws differentiating between biological mothers and fathers.

Elsewhere there are explicit state constitutional privacy protections that could prompt courts to define childcare parents. Thus in Louisiana[76] and South Carolina,[77] there are guarantees against unreasonable "invasions of privacy." And in Illinois, "every person shall find a certain remedy in the laws for all injuries and wrongs" relating to the person's "privacy."[78]

Generally, however, there are few explicit state constitutional provisions directly or indirectly addressing childcare parentage.[79] In some American states, though, there are general state constitutional provisions and accompanying case precedents on parenthood that do limit governmental officials in special ways. Thus, some state courts recognize, under their state constitutions, parental or other family interests that go unrecognized elsewhere.[80] There is no lockstepping here. These local law variations are worthy of note as they illustrate the possible use of state constitutional law to define childcare parents. The following Iowa rulings are exemplary.

In *Michael H. v. Gerald D.*,[81] the United States Supreme Court rejected an unwed biological father's federal constitutional challenge to a California statute conclusively presuming, in the absence of impotency or sterility, that a child born into an intact marriage is "a child of the marriage" even where the unwed biological father had "an established parental relationship."[82] In a plurality opinion, Justice Scalia relied heavily on tradition in rejecting the unwed biological father's argument, deeming the presumption of the legitimacy of a child a "fundamental principle of the common law" that usually could only be rebutted by "proof that a husband was incapable of procreation or

75. Commonwealth v. Chou, 741 N.E.2d 17, 24 n.6 (Mass. 2001).

76. LA. CONST. art. I, § 5.

77. S.C. CONST. art. I, § 10.

78. ILL. CONST. art. I, § 12.

79. On how any explicit provisions might be read, see *Campaign for Quality Educ. v. California*, 209 Cal. Rptr. 3d 888 (Cal. Ct. App. 2016) (finding the two explicit state constitutional provisions on public schooling do not guarantee an education of "some quality").

80. Beyond due process and equal protection, many American state constitutions have "Baby Ninth Amendments" or "Lockean Natural Rights Guarantees" that can be employed to declare unenumerated state constitutional parental childcare rights. *See, e.g.*, Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War*, 68 MERCER L. REV. 389 (2016), http://ssrn.com/abstract_id=2773831; Seven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299 (2015).

81. 491 U.S. 110 (1989).

82. Michael H. v. Gerald D., 491 U.S. 110, 123 (1989).

had no access to his wife during the relevant period."[83] Yet, Justice Scalia did not rule out the possibility that American traditions would recognize parental rights for an unwed biological father where the marital parents do not raise the child "as their own."[84] Nor did Justice Scalia rule out the possibility that the California law on "categorical" preference could be changed. Further, in our national scheme of shared federal and state governmental lawmaking, Justice Scalia also could not rule out the possibility that traditions in a single state could result in state constitutional interests for unwed fathers who sought to intrude upon intact families even though similar men in other states could not. In fact, since *Michael H.*, California laws have loosened for challenges to paternity presumptions.[85]

Elsewhere, categorical preferences are generally available, at least when desired by a married couple, with most state laws originating in statutes.[86] But in Iowa in 1999, the Iowa Supreme Court ruled in a case factually similar to *Michael H*. In *Callender v. Skiles*,[87] the court found that while Rebecca and Rick Skiles were married, they had separated for some time in 1994. During their separation, Rebecca had sex with a co-worker, Charles Callender. Later, Rebecca and Rick reconciled. In June 1995, Rebecca bore a child conceived during the separation. Rebecca and Rick named the child Samantha and began to raise her as part of their family. Emotional upheaval, however, soon followed. Six months after Samantha's birth, Charles sought to establish his paternity of Samantha, as well as custody or visitation and child support orders. Blood tests revealed Charles to be the biological father. Upon obtaining limited visitation at a neutral location, Charles asked the trial court to terminate Rick's parental rights. Rick did not stop parenting, arguing Charles had no standing to sue in paternity. The trial court agreed with Rick.

On appeal, Charles urged that he was entitled to litigate his claim as an "interested person" under one Iowa Code section, or as the "established father" under another Iowa Code section.[88] Otherwise, he argued that the Iowa statutes would deprive him of his state constitutional due process and equal protection interests.[89] The Iowa Supreme Court ruled that Charles had no standing under the cited Code

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83. *Michael H*., 491 U.S. at 124.

84. *Id*. at 163 n.7.

85. *See, e.g.*, CAL. FAM. CODE §§ 7611, 7612, 7541 (West 2004) (stating the marital presumption is rebuttable, but only within two years of child's birth).

86. On American state statutes on marital parentage presumptions, see *Parentage Law (R)Evolution*, *supra* note 37, at 753-58.

87. 591 N.W.2d 182 (Iowa 1991).

88. Callender v. Skiles, 591 N.W.2d 184 (Iowa 1991) [hereinafter *Callender I*].

89. *Callender I*, 591 N.W.2d at 184.

sections, as well as no "general equitable right" to sue in paternity.[90] The high court recognized, however, Charles had an Iowa constitutional due process "liberty" interest, though there was no comparable federal constitutional interest.[91] It reasoned that there was "a strong history of providing protection" to parentage based on biological ties, that Charles possessed "a liberty interest in challenging paternity," and that Charles may have a fundamental right to maintain a relationship with his biological daughter.[92] There was no lockstepping here. Whether Charles "would ultimately have this right, and under what circumstances," were left for another day.[93]

In allowing an unwed father the chance to disrupt the integrity of an intact family, the Iowa high court said it chose to "recognize the truth and discourage deceit."[94] It also noted the importance of recognizing "the decline of the stigma of illegitimacy," "the reliability of DNA testing," the harm to the Skiles family integrity "at the time of the extramarital affair," the "societal goal of encouraging fathers to take responsibility for their children," and the comparable setting wherein children "live with a stepfather and still maintain a relationship with the biological father."[95]

The Iowa high court further said its approach "prevents the mother from exclusively determining the child's best interests, defining the family, and defining the scope of the putative father's rights."[96] Existing law already permitted the mother the chance to challenge the paternity of her husband, though Iowa laws did not require her to tell her husband of his possible or actual nonpaternity.

The court concluded that an unwed biological father may lose his right to seek paternity "by waiver," as when there was no "serious and timely expression of a meaningful desire to establish parenting responsibility."[97] Even without waiver, the court said that Charles may still not prevail if any court-ordered parent-child relationship would run against the "best interest" of the child.[98] This sounds like the approach taken by Justice Stevens in the *Michael H.* case.[99]

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90. *Id*. at 186.
91. *Id*. at 187.
92. *Id*. at 190.
93. *Id*. at 193 n.5.
94. *Id*. at 191.
95. *Id*.
96. *Id*.
97. *Id*. at 192.
98. *Id*. at 191-92.
99. *Michael H*., 491 U.S. at 135 (stating that "under the circumstances of the case," there is no need for further hearing on the request for a childcare order, as the lower court had determined such an order could not be in child's best interests).

While not inevitable, in 2001 the Iowa Supreme Court affirmed an order setting an immediate visitation schedule for Charles and his four year old offspring.[100] Interestingly, while Rebecca had appealed the lower court visitation order, Rick had not appealed "the disestablishment of his relationship with Samantha."[101]

In reviewing the visitation order in 2001, the Iowa Supreme Court analyzed several factors in determining what was in Samantha's best interest, including her age, her preexisting relationship with Charles, and her relationships with "the other three children" (whose parentage and homes were not revealed, though they were probably living in the Skiles home).[102] It also noted the inapplicability of the presumption of "maximum contact" for parents that operates for childcare issues in marriage dissolution proceedings.[103] The statute on custody decisions when there are marital breakups said:

> The court, insofar as it is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . .[104]

Here there was no marital breakup. In the end, the Iowa high court affirmed a visitation order for Charles that did not "follow a more usual blueprint," but that had a "somewhat lesser schedule."[105] It also left Rebecca as "the sole custodial parent," as well as left to Rebecca the decision on "when Samantha should be told of her parentage."[106]

The *Callender* rulings demonstrate how state constitutional law—whether by an express provision or by judicial interpretation of an ambiguous provision, like due process—might guide definitions of federal constitutional childcare parents. Yet *Callender*-type rulings are rare.[107] Explicit state constitutional authorizations of judicial au-

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100. Callender v. Skiles, 623 N.W.2d 852 (Iowa 2001) [hereinafter *Callender II*].
101. *Callender II*, 623 N.W.2d at 855-56.
102. *Id*. at 855.
103. *Id*.
104. *Id*. (quoting IOWA CODE ANN. § 598.41 (West 2008)).
105. *Id.* at 857.
106. *Id*. (reversing the trial court directive that Samantha be told of her parentage before kindergarten).
107. A bit more frequent are state rulings simultaneously utilizing both federal and state (though not always clearly) constitutional grounds for recognizing parental childcare interests. *See, e.g.*, *In re* Murray, 556 N.E.2d 1169, 1171-72 (Ohio 1990) (stating that the federal constitutional parental childcare right is "essential" and "basic," similar to the Ohio "paramount" parental custody right, derived from *Clark v. Bayer*, 32 Ohio St. 299, 305 (Ohio 1877) (stating the parental custodial right is subject to child's welfare interests, which are "paramount," with no indication that the custodial right is of constitutional dimension)). State constitutional parental childcare interests are more often recognized outside of parentage establishment settings, as when government pursues

thority to define parenthood are absent, as are significant employments by state courts of vague constitutional interests like liberty or equality in definitional disputes.[108]

So, neither federal nor state constitutional judicial precedents chiefly drive American state laws defining federal constitutional childcare parents. The *Callender* decisions illustrate how state constitutional precedents could do for parentage definitions locally what the *Roe v. Wade*[109] and *Lawrence v. Texas*[110] decisions by the United States Supreme Court did for the substance of abortion and sexual conduct interests nationally.[111] For the most part, though, childcare parents are defined by state legislators whose statutes are read and applied by state judges, as well as by state judges whose nonstatutory decisions establish common law precedents, which are typically subject to statutory override.

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parental rights terminations. *See, e.g.*, Crowell v. State Pub. Def., 845 N.W.2d 676, 678 (Iowa 2014) (concluding the Iowa constitution requires the state to pay the attorney's fees for an indigent parent whose parental rights are sought to be terminated by either public entities or private parties); *In re* Adoption of J.E.V., 141 A.3d 254 (N.J. 2016) (addressing the state due process right to counsel in a contested private adoption setting).

108. Justice Brennan recognized such employments are generally easier for state courts than for federal courts since state constitutions "are often relatively easy to amend." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986). On the frequency and breadth of state constitutional amendments (state average is 150) compared to federal constitutional amendments (27), see John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27 (2016).

109. 410 U.S. 113 (1973).

110. 539 U.S. 558 (2003).

111. Unfortunately, federal court precedents can provide little guidance on when unenumerated constitutional rights should be recognized, as opposed to leaving any such rights to Congress, as the congressional role in defining individual rights is limited by Article I constraints, though Congress can act to enforce individual federal constitutional rights, per Section 5 of Amendment XIV. U.S. CONST. art. I, amend. XIV, § 5. Federal precedents, as well, are not particularly helpful to state courts on when new unenumerated constitutional rights should or should not be judicially recognized, as demonstrated by the Due Process analysis in the same sex marriage case. Obergefell v. Hodges, 135 S. Ct. 2584, 2595, 2605 (2015) ("notwithstanding the more general value of democratic decision making," courts must assure "fundamental rights" are not abridged, to be guided by the recognition that rights must reflect "developments in law and society"); *Obergefell*, 135 S. Ct. at 2612, 2616 (Roberts, C.J., dissenting) ("social policy" matters should be resolved by the "people acting through their elected representatives," and not by "lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.").

V. INTERSTATE VARIATIONS IN STATUTORY AND COMMON LAW CHILDCARE PARENTS

With the limited role of both federal and state constitutional law, as well as the somewhat limited role Congress plays,[112] American state legislators and judges chiefly define federal constitutional childcare parents. Domestic relations matters have, however, generally been viewed as outside of broad judicial common law responsibilities, especially as here there are usually neither federal nor state constitutional jury trial rights prompting exercises of inherent judicial powers protective of constitutionally-assigned adjudicatory authority. Elected legislators are generally recognized as having primary authority over both parentage establishment and disestablishment norms. These norms are usually addressed in statutes containing special statutory causes, including marriage dissolution, probate law, and juvenile law.[113]

Characterizations of certain cases or proceedings as statutory confuse some people since many common law causes can also be dependent upon statutes. Yet because special statutory causes, as compared to general common law causes, do not prompt jury rights, they prompt less inherent judicial authority. With statutory causes, it is often said that justiciable matters, that is, civil claims or proceedings that may be pursued in trial courts, are substantially dependent on General Assembly initiatives. Here, courts usually yield to legislative wishes as to the merits and as to the appropriate dispute resolution processes. Perhaps this explains why "common sense" judicial rulings happen less frequently in some aspects of statutory wrongful death and probate causes, which are deemed special statutory causes. Put another way, there is generally less room for judicial innovations, and greater responsibilities for state legislators, regarding parentage matters than, for example, regarding tort and contract law matters, which

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112. Congressional authority to define federal constitutional rightsholders is limited. *See* U.S. CONST. amend. XIV, § 5 (describing congressional enforcement authority). There is seemingly little that Commerce Clause authority can do. Federal welfare programs have yielded Congressional mandates (should federal financial assistance be sought) on voluntary parentage acknowledgments, but these mandates extend per federal law only to parents in the welfare system.

113. *See, e.g.*, Strukoff v. Strukoff, 389 N.E.2d 1170, 1172-73 (Ill. 1979) (stating that statutory procedures for particular kinds of civil actions significantly govern, including marriage dissolution, adoption, eminent domain, and taxpayer disputes) and N.M. CODE R. § 1-001 (LexisNexis 2011) (describing in the committee commentary special cases and proceedings as including election contests, probate, workers compensation, zoning, arbitration, adoption, and condemnation). *See also* Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895, 906, 912 (Ill. 2010) (stating the legislature may limit certain types of damages, such as damages recoverable in statutory causes of action, but separation of powers principles limit state legislators in cases involving "inherent" judicial powers).

carry with them histories of significant common law precedents prompted by constitutional jury trial rights wholly implemented by judges.[114]

Of course, where statutory causes are ambiguous or indefinite, courts will effectively create law when applying the statutes. Family relations laws have long been regarded as chiefly governed by statutory causes. Yet family law matters require some common lawmaking by courts, as where state legislators have difficulty writing rigid, definitive, bright line guidelines. As the New York high court observed in overruling precedent denying any childcare standing to non-biological, non-adoptive partners of biological parents:

> The "bright-line" rule of *Alison D.* promotes the laudable goals of certainty and predictability in the wake of domestic disruption . . . . But bright lines cast a harsh light on any injustice and . . . there is little doubt by whom that injustice has been most finely felt and most finely perceived . . . . We will no longer engage in the "deft legal maneuvering" necessary to read fairness into an overly-restrictive definition of "parent" that sets too high a bar for reaching a child's best interest and does not take into account equitable principles.[115]

While many state parentage definitions originate in statutes, courts sometimes do recognize additional parentage guidelines untethered to statutes when state legislatures have not spoken, as with children born of assisted reproduction. Changes in technology and human conduct have left many courts pondering whether to establish new nonstatutory parentage doctrines since these social changes have prompted great uncertainties. Consider the Wisconsin Supreme Court's 2013 observation when establishing a precedent to guide gestational surrogacy in the absence of statute:

> We respectfully urge the legislature to consider enacting legislation regarding surrogacy. Surrogacy is currently a reality in our Wisconsin court system. Legislation could "address surrogacy agreements to ensure that when the surrogacy pro-

114. A particularly controversial exercise of such common law authority occurs when courts strike statutory damage caps for claims heard by juries because they are intrusive on inherent judicial authority over jury trial process. *See, e.g.*, Jeffrey A. Parness, *State Damage Caps and Separation of Powers*, 116 PENN ST. L. REV. 145 (2011) (critiquing *Lebron*, 930 N.E.2d at 895).

115. *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500 (N.Y. 2016) (overruling *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), which ruled there could be no childcare parentage without a biological or adoptive relation to a child due to the Domestic Relations Law).

> cess is used, the courts and the parties understand the expectations and limitations under Wisconsin law."[116]

Fifteen years earlier, a California appellate court said this when examining another gestational surrogacy contract:

> Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.
>
> Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme. Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.[117]

Certainly, a state General Assembly's failure to address gestational carrier contracts does not mean such pacts are not undertaken in that state. More importantly, it does not mean that such pacts necessarily have no legal significance. In a 2014 case, there was a surrogacy contract between one New York male spouse and a gestational carrier in India. That spouse's sperm was united with an anonymous donor's egg. The contract was deemed "against public policy, and void and unenforceable" in the male spouse's home state of New York. Nevertheless, the spouse's New York male partner was not barred in New York from adopting the twins born to the gestational carrier in India.[118]

Occasionally, legislatures recognize their own failures to address certain legal parentage issues and expressly invite judicial prece-

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116. *In re* Paternity of F.T.R., 833 N.W.2d 634, 653 (Wis. 2013) (concluding it would enforce a parentage agreement between two couples involving surrogacy, with a woman in one couple who was the birth mother and whose egg was used and with sperm from the man in the second couple who were the intended parents, as long as the child's best interests were served; but, the agreement on parental rights termination was not enforceable).

117. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998).

118. *In re* Adoption of J.J., 984 N.Y.S.2d 841, 847 (N.Y. Fam. Ct. 2014).

dents. In the New Mexico Uniform Parentage Act,[119] the legislators say:

> A. The New Mexico Uniform Parentage Act does not authorize or prohibit an agreement between a woman and the intended parents:
>
> (1) in which the woman relinquishes all rights as the parent of a child to be conceived by means of assisted reproduction;
>
> (2) that provides that the intended parents become the parents of the child.
>
> B. If a birth results pursuant to a gestational agreement pursuant to Subsection A of this section and the agreement is unenforceable under other law of New Mexico, the parent-child relationship shall be determined pursuant to Article [two] of the New Mexico Uniform Parentage Act.[120]

On occasion, courts might read general statutory recognitions of equity jurisdiction to enable nonconstitutional common lawmaking on parentage matters.[121]

Judicial pleas for General Assembly action on parentage are not limited to children born of assisted reproduction. In a parentage dispute over a child born of sex to an unwed mother, the Maine Supreme Court said this in 2014:

> Parenthood is meant to be defined by the Legislature, steeped as it is in matters of policy requiring the weighing of multiple viewpoints . . . . Although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference to de facto parenthood. We take this opportunity to again emphasize that, given the evolving compositions of families and the need for a careful approach, this issue would be best addressed by the Legislature.
>
> In the absence of Legislative action in such an important and unsettled area, however, we must provide some guidance to trial courts faced with de facto parenthood petitions.[122]

Effective July 2016, there was a new Maine Parentage Act,[123] which is said to "update" family law and which includes new presumed and de facto parent provisions.[124]

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119. N.M. STAT. ANN. §§ 40-11a-101–40-11a-903 (2011).

120. N.M. STAT. ANN. § 40-11a-801 (2011).

121. *See, e.g.*, Partanen v. Gallagher, 59 N.E.3d 1133, 1143 n.2 (Mass. 2016) (declining to rule on a request for a declaration of parentage under the equitable jurisdiction statute, MASS. GEN. LAWS ch. 215, § 6 (West 2003)); *In re Brooke S.B.*, 61 N.E.3d at 497 (debating the scope of "equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child").

122. Pitts v. Moore, 90 A.3d 1169, 1176-77 (Me. 2014) (plurality opinion).

123. ME. REV. STAT. ANN. tit. 19-A, §§ 1831-1939 (2013).

124. ME. REV. STAT. ANN. tit. 19-A, § 1851 (2013).

In the 2014 case *Moreau v. Sylvester*,[125] by contrast, the Vermont Supreme Court declined the opportunity to formulate a broad nonstatutory de facto parent doctrine.[126] The majority reaffirmed that "the Legislature is better equipped" while noting that some other state courts have declined to fill the "perceived vacuum."[127] One concurring justice indicated that his patience with General Assembly inaction was wearing thin. He commented:

> I admit that I find it more difficult to favor legislative action over judicial action in the face of years of legislative inaction. I can think of no subject that is in greater need of legislative action than this one—defining who may be considered a parent for purposes of determining parental rights and responsibilities and parent-child contact. While I am voting with the majority in this case, our responsibility to protect the best interests of the child will become only more challenging as the changing nature of families presents circumstances that are well outside the contemplation of our now archaic and inadequate statutes. I recognize that there may come a tipping point where judicial action to define rights and responsibilities beyond those of biological parents and marital partners becomes unavoidable. I would rather that the Legislature act before we see that day.[128]

While court sentiments often reflect that the legislative branch is far better suited to declare public policy in the domestic relations field due to its superior investigative and fact-finding facilities, as declaring public policy requires evaluation of sociological data and alterna-

125. 95 A.3d 416 (Vt. 2014).

126. Moreau v. Sylvester, 95 A.3d 416, 426-27 (Vt. 2014). The Vermont Supreme Court did recognize there existed already more limited statutory de facto-like parentage opportunities, as with former stepparents (who needed to show by clear and convincing evidence that there were "extraordinary circumstances"). *Moreau*, 95 A.3d at 419.

127. *Id*. at 424 (affirming its earlier approach in Tichenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997)). *See also* LP v. LF, 338 P.3d 908, 921 (Wyo. 2014) (declining to adopt de facto parentage or parentage by estoppel, "instead leaving that important policy decision to the Wyoming Legislature," while recognizing there is a Wyoming statute, WYO. STAT. ANN. § 14-2-504(a)(v) (West 2015), whereby there is presumed fatherhood in a man who, for the first two years of the child's life, resided with the child and held out the child as his own, but finding that here the man only lived with the birth mother and child for 21 months); Van v. Zahorik, 575 N.W.2d 566, 569 (Mich. Ct. App. 1997) ("As a general rule, making social policy is a job for the Legislature, not the courts . . . . [A]ccepting plaintiff's position [that he be considered an equitable parent] would, in effect, contravene established policy of this state and establish a right with social implications more appropriately addressed by the Legislature.").

128. *Moreau*, 95 A.3d at 430 (Dooley, J., concurring).

tives,[129] "the tipping point" prompting "unavoidable" judicial action varies interstate.[130]

For awhile, New York courts, and families, awaited statutory childcare parentage initiatives outside of biology or adoption due to a judicial "bright-line rule" that promoted "certainty in the wake of domestic breakups otherwise fraught with the risk of 'disruptive battles' over parentage."[131] Yet in 2016, the New York high court[132] deemed it could no longer wait, declaring "an overly-restrictive definition of 'parent' . . . sets too high a bar for reaching a child's best interest."[133]

So, while preferring General Assembly action on childcare parentage outside of biological ties and formal adoptions, courts do not always cede all parentage lawmaking authority to legislators. As a result, there are uncertainties regarding the division of lawmaking responsibilities on parentage between legislators and judges in different settings, in and outside of childcare.

In 2015, upon a romantic breakup, the Illinois Supreme Court rejected a mother's boyfriend's plea to be deemed, as to her child, either a de facto parent or a nonparent with standing to seek a childcare order, each over the mother's objection.[134] In doing so, the high court agreed with the appeals court on the need for "a comprehensive legislative solution,"[135] concluding: "Legal change in this complex area must be the product of a policy debate that is sensitive not only to the evolving reality of 'non-traditional' families and their needs, but also to parents' fundamental liberty interest embodied in the superior rights doctrine."[136]

Despite these declarations, the Illinois high court seemingly left open doors to at least some nonstatutory and nonconstitutional precedents on childcare parentage. Thus, it distinguished one appellate court decision where a biological mother was held bound to a court order reflecting "a joint parenting agreement" with her former husband, a former stepfather.[137] Further, it distinguished precedents which would enforce contracts with single parents as to future parent-

129. Blumenthal v. Brewer, 69 N.E.3d 834, 857 (Ill. 2016) (rationalizing the decision to continue to fail to recognize common law marriage, in a case where former cohabitants had property division disputes).

130. *Moreau*, 95 A.3d at 430 (Dooley, J., concurring).

131. Debra H. v. Janice R., 930 N.E.2d 184, 191-92 (N.Y. 2010).

132. *In re Brooke S.B.*, 61 N.E.3d at 500.

133. *Id*. at 500.

134. *In re* Scarlett Z.-D., 28 N.E.3d 776 (Ill. 2015).

135. *Scarlett Z.-D.*, 28 N.E.3d at 789-90.

136. *Id.* at 795. *See also id*. at 790 (noting the "legislature's superior institutional competence to pursue this debate").

137. *Id*. at 786 (finding *In re Marriage of Schlam*, 648 N.E.2d 345 (Ill. App. Ct. 1995), to be inapplicable).

age, though noting the "decisions expressly limited their holdings to cases involving children born by means of artificial insemination."[138] While these precedents involved contracts not addressed by the General Assembly, as to the boyfriend's contract with the adoptive mother in the 2015 case, the high court held that to "hold these claims are valid would allow" the boyfriend "to circumvent the statutory standing requirements."[139] So, only some parental childcare statutes can be circumvented.

Outside the childcare setting, the Illinois Supreme Court has also recognized some nonstatutory parents. Thus, it deemed the "equitable adoption" doctrine applicable to probate proceedings involving the estate of an intestate decedent, who was deemed to be the parent of a child whom he had never adopted, where biological ties were lacking.[140] The court, as it recognized in some childcare settings, focused on contractual intentions (contract to adopt in a probate setting, like a parenting agreement within a judgment and a childcare parenting agreement in anticipation of a child born of assisted reproduction).

Where states have incomplete statutes, gaps are particularly challenging for courts. When legislation fails to account for all human conduct that could lead to parentage, courts are in a quandary. Legislators often fail to include explicit statutory directives, as with language indicating that these and only these acts should lead (or not lead) to legal parentage. If the legislative history also provides few or no indications of legislative intent, courts could refuse to act, perhaps urging General Assembly action. Or, courts could act, perhaps indicating that when they do, their guidance will be short-term if legislators later fill the gaps. Courts thus sometimes must determine if statutory gaps and ambiguities were intentional, so as to require judicial initiatives in case-by-case settings; were unintentional, as when legislators never considered that gaps and ambiguities inhered in their written laws; or were intentional, as where legislators wanted no

138. *Id*. at 794-95.

139. *Id*. at 794 (finding the child support case *In re Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2003), to be inapplicable). *See also In re* T.P.S., 978 N.E.2d 1070 (Ill. App. Ct. 2012).

140. *Scarlett Z.-D.*, 28 N.E.3d at 785 (recognizing there is common law equitable adoption in probate per *DeHart v. DeHart*, 986 N.E.2d 85 (Ill. 2013)). *But see In re* Estate of Hannifin, 311 P.3d 1016 (Utah 2013) (rejecting common law equitable adoption in probate setting as there is preemption by the Probate Code). *See also Blumenthal*, 69 N.E.3d at 851-52 (deferring to General Assembly failure to sanction common law marriage, yet recognizing that property distribution disputes between unmarried cohabitants whose relationships end can be resolved by "valid contracts . . . for which sexual relations do not form part of consideration and do not closely resemble those arising from conventional marriages").

further parents under law beyond those expressly recognized by statutes.[141]

Without explicit statutory directives, courts should act pursuant to the public policies underlying related statutes, which provide strong evidence of General Assembly desires. Thus, in Nevada in 2013,[142] the Supreme Court enforced a co-parenting agreement between a birth mother and her female partner whose egg (with an anonymous donor's sperm) prompted the pregnancy. The court recognized the Nevada Parentage Act,[143] "although . . . not encompassing every possibility," including this case, had within it public policies supporting enforcement.[144] The legislature had expressly addressed parentage for same sex registered domestic partners as well as for intended parents who contract with gestational carriers who are not intended parents.[145] The court reasoned: "In Nevada, as in other states, the best interest of the child is the paramount concern in determining the custody and care of children."[146]

In Montana, one assisted reproduction statute operates outside of gestational surrogacy. It speaks directly only to a "wife . . . with the consent of [her] husband" who is artificially inseminated "under the supervision of a licensed physician . . . with semen donated by a person who is not the husband."[147] Under the Montana statute, the husband is "treated in law" automatically as the "natural father."[148] The gaps are obvious. What if assisted reproduction is employed by a woman within a same sex relationship? A woman living with her boyfriend who is the semen donor? A woman who procures semen from a friend who she promises not to pursue for child support and who himself promises not to pursue a childcare order over the woman's objection?[149] Or, a husband whose semen is used to prompt a birth to his wife without a licensed physician's supervision?

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141. *See, e.g.*, *Blumenthal*, 69 N.E.3d at 857 (stating that the "legislature knows how to alter family-related statutes and does not hesitate to do so when and if it believes public policy so requires" and here, there have been numerous statutory changes, but none addressed the override of the barrier to a common law marriage, so a court will not recognize such a marriage when former cohabitants dispute property division).

142. St. Mary v. Damon, 309 P.3d 1027 (Nev. 2013).

143. NEV. REV. STAT. §§ 126.011–126.900 (2013).

144. *St. Mary*, 309 P.3d at 1032.

145. *Id*. at 1033.

146. *Id*. at 1032.

147. MONT. CODE ANN. § 40-6-106(1) (West 2015). *See also* COLO. REV. STAT. ANN. § 19-4-106(1) (West 2015); N.J. STAT. ANN. § 9:17-44 (West 2002); MINN. STAT. § 257.56 (West 2012).

148. *Id*.

149. *See, e.g.*, Bruce v. Boardwine, 770 S.E.2d 774 (Va. Ct. App. 2015) (holding the "turkey baster" child's father is the sperm donor, even though the donor had earlier promised that the birth mother would be the sole parent, because he was not covered by assisted reproduction statute).

Further, in Colorado there is a marital presumption of paternity in the husband whose wife bears a child "during the marriage."[150] Again, there are obvious gaps. What if a woman is married to another woman who bears a child born of sex while so married? The United States Supreme Court has required states to allow same sex marriages. Further, what if a wife is pregnant during her marriage to her husband, though the child was not "born" during the marriage?[151] Equal protection may dictate that the first scenario demands similar treatment of opposite sex and same sex female couples though only in the former setting may each spouse have biological ties. But would equality principles also dictate similar treatment for spouses married during a pregnancy, but unmarried at birth, and for spouses married at the time of birth?

Incidentally, there are also statutory gaps in the parentage-related area of so-called third-party childcare where one, usually with a developed relationship with a child or with blood ties to a child, can seek a childcare order over parental objection. Thus, in Rhode Island in 2000 the "Family Court's jurisdiction to permit rights of visitation to persons other than the biological or adoptive parents of a minor child specifically" had been "limited to grandparents and siblings of the minor child."[152] In Rhode Island, two of five high court justices found that absent "legislative authority" for visitation by former same-sex partners with children they helped to raise, there was no judicial authority to rule on such visitation requests.[153] For them, but not the majority, the General Assembly's failure to recognize trial court jurisdictional authority meant there was no judicial lawmaking authority.[154]

So, there are interstate variations in the roles played by state courts in defining childcare parents outside of state constitutional law.

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150. COLO. REV. STAT. ANN. § 19-4-105(1)(a) (West 2015).

151. *Compare* COLO. REV. STAT. ANN. § 19-4-105(1)(a). (presuming a man to be a child's natural father if the child was "born during the marriage"), *with* ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2012) (presuming a man to be the father of a child if he is married to birth mother "at any time in the ten months immediately preceding the birth").

152. Rubano v. DiCenzo, 759 A.2d 959, 988 (R.I. 2000) (Bouccier, J., dissenting) (citing 15 R.I. GEN. LAWS ANN. §§ 15-5-24.3, 15-5-24.2 (West 2013)).

153. *Rubano*, 759 A.2d at 988 (Bouccier, J., dissenting). *See also In re* Custody of H.S.H.-K., 533 N.W.2d 419, 432 (majority opinion); *In re Custody of H.S.H.-K.*, 533 N.W.2d at 450 (Wilcox, J., concurring and dissenting) (stating the majority is "usurping the proper functioning of the legislature" by recognizing third-party visitation standing for former lesbian partner per equitable power).

154. Comparably, even where there can be no parental objection to third-party childcare, as when biological parents relinquish a child for adoption, a biological grandparent with a developed familial relationship with the child sometimes cannot halt an adoption by a non-biological would-be parent where there is no statutory recognition of grandparent standing, even where the grandparent "stood in loco parentis." Navarrete v. Creech, 501 S.W.3d 871, 874 (Ark. Ct. App. 2016).

Statutory gaps and ambiguities are particularly challenging for the judges who find more comfort in applying statutes than in themselves writing laws on childcare parentage. Some judges, however comfortable, sometimes do define parents for child "care, custody and control" purposes; do establish the parameters of parental childcare interests; and, do facilitate the enforcement opportunities for parents with recognized childcare interests. They are driven by the new realities of family structure prompted by changes in both technology and human conduct.

VI. MORE PRINCIPLED ALLOCATIONS OF POWERS TO DEFINE CHILDCARE PARENTS

As the United States Supreme Court will likely continue to rely on American state lawmakers to chiefly define federal constitutional childcare parents, certain principles should guide state courts when they assess judicial and legislative powers to define childcare parents unrecognized by state constitutional precedents.[155] Such assessments are especially needed due to the continuing changes in family structures and in human reproductive technologies rendering obsolete the earlier (overwhelming) reliance on biological ties, marriage, and formal adoption for defining childcare parents.

Of course, state courts need not assess state judicial and legislative definitional powers where federal laws define federal constitutional childcare parents. But such federal laws are rather limited. And, state court assessments must insure that the (somewhat limited) federal constitutional law constraints on state childcare parentage definitions are met. Thus, state legislators and judges must abide by the *Lehr v. Robertson*[156] court demands regarding the childcare opportunities of certain unwed biological fathers of children born of sex (at least in adoptions), as well as the implicit *Troxel v. Granville*[157] court limits on state parentage law definitions unduly infringing upon the childcare interests of existing parents.

Beyond *Lehr* and *Troxel*, there are federal and state constitutional equality demands that could impact the current, quite varied, state statutory and common norms on childcare parentage. Thus in 2016, one federal district court expanded the childcare parentage presumption favoring the husband of a new birth mother to the wife of a new birth mother, where births arise from assisted reproduction and

155. Guidance on such principles will not be found in Article III federal court precedents, as federal nonconstitutional common lawmaking is not undertaken with respect to parental childcare (or marriage or abortion) interests.

156. 463 U.S. 248 (1983).

157. 530 U.S. 57 (2000).

where neither presumed parent was biologically tied to his or her child.[158] As to the equality interests of the nonmarital, nonbiological, and nonadoptive childcaretakers, how constitutional precedents "will speak to burgeoning inequalities between marital and nonmarital families [and between differing nonmarital families] in this new age of marriage equality remains to be seen."[159] Yet there is little reason to think the United States Supreme Court will elaborate much on federal constitutional interstate equality. There remains *Lehr*, which maintains that in "the vast majority of cases, state law determines the final outcome" when resolving "the legal problems arising from the parent-child relationship,"[160] even where interstate outcomes differ.

Further, state courts need not balance statutory and nonconstitutional common lawmaking where state constitutions speak to childcare parents, even if obliquely. There is little reason, however, to expect an increase soon in state constitutional lawmaking. Lockstepping will likely continue. There are longstanding traditions within American states that family law matters are to be significantly regulated by state legislators, as they often implicate issues outside of the common law and thus outside of the significant inherent state judicial authority and jury trial processes.

So state courts will be challenged to have to decide whether to define childcare parentage on their own, of course within constitutional and any express statutory limits. And, state legislatures will be challenged to have to decide whether to undo any common law precedents; to remain silent should parentage common lawmaking emerge; and, to invite—perhaps quite directly—courts to define (perhaps only some) childcare parents via precedents.

In deciding whether to define childcare parents within constitutional and statutory constraints, state courts should be especially guided by the nature and extent of any recent General Assembly expansions of or inquiries into childcare parentage. In 2014, the Wyoming Supreme Court declined to recognize either a common law de facto parentage or a parentage by estoppel doctrine.[161] It noted that the legislature had enacted a Parentage Act in 2003 that recognized presumed childcare parentage in a man who resided in the same

158. Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645, at *15 (S.D. Ind. June 30, 2016) (finding a due process violation as well in the distinction between male and female spouses of birth mothers).

159. Serena Mayeri, *Foundling Fathers: (Non-) Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2392 (2016).

160. Lehr v. Robertson, 463 U.S. 248, 256 (1983). *See also* United States v. Yazell, 382 U.S. 341, 352, 357 (1966) (stating there is a need for "solicitude for state interests, particularly in the field of family" and also "no need for uniformity" in child custody laws).

161. LP v. LF, 338 P.3d 908, 921 (Wyo. 2014).

household and held out a child as his own for the child's first two years, where the statute followed cases elsewhere on in loco parentis and psychological parentage, as well as the 2000 American Law Institute's "Principles of the Law of Family Dissolution," first published in 2002.[162] It concluded that legislators in Wyoming had defined childcare parents "advisedly," acting "extensively" and left little room for the courts to "fill [in the] interstices" not covered by the statutes.[163]

Judicial reluctance to extend childcare parentage due to earlier General Assembly enactments, or failures to act, should vary depending upon the circumstances leading to pregnancy and birth. In the just noted Wyoming case, the child seemingly was born of consensual sex where the alleged male parent was not the biological father, but was present when the child was born and lived with the mother and child for between eighteen and twenty-two months.[164] The relevant statute required a two-year residence from the time of birth to establish presumed male parentage.[165] But what if the child was born of assisted reproduction, with or without the alleged legal father's sperm, or was born of assisted reproduction involving a surrogate? Here, if there were no statutes, or if state legislators had not acted "extensively," leaving significant "interstices" not covered by their laws, the Wyoming court may have recognized enhanced common lawmaking authority.

In deciding whether to define childcare parents within constitutional and statutory constraints, courts should also be guided by how parentage definitions in nonchildcare settings have emerged. Thus, they should consider whether parent and child definitions for probate, wrongful death, or other nonchildcare claims originate wholly in statutes.[166] If significant earlier judicial precedents untethered to particular statutes exist in probate, for example, common law childcare parentage rulings should be more available, though they need not be consistent in policy, especially when they address the effects of new

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162. *LP*, 338 P.3d at 918-19.

163. *Id.* at 918 (distinguishing *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005)).

164. *Id.* at 910 (relating how the mother said he lived with them for about 18 months, while the alleged father said it was 21 or 22 months).

165. *Id.* at 914 (referencing WYO. STAT. ANN. § 14-2-504(a)(v)).

166. *See, e.g.*, Conover v. Conover, 146 A.3d 433, 452 (Md. 2016) (recognizing a new common law de facto childcare parent doctrine [while overruling a "clearly wrong" eight year old precedent], and distinguishing other state precedents deferring to the legislature since in Maryland the "statutory scheme in the area of family law is not as comprehensive"). *See also* People v. Pieters, 802 P.2d 420, 423 (Cal. 1991) (stating the court "[does] not construe statutes in isolation, but rather read[s] every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (quoting Clean Air Constituency v. Cal. State Air Res. Bd., 523 P.2d 617 (Cal. 1974))).

human reproductive technologies and the explosion in nontraditional families.

Guidance should also emanate from how nonparental childcare interests have evolved in a state. Equitable or common law developments untethered to statutes indicate a judicial willingness to go beyond General Assembly directives to serve the best interests of children or on the caretaking interests of adults. These developments are relevant in parental childcare settings, of course within the *Troxel* limits.[167] The distinctions, if any, made here, as between those blood-related (i.e., grandparents) and those not blood-related (i.e., stepparents) seeking nonparental childcare orders over parental objection(s) are relevant in assessing the childcare interests of blood-related and nonblood-related individuals seeking parental status.

As well, courts should be guided by whether new parent childcare statutes are then, or have recently been, under serious General Assembly consideration. Current or recent significant legislative interest should cause courts to hesitate to act on their own.[168] Such an interest may be found, for example, where a special advisory General Assembly committee is then contemplating, or recently contemplated, comprehensive legislation, or where comprehensive reforms, while not yet enacted, have recently been subject to significant General Assembly debate and public discourse that is likely to continue.[169] By contrast, where parent childcare statutes have been amended with no mention of (and thus with no clear intent to limit) earlier equitable, i.e. nonstatutory, precedents on childcare, courts should be less hesitant to act further.[170]

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167. These limits in nonparental childcare settings are subject to some dispute, as recognized by the Committee of the National Conference of Commissioners on Uniform State Laws that was considering in 2016 a new model act on nonparental custody and visitation. NON-PARENTAL CHILD CUSTODY AND VISITATION ACT (UNIF. L. COMM'N, Discussion Draft 2016).

168. In overruling an eight-year-old precedent denying de facto parentage, the Maryland high court acted even though the legislature had at least twice considered the doctrine in the very recent past. *Conover*, 141 A.3d at 54-55 (Watts, J., concurring).

169. For example, for about ten years in Illinois, ending with legislation in 2015, the General Assembly first commissioned an independent study on possible amendments to the major Parentage Act and then enacted a new Parentage Act. *See, e.g.*, *Parentage Law (R)Evolution*, *supra* note 37, at 753-57 (reviewing proposed parentage changes in Illinois by a special study committee, including amendments to the Parentage Act of 1984 and the Marriage and Dissolution of Marriage Act). During the Illinois inquiry, some judges failed to pursue, for example, de facto parentage theories in deference to the legislative initiative. *See, e.g.*, *In re* Marriage of Mancine & Gansner, 9 N.E.3d 550, 576 (Ill. App. Ct. 2014) (Mason, J., specially concurring). A review of the 2006 commissioned inquiry into reforming Oregon parentage laws appears in Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests and Betrayal*, 44 WILLAMETTE L. REV. 297 (2007).

170. *See, e.g.*, *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 497-98 (N.Y. 2016) (stating that a domestic relations statute "evolved in harmony with . . . equitable

Where recent General Assembly consideration presents no bar to new nonconstitutional common law parentage norms, non-enacted legislative proposals can be employed to guide judicial policymaking. In concurring in the Maryland high court's 2016 recognition of de facto parenthood, two justices utilized "withdrawn" General Assembly proposals to formulate their views on a new de facto childcare parent doctrine.[171]

As to the allocation of state governmental powers to define childcare parents by defining the rebuttal, rescission, or other forms of parentage disestablishment, courts should first take a hard look at the laws that initially prompted parentage. When state legislators fail to speak explicitly on disestablishment, some legislative intent may be found in the policies underlying the relevant parentage statutes. For example, a statute recognizing presumed paternity in a husband whose wife conceives a child during a marriage, or who bears a child while married, may—in the absence of any legislation on a presumption rebuttal—nevertheless direct, via its underlying public policy, how attempted rebuttals of the presumption should be handled. Did the legislators base their marital presumption on the import of biological ties, or on the import of maintaining intact families?

The requisites for a form of parentage establishment and for the disestablishment of that form of parentage need not always be determined by the same lawmaker. It may be that a legislature desires a hard-and-fast rule on a certain form of parentage, as with parentage arising from marriage to the birth mother, but judicial flexibility, including quite broad judicial discretion, on when that parentage form might be undone. Or, it may be that legislators determine that a child's best interests are not to be considered when parentage is first established by a voluntary acknowledgment via strict statutory guidelines largely objective in nature, but that a child's best interests are to be considered when a challenge to such an acknowledgment is sought, meaning there is a fact-laden subjective judicial inquiry.

Should state courts and legislatures conclude that certain current childcaretakers are undeserving of, or not now recognized as having, federal constitutional parental childcare interests, they are not precluded from recognizing for those caretakers nonparental (sometimes labeled, third party) childcare interests, which could include childcare visitation orders over the objections of any current childcare parent. While state courts have recently recognized significant new forms of nonconstitutional childcare parentage, like de facto parentage, that

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practices" and that "[t]ellingly, the statute has never mentioned, much less purported to limit, the court's equitable powers").

171. *Conover*, 141 A.3d at 53-54 (Watts, J., concurring, joined by Battaglia, J.).

are untethered to statutes, they have not comparably recognized nonconstitutional and nonstatutory nonparental childcare interests. Perhaps they await a new uniform law (now in the works).[172] Perhaps there are fewer "interstices" and quite extensive General Assembly action. But such common law developments are possible, and may some day be deemed necessary to serve the best interests of children, which for now typically are largely irrelevant in nonconstitutional parental childcare settings (as the focus is on parental and nonparental interests).

VII. MORE RATIONAL DISTINCTIONS BETWEEN CHILDCARE PARENTS

Whether or not state courts, in the absence of statutes, themselves define childcare parents or await (if not invite) General Assembly action, they should address any irrational statutory or common law distinctions by utilizing federal or state constitutional equality or substantive due process.[173]

One current distinction worthy of broadened interpretation, not invalidation, involves statutory and common law differences between male and female spouses of mothers who bear children born of sex, if not of assisted reproduction or of unknown acts,[174] during marriage. In Louisiana, the statute on presumed parentage states, "the husband

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172. *See, e.g.*, NON-PARENTAL CHILD CUSTODY AND VISITATION ACT (UNIF. L. COMM'N, Discussion Draft 2016).

173. Rational distinctions will not save differences between, for example, male and female parents where greater justifications are required, as where intermediate scrutiny analyses are demanded. *See, e.g*., Morales-Santana v. Lynch, 804 F.3d 520, 525 (2d Cir. 2015) (arguing over different review standards for a statute distinguishing unwed citizen fathers and mothers of children born outside the United States), *cert. granted*, 136 S. Ct. 2545 (Mem.) (2016).

174. Where the use of assisted reproduction, with or without a surrogate, is known, the statutory marital parentage presumption will sometimes yield to explicit laws on spousal parental status (as with laws tying parentage to consent). *See, e.g.*, KAN. STAT. ANN. § 23-2208(a)(1) (West 2008) (presuming a man is the father of a child born to his wife "during the marriage"); KAN. STAT. ANN. § 23-2302 (West 2008) (stating that a child born of artificial insemination to a man's wife is "considered . . . a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique"). *See also* TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2013) (stating a man is a presumed father of a child born to his wife "during the marriage"); TEX. FAM. CODE ANN. § 160.754 (West 2013) (stating that a prospective gestational mother, her husband, and each intended parent may enter into a gestational agreement whereby mother and husband "relinquish all parental rights"); 750 ILL. COMP. STAT. ANN. 46/204(a) (West 2015) (providing for no marital parentage presumption in a "valid gestational surrogacy contract, or other law"). *But see* McLaughlin v. Jones, 382 P.3d 118 (Ariz. Ct. App. 2016) (finding a lesbian spouse was entitled to presumed marital "paternity" parentage under Arizona law where all parties lived, while the birth mother had been artificially inseminated by agreement with her female spouse in California where they then lived, and further finding the birth mother was equitably estopped from seeking to rebut the presumption, with no mention of any California assisted reproduction law).

of the mother is presumed to be the father of the child born during the marriage or within three hundred days from the date of the termination of the marriage."[175] By contrast, in Illinois "[a] person is presumed to be a parent of a child if . . . the person and the mother of the child have entered into a marriage, civil union, or substantially similar legal relationship, and the child is born to the mother during the marriage, civil union, or substantially similar legal relationship . . . [or] within 300 days after the marriage, civil union, or substantially similar legal relationship is terminated."[176] There is no sensible reason to differentiate in-state, as in Louisiana, between male and female spouses of birth mothers who bear children from adulterous sexual relationships.[177] Thus, "husbands" in marital parentage presumption statutes should be read to include "wives" of spouses who bear children,[178] until the language is changed to gender-neutral terms.

Comparably worthy of broadened interpretation, not invalidation, are statutes and common law precedents that unreasonably favor different-sex unmarried couples over same-sex unmarried couples where all couples comparably act to prompt children born of assisted human reproduction. Consider couples who intend to be childcare parents without surrogacy.[179] As the Florida Supreme Court ruled in 2013,

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175. LA. CIV. CODE ANN. art. 185 (2009). *See also* ALA. CODE § 26-17-204 (2002) (stating a "presumption of paternity"); ARIZ REV. STAT. ANN. § 25-814 (stating a "presumption of paternity"); CAL. FAM. CODE § 7540 (West 2004) (stating a "child of a wife cohabiting with her husband"); COLO. REV. STAT. ANN. § 19-4-105(1) (presuming a "natural father"); DEL. CODE. ANN. tit. 13, § 8-204(a) (West 2007) (explaining "presumed to be the father").

176. 750 ILL. COMP. STAT. ANN. 46/204(a). *See also* D.C. Code Ann. § 16-909(a-1)(2) (West 2001) (stating a woman is presumed to be "the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth"); IOWA CODE ANN. § 598.31 (West 2008) (stating that "[c]hildren born to the parties, or to the wife in a marriage relationship . . . shall be legitimate as to both parties").

177. State statutes sometimes dictate equality between all state-sanctioned marital and marital-like relationships, as in Vermont where there was an equal protection provision in the civil union statute. Moreau v. Sylvester, 95 A.3d 416, 421-22 (Vt. 2014).

178. *McLaughlin*, 382 P.3d at 719. *See also* Torres v. Seemeyer, No. 15-cv-288-bbc, 2016 WL 4919978, at *9 (W.D. Wis. Sept. 14, 2016) (ordering that the word "husband" in the birth certificate statute should be construed to mean "spouse" so that same-sex and different-sex married couples would be similarly treated).

179. *See, e.g.*, TEX. FAM. CODE ANN. § 160.7031 (West 2013) (stating that if "an unmarried man, with the intent to be the father . . . provides sperm . . . for assisted reproduction by an unmarried woman," then he is "the father of a resulting child"). *But see* CAL. FAM. CODE §§ 7613(a), 7613(c) (West 2004) (stating that "[i]f a woman conceives through assisted reproduction with . . . ova . . . donated by a donor not her spouse," another person can be an "intended parent" if there is proper consent, whereas that "donor of ova for use in assisted reproduction" is not a parent if she did not intend "to be a parent"). Some laws on conduct by unwed different-sex and same-sex couples recognize equality for all couples, as when statutes or precedents require the nonbirth parent to have contributed genetic material. While both different-sex and same-sex couples can comply, such limits arguably exclude unreasonably couples desirous of co-parenting

such a Florida statute "lacks a rational basis."[180] This statutory differentiation, however, remains on the books in Florida, if not in practice.[181] Comparably problematic are nonsurrogacy assisted reproduction laws that distinguish between married heterosexual couples and other couples,[182] and perhaps laws differentiating coupled and single individuals[183] and those in two-party and three-party romantic or familial relationships.[184]

Further, broadened interpretation, not invalidation, should be considered for statutes or common law precedents that differentiate between married couples and both unmarried couples and single individuals who wish to raise children born to surrogates.[185]

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who contribute no eggs or sperm (and may also be vulnerable as unduly burdensome on procreational rights, especially for those incapable of contribution). *Compare*, *e.g.*, TEX. FAM. CODE ANN. § 160.7031 (stating an unmarried man is the father of a resulting child if he provides sperm with the intent to be the child's parent), *with* N.M. STAT. ANN. § 40-11A-703 (West 2011) (stating that "[a] person who provides eggs, sperm or embryos for or consents to assisted reproduction," per section 40-11A-704 (which speaks to "intended parent or parents") "with the intent to be the parent of a child" is a parent).

180. D.M.T. v. T.M.H., 129 So.3d 320, 344 (Fla. 2013).

181. Notwithstanding *D.M.T.*, the Florida statutes on assisted reproduction without surrogacy continue to speak only of an "intended mother and father of a child." FLA. STAT. ANN. § 742.13(2) (West 2013).

182. *Compare* KAN. STAT. ANN. § 23-2302 (referring to "husband and wife"), MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2003) (referring to "married woman" and "husband"), *and* MINN. STAT. ANN. § 257.56 (stating "with the consent of her husband, a wife is inseminated artificially"), *with* ALASKA STAT. ANN. § 25.20.045 (West 2014) (discussing parentage for "both spouses"), GA. CODE. ANN. § 19-7-21 (West 2015) (referring to "both spouses"), *and* ALA. CODE § 26-17-702 (2002) (highlighting a "married couple"). *Compare* CAL. FAM. CODE § 7613(a) (stating that when a woman conceives a child with a donor not her spouse, she and other "intended parent" are treated as "natural" parents of later born child), *and* DEL. CODE. ANN. tit 13, § 8-704(a) (West 2007) (requiring "[c]onsent by a woman and an intended parent of a child conceived via assisted reproduction"), *with* N.D. CENT. CODE ANN. § 14-20-62 (West 2015) (requiring "[c]onsent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction").

183. *See, e.g.*, OHIO REV. CODE ANN. § 3111.89 (West 2010) (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"); ARK. CODE ANN. § 9-10-201 (West 2006) (stating that an unwed birth mother is the legal mother, with no mention of a possible intended father as parent); CAL. FAM. CODE § 7613.5 (providing that nonsurrogacy assisted reproduction is available to both couples and single women).

184. *Compare* 750 ILL. COMP. STAT. ANN. 46/204(a)(1)-(2), (b) (providing that for the birth mother of a child born of sex, only one of two of her spouses during the pregnancy can be a presumed childcare parent), *with* CAL. FAM. CODE. §§ 7611, 7612(c) (stating that with the birth mother, there can also be two presumed parents).

185. *Compare* TEX. FAM. CODE ANN. § 160.754(b) (providing that an authorized gestational agreement must include "intended parents . . . married to each other"), *with* ARK. CODE ANN. § 9-10-201(c)(1)(B) (providing that an unwed biological father is a parent of a child born to a surrogate, with no mention of a second intended parent), ARK. CODE ANN. § 9-10-201 (c)(1)(C) (stating that a woman intended to be the mother is the parent, but only when "an anonymous donor's sperm was utilized for artificial insemination"), FLA. STAT. ANN. § 742.13(2) (stating that a "[c]ommissioning couple" in a "[g]estational surrogacy contract" (under section 742.15) means "the intended mother

State, if not federal, constitutional equality should be used today to invalidate unreasonable differences in adoption proceedings between a biological father of a child born of sex to an unwed mother who, before any adoption is finalized, registers with a putative father registry and a similar father who only files a paternity action or a similar proceeding before the adoption. While the United States Supreme Court has sanctioned such differences for now,[186] state constitutional equality protections can go further, especially where state constitutions speak more explicitly of equality guarantees than does the United States Constitution.

Constitutional equality, be it federal or state, need not always be employed to strike a statute or common law precedent unreasonably treating comparably situated childcare parents. Courts can simply interpret the law to preclude senseless differentiations. Thus, while one state statute declared a biological father could only challenge an adoption petition when he both moved to contest the adoption in the adoption case and filed a paternity action, the state high court allowed a biological father to pursue a challenge when he had only filed a timely paternity action,[187] validating adequate or effective—if not technical—compliance with the statute.

VIII. CONCLUSION

Per United States Supreme Court precedents, federal constitutional childcare parents are chiefly defined today by state legislators and judges—and their definitions vary widely interstate. These definitions go by different names, like de facto parents; presumed marital and nonmarital parents; and equitable adoption parents. More importantly, state law definitions of childcare parents carry differing requisites, like maintaining a household residence; providing financial

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and father" of a child conceived via assisted reproduction, but only if at least one of the intended parents donated "eggs or sperm"), UTAH CODE ANN. §§ 78 B-15-801(3), (5) (West 2014) (stating that the "intended parents shall be married" with at least one being "a donor"), *and* N.H. REV. STAT. ANN. §§ 168-B:7, B:8 (2002) (stating that a "child conceived as a result of assisted reproduction and a gestational carrier agreement" is a child of the "intended parent or parents," who are not expressly required to have donated their own genetic material).

186. Lehr v. Robertson, 463 U.S. 248, 264-65 (1983) (providing that parties interested in possible adoption proceedings must "adhere precisely to the procedural requirements" of the adoption statute). In *Lehr*, the statutory requirements demanded notice be given in an adoption case to one who had filed an "unrevoked notice of intent to claim paternity," but said nothing of one who had filed a paternity action. *Lehr*, 463 U.S. at 250-51 nn.4-5.

187. *In re* B.W., 908 N.E.2d 586, 589, 594 (Ind. 2009) (noting how the father had not only sued in paternity within 30 days of receiving the adoption case notice, but he had also filed prebirth with the Putative Father Registry).

support; and holding out a child as one's own.[188] State laws on childcare parentage disestablishment are similar, with differing terms like rebuttal and rescission, and with differing requisites, as with the absence of biological ties, laches, or estoppel.

Given the likely continuing (and dramatic) changes in family structures and in the availability and use of human reproductive technologies, as well as United States Supreme Court deference, state lawmakers will continue to define and redefine federal constitutional childcare parents. Such lawmaking requires more deliberate and principled state-by-state assessments of the allocations of legislative and judicial powers. Initially, there should be judicial explorations into the possible role of state constitutional laws. These exams will likely need to be followed by in-depth explorations of past and current state General Assembly and high court parentage law initiatives in and outside of childcare parentage.

To date, the intrastate allocations of legislative and judicial powers to define federal constitutional childcare parents have varied, as have the state laws defining and disestablishing such parents. These variations in lawmaking powers should continue as the separation of powers and the public policies on parental childcare are not uniform interstate. Yet, in balancing the divide, state legislatures and judges should act more principally by relying primarily on their own state's unique history of shared governance in childcare parentage and related matters. They must recognize the balances can even vary intrastate depending upon how children were born into the world and what purposes will be served by the parentage definitions, as between childcare and child support. Whatever balances are struck, however, state lawmakers must avoid irrational or noncompelling distinctions in childcare parent laws, especially now that same-sex, as well as unwed, human couples have been generally afforded certain familial protections once reserved for opposite sex couples.

188. For a review of the varying American state laws defining childcare parents, see *Parentage Law (R)Evolution*, *supra* note 37, at 752-63.