MARRIAGE EQUALITY, PARENTAGE (IN)EQUALITY

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I. INTRODUCTION

Recently, several distinguished commentators have asked how, if at all, the U.S. Supreme Court will speak, after its same sex marriage ruling,[2] to interstate inequalities involving the federal constitutional rights of childcaring parents.[3]

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2. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

3. *See, e.g.*, Serena Mayeri, *Foundling Fathers: (Non-) Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2392 (2016) [hereinafter *Foundling Fathers*] ("How, if at all, the Constitution will speak to burgeoning inequalities between marital and nonmarital families in this new age of marriage equality remains to be seen."). Earlier she explored how "marital supremacy" in childcare settings has carried a "steep price" for unwed parents involving "equality, freedom and dignity"; Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1351 (2015). *See also* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1266 (2016) [hereinafter *New Parenthood*] ("[B]y validating the model of parenthood central to same-sex family formation [i.e., intentional and functional parenthood], marriage equality can provide a precedent on which to justify the expansion of that model not only inside but also outside marriage, for both same-sex and different-sex relationships."). Professor Joslin agrees (Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. F. 197, 211 (2016) ("Marriage equality, NeJaime argues, may result in greater protections not just for marital parents but for nonmarital parents. I agree with NeJaime . . . I think . . . Obergefell opens up the possibility of rethinking the marriage/nonmarriage divide that continues to shape the law . . . of parentage.")). Professor Cahill finds the U.S. Supreme Court's same-sex marriage equality case evisions a comparable "constitutional norm" of equality in the "'related rights' of childrearing and procreation." Courtney Megan Cahill, Obergefell *and the 'New' Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6 (2016) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2599). *See also* Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 623 (2016) ("Article . . . asks how marriage equality might constrain emerging proposals to regulate the practice of alternative reproduction."). But Dean Murray is less optimistic, finding Obergefell "furnishes little basis for challenging" the

Specifically, Professor Mayeri notes that today the "constitutional law of the family stands at a critical turning point," leaving us to ponder whether the "advent of marriage equality," which "disrupted conventional definitions of parenthood" by demoting "marriage and biology in favor of more intent-based and functional criteria," will heighten or diminish the federal "constitutional significance of marital status" in parentage matters.[4] Professor NeJamie worries that *Obergefell* "may reduce incentives to achieve laws that recognize unmarried, nonbiological parents,"[5] though there is the "potential" for it to "yield more robust recognition for *some* unmarried parents."[6] And Dean Murray, while recognizing this "potential,"[7] worries *Obergefell* may not be read to "sanction and facilitate . . . methods of family formation . . . that credit nonmarriage."[8]

The same sex marriage equality ruling did not directly address any issues involving national parentage equality. It is not likely the ruling will prompt the U.S. Supreme Court to address national parentage equality any time soon. The Court has historically deferred to state parentage laws while recognizing their significant interstate variations.

While interstate parental childcare equality issues are important, they pale in significance to issues of intrastate equality for marital and biological parents, as well as for nonmarital, nonbiological, nonadoptive parents who care for children and who are often deemed de facto or presumed parents, which can include grandparents and/or stepparents. Herein, I offer a few thoughts on intrastate parental childcare equality[9] after explaining why interstate inequalities will likely remain unaddressed by the U.S. Supreme Court.[10]

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marital/nonmarital "inequality" in state laws that "specifically limit gestational surrogacy to married couples." Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1254-55 (2016) [hereinafter *Nonmarriage Inequality*]. *But see* Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. OF CONFLICT RESOL. 717, 747 (2016) (concluding "Obergefell's most important contribution to parentage law may be simply to provoke the scrutiny we should already have given it.").

4. *Foundling Fathers*, *supra* note 2, at 2301-02.

5. *New Parenthood*, *supra* note 2, at 1252.

6. *New Parenthood*, *supra* note 2, at 1253.

7. *Nonmarriage Equality*, *supra* note 2, at 1252.

8. *Nonmarriage Equality*, *supra* note 2, at 1254.

9. While the same sex marriage ruling was seemingly founded on both the Equal Protection and Due Process Clauses, Peter Nicolas, *Fundamental Rights in a Post*-Obergefell *World*, 27 YALE J. OF L. AND FEMINISM 331, 331 (2016), any Due Process analysis should not impact significantly my assessments of intrastate federal equality issues. *See, e.g.*, Henderson v. Adams, 209 F. Supp. 3d 1059 (S.D. Ind. 2016) (finding both equality and due process safeguards violated when marital parentage presumption favored husbands, but not wives, of childcaring birth mothers employing assisted reproduction), clarified by Henderson v. Adams, No. 115CV00220TWPMJD, 2016 WL 749247, at *4 (S.D. Ind. Dec. 30, 2016) (ruling applies whether or not anonymous sperm donor employed; marital presumption here is rebuttable under "same methods" as used when husbands seek rebuttal).

10. Neither intrastate nor interstate differences in parentage issues beyond defining parents for childcare purposes are significantly addressed herein. There are important interstate differences on who is the parent for such other purposes as adoption participation, child support, and inheritance. *See, e.g.*, Paula A. Monopoli, *Inheritance Law and the Marital Presumption After* Obergefell, 8 EST. PLAN. AND COMMUNITY PROP. L.J. 437 (2016) (arguing

II. FOSTERING INTERSTATE INEQUALITY ON CHILDCARE PARENTAGE

Equal parental childcare rights across the country have never been demanded by the U.S. Supreme Court, whether parentage occurs in or outside of marriage. And equal parental childcare rights will not soon be demanded, notwithstanding the same-sex marriage equality ruling. However, equal parental childcare rights within individual states are required. Yet it is commonplace for intrastate inequalities to go unrecognized.

Unlike other federal constitutional rightsholders,[11] a parent with the federal constitutional right to exercise "care, custody, and control" over a child is subject to significant, though not exclusive, state definitional lawmaking. While federal constitutional childcaring parents may be defined by state constitutional law precedents, more often the definitions arise from state statutes and their case precedents or from state court precedents untethered to statutes.[12] The balance between state legislative and untethered judicial authority over federal constitutional childcare parentage definitions varies interstate,[13] as well as intrastate depending upon how childcare parentage is established.[14] At times, whether by statutes or precedents, childcare parentage is defined, inter alia, by

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Obergefell mandates extension of current marital parentage presumptions to same-sex, nonbirth/nongenetic spouses in inheritance law). There are important, possibly troublesome, differences in the applications of these definitions in childcare settings. *See, e.g.*, Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331 (2016) (advocating prohibitions on discrimination against nongenetic contributors involving children born of assisted reproduction).

11. Outside of parental childcare, other federal constitutional rights holders are generally uniform across state borders. The criminally accused, whose rights include effective assistance of counsel, jury trial, and speedy trial, do not vary widely interstate. U.S. CONST. amend. VI. *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial right applies in state criminal cases). Nor do religious practitioners. U.S. CONST. amend. 1, as read in Cantwell v. Connecticut, 310 U.S. 296 (1940) (like Congress, states may not enact laws prohibiting the free exercise of religion). Nor do those subject only to reasonable searches. U.S. CONST. amend. IV, as read in Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applicable in state criminal case).

12. *See, e.g.*, Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752-63 (2013) [hereinafter *Parentage Law (R)Evolution*] (overview of statutory and common law developments).

13. *See, e.g.*, Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479 (2013) [hereinafter *State Lawmaking*] (reviewing concerns by judges with separation of powers limits on judicial lawmaking involving matters of childcare parentage).

14. *E.g.*, consider that in some states the marital parentage presumptions are established by statute, while nonmarital parentage presumptions (as by developing a parental-like relationship and holding out a child as one's own) are established through common law. *See e.g.*, N.Y. DOM. REL. LAW § 24.1 (McKinney 2017) ("effect of marriage on legitimacy of children") and Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490, 493 (N.Y. 2016) (child custody statute outside of marriage uses term "parent," which is left "to be defined by the courts"; statute is now read to include one who "agreed to conceive a child and to raise the child together" with the birth mother though one is neither a biological or adoptive parent).

actual biological ties; imagined, but not actual, biological ties (as with marital paternity presumptions); contracts; and/or earlier parental-like acts.

Broad state lawmaking discretion on defining who are childcare parents under the federal constitution emanates from three major U.S. Supreme Court precedents. In *Lehr v. Robertson*, 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.[15] The adoption was pursued by the mother's new husband. The Court recognized that state lawmakers could vary their standards on denying such a father any participation rights. While the Court recognized that the "intangible fibers that connect parent and child" through biology "are sufficiently vital to merit constitutional protection in appropriate cases," it concluded that in "the vast majority of cases, state law determines the final outcome" when resolving "the legal problems arising from the parent-child relationship."[16] Before and since *Lehr*, American states have varied widely on what participation rights of unwed biological fathers arise in formal adoption proceedings.[17]

Another precedent is *Michael H. v. Gerald D.*, where an unwed biological father of a child born of sex to a married woman sought to undo a state law favoring a presumption of paternity in the husband.[18] The Court ruled that California could deny, as it then wished, the biological father any opportunity interest in establishing childcare parentage where the married couple wished to remain an intact nuclear family.[19] While California public policy has since changed,[20] in Pennsylvania a comparable biological father can still be thwarted in pursuing legal parentage at least by an intact nuclear family.[21] Both before and

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

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

17. *See, e.g.*, Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. AND FAM. STUD. 223 (2003) (critically reviewing state laws) and Comment, Kimberly Barton, *Who's Your Daddy?: State Adoption Statutes and the Unknown Biological Father*, 32 CAP. U. L. REV. 113 (2003) (suggesting better ways to notify biological fathers when their children are placed for adoption).

18. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

19. *Id.* at 129 (Scalia, J., plurality opinion). The ruling was applied against a biological father who had "an established parental relationship." *Id.* at 123.

20. CAL. FAM. CODE § 7541(a) (Deering 2017) (rebutted with "evidence based on blood tests").

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

since *Michael H.*, American states have varied widely on the norms for disestablishing marital paternity, and more recently marital maternity, parentage presumptions.[22]

The third precedent is *Troxel v. Granville*, where the attributes of parental childcare rights were at issue, not who had such rights.[23] In *Troxel*, grandparents sought a court order on grandparent-grandchild visits over parental objections.[24] In limiting judicial opportunity to override parental desires, a few opinions of a splintered Court recognized broad state lawmaking discretion in defining childcare parentage. There was mention not only of child visitation laws benefitting third parties (i.e., nonparents) via "gradations,"[25] but also of possible "de facto" parenthood,[26] a parentage establishment norm involving neither biological ties nor formal adoption.[27] Before and since *Troxel*, American state statutory and common law childcare parentage have varied widely in their definitions of de facto (and comparable nonbiological and nonadoptive) parents possessing federal constitutional childcare interests.[28]

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22. *See, e.g.*, June Carbone & Naomi Cahn, *Marriage, Parentage and Child Support*, 45 FAM. L. Q. 219 (2011);
Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 345 n.1 (Iowa 2013). Recently, marital parentage presumptions in childcare settings have been applied by some courts to lesbian spouses of birth mothers, at times even where the statutes speak explicitly of husbands and presumed biological ties. *See, e.g.*, McGlaughlin v. Jones, 2017 WL 4126939 (Ariz. 2017); McGlaughlin v. Jones, 401 P.3d 492 (Ariz. 2017); In re D.S., 207 Cal. App. 4th Supp. 1088, 1097-98 (Cal. Ct. App. 2012); Henderson v. Adams, 209 F. Supp. 3d 1059, 1079 (S.D. Ind. 2016); TEX. FAM. CODE ANN. §§ 160.106, .201(b), .204 (Vernon 2001) (presumed paternity laws for men apply as well to women); Chatterjee v. King, 280 P.3d 283, 285 (N.M. 2012) (former lesbian partner can be a presumed parent under statute speaking to the natural fatherhood of a "man"); In re Guardianship of Madelyn B., 98 A.3d 494, 502 (N.H. 2014) (presumed "father" statute applied equally to a woman). *See also* Torres v. Seemeyer, 207 F. Supp. 3d 905, 914 (W.D. Wis. 2016) ("husband" in birth certificate statute should be construed to mean "spouse" so that same sex and opposite sex married couples would be similarly treated).

23. Troxel v. Granville, 530 U.S. 57, 60 (2000). An earlier U.S. Supreme Court precedent in a case involving a childcare dispute between a parent and a grandparent had suggested there could be no federal law on establishing parental rights. *Ex Parte* Burrus, 136 U.S. 586, 594 (1890) ("As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction.").

24. Troxel, 530 U.S. at 61.

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

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

27. *See, e.g.*, D.C. CODE § 16-831.01(1) (2001) (single parent's "agreement" and residency in same household can establish a "de facto parent"); Del. Code tit, 13, 8-201(c) (exercise of "parental responsibility 'with' support and consent of the child's parent").

28. *See, e.g.*, Jeffrey A. Parness, *Parentage Law (R)Evolution*, *supra* note 11, at 752-763. Of course, there can be additional state constitutional law protections of parental childcare. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (state constitutional right to privacy in parenting decisions); Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1991) (state constitution has "a strong history of providing protection" to parentage based on

While state lawmakers have broad leeway, their discretion to define federal constitutional childcare parents is not boundless. A few U.S. Supreme Court precedents do limit state definitional authority. Thus, all women who bear children as a result of sex are parents at birth and thus have federally-protected childcare rights.[29] However, not all men who, via sex, impregnate women who later bear children have such rights. Men who impregnate by sex unmarried women only have a federally-protected opportunity interest in establishing parenthood in order to be heard later on childcare, with the establishment requisites largely left to state lawmakers.[30] Men who impregnant by sex married women may be denied by a state any childcare opportunity interest.[31] The requirements for seizing federal constitutional childcare parent opportunities vary significantly interstate.[32]

III. ACTUAL INTERSTATE INEQUALITIES ON CHILDCARE PARENTAGE

The broad leeway afforded to state lawmakers by the U.S. Supreme Court to define federal constitutional childcare parents has resulted in significant interstate variations in both parentage establishment and parentage disestablishment norms.[33]

Parentage establishment norms go by varying terms, including not only de facto parent, but also equitable adoption, presumed parent, and parent by estoppel.[34] The major requisites for establishment vary widely interstate, both

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biological ties). Challenges to certain interstate differentiations have been shunned by the U.S. Supreme Court. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 178-79 (Wash. 2005) (recognizing common law de facto parentage in former unwed lesbian partner of unwed birth mother, where birth mother later married the semen donor who aided in the assisted reproduction birth), *cert. filed.*, Britain v. Carvin, 2006 WL 263544 (U.S.) (urging that state de facto parentage laws in 18 states wrongly construe Troxel), *cert. denied*, 547 U.S. 1143 (2006); Amy G. v. M.W., 47 Cal. Rptr. 3d 297, 308 (Cal. Ct. App. 2006) (no equal protection violation in state laws that protect families raising wife's extramarital child, but not families raising husband's extramarital child), *cert. filed*, Amy G. v. M.W., 2007 WL 683955 (U.S.) (arguing equality necessary), *cert. denied*, 550 U.S. 934 (2007).

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

30. Lehr v. Robertson, 463 U.S. 248, 256 (1983), (in most cases state laws determine who has standing to assert possible child custody or visitation; "rules governing . . . child custody . . . vary from state to state").

31. Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (under certain circumstances, biological father has no parental childcare interest even if he had earlier established a "paternal relationship").

32. *See, e.g.*, Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J. L. & PUB. POL'Y 1031, 1057–68 (2002) (variations in state uses of putative father registries in adoption cases involving required notices to and participation by unwed biological fathers who door may seek to childcare).

33. Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 1002 (2016) (critiquing U.S. Supreme Court deference to state lawmakers on who are federal constitutional childcare parents).

34. *See, e.g.*, Jeffrey A. Parness, *Parentage Law (R)Evolution*, *supra* note 11, at 752-63.

by lawmaker and by content.[35] Similarly, state lawmakers use different terms for parentage disestablishment, including rebuttal, rescission and challenge, usually depending on how parentage was established.[36] Again, as well, there are widespread and significant interstate variations in lawmakers and in content.[37]

The U.S. Supreme Court has the power to craft definitions of federal constitutional childcare parents.[38] With state terminations of established federal constitutional parental childcare interests, the high court has already set significant uniform constitutional norms.[39] It cannot be that federal constitutional childcare rightsholders necessarily must be left to state law definitions (e.g., per the Tenth Amendment reservation of rights), especially since other, very personal, familial privacy rightsholders, as with the abortion,[40] contraception,[41] sexual conduct,[42] and marriage,[43] have been substantially federalized through U.S. Supreme Court precedents.[44]

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35. *See, e.g.*, Jeffrey A. Parness, *State Lawmaking*, *supra* note 12, at 495-504 (reviewing differing approaches by state courts to the roles of legislators and judges in establishing state childcare parentage norms); Jeffrey A. Parness, *Parentage Law (R)Evolution*, *supra* note 11, at 752-63 (reviewing differing contents of state childcare parentage norms).

36. Marital paternity presumptions are typically subject to rebuttal, a term employed in the much-followed Uniform Parentage Act. *See, e.g.*, UNIF. PARENTAGE ACT § 4(b) (UNIF. LAW COMMISSIONERS 1973) (paternity presumption may be rebutted by clear and convincing evidence); UNIF. PARENTAGE ACT § 204(b) (NAT'L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS 2002) (paternity presumption may be rebutted only by an adjudication). Voluntary paternity acknowledgments [hereinafter VPAs] are subject to rescission (before 60 days) and challenge by contest (after 60 days), norms are driven by federal welfare subsidy policies found in 42 U.S.C. 666(a)(5)(D).

37. For the differing American state laws on rebutting marital parentage presumptions, *see, e.g.*, June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-*Obergefell, 84 UMKC L. REV. 663, 665-67 (2016) [hereinafter *Marital Presumption Post-*Obergefell] ("three distinct categories" to marital parentage presumption and its rebuttal). For the differing American state laws on rescinding (within 60 days) and challenging (after 60 days) voluntary paternity acknowledgments, *see, e.g.*, Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHICAGO-KENT L. REV. 177 (2017) [hereinafter *Challenging Voluntary Acknowledgments*]. These rebuttal and rescission laws are chiefly statutory with little room for judicial discretion. The VPA challenge norms are guided by rather vague statutes, with much room for judicial discretion (and with significant interstate variations though all rulings are limited initially by the congressional norm of "fraud duress, or material mistake of fact"). *See id.* at 185-203.

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

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

40. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

41. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

42. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

43. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

44. Granted, not all federal constitutional childcare rights holders have been explicitly deemed subject to state law definitions. To date, the U.S. Supreme Court has not directly addressed childcare rights when children are born of assisted reproduction. *See, e.g.*, Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22 (2015) (argues

Nevertheless, for now and into the forseeable future, the definitions of those eligible to maintain federal constitutional childcare parenthood are substantially left to state lawmakers. This has led to very different approaches to who, within state government, define parents[45] and how federal constitutional childcare parents are defined.[46] There is very little opportunity, due to federalism principles, for the U.S. Supreme Court to speak, via equality (and perhaps due process), to who within a state government should define childcare parentage, since in-state separation of powers are left to state constitutional and nonconstitutional norms. There is, at least, some opportunity for the Court to speak to how federal constitutional parents have been defined in any state. State law distinctions involving parental childcare must at least be rational, if not supported by somewhat more significant (if not compelling) reasons, per both federal and state constitutional equality principles.[47]

IV. LIMITS ON INTRASTATE INEQUALITIES ON CHILDCARE PARENTAGE

As to the definitions of childcare parents, what intrastate equality questions might soon arise for the U.S. Supreme Court, and for state courts, regarding nonmarital, nonbiological, nonadoptive childcare parents?[48] One such question

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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).

45. *Compare* Pitts v. Moore, 2014 ME 59, ¶¶ 18-19, 90 A.3d 1169, 1177 (2014) (plurality opinion) ("in absence of Legislative action in such an important and unsettled arena, we must provide some guidance"), *with* Moreau v. Sylvester, 2014 VT 31, ¶¶ 25-26, 95 A.3d 416, 424 (2014) ("the Legislature is better equipped").

46. Jeffrey A. Parness, *Parentage Law (R)Evolution*, *supra* note 11, at 752-763.

47. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 267 (state may not treat differently two parents who "are in fact similarly situated with regard to their relationship with the child"); Nguyen v. I.N.S., 533 U.S. 53, 60 (2001) (gender-based distinctions in childcare parentage laws must "at least" serve "important governmental objectives," with the discriminatory means employed "substantially related" to achieving these objectives). *See also* Symposium, *Is the Rational Basis Test Constitutional?*, 14 GEO. J. L. & PUB. POL'Y 347-575 (2016) (includes nine perspectives). State constitutional equality demands can require more significant governmental justifications for unequal treatment than federal constitutional equality demands. *See, e.g.*, Griego v. Oliver, 316 P. 3d 865, 880-81 (N.M. 2013) ("greater level of scrutiny" in gender discrimination cases than is required by the federal constitution).

48. Beyond childcare, there are other in-state distinctions in parental interests possibly subject to equal protection challenges. *See, e.g.*, Estate of Smith v. Smith Ex. Rel Rollins, 130 So. 3d 508 (Miss. 2014) (statutes differentiate parents regarding a child's interest in death benefit recoveries under wrongful death and worker's compensation laws); In re Scarlett Z.-D., 28 N.E.3d 776 (Ill. 2015) (statutes differentiate doctrine of equitable adoption parent in probate setting, where it is recognized, and childcare setting, where it is not); Brooke S.B. v. Elizabeth A.C.C., 61 N.E. 3d 488, 496 (acknowledging "the apparent tension in . . . decision to authorize parentage by estoppel in the support context . . . and yet deny it in the visitation and custody context"); Torres v. Seemeyer, 207 F. Supp. 3d 905, 914 (W.D. Wis. 2016) (there can be no distinctions between opposite sex and same sex couples seeking birth certificate recognitions); Seema Mohapatra, *Assisted Reproduction Inequality and Marriage Equality*, 92 CHICAGO-KENT L. REV. 87 (2017) (under Obergefell, challenging, under Obergefell, private insurers' distinctions in infertility coverage between married opposite sex and same sex

arises in formal adoption settings. *Lehr* permits states to deny childcare parent opportunities in an adoption setting to an unwed biological father who fails to form a "significant custodial, personal, or financial relationship" with his child.[49] Yet such denials within any state cannot irrationally distinguish between unwed biological fathers who comparably form such relationships. Thus, in formal adoption proceedings, states should not be able to differentiate between an unwed biological father who signed a putative father registry and an unwed biological father who filed a paternity action, each before formal adoption proceedings were completed.[50] Any such difference amount to the "sheerest formalism."[51]

Comparably, state laws cannot irrationally distinguish between those achieving de facto (or similar) parental childcare status in adoption proceedings (where any other parental rights have been terminated), as well as in custody disputes with other parents.[52]

While *Michael H.* permits states to recognize childcare parentage in the male spouses (via presumptive paternity) of parental caretaking women who bear children, such recognitions within any state cannot differently treat male and female spouses of birth mothers. Now, both men and women can, in assisted reproduction settings, provide the genetic material prompting births to their

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couples).

49. Lehr, 463 U.S. at 267-68.

50. *But see* In the Matter of the Adoption of Jessica "XX," 434 N.Y.S.2d 772 (App. Div. 1980) (commencement of a paternity action by biological father did not give him any right to receive notice of the adoption proceeding when he had not also filed with putative father registry), affirmed in Lehr, 463 U.S. at 267-68. *See also* Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002) (biological father's substantial compliance with a statutory putative father registration law was insufficient to preserve his childcare interests in adoption proceeding). If not by federal constitutional equality, such a differentiation should fall under state constitutional equality demands. *See, e.g.*, Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773 (2009-2010) (reviewing American state constitutional equality norms). *See also* Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After* Lehr *and* Michael H., 43 U. TOL. L. REV. 225, 244 (2012) ("over twenty five years have passed since Lehr. The 'sheerest formalism' and maternal choice continue to thwart many genetic fathers seeking legal fatherhood in adoptions."). Some in Lehr did find Equal Protection difficulties in statutory distinctions between birth mothers of nonmarital children and biological fathers "who have made themselves known." Lehr, 463 U.S. at 275 (White, J., dissenting, joined by Marshall, J. and Blackmun, J.).

51. Lehr, 463 U.S. at 275 (White, J. dissenting).

52. Distinctions, if any, should favor new de facto parents in adoption proceedings as there they may only be adverse to strangers with no biological ties seeking to adopt. *But see* Navarette v. Creech, 2016 Ark. App. 414, 501 S.W.3d 871 (Ct. App.) (maternal grandmother, who was assumed to stand "in loco parentis," has no ability under statute to challenge the adoption of her granddaughter by the mother's probation officer); Daniel v. Spivey, 2012 Ark. 39, ¶ 5, 386 S.W. 3d 424, 428 ("A person who stands in loco parentis to a child puts himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to a legal adoption.") (employed in a custody dispute between a biological parent and a nonparent who then achieved "in loco parentis" status); Winn v. Bonds, 2013 Ark. App. 147, 426 S.W.3d 535 (Ct. App. 2013) (former stepgrandmother secured custody).

mates. Both male and female spouses can have adultery result in childbirth to their female partners. If lack of genetic ties within a state does not foreclose a marital paternity presumption, it should not foreclose a marital maternity presumption.[53]

A different equality issue arises where state laws treat differently the spouses in settings where children are born of sex and children are born of assisted reproduction.[54] Equality issues, albeit perhaps even more difficult, also can arise when married women, as surrogates, bear children born of assisted reproduction where the laws distinguish between their spouses who do or do not consent to the surrogacy contract.[55] Maybe here marital parentage presumption in the birth mother's spouse can be denied though it arises in other birth settings, as where adultery prompts birth, since only here are there intended parents outside the marriage wherein the birth occurs.

Equality issues could be raised by one same sex spouse regarding the lack of an opportunity to adopt, or the lack of a marital parentage presumption, when the other spouse adopts a child.[56]

As noted, some justices in *Troxel* suggested there can be de facto parents under state laws that are based on parental conduct occurring sometime after birth. Such recognitions within any state cannot unduly deny equality to all who

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53. *See supra*, note 21 for supporting cases. Illustrative of differences in statutory language are the provisions in ALA. CODE § 26-17-204 (2008) ("presumption of paternity"), ARIZ. REV. STAT. ANN. § 25-814 (2015) ("presumption of paternity"), LA. CIV. CODE. ANN. art. 185 (2005) ("husband" is presumed "father"), the provisions in 750 ILL. COMP. STAT. ANN. 46/204(a)(1)(2) (West 2017) ("a person is presumed to be a parent of a child" if married to, or in a substantially similar relationship with, the birth mother, except in a gestational surrogacy contract setting), and D.C. Code Ann. § 16-909(a)(1)(2) (West 2016) (similar). *See generally* Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & L. 591 (2012).

54. *Compare* KAN. STAT. ANN. § 23-2208 (a)(1) (West 2011) (man is presumed father of child born to his wife "during the marriage"), *with* KAN. STAT. ANN. § 23-2302 (West 2017) (child born of an assisted reproduction technique to wife is considered "a naturally conceived child of the husband" only if husband consents to the "use of such technique"). These statutes raise the question of why spousal parentage should depend on consent to assisted reproduction when it does not depend on consent to adultery. *See also In re* Scarlett Z.-D., 28 N.E.3d 776, at ¶ 67 (equitable parent doctrine for one not necessarily a spouse operates in childcare settings arising from birth via artificial insemination, but not adoption (or birth via sex)).

55. *See, e.g.*, TEX. FAM. CODE ANN. § 160.754 (West 2014) (stating gestational agreement requires husband of "prospective gestational mother" to enter into an agreement relinquishing "all parental rights") (absence of such agreement might prompt a marital parentage presumption in the husband, per TEX. FAM. CODE ANN. § 160.204 (West 2014)). Why should the husband, for example, be a childcare father when his wife, via assisted reproduction, delivers a child employing the genetic material of her sister and her sister's husband where the sisters and the nonbirth mother's husband all intended the birth mother to only be an aunt to the child? Seemingly, the absence of consent by the birth mother's husband might be treated differently where his sperm was employed to prompt the pregnancy.

56. *See, e.g.*, *In re* Marriage of Doty-Perez, 388 P.3d 9 (Ariz. Ct. App. 2016) (denying parental status to same sex partner, who was an intended parent at the time of adoption but was foreclosed from formally adopting).

substantially meet the state de facto parent norms.[57] Some courts have already found irrational distinctions in state laws that distinguish between men and women who comparably reside with, and provide support for, children theretofore in the custody of a single legal parent.[58]

A more difficult equality (and due process) question arises when states distinguish between residing and supporting men and women. For example, can states distinguish between children then already having two parents and children then having only one parent under law?[59]

Postbirth (and occasionally prebirth) conduct prompting childcare parentage can also originate in written parentage acknowledgments filed with the state. Equality demands may permit a single state's distinction in allowing acknowledgments by nonbirth mothers and fathers having genetic ties, and not allowing acknowledgments by nonbirth mothers and fathers each having no genetic ties.[60] Yet equality demands may invalidate intrastate distinctions between acknowledging men and women with actual genetic ties, like when men

57. The norms are viewed in Jeffrey A. Parness, *Law (R)Evolution*, *supra* note 11, at 752-63.

58. Thus, while some state statutes explicitly deem only a man is a "presumed parent" if he resides in the same household with a mother and her child and holds out the child as one's own, state courts have read comparable marital paternity presumption statutes to recognize a female as a parent. *In Re* D.S., 143 Cal. Rptr. 3d 918, 926 (Cal. Ct. App. 2012); Henderson v. Adams, 209 F. Supp. 3d 1059, 1079 (S.D.Ind. 2016). Consider also the legitimacy of the differing treatment of de facto parents (and their children) in the Michigan interstate succession law that distinguishes parenthood by when parental-like acts began or ended. MICH. COMP. LAWS § 700.2114(c)(iii) (2002) ("a man is considered to be the child's natural father for purposes of intestate succession" if the "man and the child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either"). Consider a California statute on presumed parentage for a nonbiological parent that distinguished between one who did or did not ever live with the child. *In re* Jerry P., 116 Cal. Rptr. 2d 123, 132-38 (Cal. Ct. App. 2002) (such a distinction violates due process and equal protection guarantees as it allows a biological parent and others to thwart otherwise established presumed parentage).

59. *See, e.g.*, Bancroft v. Jameson, 19 A.3d 730 (Del. Fam. Ct. 2010) (recognizing a new third parent would unduly interfere with the federal constitutional childcare interests of two existing parents). *Compare* A.L. v. D.L., No. 12–07390, 2012 WL 6765564 (Del. Fam. Ct. Sept. 19, 2012) (Delaware General Assembly contemplated 3 possible parents), *and* CAL. FAM. CODE § 7612(c) (recognizing there can sometimes be a third parent where two existing parents retain their childcare rights), *with In re* Brooke S.B., 61 N.E.3d 488, 493 n.3 (N.Y. 2016) (statute "clearly limits a child to two parents, and no more than two, at any given time").

60. *See, e.g.*, Jeffrey A. Parness & David A. Saxe, *Challenging Voluntary Acknowledgments*, *supra* note 36, 181-82 n.19 (reviewing the differing American state approaches to possible and actual genetic ties underlying voluntary parentage acknowledgments).

in consensual sex settings can acknowledge while women in surrogacy[61] and nonsurrogacy[62] assisted reproduction settings cannot acknowledge.

Equality demands may invalidate intrastate distinctions between men with actual genetic ties, like when men in consensual sex settings can voluntarily acknowledge parentage (VAP) while men in assisted reproduction settings cannot comparably acknowledge. VAPs, and comparable declarations of intended parentage for intended parents with no biological ties, are particularly important to those seeking parental status. VAPs and similar declarations are easily and inexpensively undertaken, employing forms that are filed with no court proceedings (and no lawyers) necessary.[63]

Further, equality demands may foreclose certain intrastate distinctions between married and unmarried couples desiring childcare parentage status in assisted reproduction setting where surrogates are not employed.[64] As well, certain intrastate distinctions in assisted reproduction settings involving married couples seem dubious when dependent upon a particular form of consent,[65] when

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61. *See, e.g.*, Frank G. v. Renee P.-F., 142 A.D.3d 928 (N.Y. App. Div. 2016) (male domestic partners arranged surrogate childbirth to a sister of one of the partners whose mate donated the sperm; upon end of domestic partnerships, both partners recognized as having custodial interests though neither could have signed an acknowledgement). Query whether the nondonor was a biological parent per a marital or marriage-like parentage presumption.

62. *See, e.g.*, Jeffrey A. Parness & David A. Saxe, *Challenging Voluntary Acknowledgments*, *supra* note 36, 207-08 (suggesting new voluntary parentage acknowledgments, going beyond federal statutory voluntary paternity acknowledgments, to include "same sex female couples, who each share some physical ties to the child (i.e., one woman donates ova and another bears the child)"); Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 467 (2012) (similar).

63. *See, e.g.*, Jeffrey A. Parness, *Formal Declaration of Intended Childcare Parents*, 92 NOTRE DAME L. REV. ONLINE 87, 101-04 (2017) (urging use of acknowledgement forms by men and women involved in assisted reproduction births, though the forms would be distinct from those employed by men in consensual sex births).

64. *Compare*, *e.g.*, 750 ILL. COMP. STAT. ANN. 40/3(a) (West 2009) ("husband and wife" acting under "supervision of licensed physician"), *with* N.D. CENT. CODE § 14-20-62(1) (2009) ("consent by a woman and a man who intends to be a parent"), *and* WYO. STAT. ANN. § 14-2-904(a) (2013) ("Consent by a woman and a man who intends to be the parent of a child born to the woman by assisted reproduction . . . .").

65. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 40/3(a) (West 2009) (to be treated as a natural father under law, husband must consent "in writing" when his wife delivers a child born via "semen donated by a man not her husband"). No consent at all is needed by a husband who is a "presumed" parent when his wife bears a child resulting from adulterous sex (even if unknown to the husband). 750 ILL. COMP. STAT. ANN. 46/204(a) (West 2009 & Supp. 2017). The North Dakota statute on assisted reproduction births (to both married and unmarried couples) comparably requires signed consents, but indicates a failure of such consent "does not preclude a finding of paternity" where the birth mother and man (not the semen donor) resided together and held

several forms of consent comparably prompt only voluntary and informed assents.

Equality demands may prohibit distinctions in surrogacy settings, as between wed and unwed couples,[66] as well as between a couple and an individual who employ a surrogate.[67] Equality demands may also disallow distinctions between those employing surrogates who do or do not contribute their own genetic materials to the pregnancies.[68] Finally, equality demands should bar differences between a couple and a single woman who employ nonsurrogacy assisted reproduction.[69]

V. CONCLUSION

Per *Obergefell v. Hodges*, there is now interstate equality in the marriage opportunities for all couples.[70] Commentators are just now beginning to ponder the importance of *Obergefell* for interstate equality for all seeking childcare parent status. Yet, for now, U.S. Supreme Court precedents generally do not demand interstate childcare parentage equality. However, the precedents do demand certain intrastate parentage equalities. Federal constitutional challenges

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the child out as their own for "the first two years of the child's life." N.D. CENT. CODE § 14-20-62 (2009). *See also* TEX. FAM. CODE ANN. §160.704(b) (West 2014) (failure of husband to sign a consent does not preclude his parentage if husband and wife "openly treated the child as their own"). Some precedents disregard the statutory "writing" requirement as long as there is evidence of consent. *See, e.g.*, *In re* Baby Doe, 353 S.E.2d 877, 878-79 (S.C. 1987).

66. As to wed and unwed couples in surrogacy settings, compare *e.g.*, FLA. STAT. ANN. § 742.13(2) (West 2010) ("commissioning couple," means "the intended mother and father"); UTAH CODE ANN. § 78B-15-801(3) (LexisNexis 2012) ("intended parents shall be married"); and TEX. FAM. CODE ANN. § 160.754(b) (West 2014) (in authorized gestational agreement, "intended parents must be married to each other"). *See also Nonmarriage Inequality*, *supra* note 2, 1254-55 (Obergefell "furnishes little basis" for challenging surrogacy statutes limited to married couples).

67. As to couples and individuals in surrogacy settings, *compare*, N.H. REV. STAT. ANN. § 168-B.7 (LexisNexis 2010 & Supp. 2014) ("gestational carrier agreement" for "the intended parent or parents"), *and*
ARK. CODE ANN. § 9-10-201(c)(1) (2009) (unwed biological father of child born to surrogate with no mention of a second intended parent), *with* UTAH CODE ANN. § 78B-15-801(3) (LexisNexis 2012) ("intended parents shall be married"), *and* FLA. STAT. ANN. § 742.13(2) (West 2010) ("commissioning couple" to surrogacy pact).

68. As to intended parents via surrogacy who do or do not contribute genetic materials, *compare*, N.H. REV. STAT. ANN. § 168-B.8 (2010) (no express requirement for any intended parent to be a donor), *and* UTAH CODE ANN. § 78B-15-801(3), (5) (LexisNexis 2012) (intended parents should be married, with least one having donated "egg or sperm"), *with* N.D. CENT. CODE § 30.1-04-20(1)(d) (2010) ("intended parent" need not have "a genetic relationship").

69. Intentions on parentage should be respected for all. On the availability of nonsurrogacy assisted reproduction opportunities for both couples and for single women, *see, e.g.*, CAL. FAM. CODE § 7613.5 (West 2013 & Supp. 2015).

70. As yet, interstate equality in the marriage opportunities for three or more humans is not demanded. For a discussion of how the pre-Obergefell same sex marriage equality precedents impact those advocating a freedom to undertake a polyamorous marriage, *see* Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J. OF L. & GENDER 269 (2015).

to intrastate inequalities should proliferate as new forms of childcare parentage are sought and as new forms of family relations proliferate.