

**AMERICAN CONSTITUTIONS AND ARTIFICIAL
INSEMINATION BIRTHS**

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I. INTRODUCTION

Childbirth can, of course, arise from sex. It can also arise from assisted reproduction,¹ which, to date, usually involves either “the introduction of semen . . . into a woman’s vagina, cervical canal or uterus through . . . artificial means,”² the process of artificial insemination (AI), or the introduction of a fertilized egg into a woman “using gametes” that are not the woman’s “own,” in the process of fertilized egg introduction (FEI).³ State laws generally govern childcare parentage in the United States for children born of sex, AI, or FEI,⁴ but there are some federal

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1. State law definitions of assisted reproduction can be problematically limited. *See, e.g.*, VA. CODE ANN. § 20-156 (West 2019) (“assisted reproduction means a pregnancy resulting from any intervening medical technology . . . which completely or partially replaces sexual intercourse as a means of conception.” The statute fails to account for do-it-yourself artificial insemination (as with a turkey baster).

2. IDAHO CODE § 39-540(1) (defining artificial insemination). Artificial insemination can involve a woman who intends to rear the child, or a woman who does not intend to rear the child, i.e., a genetic surrogate. UNIFORM PARENTAGE ACT § 701 (nonsurrogacy AI) & § 801(1) (surrogacy AI) (2017) (“2017 UPA”).

3. 2017 UPA § 801(2) (defining gestational surrogate as limited to a woman who does not intend to rear the child). *See also* VA. CODE ANN. § 20-156 (“gestational mother means the woman who gives birth to a child, regardless of her genetic relationship to the child”); VA. CODE ANN. § 20-158 (“gestational mother” is “the child’s mother under law unless she is a surrogate”).

4. This paper focuses on parentage interests in the “care, custody, and control” of AI children, interests that receive federal constitutional protections. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (while the children in *Troxel* were born of consensual sex, there is no good reason to treat AI children differently, especially as only in AI settings do the participants almost always intend pregnancy to follow). Parentage responsibilities, as with child support, that follow such births might differ in their

guidelines.⁵ The balance in state lawmaking between legislatures and courts for any particular form of birth varies interstate. The balance within a single state also often varies depending on the form of birth, including children born of sex, of nonsurrogacy AI, of nonsurrogacy FEI, of surrogacy AI (i.e., a genetic surrogate), or of surrogacy FEI (i.e., a gestational surrogate).

State parentage laws for children born of sex have changed in the last half century through recognitions of voluntary acknowledgment, residency/hold out, and de facto parent doctrines. State laws on children born of surrogacy pacts involving FEI have also evolved. Enforceable FEI surrogacy pacts provide an avenue to childcare parenthood for some while recognizing a waiver of childcare interests by others; here, guidelines usually require medical aid, and perhaps judicial oversight. At least for now, there are no do-it-yourselfers (DIY) undertaking FEI births. Pregnancy cannot be accomplished by following a YouTube video.

State laws on children born of nonsurrogacy and surrogacy AI have also evolved. As with surrogacy FEI births, these laws often speak of AI with medical oversight. But there can be, and have been, many DIY pregnancies. Thank you YouTube. To date there is no comprehensive constitutional, statutory, or common law guidance on parentage arising from AI births involving DIYers.

Childcare parentage issues arising from AI births are subject to constitutional guidance, including due process, equal protection, and privacy dictates. Constitutional rights, however, sometimes go unrecognized in AI laws, particularly for same sex couples, wed and unwed, as well as for single women. Upon a brief review of contemporary American state AI laws, current and future constitutional precedents are explored. Constitutional, as well as public policy, reforms are particularly needed for same-sex female couples and single women employing AI as intended parents.

II. CONTEMPORARY AI PARENTAGE LAWS

The significant variations in contemporary childcare parentage laws covering AI births are well illustrated by reviewing the Idaho Artificial Insemination Act (AIA) and the 2017 Uniform Parentage Act (UPA).

parenthood definitions. *See generally* Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 797-800 (2018).

5. The limited federal guidelines are reviewed in Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965 (2016).

Idaho laws, as well as some other state laws,⁶ follow the 1973 UPA on AI births, and are quite limited, leaving open significant constitutional questions. The 2017 UPA is more comprehensive, though it too prompts some questions.

A. Idaho Artificial Insemination Act

In Idaho there are no statutes or precedents on parentage for children born of surrogacy FEI or surrogacy AI.⁷ Nonsurrogacy AI births are addressed in statutes that contemplate parentage for the person giving birth and her husband.⁸ A 2021 Idaho Supreme Court decision, relying on the U.S. Supreme Court marriage equality dictate for same sex couples, deemed married lesbian couples were also governed by the statutes.⁹

Under the Idaho statutes, “only” licensed physicians and “persons under their supervision may select artificial insemination donors and perform artificial insemination.”¹⁰ The statutes cover only semen introduction involving a donor,¹¹ defined as a man who is not “the husband of the woman upon whom the artificial insemination is performed.”¹² Upon donor selection, AI “shall not be performed upon a woman without her prior written request and consent and the prior written request and consent of her husband.”¹³ Where the physician performing AI does not deliver a conceived child, “it is the duty of the mother and her husband” to give “notice” to that physician of the child’s birth.¹⁴ A child’s AI birth following such AI establishes the same “relationship, rights, and obligations” in the husband “as if the child had been naturally and legitimately conceived by the mother and the mother’s husband.”¹⁵ The Idaho AI statutes apply to “all persons conceived as a result of artificial

6. See, e.g., ALA. CODE § 26-17-704(a); MONT. CODE ANN. § 40-6-106(1); TEX. FAM. CODE § 160.704(a); MINN. STAT. § 257.56(1); COLO. REV. STAT. § 19-4-106(1); UTAH CODE ANN. § 78B-15-704.

7. See, e.g., *In re Doe*, 372 P.3d 1106 (Idaho 2016) (no judicial authority to declare parentage of a child born to gestational carrier in absence of statute); see also *Doe v. Doe*, 395 P.3d 1287 (Idaho 2017) (former unwed female partner has no legally recognized interest in a child born to her partner via AI).

8. IDAHO CODE § 39-5403(1).

9. *Gatsby v. Gatsby*, 495 P.3d 996, 1002-03 (Idaho 2021) (under *Obergefell v. Hodges*, 576 U.S. 644 (2015), which requires state recognitions of same-sex marriages, the Idaho AI statute applies to “opposite-sex and same-sex couples in the exact same manner”).

10. IDAHO CODE § 39-5402.

11. *Id.* § 39-5401(1).

12. *Id.* § 39-5401(2).

13. *Id.* § 39-5403(1).

14. *Id.* § 39-5403(2).

15. *Id.* § 39-5405(3).

insemination as defined” therein.¹⁶ It is a misdemeanor¹⁷ for any “person” to violate the statutory provisions on physician-only AI;¹⁸ on requests, consents and notices regarding AI birth;¹⁹ and, on donors.²⁰

B. 2017 Uniform Parentage Act

The 2017 UPA, implemented in some states,²¹ is far different in its approach to childcare parentage in AI births. It is also far more progressive than its 1973 or 2000 UPA counterparts.

1. Nonsurrogacy AI Births

As for nonsurrogacy AI births, the 1973 Uniform Parentage Act (UPA) only recognizes a limited form of assisted reproduction, which embodies an AI birth undertaken by a married, opposite sex couple who employed “a licensed physician” and “semen donated by a man” other than the husband.²² The donor here is always “treated in law as if he were not the natural father.”²³ The husband is only “treated in law as if he were the natural father” if insemination occurred “under the supervision of a licensed physician and with the consent” of the husband.²⁴ As noted, the Idaho statute is comparable.²⁵

The 2000 UPA expands parentage opportunities for those involved in births not arising from sex, speaking to “assisted reproduction” and not just AI.²⁶ It authorizes parentage for sperm donors and for nondonor men who consent to AI “with the intent to be the parent.”²⁷ Such men are

16. *Id.* § 39-5406 (except for judicial decrees entered before the effective date of the AI statutes, which were first enacted in 1982).

17. *Id.* § 39-5407.

18. *Id.* § 39-5402.

19. *Id.* § 39-5403.

20. *Id.* § 39-5404.

21. *See, e.g.*, R.I. GEN. LAWS §15-8-101; WASH. REV. CODE 26.26A.005. Where chiefly implemented, the 2017 UPA is not always strictly followed. *See, e.g.*, R.I. GEN. LAWS § 15-8.1-101 to 15-8.1-1004 (no paternity registry provision); WASH. REV. CODE § 26.26A.005–26.26A.904 (no paternity registry provision).

22. UNIFORM PATERNITY ACT § 5(a) (1973) (“1973 UPA”).

23. *Id.* § 5(b).

24. *Id.* § 5(a).

25. IDAHO CODE § 39-5402 (physicians and persons under their supervision); *Id.* §39-5403(1) (husband and wife must request and consent).

26. The 2000 UPA defines assisted reproduction as involving “pregnancy” other than by sexual intercourse, including pregnancy by intrauterine insemination, donation of eggs, donation of embryos, IVF and transfer of embryos, and intracytoplasmic sperm injection. UNIFORM PATERNITY ACT § 102(4) (2000) (“2000 UPA”).

27. 2000 UPA § 703-704 (consent “must be in a record” and signed by the man and the woman to receive AI).

expecting legal parents whose parentage arises when children are born.²⁸ The “husband” of a “wife” who gives birth via AI has limited opportunities to “challenge his paternity.”²⁹ The 2000 UPA is generally followed in some states,³⁰ though some of its proposed laws are subject to significant challenges.³¹

The 2017 UPA further expands parentage opportunities in nonsurrogacy AI settings. That act is “substantially similar” to the 2000 UPA, but is updated to apply “equally to same-sex couples.”³² Thus, an “individual” who consents to “assisted reproduction by a woman, with the intent to be a parent of a child conceived by the assisted reproduction,” is a parent of the child.³³ With a nonsurrogacy AI birth having no such consenting individual, the spouse of the person giving birth has limited opportunities to challenge the spouse’s parentage.³⁴

For there to be two legal parents at birth for a nonsurrogacy AI child, the 2017 UPA requires that the consent to parentage be signed “in a record” by the person giving birth and “an individual who intends to be a parent,” though the “record” need not be certified by a physician.³⁵ Seemingly, “consent in a record” can be undertaken “before, on, or after birth of the child.”³⁶ A lack of such consent does not foreclose, however, childcare parentage for an intended parent where there is clear-and-convincing evidence of an “express agreement” between the individual and the person giving birth “entered before conception.”³⁷ As well, a lack

28. *Id.* § 703 (“a parent of the resulting child”).

29. *Id.* § 705. One opportunity involves a lack of consent, “before or after birth of the child,” shown in a proceeding brought “within two years after learning of the birth.” *Id.* § 705(a). Another opportunity involves a challenge at any time where there was either no sperm donation or no consent; no cohabitation “since the probable time of assisted reproduction;” and no open hold out of the child as one’s own. *Id.* § 705(b).

30. *See, e.g.*, 13 DEL. CODE § 8-703(a); WYO. STAT. ANN. § 14-2-903.

31. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE LAW J. 2260 (2017) (with useful charts and citations on American state assisted reproduction laws).

32. 2017 UPA, Art. 7, cmt.

33. 2017 UPA § 703(a).

34. *Id.* § 705(a) (spouse “at the time of the child’s birth”).

35. *Id.* § 704(a). *Compare* CAL. FAM. CODE § 7613(a)(1) (“consent shall be in writing”) and § 7613(a)(2) (intended parent by pre-conception “oral agreement” is shown by clear and convincing evidence).

36. 2017 UPA § 704(b).

37. *Id.* § 704(b)(1). It may be sensible that an “express agreement” undertaken postconception does not prompt comparable childcare parentage. Here, there is much greater certainty that a child will be born so that an agreement is far less speculative. Perhaps instead of a postconception but prebirth agreement, the 2017 UPA contemplated a postconception but prebirth VAP, as it recognizes an “intended parent” can sign a VAP. Yet, an “intended parent” in many states has no prebirth VAP access where there is followed the 1973 UPA or 2000 UPA which only authorize postbirth (paternity) VAPs. 1973 UPA § 4(b) (“paternity” acknowledgment “of the child” in a “writing filed with” the

of consent in a record and a lack of an express agreement does not foreclose an individual's parentage where the child was held out as the individual's own in the child's first two years.³⁸ The nonparental status of one married to a person giving birth to a nonsurrogacy AI child, even if a gamete donor, may be established by a showing of a lack of consent, a lack of any agreement, or a lack of any holding out of the child as one's own.³⁹

As noted, the nonsurrogacy AI parentage norms in each of the UPAs are now reflected in state statutes.⁴⁰ Further, there are state common law precedents untethered to statutes that are similar to the UPA provisions.⁴¹ There are significant interstate variations.⁴²

So, childcare parentage for those giving birth and for intended parents in nonsurrogacy AI settings can arise from express consents. There could be, but there generally are no, state forms guiding, if not mandating, usage. In California in nonsurrogacy AI settings, there are statutorily-recommended consent forms that may be used, but are not required.⁴³

state, which is not disputed by "the mother"); 2000 UPA § 301 ("man claiming to be the genetic father of the child" signs together with the "mother of a child").

38. 2017 UPA § 704(b)(2).

39. *Id.* § 705.

40. American state statutes include: TEX. FAM. CODE § 160.7031 (fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the physician); N.H. REV. STAT. § 5-C:30(I)(b) (unwed mother has sperm donor "identified on birth record" where "an affidavit of paternity" has been executed); 13 DEL. CODE § 8-704(a) ("Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man."); WYO. STAT. § 14-2-904(a) (like Delaware); N.M. STAT. ANN. § 40-11A-703 ("A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 704 ["record signed . . . before the placement"] . . . with the intent to be the parent of a child is a parent of the resulting child").

41. Precedents include: *Shineovich v. Shineovich*, 214 P.3d 29 (Or. App. 2009) (to avoid constitutional infirmity, assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners); *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789 (Cal. App. 2d 2014)(though the statute (both pre-2011 and post-2011) indicated explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one's own natural child can support—in certain circumstances—legal paternity for the semen donor); *Ramey v. Sutton*, 362 P.3d 217 (Ok. 2015) (unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E. 3d 488 (N.Y. 2016) (agreement between lesbian partners can prompt parentage in non-birth mother).

42. The nonsurrogacy AI laws are reviewed and critiqued, in Deborah H. Forman, *Exploring the Boundaries of Families Created with Known Sperm Donors: Who's In and Who's Out?*, 19 PENN. J. L. & SOC. CHANGE 41 (2016).

43. CAL. FAM. CODE § 7613.5(d) (forms on assisted reproduction pacts by two married or by two unmarried people, where signatories may or may not have used their own genetic material to

As noted, the 2017 UPA recognizes nonsurrogacy AI parentage where there is no consent “in a record” if there is either an express agreement on intended parenthood or there is actual residency/hold out parental-like conduct in the child’s first two years.⁴⁴ Perhaps as well, one can attain nonsurrogacy AI parenthood by establishing de facto parentage, which requires no residency with the child in the child’s first two years.⁴⁵

2. Surrogacy AI Births

As for surrogacy AI births, the 1973 UPA only speaks to AI involving a wife, her nondonor husband, and a semen donor who is treated “as if he were not the natural father.”⁴⁶ A comment declares the act “does not deal with many complex, and serious legal problems raised by the practice of artificial insemination.”⁴⁷

The 2000 UPA, by contrast, has separate articles on children of assisted reproduction and children of gestational agreements.⁴⁸ The article on assisted reproduction does not apply to a birth “as the result of a gestational agreement.”⁴⁹ Such an agreement, “whether in a record or not, that is not judicially validated is not enforceable.”⁵⁰ Births arising from nonvalidated gestational agreements are governed by the article on the “parent-child relationship,” which deems the woman giving birth to be the legal parent, together with a man (i.e., “father”) who was married to the birth mother at the time of birth, who signed a VAP, who consented to AI, or who was adjudicated a parent in a paternity suit (i.e., has genetic ties).⁵¹

prompt a pregnancy). *See also* Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE SUPP. 87 (Mar. 30, 2017) (urging more states to create such forms).

44. 2017 UPA § 704(b).

45. *Id.* § 609 (only one claiming de facto parentage can seek establishment). *See* Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. ACAD. MATR. LAWS. 157, 169-73 (2018) (urging broader standing for those who seek de facto parentage). Under the 2017 UPA, de facto parentage is only unavailable in a proceeding “to adjudicate the parentage of a child born under a surrogacy agreement.” 2017 UPA § 601(b).

46. 1973 UPA § 5.

47. 1973 UPA, cmt. at 5 (indicates “further consideration of other aspects” of AI was urged, citing Walter Wadlington, *Artificial Insemination: The Danger of a Poorly Kept Secret*, 64 NW. UNIV. L. REV. 777, 793-97, 807 (1970) (urging state laws on AI after reviewing some early statutes starting in the mid-1960s)).

48. 2000 UPA, Art. 7 (Child of Assisted Reproduction) & 8 (Gestational Agreement).

49. 2000 UPA § 701.

50. 2000 UPA § 809(a).

51. 2000 UPA § 809(b) (referencing § 201).

The 2017 UPA similarly has separate articles on assisted reproduction and surrogacy agreements.⁵² But it also has special parts for gestational surrogacy agreements and a genetic surrogacy agreements.⁵³ For each type of surrogacy agreement, pregnancy results from “assisted reproduction.”⁵⁴ AI is employed only with “genetic” surrogacy, where a woman, who “is not an intended parent,” agrees to “become pregnant” through AI while “using her own gamete” pursuant to an “agreement as provided” in the Act.⁵⁵ A genetic surrogacy agreement must, inter alia, conform to eligibility norms for any surrogate and any intended parents (who need not be “genetically related”);⁵⁶ be in “a record;”⁵⁷ be undertaken with “independent legal representation;”⁵⁸ be “executed before a medical procedure occurs related to the agreement, other than “medical evaluation and mental health consultation;”⁵⁹ and, usually be “validated” by a court before any AI related to the agreement.⁶⁰ A genetic surrogacy agreement can be terminated by an intended parent by notice “any time before a gamete or embryo transfer.”⁶¹ Such an agreement can be terminated by the genetic surrogate “any time before 72 hours” after the AI birth.⁶² An unvalidated genetic surrogacy agreement, where there is no withdrawal of consent within 72 hours of birth, does not necessarily lead to parentage under law in the woman giving birth.⁶³

52. 2017 UPA §§ 701 et seq. (Assisted Reproduction) & 801 et seq. (Surrogacy Agreement).

53. 2017 UPA §§ 813-18 (genetic surrogacy), §§ 808-12 (gestational surrogacy).

54. 2017 UPA § 804(a)(1).

55. 2017 UPA § 801(1). Gestational surrogacy, by contrast, has the woman giving birth achieving pregnancy through “gametes that are not her own” (FEI). 2017 UPA § 801(2).

56. 2017 UPA § 802(a) & (b).

57. 2017 UPA § 803(4).

58. 2017 UPA § 803(7).

59. 2017 UPA § 803(9).

60. 2017 UPA § 813(a). Exceptions include settings where “all parties agree” that court validation could occur after AI, but before birth. 2017 UPA § 816(b). Where the genetic surrogate withdraws consent to an unvalidated agreement within 72 hours of birth, parentage is adjudicated, with possible approaches including birth mother parentage, spousal parentage, residency/hold out parentage, VAP parentage, and de facto parentage. 2017 UPA § 816(c) (referencing Articles 1-6 of 2017 UPA). Where there is no validated agreement and no such withdrawal, an adjudication of parentage depends upon assessments of the best interests of the child (with relevant factors in 2017 UPA § 613(a)) and “the intent of the parties.” 2017 UPA § 816(d).

Preinsemination court orders validating genetic surrogacy pacts differ from preinsemination and postinsemination but prebirth court orders declaring legal parentage of later born children. *See, e.g.,* Steven H. Snyder & Mary Patricia Bym, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L. Q. 633 (2005) (reviewing availability of such orders in several states).

61. 2017 UPA § 814(a)(1).

62. 2017 UPA § 814(a)(2).

63. 2017 UPA § 816(d).

III. CONSTITUTIONAL ISSUES IN PARENTAGE FOR AI BIRTHS

American state statutes and judicial precedents chiefly govern childcare parentage, that is, parent status under law for child custody, visitation, and/or parental responsibility allocation purposes.⁶⁴ Of course, these laws cannot infringe upon individual federal or state constitutional interests, including rights tied to due process, equal protection, and privacy.⁶⁵ One such infringing statute is the Idaho Artificial Insemination Act. When this act was challenged, the Idaho high court found only limited constitutional infringement.⁶⁶ But the act is far more problematic than was indicated. The court ruling, once reviewed, will be used to illustrate the span of constitutional issues arising under AI statutes, including laws grounded on the varying UPAs.

A. Reading the Idaho Artificial Insemination Act

In *Gatsby v. Gatsby*, two women, Linsay and Kylee, were married in June 2015.⁶⁷ Deciding to have a child through the artificial insemination of Kylee “using semen donated by a mutual friend,” the women proceeded “without using the services of a physician” and “without consulting an attorney.”⁶⁸ The couple did sign with the friend “an artificial insemination agreement Linsay found online, listing the friend as ‘donor’ and both Linsay and Kylee as the ‘recipient’.”⁶⁹ The pact said the donor “would not have parental rights or obligations to the child.”⁷⁰

64. Legal parentage is contextual so that it can vary between different settings. Nonconstitutional, nonstatutory common law precedents and statutes can significantly differ in childcare, tort and probate. *See, e.g.*, Jeffrey A. Parness, *Who Is A Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MAT. LAWS. ____ (forthcoming 2022).

65. State constitutions can go further in guaranteeing equal protection. *See, e.g.*, ILL. CONST. art. 1, § 18 (no unequal protection by state or its units of local government and school districts due to “sex”); TEX. CONST. art. 1, § 3a (“self-operative” amendment declaring no denial of equality “because of race, color, creed, or national origin”); KAN. CONST. art. 15, § 6 (women have “equal rights in the possession of their children”). While the federal constitution has no explicit recognition of individual privacy interests, some state constitutions do; thus, constitutional privacy interests beyond those arising under due process and equal protection can limit state AI parentage laws. *See, e.g.*, CAL. CONST. art. 1, § 1 (“All people . . . have . . . inalienable rights” which include “happiness” and “privacy”); WASH. CONST. art. 1, § 7 (“No person shall be disturbed in his private affairs . . . without authority of law”). There also may be other possible constitutional interests in AI parentage laws, like the right to travel for intended parents (e.g., for those seeking surrogacy parenthood unavailable at home) and the right of guaranteeing children to know about, if not have relationships with, those with whom they have genetic ties (not unlike informational interests for children formally adopted).

66. *Gatsby v. Gatsby*, 495 P.3d 996, 1002-03 (Idaho 2021).

67. *Id.* at 999.

68. *Id.*

69. *Id.*

70. *Id.*

Linsay performed the insemination in the couple's home.⁷¹ Kylee gave birth on October 29, 2016.⁷² The birth certificate listed both Linsay and Kylee as "mother."⁷³ The child lived with the women "who held themselves out as the child's parents" until the Summer of 2017 when the women physically fought, leading to a domestic battery conviction for Kylee and a July 2017 no contact order "which prohibited Kylee from seeing her child except at daycare."⁷⁴ Linsay filed for divorce in August 2017, whereupon Kylee asserted Linsay had no legal claim or standing to any custody or visitation.⁷⁵

Linsay had sole custody of the child from July 3 to December 27, 2017, at which time an order of "equal custody" was entered.⁷⁶ Custody was shared until November 2018, when a magistrate court granted Kylee "sole custody," upon finding that "Linsay was not the child's legal parent" and that Linsay "had established no third-party rights." It also found that it was not in the child's best interests for Linsay to have any custody or visitation.⁷⁷

While Linsay was deemed a presumptive spousal parent due to her marriage to Kylee at the time of birth, the magistrate found the presumption overcome by the fact that Linsay "is not [the child's] biological parent."⁷⁸ The magistrate found Linsay could have attained legal parenthood via "a voluntary acknowledgement of paternity affidavit" (VAP), but did not do so.⁷⁹ The magistrate also found Linsay did not adopt the child and "did not comply with the Artificial Insemination Act (AIA)."⁸⁰ Upon affirmance by a district court, an appeal went to the Idaho Supreme Court.

The high court did not address whether Linsay could have completed a VAP.⁸¹ Yet it strongly hinted that such a VAP was unavailable to Linsay

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 999-1000. The child was not identified "due to privacy concerns." *Id.* at 999 n.1.

75. *Id.* at 1000.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (IDAHO CODE § 7-1106 (1), within Paternity Act). VAPs that are later discussed herein encompass all forms of voluntary parentage acknowledgements, however denominated and whoever may be explicitly recognized as VAP signatories, including those without alleged or actual biological ties, as with Linsay. *See, e.g.*, 15 VT. STAT. § 310 (2019) (signing of an "acknowledgement of parentage" by the person who gave birth and "an intended parent").

80. *Gatsby*, 495 P.3d at 1000.

81. *Id.* at 1007.

for the AIA was “controlling” due to the use of AI.⁸² Further, the Idaho “common law marital presumption of paternity” was deemed inapplicable because the AIA controlled,⁸³ not because the presumption only applied to men. The court did not address the issue of Linsay’s “third-party standing” under law for nonparental childcare.⁸⁴ The court did affirm the conclusion on “the child’s best interest for Kylee to be awarded sole custody,”⁸⁵ perhaps making its legal conclusions on the AIA merely dicta.⁸⁶ The court also affirmed the “holding that Linsay could not obtain parental rights . . . under the AIA because she did not comply with all the requirements of the law.”⁸⁷ Finally, the court agreed that Linsay could have avoided the case outcome by adopting the child,⁸⁸ recognizing at least one exception to the controlling status of the AIA.

B. Controlling/Exclusive AI Statutes

Reading AI statutes generally to be the controlling/exclusive avenues to parent status for intended parents who do not give birth, as the *Gatsby* court did with the Idaho AIA, leaves many prospective parents with only the options of a formal adoption (a costly venture) or a nonparental childcare order (a costly venture even when available). Prospective parents were also not afforded much insight by the high court on what would have constituted “prior written request and consent” by Kylee and

82. *Id.* at 1002 (AIA “is controlling” as it is a “more specific statute” than the Paternity Act, IDAHO CODE § 7-1101 et seq., which contains the VAP norms, at §§ 7-1106 & 1007).

83. *Id.* at 1002. Compare *McLaughlin v. Jones*, 401 P.3d 492, 501-02 (Ariz. 2017) (same sex female spouse can equitably estop a birth mother’s attempt to override a spousal parentage presumption) with *Doherty v. Leon*, 472 P.3d 531, 538-39 (Ariz. App. 2020) (sperm donor equitably estopped from seeking parentage of AI child born to a married female couple).

84. *Gatsby*, 495 P.3d at 1010 (“any error in the . . . third party standing analysis was cured because the magistrate court nevertheless addressed whether giving Linsay custody rights would be in the child’s best interest”). Third party standing had been sought under *Stockwell v. Stockwell*, 775 P.2d 611, 613 (Idaho 1989) (common law guidelines on a nonparent (there a stepparent) overcoming a natural parent’s custodial rights). *Gatsby*, 495 P.3d at 1010. On third party statutory standing of a nonparent to seek child visitation, see, e.g., IDAHO CODE § 32-1703 (“de facto custodian” who must be “related to a child within the third degree of consanguinity”); IDAHO CODE § 32-717(3) (grandparents); IDAHO CODE § 32-719 (grandparents and great grandparents); IDAHO CODE § 15-5-204 (guardianship proceeding).

85. *Gatsby*, 495 P.3d at 1007.

86. See, e.g., *Smith v. Angell*, 830 P.2d 1163, 1173 (Idaho 1992) (Bistline, J., concurring) (obiter dictum and dictum involve court pronouncements not essential to the court’s determination); see also *City of Weippe v. Yamo*, 528 P.2d 201, 205 (Idaho 1974) (high court is not bound by its own earlier dicta).

87. *Gatsby*, 495 P.3d at 1004. The AIA bar to Linsay, the natural mother’s spouse, was foreshadowed in *Doe v. Doe*, 395 P.3d 1287, 1291 (Idaho 2017) (AIA bar applied to natural mother’s former female partner).

88. *Gatsby*, 495 P.3d at 1007.

Linsay. Further, Idaho legislators arguably did not contemplate AI do-it-yourselfers since the AIA limited AI performance to licensed “physicians” and “persons under their supervision.”⁸⁹ As well, intended parents were teased with the potential for nonparental childcare standing, though relevant statutes and precedents seem unaccommodating to the likes of Linsay.⁹⁰

Surely controlling/exclusive statutes could address the norms for all who undertake AI. But where statutes do not, they should reference other possible avenues to parenthood in AI births for those not included, like a husband who intends to parent a child born of AI to his wife with the use of his semen.⁹¹ The Idaho AIA spoke specifically only to married couples who employed “physicians.” The “controlling” nature of this statute, as read in *Gatsby*, presents difficulties for do-it-yourselfers, as well as for both unmarried couples and single women pursuing AI parentage, whether or not physicians are used.

To avoid constitutional issues (i.e., infringements on procreational/privacy rights) arising from incomplete AI statutes deemed controlling/exclusive, courts should shun these designations.⁹² In Idaho, the AIA says its provisions “apply to all persons conceived as a result of artificial insemination as defined herein.” The child of Kylee and Linsay arguably was not such a person as no physician was used and thus the child was outside of the conduct explicitly addressed in the AIA. The AIA should not have covered the actions of Kylee and Linsay because it was controlling. Such a reading makes Linsay’s possible use of a marital spousal parent presumption or a voluntary parentage acknowledgment much easier.⁹³

89. IDAHO CODE § 39-5402.

90. See *supra* note 85 (citing Idaho statutes). As to precedent, see, e.g., *In re Ewing*, 529 P.2d 1296, 1298 (Idaho 1974) (nonparent must have had custody “for an appreciable period of time (in excess of three years)” as well as show “best interests of the child”).

91. Under the *Gatsby* ruling, such a husband may not be a parent and may have to undertake a formal adoption to secure childcare parentage (as spousal parentage may only apply to nonAI births since AI births are exclusively guided by the “controlling” AIA).

92. Even when AI statutes deemed “exclusive” omit certain intended parents, courts have employed the “equitable-parent” doctrine to find parenthood. See, e.g., *Pueblo v. Haas*, 2021 WL 6130700 (Mich. App. 2021) (doctrine limited to AI births to married couples). Similar decisions with no judicial deference to legislatures on matter involving significant social problems are found when there is a complete absence of statutes. See, e.g., *In re Paternity of F.T.R.*, 833 N.W. 2d 634, 653 (Wis. 2013) (enforcing, via common law precedent, a surrogacy AI pact, while observing “surrogacy is currently a reality”).

93. There was no mention in *Gatsby* of any General Assembly desire to block VAPs for intended female parents in AI births.

The 2017 UPA provisions on AI births reject controlling/exclusive status as it expressly recognizes parentage can arise from AI births outside the proposed statutory AI guidelines on consent “in a record.”⁹⁴ The 2017 UPA declares that without a “record” consent, “before, on, or after the birth of the child,” an “individual” can become a parent to an AI child if (1) the individual had a preconception “express agreement” that the individual and prospective birth mother “intended they both would be parents,”⁹⁵ or (2) “for the first two years of the child’s life,” the individual and birth mother “resided together in the same household with the child and openly held out the child as the individual’s child.”⁹⁶ In California, an exception to the requirement of a “writing” is found in the AI statute, under which an “intended parent” and an AI birth mother are both parents if there is “clear and convincing evidence that, prior to the conception . . . the woman and the intended parent had an oral agreement that the woman and the intended parent would both be parents of the child.”⁹⁷ Without explicit statutory alternatives to the consent requirement in the Idaho AIA, judicial precedents are warranted in order to respect parental intentions and to promote a child’s best interests. Such precedents are also necessary to meet constitutional demands.

C. Limiting AI Intended Parents

Statutes on childcare parentage arising from AI births often limit standing to seek parentage. The Idaho AIA expressly speaks only of preconception consent by a “woman” and “her husband,”⁹⁸ though the *Gatsby* court deemed the act also applicable to a woman and her female spouse given the federal constitutional demands of equality for same-sex and opposite-sex married couples.⁹⁹ By contrast, as noted the 2017 UPA

94. 2017 UPA § 704(a).

95. 2017 UPA § 704(b)(1) (need “clear-and-convincing evidence;” either the birth mother (presumably often for child support purpose) or the individual can seek to prove such an agreement).

96. 2017 UPA § 704(b)(2), which derives from 2017 UPA § 204 (a)(2) (outside the article on assisted reproduction). The AI birth mother is a legal parent by giving birth. 2017 UPA § 201(1) (which excepts “genetic” and “gestational” surrogates, under Article 8 of the UPA, particularly at 801(1) and 801(2)). No explanation is given in *Gatsby* as to why Kylee’s parentage was not controlled by the AIA. Such control seems contrary to U.S. Supreme Court precedent on the constitutional childcare interests of those giving birth. *See, e.g., Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60, 62 (2001) (birth mothers do not have same requirements as biological fathers in claiming U.S. citizenship for their children because for birth mothers “real, everyday ties” during pregnancy are sufficient to prompt protected childrearing interests).

97. CAL. FAM. CODE § 7613(a)(2).

98. IDAHO CODE § 39-5403 (no performance of AI (by a physician) without prior “request and consent”).

99. *Gatsby*, 495 P.3d at 1002-03.

speaks of “consent” in a record by “an individual” and a “woman giving birth.”¹⁰⁰ In a California AI birth employing a nonparent semen donor, the woman and “another intended parent” can “consent” to dual parentage.¹⁰¹

The 2017 UPA and California approaches are preferable. They are also constitutionally compelled in some instances.¹⁰² The U.S. Supreme Court has declared: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁰³ Where the state seeks to foreclose a certain form of AI parentage altogether, the infringements on procreation desires must be supported by legitimate (if not compelling) governmental interests.

Constitutional requirements on the need for legitimate state interests has both fundamental rights and equality elements. While the U.S. Supreme Court has been urged to extend substantive “liberty” interests in childcare to many intended nonbiological parents,¹⁰⁴ in the near future such recognitions seem unlikely.¹⁰⁵ Yet those similarly situated must also be treated equally in AI laws, with distinctions between individuals and

100. 2017 UPA § 704(a) & (b) (noting that failure to “consent in a record . . . before, on, or after birth” does not preclude AI parentage due to a preconception “express agreement” or to residency/hold out parentage acts in the “first two years of the child’s life”).

101. CAL. FAM. CODE § 7613(a)(1)&(2). *See also* CAL. FAM. CODE § 7613(b)(2) & (3) (recognizing intended parentage in women and men (who may or may not have provided sperm) where “a licensed physician or surgeon or a licensed sperm bank” is not employed).

102. It also may be that procreation interests for some people intending to use their sperm in AI settings can be limited by the state. Consider, e.g., the Idaho AIA which bars semen donations by any person who has “any disease or defect known by him to be transmissible by genes” or who “knows or has reason to know he has a venereal disease.” IDAHO CODE § 39-5404. Where a donor is pursuing parenthood via AI, similar state limits do exist. *See, e.g.,* 52 OR. REV. STAT. § 677.370 (semen may not be donated for use in AI by any person who has a disease transmissible by genes or who knows or has reason to know he has a sexually transmitted infection); 20 ILL. COMP.STAT. ANN. § 2310/2310-325(b) (Class A misdemeanor to knowingly use semen of an AI donor “who has tested positive for exposure to HIV”).

103. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (contraception access case with no majority opinion). The *Eisenstadt* declaration has since been deemed, with other precedents like *Roe v. Wade*, 410 U.S. 113 (1983), to teach “that the Constitution protects individual decisions in matters of childrearing from unjustified intrusions by the State.” *Carey v. Population Services International*, 431 U.S. 678, 687 (1987).

104. *See, e.g.,* NeJaime, *supra* note 31, at 2357-59 (how “courts might extend due process protection to social bonds in the absence of biological connection”); Douglas NeJaime, *The Constitution of Parenthood*, 72 STANFORD L. REV. 261, 376-79 (2020) (the consequences, and difficulties in, applying a recognized “liberty interest for those who form non-biological parent-child bonds”).

105. Parness, *Federal Childcare Parents*, *supra* note 5, at 978-95 (describing, and criticizing, U.S. Supreme Court deferral to state lawmaking on defining parents who possess superior federal constitutional childcare rights).

couples, or between wed and unwed couples, being, at least, rational. Where distinctions are suspect because of their focus on immutable characteristics or discrete groups, their justifications must be more significant.¹⁰⁶

As to equality, the *Gatsby* court held the U.S. Supreme Court same-sex marriage ruling in *Obergefell v. Hodges* mandated that same sex married couples should have equal access to dual parentage via AI births under the AIA as had by opposite sex married couples.¹⁰⁷ Do equality principles not also demand that a single woman can secure parentage via a nonsurrogacy AI birth facilitated by a sperm donor who waived any parental interests? And do equality principles not also demand that a married or unmarried opposite sex couple can secure dual parentage via an AI birth which did not involve the sperm donor's waiver of parental interests? The 2017 UPA, encompassing such possible single or dual parentage,¹⁰⁸ recognizes the need for equality.

As well, certain parentage recognitions beyond the Idaho AIA seem constitutionally mandated by substantive due process, as with the single intended parent giving birth or with a sperm provider who intends parentage via surrogacy or nonsurrogacy AI. The U.S. Supreme Court has generally recognized that parental childcare interests arise automatically for a birth mother whose child was conceived through sex.¹⁰⁹ Why not similar parentage for a nonsurrogate employing AI? As to sperm providers, the U.S. Supreme Court has recognized the biological father, in a birth involving consensual sex, has a constitutionally-protected interest in developing a parent-child relationship with his offspring, except when the child is born into an intact marriage (under *Obergefell*, either same sex or opposite).¹¹⁰ That exception does not even apply in states whose separate constitutional privacy interests extend beyond the interests protected by federal due process.¹¹¹ With or without the exception, should not sperm providers in AI settings with unwed birthgivers be treated like sperm providers in consensual sex settings,

106. See, e.g., Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 14-16 (2015).

107. *Gatsby*, 495 P.3d at 1002-03.

108. 2017 UPA § 703 (an "individual" consents to AI, with a woman, to be a parent of a child").

109. *Nguyen*, 533 U.S. at 60.

110. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (an unwed biological father of a child born of consensual sex has a parental opportunity interest which is grasped by forming a "significant custodial, personal, or financial relationship" with his offspring). Though the interest in *Lehr* is perhaps limited to children born to women married to others as in *Michael H. v. Gerald D.*, 491 U.S. 110, 128, 132 (1989) (four Justices).

111. See, e.g., *Callender v. Skiles*, 591 N.W.2d 182, 190-91 (Iowa 1999) (unwed biological father of child born of sex to a woman married to another has a liberty interest in challenging the husband's paternity, a view rejected in *Michael H.*, 491 U.S. at 128).

especially because only in the former setting is evidence of intended parentage usually required.

The limits on AI intended parents in the Idaho AIA and in similar statutes should be removed. If there is no removal by legislators, then removal by courts is appropriate as there is no deference due unconstitutional legislation.

D. Limiting Parental Interest Waivers

In AI birth settings, there can be: a sperm donor who waived any parental childcare interest before insemination; a sperm donor who waived any parental childcare interests after insemination but before birth; a sperm donor who waived any parental childcare interests only after birth; a sperm donor who, prior to insemination, intended to be a childcare parent, but who shed that desire after insemination, during the pregnancy, or after birth; and, a sperm donor who earlier waived any parental childcare interests, but who later, preinsemination, postinsemination, or postbirth, sought to be a parent under law. What, if anything, do federal and state constitutions have to say about parental interest waivers and their retractions?

Unfortunately, direct constitutional precedents are rare. Some rulings, though, are pertinent to AI sperm donors. In *Lehr v. Robertson*, the U.S. Supreme Court did recognize that those with male genetic ties to children, born of consensual sex, do have potential parental interests which no other men possess.¹¹² In an adoption case setting, such interests were deemed waived by a man who failed to timely establish a “significant custodial, personal, or financial relationship” with his offspring.¹¹³ The timely establishment norms basically have been left to the states as long as they are within federal due process constraints. Waivers can include a parental opportunity loss arising from a failure to follow statutory guidelines, as with a paternity registration, even where those guidelines, and the pregnancy and birth, were not actually known to the genetic father.¹¹⁴ Precedent thus suggests that unintentional parental interest waivers can be sustained. In *Michael. H. v. Gerald D.*, the U.S. Supreme Court did not mandate that states recognize this parental opportunity interest in an unwed genetic father whose sex with a woman

112. *Lehr*, 463 U.S. at 262.

113. *Id.*

114. *Id.* at 251 n.5 (citing N.Y. DOM. REL. L. § 111-a(2)(C), which embodies N. Y. SOC. SERV. L. § 372-c (“putative father registry”).

married to another prompted a birth into an intact family of two who have raised, and wish to continue to raise, the child.¹¹⁵

A sperm donor via AI should be treated comparably under state law, given *Lehr*, to genetic father of a child born of consensual sex to an unwed mother. Thus, his future parental intentions and pregnancy support, particularly accompanied by the comparable, one-time intentions of the woman later giving birth, should be respected.

Any recognition of a “record” consent to intended parentage arising from an AI birth, as well as a sperm donor’s waiver of parental interests, could be limited to preconception settings. Postconception but prebirth parental intentions and parental interest waivers can be addressed in VAPs (though not where acknowledging parents are limited by law to gamete donors). Postbirth parental intentions and parental interest waivers in AI births can be accommodated by VAPs, by formal adoptions, and by residency/hold out and de facto parentage (where gametes donations are not required).

The Idaho AIA on semen donors requires preinsemination donations and waivers by men who are not the husbands of the women upon whom AI is performed,¹¹⁶ as well as preinsemination written requests and consents by the husbands of such women.¹¹⁷ Upon such donations and consents, no statutory provision in Idaho allows donors to retract their parental interest waivers or husbands to retract their consents. These inabilities to retract, at least preinsemination, may run afoul of constitutional procreation interests. Constitutional difficulties, due to the lack of retraction opportunities on waivers and consents, are especially likely where inseminations would come long after the waivers/consents were first secured. Constitutional issues are far less likely to arise where waiver/consent retractions, by statute, cannot be undertaken after a certain period of time, which provides some assurance to a prospective birth mother that the rug will not be pulled out from under her at the last moment.

The 2017 UPA has no provisions on retracting waivers by donors pre or post insemination,¹¹⁸ with the waivers of parental interests undertaken preinsemination.¹¹⁹ As for an individual who “consents . . . to assisted reproduction by a woman with the intent to be a parent,” the 2017 UPA

115. *Michael H.*, 491 U.S. at 130.

116. IDAHO CODE § 39-5401.

117. *Id.* § 39-5403(1).

118. 2017 UPA § 702.

119. 2017 UPA § 102(9) (a donor is “an individual who provides gametes intended for use in assisted reproduction”).

allows such an individual to “withdraw consent at any time before a transfer results in a pregnancy.”¹²⁰ The ability of an intended parent, but not a donor, to undertake a preinsemination retraction raises eyebrows. As the Supreme Court declared, the right of privacy embodies individual freedom from unwarranted governmental intrusion into decisions on “whether to bear or beget a child.”¹²¹ Is a sperm donor who earlier agreed to waive parental interests begetting a child? To facilitate family planning, it would be sensible to allow a donor to retract a parental waiver within a certain time after a donation is completed, and to allow an intended parent to retract within so many days after consent is completed or within so many days before insemination.

IV. CONCLUSION

American state AI laws vary greatly in their approaches to childcare parentage. Too often they are fraught with due process, equal protection and privacy problems, particularly for same-sex couples, wed or unwed, and for single women. Illustrative is the Idaho Artificial Insemination Act, passed in 1982 and generally following the 1973 UPA. While the 2017 UPA, followed in some states, is less troublesome, it too has problems in its approach to parentage in AI births. Given separation of powers issues in childcare parent cases, state commitments to democratic principles and robust debate on public policy matters, and federal lawmakers’ reluctance to define parentage, state legislators should specially address childcare parentage in artificial insemination birth settings.

120. 2017 UPA § 707(a).

121. *Eisenstadt*, 405 U.S. at 453.