

**DOBBS AND UNENUMERATED PARENTAL CUSTODY
RIGHTS AND INTERESTS**

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In *Dobbs v. Jackson Women's Health Organization*,¹ the U.S. Supreme Court eliminated the federal constitutional right to abortion.² The federal constitutional right of a parent to the “care, custody, and control of their children”³ remains for now, as do the federal parental opportunity interests of some genetically-tied parents.⁴ What, if anything, does the *Dobbs* decision mean for those claiming parent custody rights or interests? This paper explores the impact of *Dobbs* on the existing and possible new federal constitutional parental rights or interests for custodial purposes.

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1. 597 U.S. ___, 142 S. Ct. 2228, 2285 (2022) (overruling precedents on federal constitutional abortion access right and returning regulatory authority “to the people and their elected representatives”).

2. A somewhat comparable override of a fundamental state constitutional abortion right occurred in *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W. 2d 710 (Iowa 2022) (no longer strict scrutiny of abortion regulations).

3. *Troxel v. Granville*, 530 U.S. 57, 65, 70 (2000) (O'Connor, J., majority, joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer) (“We have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment”) (Souter, J., concurring in the judgment). The precise limits on parental custody rights are in doubt in certain contexts. See, e.g., Leigh Johnson, *My Body, Your Choice: The Conflict Between Children’s Bodily Autonomy and Parental Rights in the Age of Vaccine Resistance*, 89 U. CHI. L. REV. 1605 (2022) (suggesting courts respect child decision making on vaccine access via statutory informed consent scheme).

4. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). While *Lehr* involved genetic ties via consensual sex births, it has been applied to assisted reproduction births. See, e.g., *Matter of Schnitzer*, 493 P.3d 1071 (Or. App.), review allowed, 498 P.3d 807 (2021); *D.M.T. v. T.M.H.*, 129 So.3d 320, 337-39 (Fla. 2013).

Currently, at birth and after birth, parent custody laws, chiefly found in state laws,⁵ are tied to sperm or eggs; marriage; birth giving; contracts; parental functioning; formal adoption; and/or parental intentions. These custody laws are only somewhat constrained by pre-*Dobbs* federal constitutional precedents.

In addressing issues involving custodial parents after *Dobbs*,⁶ the paper first briefly describes the federal constitutional right to an interest in custodial parentage under pre-*Dobbs* U.S. Supreme Court precedents. It finds few precedents on defining parents at birth and no precedents on defining parentage arising from post-birth acts.⁷ The paper then reviews *Dobbs*, particularly its varying takes on unenumerated constitutional rights.⁸ Finally, it explores how *Dobbs* should influence future precedents on federal constitutional custodial parentage that arises either at birth or after birth. It urges federal courts to expand custodial parentage in light of societal changes in family structures within the *Dobbs* limits on unenumerated rights.⁹

I. CONSTITUTIONAL PARENTAL CUSTODY BEFORE *DOBBS*

Before *Dobbs*, a plurality of the U.S. Supreme Court recognized, in *Troxel*, that the “liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized” by the Court.¹⁰ This unenumerated parent

5. See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965 (2016).

6. The paper, at times, generally eschews such terms as man and woman and father and mother, utilizing instead gender-neutral terms like sperm provider and gestating parent. Societal and personal gender identifications usually add nothing to the childcare parent analysis; the lack of usage demonstrates respect for those nonbinary, gender fluid, and other persons. See, e.g., Jeffrey A. Parness, *Nongendered Childcare Parentage*, 56 GONZ. L. REV. 465 (2021).

7. There are precedents on terminating existing parental childcare interests/rights, as in adoption proceedings. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 779 (1982) (at a minimum, “clear and convincing evidence” standard of proof).

8. High court authority to consider certain unenumerated constitutional rights has been barred in at least one state. GA. CONST. art. 1, § 1, para. XXIX. “The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.”

9. Parentage for custodial purposes can differ from parental definitions in other settings, even in a single state, as with claimants seeking to recover for their own losses arising from harms to their alleged children. On contextual parentage, see, e.g., Jeffrey A. Parness, *Who Is A Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW. 455 (2022) (demonstrating there can be a lack of childcare parentage for custodial purposes though parentage remains for child support purposes).

10. See *supra* note 3.

custody “interest” was said to date back at least a century.¹¹ It has prompted no significant resistance by later federal courts or state lawmakers.¹² The continuing recognition of this unenumerated interest was raised only by Justice Thomas in *Dobbs*. He noted that “neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.”¹³

While there is some confusion in utilizing both the terms interests and rights in parent custody settings, the recognition of a constitutional liberty interest for a person under *Troxel* can mean that a person has a constitutionally-protected custodial right or that a person only has an opportunity to establish parent custody upon the satisfaction of certain conditions. In *Lehr*, in contrast to *Troxel*, the U.S. Supreme Court recognized that an unwed sperm provider of a child born of consensual sex to an unwed gestating parent has “an opportunity that no other male possesses to develop a relationship with his offspring,” which, once grasped, allows the sperm provider to “enjoy the blessings of the parent-child relationship.”¹⁴

Since *Troxel* and *Lehr*, the liberty interest in actual and potential parent custody continues. But there also continues the U.S. Supreme Court’s unwillingness to articulate in more precise terms who qualifies as a parent possessing this interest, whether parentage is established prebirth, at birth, or long after birth.¹⁵ The pre-*Dobbs* cases on custodial parentage at birth are now surveyed. Their continuing legitimacy and need for expansion will later be assessed.

11. See, e.g., *Troxel*, 530 U.S. at 65-66 (O’Connor, J., plurality opinion) (“a constitutional dimension to the right of parents to direct the upbringing of their children,” citing early decisions in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (parental control over education of children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (enjoining as unconstitutional the Compulsory Education Act); and *Prince v. Massachusetts*, 321 U.S. 158 (1944) (parental freedom and authority in matters of conscience and religious conviction)).

12. While general recognition of parental childcare interests has been widespread, there have been significant interstate differences in the breadth of such interests, as with parental authority in determining nonparental visitations with their children, as in *Troxel*, 530 U.S. at 67 (Washington statute unconstitutionally infringed on fundamental parent right).

13. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

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

15. See, e.g., Parness, *Federal Constitutional Childcare Parents*, *supra* note 5, at 968 (finding no reasonable justification for “extreme deference” to state laws defining federal constitutional parents, resulting in “significant interstate variations” which prompt “many problems” for children and their caretakers).

To date, the precedents only speak to parental custody interests in children born of consensual sex, whether in or outside of marriage.¹⁶ The precedents do not speak to how custodial parentage can arise exclusively from post birth acts beyond state-authorized adoptions.¹⁷

As to the person giving birth to a child born of sex, the Court has long recognized custodial rights. It reasoned in the *Quillon v. Wolcott* case that the gestating parent was a custodial parent since that parent necessarily “exercised actual or legal custody” and “shouldered . . . significant responsibility with respect to the daily supervision, education, protection, or care of the child.”¹⁸ The Court has never applied this recognition, however, to a person giving birth via assisted reproduction (AR), utilizing either artificial insemination (AI) or fertilized egg implantation (FEI).¹⁹

As for a birth arising from consensual sex with a gestating parent who is married to another, in the *Michael H. v. Gerald D.* case, the Court recognized the validity of but did not require, a state law presuming, whether rebuttably or irrebuttably, custodial parentage in the spouse.²⁰ State laws have long recognized such presumptions and do not vary much

16. On the difficulties with current laws on parent custody when sex with a gestating parent is not consensual, see, e.g., Karen Syme Czapanskiy, *The Constitution, Paternity, Rape, and Coerced Intercourse: No Protection Required*, 35 J. AM. ACAD. MATRIM. LAW 83 (2022).

17. On adoptions, the Court has been chiefly concerned with securing fair procedures for actual or possible parents when their children may be adopted by others, as well as with insuring fair procedures in terminations of recognized parental rights/interests. See, e.g., *Santosky*, 455 U.S. at 779 (“clear and convincing” evidence standard).

18. *Quillon v. Wolcott*, 434 U.S. 246, 256 (1978) (persons providing sperm for births arising from consensual sex differ as there is not always custody/responsibility).

19. See, e.g., Jeffrey A. Parness, *American Constitutions and Artificial Insemination Births*, 13 CONLAWNOW 125 (2022) (reviewing due process and equal protection constraints on parentage laws for such births).

20. *Michael H. v. Gerald D.*, 491 U.S. 110, 129-130 (1989) (J. Scalia, joined by Chief Justice Rehnquist, J. O’Connor and J. Kennedy; the latter two only did not concur in Note 6) (“It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted”). One justice assumed there were constitutional custodial interests in sperm provider settings, *id.* at 133 (Stevens, J., concurring) (“I am willing to assume for the purpose of deciding this case that Michael’s relationship with Victoria is strong enough to give him a constitutional right” to seek visitation), while four other justices recognized such interests, *id.* at 136 (Brennan, J., dissenting, joined by JJ. Marshall and Blackmun) and *id.* at 2360 (White, J., dissenting, joined by J. Brennan).

on when such presumptions arise.²¹ But state laws do differ in important ways on how spousal parent presumptions can be rebutted.²²

As for a birth arising from consensual sex with an unwed gestating parent, the Court has allowed, but not required, as in the *Lehr* case, a state to foreclose parent custody interests in the sperm provider even if parental opportunity interests were seized.²³ In *Lehr*, the interests were not seized under state law in a setting where adoption of the child was sought by the gestating parent's post-birth spouse.²⁴ Parent custody interests, as in a paternity suit, can also be lost under state laws due to a sperm provider's failure to seize parenthood, leaving the gestating parent as the sole custodial parent.²⁵

II. *DOBBS* ON UNENUMERATED FEDERAL CONSTITUTIONAL RIGHTS

In *Dobbs*, Justice Alito's opinion found that the federal constitution, particularly its substantive due process protections of liberty interests that are not within "a select list of fundamental rights," no longer recognized a "right to an abortion."²⁶ In denying continuing recognition, he reasoned that an abortion right was not "deeply rooted" in the country's "history and tradition"²⁷ and that such a right was not "essential" to the country's

21. The similarities in spousal parentage establishment seemingly result from state employments of the Uniform Parentage Acts (UPAs), whether the 1973, 2000 or 2017 version, which all have a spousal parent presumption arising for a child "born during the marriage" or within 300 days after the termination of a marriage. 1973 UPA, at §4(a)(1); 2000 UPA, at §204(a)(2); and 2017 UPA, at §§204(a)(1)(A) and (B) (the Acts do vary on how a marriage is terminated; they all include death, annulment, declaration of invalidity, divorce, and a court decree of separation, while the 2017 UPA also includes a court decree of separate maintenance).

22. State rebuttal laws, and their possible reforms, are reviewed in Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINNESOTA L. REV. 243, 246 (2019) (reconceptualizing rebuttal norms means assessing the import of genetic ties, parental intentions, and established and healthy parent-child relationships).

23. *Lehr*, 463 U.S. at 262 ("an opportunity that no other male possesses to develop a relationship with his offspring").

24. *Id.* at 250 (the gestating parent married the person who petitioned for adoption eight months after the child's birth).

25. For example, there are time bars to paternity actions by sperm providers seeking parental custody. See, for example, the three versions of the Uniform Parentage Act. 1973 UPA § 7 (alleged father has three years after birth to seek a determination of the father and child relationship where there is no presumed father); 2000 UPA § 607(a)(1) (alleged father usually has two years after birth if there is no presumed father); 2017 UPA § 607 (parent action by alleged genetic parent "before child becomes an adult") and § 608(b) (limits on alleged genetic father overriding parentage presumption in another after the child attains two years of age).

26. *Dobbs*, 142 U.S. at 2246, 2248 (Alito, J., majority, joined by JJ. Thomas, Gorsuch, Kavanaugh and Barrett).

27. *Id.* at 2246.

“scheme of ordered liberty.”²⁸ Further, Justice Alito declared there should be no continuing respect for a precedent on an unenumerated right, like abortion if the precedent was “egregiously wrong.”²⁹

As to the history and lack of deep roots, Justice Alito observed:

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, a bortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortion. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.³⁰

Thus, for Justice Alito, a new unenumerated federal constitutional right might be recognized if preceded by at least some state judicial or legislative recognition of a comparable right, with long-time illegal acts being ineligible for constitutional protection.

In his concurrence, Justice Thomas rejected any notion of a fundamental substantive due process right untethered to an expressly-recognized constitutional right because it would constitute an “exaltation of judicial policymaking”³¹ For him, the Due Process Clause chiefly guarantees fair processes with any governmental deprivation of life, liberty, or property.³² Justice Thomas added that “in future cases, we should reconsider all of this Court’s substantive due process precedents,” including cases on access to contraceptives, “private, consensual sexual

28. *Id.*

29. *Id.* at 2243 (the decision was “wrong from the start,” had “exceptionally weak” reasoning, and prompted “damaging consequences”).

30. *Id.* at 2248-49 (deeming the decision in *Roe* “either ignored or misstated” this history on abortion, and the decision in *Casey* “declined to reconsider *Roe*’s faulty historical analysis”).

31. *Id.* at 2302.

32. *Id.* at 2301.

acts, and same-sex marriage.”³³ He could have added the cases on parental custody, whose legitimacy he seemingly questioned twenty-two years earlier in *Troxel*.³⁴

In a separate concurrence, Justice Kavanaugh joined the Alito opinion in finding “a right to abortion is not deeply rooted in American history and tradition.”³⁵ He emphasized that rights unenumerated in the federal constitution should now only become protected by the federal constitution via federal legislation or federal constitutional amendment.³⁶ Further, he found that the *stare decisis* doctrine can prevent an override of earlier unenumerated constitutional rights cases, even if “egregiously wrong.”³⁷ Justice Kavanaugh declared, however, that *Roe* merited override, observing:

But as the Court today explains, *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court’s constitutional authority; gravely distorted the Nation’s understanding of this Court’s proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State’s “important and legitimate interest” in protecting fetal life. . . . All of that explains why tens of millions of Americans—and the 26 States that explicitly ask the Court to overrule *Roe*—do not accept *Roe* even 49 years later.³⁸

So, for Justice Kavanaugh, even an “egregiously wrong” precedent regarding an unenumerated liberty interest should survive if it has not met significant resistance from state lawmakers.³⁹

33. *Id.* Both the Alito opinion and the Kavanaugh concurrence declared that overruling *Roe* did not mean to overrule, or to threaten, those precedents. *Id.* at 2277 (opinion should not be understood to cast doubts on precedents that do not concern abortion) (J. Alito) and *Id.* at 2309 (no threat) (J. Kavanaugh). These declarations are not unlike the plurality’s note in *Michael H.* regarding the difference in a person’s liberty interest in access to contraceptives and an alleged liberty interest of “an adulterous natural father” in a child born of consensual sex into an intact marriage. *Michael H.*, 491 U.S. at 128 n. 6. And like the dissent in *Dobbs*, the focus on “history and tradition” in assessing unenumerated federal constitutional rights has been challenged by other justices. *See, e.g., Michael H.*, 491 U.S. at 132 (Justices O’Connor and Kennedy fail to concur in note 6 of Justice Scalia’s plurality).

34. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (need to reconsider all substantive due process precedents that are untethered to expressly-recognized constitutional rights).

35. *Dobbs*, 142 U.S. at 2304.

36. *Id.* at 2306 (rights enumerated in the Constitution can lead to new precedents created when applying those rights to “situations that were unforeseen in 1791 or 1868”).

37. *Id.* at 2307.

38. *Id.* at 2307-08.

39. *Id.* at 2307.

In concurring with the judgment only,⁴⁰ Chief Justice Roberts limited his opinion to answering the question of which review was granted, that is, whether a state can ban abortions after fifteen weeks of pregnancy.⁴¹ On this question, he found that such a ban would not be “necessarily unlawful.”⁴²

Chief Justice Roberts did not opine that there was no unenumerated federal constitutional right to an abortion under any circumstances. Rather, he found only that the viability standard of *Roe* “should be discarded,”⁴³ with the issue of whether any abortion right should be fully discarded to be left for another day.⁴⁴ Justice Roberts thus only chose to discard the viability standard for the abortion right, finding that it “came out of thin air”⁴⁵ and did not recognize the “permissible goals” of abortion regulation.⁴⁶ Justice Roberts did not comment on when, if at all, the Court should recognize an unenumerated constitutional right.⁴⁷

The dissenting opinion, “with sorrow,”⁴⁸ by Justices Breyer, Sotomayor, and Kagan, found that “the disruption of overturning” the abortion right precedents will be “profound”⁴⁹ while breaching the core rule-of-law principle designed to promote constancy in the law.⁵⁰ Beyond *stare decisis*, the dissenters declared that there was a need to respect “a woman as an autonomous being” and to “grant her full equality,” meaning “giving her substantial choice” over the “most personal and most consequential of all life choices.”⁵¹

The dissenters viewed differently “the guarantees of ‘liberty’ and ‘equality’ for all.”⁵² They deemed that these guarantees were not defined “by reference to the specific practices existing at the time” they were

40. *Id.* at 2317.

41. *Id.*

42. *Id.*

43. *Dobbs*, 142 U.S. at 2310 (Roberts, J., concurring).

44. *Id.* at 2316-17 (“I am not sure . . . that a ban on terminating a pregnancy from the moment of conception must be treated the same . . . as a ban after fifteen weeks”).

45. *Id.* at 2311.

46. *Id.* at 2312 (beyond the protection of potential life recognized in *Roe v. Wade*, other goals of abortion regulation include “maintaining social ethics” and “preserving the integrity of the medical profession”).

47. *Id.* at 2311 (while finding the Alito opinion “thoughtful and thorough,” it nevertheless is said not to “compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us”).

48. *Dobbs*, 142 U.S. at 2350 (dissent).

49. *Id.* at 2343.

50. *Id.* at 2350.

51. *Id.* at 2317.

52. *Id.* at 2326.

framed.⁵³ Rather, they determined that these guarantees were intended by the Constitution’s framers “to permit future evolution in their scope and meaning.”⁵⁴

III. DEFINING FEDERAL CONSTITUTIONAL CUSTODIAL PARENTS

While Justices Alito and Kavanaugh said *Dobbs* should not be read to cast doubts on precedents on unenumerated constitutional rights outside abortion,⁵⁵ their opinions invite a reexamination of other unenumerated fundamental substantive due process rights and interests, including parent custody. What influence might *Dobbs* have if the Supreme Court further explores custodial parentage?

Like the reasoning of the dissenters in *Dobbs* that recognized unenumerated constitutional rights can evolve in “their scope and meaning,” notwithstanding “the specific practices existing at the time” that the “liberty” and “equality” guarantees were framed,⁵⁶ the Iowa Supreme Court in 1999 deemed the Iowa state constitutional due process guarantee could evolve. That court nicely explained why the ambit of parentage should be able to evolve:

We acknowledge our society has not traditionally afforded parental rights to persons like Charles [a biological father of a child born from adultery]. This is an important consideration in determining the existence of a fundamental interest. . . . Due process protections, however, should not ultimately hinge upon whether the right sought to be recognized has been historically afforded. Our constitution is not merely tied to tradition, but recognizes the changing nature of society. . . . The traditional ways to establish legal parentage have dramatically changed in recent generations, as has the traditional makeup of the family. Scientific advancements have opened a host of complex family-related legal issues which have changed the legal definition of a parent. It has also made the identity of a biological parent a virtual certainty. Social stigmas have also weakened. If we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced. Instead, we need to focus on the underlying right at stake. The nontraditional circumstances in which parental rights

53. *Id.* at 2325.

54. *Id.*

55. *Id.* at 2277 (Alito, J., majority) and *id.* at 2309 (Kavanaugh, J., concurring).

56. *Dobbs* 142 U.S. at 2325. *See supra* note 26 (Justices O’Connor and Kennedy, in *Michael H.*, 491 U.S. at 128 n. 6 and 132, disagreeing with the focus on “history and tradition” in assessing possible unenumerated federal constitutional rights).

arise do not diminish the traditional parental rights at stake. We therefore find Charles has a liberty interest in challenging paternity.⁵⁷

While a majority of the U.S. Supreme Court Justices in *Dobbs* generally eschew such evolutions of unenumerated constitutional rights, might this majority recognize new definitions of custodial parents, as done in Iowa, given “the changing nature of society,” including new family makeups and scientific advances? New definitions might operate to establish parentage at birth.⁵⁸ New definitions might also operate to establish parentage long after birth arising from post birth actions not involving formal adoptions.⁵⁹

A. At Birth Parentage

As to parentage arising at birth (with or without any necessary pre-birth actions), as recognized by the Iowa court, “scientific advancements” now prompt births arising from nonsexual acts. Such acts include artificial reproductive techniques (AR), including artificial insemination (AI) and fertilized egg implantation (FEI).

Under *Dobbs*, would any recognitions of unenumerated parental custody interests for non-gestating parents involved in AR births involve expansions of the parental custody right, last recognized in *Troxel*, or a wholly new parental right? Seemingly, it matters not if *Troxel* and its predecessors were not “egregiously wrong,” thus allowing the parent custody precedents to continue,⁶⁰ if a would-be parent’s procreational interest, albeit not “deeply rooted” in “history and tradition,” is found “essential” to the country’s “scheme of ordered liberty.”⁶¹ There are good reasons to find that the century-old parent custody cases were not “egregiously wrong” and that certain procreational interests are “essential” to many Americans, especially where there is no adverse impact on individual Americans or governmental interests.⁶²

57. Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999).

58. Parentage for custodial purposes generally cannot be established prebirth, though prebirth acts like a marriage or a voluntary parentage acknowledgment can prompt parentage at the time of birth. See, e.g., 2017 UPA § 204(a)(1)(A) (“child is born during the marriage”) and §§ 304(b) and (c) (acknowledgment of parentage may be signed before birth, but takes effect at birth).

59. See, e.g., 2017 UPA § 204(a)(2) (residential/hold-out parent if parental-like acts in first two years of child’s life) and § 609 (de facto parent).

60. *Dobbs*, 142 U.S. at 2243 (“wrong from the start,” with “exceptionally weak” reasoning and “damaging consequences”).

61. *Id.* at 2246.

62. It would be unwise to limit protected procreational interests in AR births to those who cannot procreate otherwise. State inquiries into, and state distinctions between, absolute medical and other recognized barriers to childbirth via sex would prompt undue privacy intrusions.

Less likely candidates for new parent custody interests at birth are those seeking to undo the parentage of gestational or genetic surrogates via pre-birth agreements. Further, expansions via genetic surrogacy pacts are even less likely to be recognized than expansions via gestational surrogacy pacts.⁶³ Recall that in *Quillon*, the U.S. Supreme Court focused on “custody” and on “daily” care of a gestating parent, not on genetic ties,⁶⁴ in determining automatic custodial interests were warranted. Thus, all surrogacy parentage norms may need to be similar. Of course, *Quillon* could be read to be limited to genetically-tied gestating parents, perhaps with a nod to *Lehr*, which similarly recognized the significant interests in custodial parentage of those with sperm ties to children, excepting certain adulterers under state laws sanctioned by the *Michael H.* case.⁶⁵

Prime candidates for expanded or new parental custody interests at birth include some who undertake procreation via AI. A sperm provider who plans and helps complete an AI birth with an unwed and fully consenting gestating parent should have, under *Lehr*, the federal constitutional “opportunity that no other male possesses to develop a relationship with his offspring.”⁶⁶ A sperm provider who undertakes a similar AI birth with a spouse usually has a comparable opportunity.⁶⁷ In each setting, constitutional protection may be needed if state parentage laws are silent on or foreclose such opportunities.⁶⁸ Comparably, an egg provider who intentionally undertakes an FEI birth with a consenting gestating parent partner, including a spouse, should have a parental opportunity interest.⁶⁹

63. While the 2017 UPA, in many ways, treats comparably “genetic surrogate,” 2017 UPA § 801(1), and “gestational surrogate,” 2017 UPA at § 801(2), as with certain agreement processes and substantive requirements, 2017 UPA § 803 and § 804, there are special rules for genetic surrogacy agreements, 2017 UPA §§ 813-818, including the requirement that only a genetic surrogate may withdraw consent to a surrogacy pact “any time before 72 hours after the birth of the child conceived by” AR, 2017 UPA § 814(a)(2).

64. *Quillon*, 434 U.S. at 256.

65. Excepted adulterers are recognized in state laws barring adulterers (and perhaps others) from pursuing rebuttals of the spousal parentage presumptions where the marriages of the gestating parents are extant. *Michael H.*, 491 U.S. at 127 (plurality opinion) (“an extant marital union that wishes to embrace the child”).

66. *Lehr*, 463 U.S. at 262. State cases recognizing such an opportunity are reviewed in *In re K.M.H.*, 169 P.3d 1025, 1034-1038 (Kan. 2007). Statutory conditions on seizing such an opportunity may seem harsh at times. *See, e.g., K.M.H.*, 169 P.3d at 1044 (“ignorance of the law is no excuse for failing to abide by” a statutory requirement of a “written agreement”).

67. *K.M.H.*, 169 P.3d at 1033-34 (reviewing state statutes). The statutes on unwed and wed sperm providers may differ. *See, e.g.,* 2017 UPA § 705 (greater limitation on spouse’s dispute of AI parentage).

68. *See, e.g., C.M. v. C.C.*, 377 A.2d 821 (N.J. 1977).

69. *See, e.g., D.M.T. v. T.M.H.*, 129 So.3d 320 (Fla. 2013).

B. After Birth Parentage

While the pre-*Dobbs* precedents focused on constitutional custodial parentage arising at the time of birth, such parentage can also arise long after birth. Traditionally, such parentage arises from a formal adoption.⁷⁰ For some time, it has also arisen from a post birth marriage to one who is an existing legal parent.⁷¹ More recently, it has arisen from post birth parental-like acts by those who are then nonparents.⁷² There is a need to consider new or expanded constitutional custodial parent definitions that operate after birth.

As for parentage arising after birth and originating from post birth acts outside of a formal adoption or a marriage, there are many state laws on common residency/hold-out parentage,⁷³ as well as an increasing number of state laws on de facto parentage⁷⁴ and its equivalents.⁷⁵ In each setting, state laws, whether in statutes or precedents, recognize as a custodial parent a person who has held out the child as one's own, with whom there developed a bonded and dependent relationship, parental in nature, that was not motivated by economic gain. Federal constitutional protections for such parentage would promote individual interests that are

70. Formal adoptions often result from state judicial inquiries and determinations resulting in judgments on custodial parentage (and often include terminations of existing parental rights and duties). While never directly addressed by the U.S. Supreme Court, history, tradition, and deeply rooted state laws recognize that upon formal adoption, new adoptive parents and any remaining legal parents have the same custodial interests. *See, e.g.*, MISS. CODE ANN. § 97-17-13(2)(b). In adoptions, stepparents sometimes do differ from other adopters. *See, e.g.*, MONT. CODE § 42-4-309 (possible waivers of “preplacement evaluation” and “postplacement evaluation” in stepparent adoptions) and *Amendments to Florida Supreme Court Approved Family Law Forms—Stepparent Adoption Forms*, 821 So.2d 263 (Fla. 2002). As well, adopters who are “related by blood” are at times treated differently, with less restrictions on access to adoption. *See, e.g.*, MISS. CODE ANN. § 93-17-13(1) (final decree before 6 month period after interlocutory decree ends).

71. On postbirth marital parents, *see, e.g.*, 2017 UPA § 204(a)(1)(c) and § 608(b) (“individual” is a presumed parent) (presumed spousal parentage arises if marriage occurs after birth, though it is a rebuttable presumption); R.I. GEN. LAWS § 15-8.1-401(a)(3); WASH. STAT. § 26.26A.115(1)(a)(iii); VT. STAT. tit. 15, 401(a)(3). Post birth marital parentage was also recognized in the earlier UPAs. *See* 1973 UPA § 4(a)(3) (“man marries child’s natural mother,” and he acknowledges paternity, he is named on the birth certificate, or he is obligated to support the child); 2000 UPA § 204(a)(4) (similar).

72. Such state laws are reviewed in Douglas NeJaime and Courtney G. Joslin, *How Parenthood Functions*, 123 COLUMBIA L. REV. 319 (2023).

73. *See, e.g.*, 2017 UPA § 204(a)(2) & § 609. On common residency/hold out parentage recognitions, *see, e.g.*, TEX. CODE § 160.204(a)(5) and WASH. CODE § 26.26.116(2).

74. *See, e.g.*, 2017 UPA § 609. On actual de facto parentage recognitions, *see* DEL. CODE tit. 13, 8-201 and WASH. CODE § 26.26A.440.

75. Equivalents include psychological parent, equitable parent, equitable estoppel parent, intended parent and functional parent. *See, e.g.*, NeJaime & Joslin, *supra* note 72 at 324-25. (reviewing state laws on de facto parentage and their equivalents found in two thirds of the states, and the cases thereunder).

“essential” and are in accord with precedents on protections of extant families⁷⁶ and the familial association interests of parents, children, and perhaps other family members.⁷⁷

With or without new constitutional recognitions of after-birth custodial parents, a separate federal constitutional issue arises in after-birth parentage laws. It involves whether the residential/hold out, de facto parent, and comparable doctrines (like equitable adoption and parentage by estoppel) allowing one existing legal parent to facilitate such new parentage over the objection—or lack of consent—by a second existing legal parent violate the care, custody, and control rights of the second parent under the *Troxel* case. The 2002 ALI *Principles of the Law of Family Dissolution* expressly recognize such second-parent interests in its definition of “parent by estoppel” but not in its definition of “de facto parent.”⁷⁸ The 2017 UPA follows the Principles in its “de facto parent” norms by not recognizing second-parent interests.⁷⁹ To date, state high courts in Maryland⁸⁰ and Maine⁸¹ have, however, recognized such second-parent interests as meriting federal constitutional protection.

76. *Michael H.*, 491 U.S. at 127 (no “substantive parental rights to the natural father of a child conceived [by sex] within and born into an extant union that wishes to embrace the child”).

77. See, e.g., *Moore v. City of East Cleveland*, Ohio, 431 U.S. 494, 499 (1977) (plurality opinion) (when “the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the government’s interests advanced and the extent to which they are served by the challenged regulation,” citing *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting)) and *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 847 (1977) (“unnecessary” to resolve “complex and novel questions” involving protected liberty interest in foster family relations)). See, e.g., *Perry v. Indiana Dept. of Child Services*, 196 N.E.3d 1264, 1270 (Ind. 2022) (liberty interest in foster family relationship not yet “clearly established”); *In re Adoption/Guardianship No. 6Z970003*, 731 A.2d 467, 477-78 (Md. Spec. App. 1999) (child has a fundamental interest in the continuation of parental care and support and in freedom from governmental action that would jeopardize it).

78. American Law Institute, *Principles of the Law of Family Dissolution* (2002), §§ 2.03(1)(b) and (c) (only with the parent by estoppel doctrine is there a need for “a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities,” assuming that “the child’s best interests” are served).

79. 2017 UPA § 609(c).

80. *E.N. v. T.R.*, 255 A.3d 1, 29 (Md. 2021) (“for establishment of de facto parenthood, where there are two legal (biological or adoptive) parents, a prospective de facto parent must demonstrate that both legal parents consented to and fostered such a relationship or that a non-consenting legal parent is unfit or exceptional circumstances exist”). See also *id.* at 31 (“Moreover, completely disregarding whether both legal parents have consented to and fostered a prospective de facto parent’s parent-like relationship with a child or that a parent is otherwise unfit or exceptional circumstances exist, not only runs afoul of a parent’s constitutional rights, but also basic family law principles”).

81. *Martin v. MacMahan*, 264 A.3d 1224, 1234-35 (Maine 2022) (holding that a putative de facto parent must prove that a legal parent who appears and objects to the de facto parentage petition “fostered or supported” de facto parenthood; otherwise, it “would potentially allow the unilateral

IV. CONCLUSION

Some of the opinions cast significant doubts on the continuing legitimacy of, and the future prospects for, fundamental but unenumerated, substantive due process liberty interests. Under the earlier *Troxel* precedent, one such liberty interest involves parental “care, custody, and control” of children. Notwithstanding the general reluctance of certain Justices to recognize new unenumerated liberty interests and to maintain some existing unenumerated liberty interests, the *Troxel* precedent fits within the narrowed limits on new and continuing unenumerated rights. Further, the “essential” nature of procreational rights before birth and family association rights after birth, as reflected in many contemporary state laws, counsels that the U.S. Supreme Court should expand its recognitions of federal constitutional unenumerated parental liberty interests.

actions of one legal parent to cause an unconstitutional dilution of another legal parent’s rights,” citing *E.N.*, 253 A.3d at 31).