OBERGfell’s Ambiguous Impact on Legal Parentage
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92 Chi-Kent L. Rev. 55 (2017)

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. ... The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

United States v. Windsor, 133 S. Ct. 2675, 2694 (2013)

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.


The lawyers who structured the campaign for marriage equality for same-sex couples emphasized that denying these adults access to marriage harmed their children whom they were actually raising. They crafted this argument at least partially in response to their opponents’ claim that opposite-sex married families are uniquely well-suited to raising children and that the ban on same-sex marriage was constitutional because it promoted childbearing within opposite-sex marriages. While a few state courts accepted the opponents’ claim, more accepted the counterargument that the children of same-sex couples were harmed when their parents were denied access to marriage. Of course, the Supreme Court also accepted the latter argument in Windsor and Obergefell and said that it supported the conclusion that bans on same-sex marriage and refusal to recognize same-sex marriages from other jurisdictions violate the Fourteenth

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As a few scholars have written, these cases also have the potential to affect the law of parent-child relations more broadly, particularly the law that determines who is a legal parent. However, how the cases will affect this area of the law is at best ambiguous.

For more than thirty years, the central question of the law of parentage has been when and to what extent determinations of legal parenthood should be based on biological relationship, marriage to a child’s biological parent, or functioning as or intending to be a parent. This question is embedded in the excerpts from the Supreme Court decisions at the beginning of this article. On the one hand, the Court is endorsing the claim that children whose parents are married are better off socially and legally than non-marital children; the language in both opinions could easily be taken to support legal rules that encourage or prefer childrearing within marriage.

On the other hand, the Court’s argument assumes that both members of the same-sex couple are in fact parents of the children, even though it is highly likely that only one adult is biologically related to the child. The unspoken premise of the argument is that both are parents because both

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6 Many scholars have made the arguments for recognizing and protecting children’s relationships to adults who take on parental responsibilities toward them. One of the earliest and most influential articles is Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 Va. L. Rev. 879 (1984). I discuss the basic issues in Leslie J. Harris, Reconsidering the Criteria for Legal Fatherhood, 1996 UTAH L. Rev. 461 (1996).
9 The exception would be where one woman provides the egg that is fertilized and then carried to term by the other woman. Even then, some people debate whether gestation counts as biological relationship. See generally Annette R. Appell, The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption, 22 BYU J. Pub. L. 289 (2008); Melanie B. Jacobs, Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents, 25 N. Ill. U. L. Rev. 433 (2005); Naomi Cahn, Children’s Interests and Information
function as parents (and often, but not always, both participated in the decision-making process that led to the child’s conception and birth).

At the root of the debate over legal parenthood is whether for children, how important blood ties and legal relationships between adults are compared to the children’s own relationships with adults who function as their parents and develop emotional bonds with them. Proponents of the view that the child’s relationships matter more argue that a child’s greatest need is for a close, stable relationship with an adult committed to the child's welfare, and that the law of parenthood should protect such a relationship. Few, if any, seriously question the importance of protecting these relationships between children and their adult caregivers; the debate is over the best way to protect all children generally and to advance other social goals.

The traditional law of parentage protected functional parenthood, though not expressly. It provided that marriage to a child’s mother was the only way that anyone except the mother became a legal parent (other than by adoption) through a centuries-old rule that is still viable today: a married woman’s husband is presumed to be the father of her children. When most children were born to married women, this rule served to identify as the legal father the man who was most likely to be a child’s biological and social father. However, as non-marital childbearing increased dramatically, relying primarily on marriage to determine legal paternity became unsustainable. The law of parentage for non-marital children has developed two strands. One emphasizes the needs of the child support enforcement system and bases legal parentage on biological paternity. The other is used mostly to determine custody and related issues and focuses on the psychological and functional relationships between the child and the adults. However, the biology-based strand of the law is often taken as the norm, while the claims to protect functional relationships are treated as exceptions. The dominance of biologically based paternity also affects marital children, particularly when a husband’s legal paternity is challenged on the basis that he is not the biological father. Faced with the tacit expectation that legal parenthood depends on biological parenthood, proponents of functional parenthood must constantly struggle for the acceptance of their position.

This article examines how the law in the various states balances claims to base legal parentage on biology, function, and marriage, and how the Supreme Court’s same-sex marriage


9 The classic article expressing this view is Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879 (1984).

10 See Part III infra.

11 See notes 37–39 and accompanying text infra.

12 Leslie Joan Harris, The Basis for Legal Parentage and the Clash Between Custody and Child Support, 42 IND. L. REV. 611, 632 (2009) [hereinafter Harris, The Basis for Legal Parentage].

13 Leslie Joan Harris, Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality, 2013 Mich. St. L. Rev. 1295, 1296 (2013) [hereinafter Harris, Reforming Paternity Law].
decisions are affecting that balance. It concludes that the decisions are having some impact in the lower courts, particularly by supporting recognition of the parental claims of adults who are not biologically related to children whom they have raised with their same-sex partners. However, these decisions are limited and cannot protect children and their functional parents adequately in all situations. Therefore, legislative solutions are still needed.

The first part of this article describes changing social conditions that have generated today’s uncertainty about the law of legal parenthood. The second part analyzes statutes and case law that directly recognize functional parenthood through such doctrines as de facto parentage, with a focus on recent decisions with mixed results from Oklahoma, Maryland, Massachusetts, New York, and Wyoming. The third and fourth parts examine more traditional rules of parentage, first when children are born to married women, and then when the mothers are not married. Each part includes a discussion of cases extending these principles to children of same-sex couples. The final part returns to the questions of the adequacy of current law and the need for legislation to improve the situation.

I. The Social Context of the Law of Parentage

In 2015 in the United States, about fifty-one million children younger than eighteen, or 69%, lived with both parents. The parents of most of these children were married, but three million children, or 4% of all children under eighteen, lived with both biological parents who were not married to each other.

On the other hand, almost a third of all children, more than nineteen million, did not live with both parents because of the high rates of non-marital births, divorces, and breakups of informal domestic partnerships. Most of them live with their mothers. In 2015, 7.1 million of all children lived with a mother who was divorced or separated, while 8.3 million lived with a mother who had never been married. Another 1.6 million lived with a father who was divorced or separated, and 842,000 lived with a father who had never been married. The incidence of

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20 Id.
21 Some 2.9 million children lived with neither parent. Id.
children not living with both parents is unlikely to decline, mostly because of the high non-marital birth rate. In 2014, 40.2% of all births in the United States were non-marital.\textsuperscript{22}

Many children not living with both parents currently live or will live in blended families because of the strong tendency of divorced\textsuperscript{23} and single\textsuperscript{24} parents to form new romantic relationships during their children’s minorities. In 2015, of all adults living with their own children younger than eighteen, 14% had been married twice, and 2.3% had been married three or more times. Only 11% had never been married.\textsuperscript{25} And parents often live with other romantic partners to whom they are not married; in 2015, 2.4 million children lived in a household that

\begin{thebibliography}{9}
\bibitem{bradyhamilton2015} Brady E. Hamilton et al., \textit{Births: Final Data for 2014}, 64 Nat’l Vital Stat. Rep. 12, tbs.1–4, tbl.B (Dec. 23, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf. Women of color are more likely than white women to have children outside marriage. In 2014, 29.2% of births to non-Hispanic white mothers were non-marital, compared to 52.9% of births to Hispanic mothers, and 70.9% to non-Hispanic black mothers. \textit{Id.}
\bibitem{andrewcherlin2009} In the United States, non-marital families are much less stable than marital families. ANDREW J. CHERLIN, \textit{The Marriage-Go-Round: The State of Marriage and the Family in America Today}, (2009); ELIZABETH MARQUARDT ET AL., \textit{The President’s Marriage Agenda for the Forgotten Sixty Percent in The State of Our Unions}, 6–8, 31 (Nat’l Marriage Project & Inst. for American Values, 2012). Evidence from the Fragile Families and Child Well-Being Study, a major longitudinal study of about 5,000 children and their parents that includes a disproportionate number of non-marital children, shows that the relationships of unmarried parents are fragile; a year after birth, 48% of the fathers in the study were living away from their child, 56% were at three years and 63% were at five years. Marcia J. Carlson, Sara S. McLanahan & Jeanne Brooks-Gunn, \textit{Coparenting and Nonresident Fathers’ Involvement with Young Children After a Nonmarital Birth}, 45 DEMOGRAPHY 461, 461 (2008). The study includes children born in seventy-five hospitals in twenty cities in the U.S. with a population over 200,000. The study uses baseline data collected between 1998 and 2000. Mothers and fathers were interviewed at birth, and follow-up interviews were done when the children were one, three, and five years old. Results of the study are generalizable to urban areas with a population of more than 200,000. SARA McLANAHAN ET AL., \textit{The Fragile Families and Child Wellbeing Study in Baseline National Report}, at *2 (Rev. 2003). Re-partnering was the norm in the Fragile Families study. By the time a child was five years old, more than half had seen their mother’s romantic partner move out or a new partner move in, 39% had experienced one or two of these changes, and 15% had experienced three or four changes. Sara McLanahan, \textit{Fragile Families and Children’s Opportunities} tbl.4 (Working Paper No. WP12-21-FF, (2012), http://crcw.princeton.edu/workingpapers/WP12-21-FF.pdf.
\bibitem{jamielewis2015} The average number of residential partner changes was three times higher among unmarried mothers than among married mothers. Sara McLanahan & Audrey N. Beck, \textit{Parental Relationships in Fragile Families}, 20 FUTURE CHILD., Fall 2010 at 22.
\end{thebibliography}
included a parent’s unmarried opposite-sex partner who was not also the child’s parent.26

While most children live with two opposite-sex parents, almost 220,000 children lived in a household headed by a same-sex couple in 2013.27 Of the 783,100 same-sex couples in the United States in 2014, 16% were living with at least one child who was the legal child of at least one of them.28 In 2013, the Williams Institute reported that nearly half of LGBT women are raising a child younger than eighteen, and a fifth of LGBT men are.29 Children of same-sex parents also commonly live in blended families, since most children being raised by lesbians were conceived in prior heterosexual relationships.30

As data shows, of the 30% of American children who do not live with both biological parents, most at some point live in a household that includes a parent’s new partner, many of whom become caretakers for the children.31 In at least some circumstances, these adults become functional parents, and both they and the children need legal protection for their relationships. The same is true for some of the 2.9 million children who live with neither parent,32 though they are not the focus of this paper. The next section of this paper discusses statutes and case law that provide this protection on the express basis of giving legal recognition to functional parent-child relationships.

II. DE FACTO PARENTHOOD OTHER THEORIES TO RECOGNIZE FUNCTIONAL RELATIONSHIPS

The major legal barrier to permitting an adult who is not a child’s biological or adoptive parent to have access to the child over the parent’s objection is the Supreme Court’s decision in Troxel v. Granville.33 Troxel is an ambiguous decision without a plurality opinion, but at its core it provides due process protection for the childrearing decisions of “fit” parents, particularly decisions about whether the children will spend time with other adults who are not legal parents. While the dominant interpretation of Troxel is that it means a parent’s decision can be overridden

29 GATES, supra note 27 at 2.
32 Id.
to avoid detriment to the child, some states require proof that the parent’s decision will harm the child or even that the parent is unfit.\(^\text{34}\)

At least thirty-two states have statutes or case law that sometimes allows a functional non-biological parent to seek custody or visitation over a legal parent’s objection, notwithstanding Troxel.\(^\text{35}\) Eight states have statutes that create these rights,\(^\text{36}\) and another eighteen have cases that recognize a relationship called “de facto parent,” “psychological parent,” or person standing “in loco parentis.”\(^\text{37}\) In some of these states, the de facto parent has the status of legal parenthood and stands on equal footing with other legal parents.\(^\text{38}\) In others,


\footnotesize{38 See, e.g., *C.E.W.*, 845 A.2d at 1151; *V.C.*, 748 A.2d at 549; *In re Parentage of L.B.*, 122 P.3d at 180–81. See also Smith v. Guest, 16 A.3d 920, 931 n.61 (Del. 2011) (citing cases).}
the de facto parent is not a legal parent and must overcome the *Troxel* presumption that the legal parent's decisions about access control. In another five states, courts have held that a statutory presumption that a person taking a child into his or her home and holding the child out as his or her cannot always be rebutted by evidence that the adult is not the child’s biological parent; the effect is that the adult is the child’s legal parent. Finally, New York, has adopted a unique doctrine that protects functional parents sometimes. In 2016, the New York Court of Appeals in *Brooke S.B. v. Elizabeth A.C.C.* refused to recognize a broad doctrine of de facto parenthood. Instead, it adopted what amounts to a waiver theory: If the biological parent and the functional parent agreed to conceive and raise a child as co-parents, the functional parent has the legal status of a parent, and has standing to seek custody because of the agreement. On the other hand, courts in at least seven states have recently refused to recognize any of these doctrines or to provide any remedy to functional parents.

Many, but not all, of the cases about whether to recognize de facto parenthood or a similar theory were based on disputes between lesbian couples at the time their relationships broke up. These include *Brooke S.B.* and three other very recent cases. Two of these cases overruled earlier decisions and recognized the de facto parent doctrine, and the third ruled that a presumption that a person holding out a child as her own cannot necessarily be rebutted by proof that the adult is not the child’s genetic mother. Acknowledging the constitutional protection for parental decisions about who will have access to their children under *Troxel*, the courts that adopted the de facto parent doctrine concluded that acceptance of same-sex marriage undermined the premises of the older cases, though they were careful to distinguish de facto

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42 *Brooke S.B.*, 28 N.Y. 3d at 11.
parents from other adults who might seek custody or visitation over a parent’s objection.\textsuperscript{46} Both courts placed de facto parents on a legal par with biological or adoptive parents. In Conover v. Conover, the Maryland high court wrote:

Additionally, the passage of time and evolving events have rendered [the overruled case] obsolete . . . . Maryland's recognition of same-sex marriage in 2012—Civil Marriage Protection Act, Ch. 2, 2012 Md. Laws 9—undermines the precedential value of [the overruled case]. Our state's recognition of same-sex marriage illustrates the greater acceptance of gays and lesbians in the family unit in society . . . .

. . . In light of our differentiation . . . between “pure third parties” and those persons who are in a parental role, we now make explicit that de facto parents are distinct from other third parties. We hold that de facto parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis. The best interests of the child standard has been “firmly entrenched in Maryland and is deemed to be of transcendent importance.” With this holding we fortify the best interests standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships.\textsuperscript{47}

The Oklahoma Supreme Court expressed similar views in Ramey v. Sutton, citing Obergefell as part of the reason to overrule the earlier case rejecting de facto parenthood:

Since [the earlier decision], the Supreme Court of the United States (“SCOTUS”) has ruled that marriage is a constitutionally guaranteed fundamental right for same sex couples in every state in this nation and affirming the longstanding constitutional right to have a family and raise children, Obergefell v. Hodges, 576 U.S. — (2015). Today we [acknowledge] the rights of a non-biological parent in a same sex (sic) relationship who has acted \textit{in loco parentis} where the couple, prior to . . . Obergefell, supra, (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner's parental role following the birth of the child . . . .

. . . . We have consistently given compelling consideration to the best interests of the minor child in custody matters. Our long standing jurisprudence recognizes the fundamental right of a parent to the companionship, care, custody and management of the child as guaranteed by the United States Constitution and the Oklahoma Constitution.

\textsuperscript{46} However, the Maryland court did not tie legal recognition of functional parents to marriage, citing the work of Professor Nancy Polikoff. \textit{Id.} at 46–47.

\textsuperscript{47} \textit{Id.} at 46, 50 (internal citations omitted).
We have held that when persons assume the status and obligations of a parent without formal adoption they stand in loco parentis to the child and, as such, may be awarded custody even against the biological parent. Other jurisdictions have relied on this doctrine in finding a former same sex partner had standing to bring a child custody action where the biological parent consented and encouraged her partner to assume the status of parent and acquiesced to the partner's performance of parental duties. One court noted that although the biological mother enjoys many rights as a parent, it does not include the right to erase a relationship that she voluntarily created and fostered with their child.  

Like the two de facto parent decisions, the Massachusetts Supreme Judicial Court case that relied on the holding out presumption to establish the legal parentage of the second member of a lesbian couple raising children together also recognized the parental rights of the biological mother. However, the court said, protecting the children’s interest in preserving the actual family relationship with the other mother took precedence.

In contrast, the New York Court of Appeals refused to recognize a broad, de facto parentage doctrine, because of Troxel. However, it agreed with the Maryland and Oklahoma courts that the changing legal position of same-sex couples required rejection of a twenty-five-year-old precedent that denied all rights to the nonbiological parent when a same-sex couple breaks up. In Brooke S.B. the court wrote:

[The overruled case’s] foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in Obergefell v. Hodges (576 U.S. ———, 135 S. Ct. 2584 [2015]), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples…..

The Supreme Court has emphasized the stigma suffered by the “hundreds of thousands of children [who] are presently being raised by [same-sex] couples” (Obergefell, 135 S Ct at 2600–2608). By “fixing biology as the key to visitation rights, the [overruled case] inflicted disproportionate hardship on the growing number of nontraditional families across our State . . . .

. . . . We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children. For certainly, “the interest of parents in the care, custody and control of their children [ ] is perhaps the oldest of the fundamental liberty interests,” and any infringement on that right “comes with an obvious cost” (Troxel, 530 U.S. at 64–65). But here we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a “parent” with

48 362 P.3d at 218, 221 (footnotes omitted).
49 Partanen, 59 N.E.3d at 1141.
coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical.

We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered.

Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proven by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.

In sharp contrast to the cases from Maryland, Massachusetts, Oklahoma and New York, the Wyoming Supreme Court in 2014 refused to provide any relief to a functional parent when the biological parent sought to deny him visitation. Unlike the other three cases, the Wyoming case, L.P. v. L.F., involved an opposite-sex couple. The mother and the man were living together when the child was born, and he was listed as the father on the birth certificate, though he was not the biological father. They lived together for the first eighteen to twenty-one months of the child’s life, separated, and then lived together again briefly. After a separation, they lived near each other for five more years, though they did not live together. The man helped support the child and saw him regularly, and the child regarded him as his father. For undisclosed reasons, the mother then filed a petition to disprove the father-child relationship. The man argued that even if he was not the child’s biological father, the court should adopt the de facto parent doctrine and grant him parental rights. The court refused, finding that the legislature intended the state parentage statutes—which are based on the Uniform Parentage Act (UPA)—to cover all theories upon which a nonparent might claim a right to a relationship with a child.

In sum, while the de facto parent doctrine and related theories protect functional parent-

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52 If the man had lived with the child for the first two years of his life, he would have been presumed to be the child’s father, and the statute of limitations on legal actions to challenge that presumption would have run. Id. at 911. The court rejected the man’s argument that he had substantially complied with the statute creating the presumption and said that even if the presumption applied, it was rebutted by genetic evidence showing that he was not the biological father. Id. at 914-15. For a discussion of the presumption of legal paternity based on living with a child and holding out the child as one’s own, see infra text accompanying notes 113–35.
child relationships where they are recognized, they have not been adopted in almost half the states. In some states, such as Oklahoma, there is a question about the applicability of the doctrine where parents could marry but choose not to. The next two sections examine traditional principles of the law of paternity that fill this gap in some places and to some extent.

III. THE MARITAL PRESUMPTION – PARENTAGE BASED ON MARRIAGE TO A CHILD’S LEGAL PARENT AT BIRTH

As discussed in the introduction to this article, all states presume the husband of a married woman to be the father of her children born during the marriage. *Obergefell* raises the question of whether the marital presumption applies if the married couple is same-sex. A related question is whether state laws providing that a child born to a married woman via artificial insemination with her husband’s consent is the legal child of the husband apply to married same-sex couples. While this rule is not on its face the same as the marital presumption, it is rooted in the same principles, and advances the same policies as the marital presumption. This section first examines whether these rules apply to married lesbian couples, including whether application of the rules is constitutionally required after *Obergefell*. It then considers the applicability of these principles when the partners are men. It concludes with a discussion of what happens when the marital presumption is challenged on the basis that the mother’s spouse is not the child’s biological parent.

A. Applicability of the Marital Presumption to Lesbian Couples

The marital presumption, which has very old, common-law roots, applies to married opposite-sex couples in all states. While some scholars have argued that the primary purpose and effect of the presumption is to allow married couples an easy way to establish the legal parent-child relationship based on biology, the rule does more than this. Most husbands are in fact the biological fathers of their wives’ children. In the great majority of cases, the

54 See *Ramey*, 362 P.3d at 221, quoted at text accompanying *supra* note 48.
58 Empirical studies show that almost always men who believe themselves to be the fathers of children are in fact the fathers. A study published in 2013 reconstructing large family
presumption also protects the functional parent-child relationship and the integrity of the marriage, since no effort is made to rebut the presumption.

Whether the marital presumption applies to lesbian couples depends in the first instance on whether the court treats the presumption as pertaining only to biological parenthood. Relatively few states with laws addressing civil unions, comprehensive domestic partnerships, or same-sex marriages addressed this question before Obergefell was decided; of those that did, most held that lesbian couples are entitled to the benefit of the presumption as one of the benefits of marriage. In an early decision, following the holding in Goodridge v. Department of Public Health that same-sex marriage must be recognized under the state constitution, the Massachusetts Supreme Judicial Court recognized a California domestic partnership as equivalent to marriage, and then applied the marital presumption. Within a few years, courts in Connecticut and Iowa reached the same conclusion under their own statutes and case law. The Arizona Court of

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The rate of non-paternity is much higher for men who seek genetic tests to determine their paternity. A study conducted in the mid-2000s found that, for any man who was tested for paternity in a child support office, there was a 72% probability that the test would show that he is the father. The rate varied little across racial or ethnic lines. The differences among racial and ethnic groups was not statistically significant. David Bishai, *A National Sample of US Paternity Tests: Do Demographics Predict Test Outcomes?* 46 TRANSFUSION 849, 852–53 (May 2006). See also Anderson, *supra* note 58, at 5 (30% of the men who seek blood tests to confirm paternity are not the biological father).

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62 Gartner v. Iowa Dept. Pub. Health, 830 N.W.2d 335, 351 (Iowa 2013). In contrast, in 2015 the Iowa Supreme Court held that a husband who was married to the mother at the child’s birth and who had raised the child, but who was clearly not a child’s biological father, had no rights in a juvenile court dependency case because the statute speaks of biological and adoptive parents. *In re J.C.*, 857 N.W.2d 495, 508 (Iowa 2014). Whether the legislature intended to use the statute to exclude the husband is far from certain, though. On the treatment of fathers in dependency cases generally, see Leslie J. Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J. L. & FAM. STUD. 281, 282 (2007).
Appeals held that, in light of Obergefell, the marital presumption applies to a married lesbian couple, and in dicta, an intermediate Missouri Appellate Court indicated that it would reach the same conclusion.

However, strong dicta in a 2009 Oregon Court of Appeals decision said that the marital presumption could not apply to a same-sex couple because it is based on biology, a position that it reaffirmed in 2015. Similarly, dicta in a 2015 Florida case suggested strongly that the marital presumption would not apply to a same-sex couple, relying on a 1993 case holding that a husband who was living with the mother when her child was born and raised the child did not have standing to seek visitation when the parties divorced. Both of these cases were decided before Obergefell, however, and so they do not address whether the constitution requires extending the presumption to same-sex couples. The lower courts in New York are divided about whether the marital presumption applies to same-sex couples, although the New York Court of Appeals decision in Brooke S.B. v. Elizabeth A.C.C. better comports with the decisions applying the presumption. This is so because most of the time when a child is born to a same-sex couple, they will have agreed to raise the child together, which gives the biological mother’s partner parental status under Brooke S.B.

B. Applicability of Artificial Insemination Statutes (AIS) to Lesbian Couples

If a married woman conceives by artificial insemination by donor, and the marital presumption in her state is rebuttable by evidence that her husband is not the biological father, his legal paternity would be vulnerable. In fact, in some early cases, courts held that the children

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65 Shineovich v. Shineovich, 214 P.3d 29, 36 (Or. Ct. App. 2009) (“By the very terms of the statute, for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child.”).
66 In re Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015). Both Madrone and Shineovich involved lesbian couples who were not married or in a domestic partnership when their children were born because the laws at the time did not allow them to. The women who were not the biological mothers successfully argued that a statute concerning a husband who consents to his wife’s artificial insemination applied to them so as to make them legal parents of their mates’ children.
68 For a discussion of this issue, see infra Part III.C.
71 See id.
were not the husband’s legal issue, even though he had consented to the procedure.\textsuperscript{72} To avoid this outcome, a number of states have enacted statutes providing that when a husband consents to his wife’s artificial insemination, he is the legal father.\textsuperscript{73} Before Obergefell, courts in some states applied these statutes to lesbians who were married, in civil unions, or in domestic partnerships,\textsuperscript{74} although other courts did not.\textsuperscript{75} In 2015, a Michigan appellate court applied Obergefell to reach the same result,\textsuperscript{76} and in 2016 the Indiana Court of Appeals applied to a lesbian couple its case law rule that a child conceived during marriage with the consent of both spouses is the child of both of them, though it did not invoke Obergefell.\textsuperscript{77}

C. Does the Constitution Require Applying the Parentage Rules to Same-sex Couples?

Since Obergefell, two federal district courts have held that states’ refusals to extend the marital presumption to a woman whose wife gives birth during the marriage violates equal protection, due process, or both. In Henderson v. Adams, the Indiana department of vital statistics refused to allow both women’s names to be on the child’s birth certificate on the basis that the wives of the biological mothers were not legal parents under state law.\textsuperscript{78} The women sued, alleging that the state law violated equal protection and due process because they created a presumption of parenthood for husbands, but not wives, of birth mothers. The court granted their motion for summary judgment. On similar facts, the Utah federal district court in Roe v. Patton also ruled in favor of the biological mother and her wife.\textsuperscript{79}

In Henderson, the more extensive of the two opinions, the court ruled that the state’s action was subject to heightened scrutiny because the state was applying the marital presumption

\begin{itemize}
  \item \textsuperscript{74} Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012); Wendy G-M., 985 N.Y.S.2d at 845.
  \item \textsuperscript{77} Gardenour v. Bondelie, No. 32A01-1601-DR-82, 2016 Ind. App. LEXIS 290, at *19–22 (Ind. Ct. App. Aug. 15, 2016). See also Matter of L., 2016 N.Y. Misc. LEXIS 3674 (N.Y. Fam. Ct.) (applying artificial insemination statute to married same-sex couples but also allowing the nonbiological mother to adopt the children because her legal relationship to the children based on the statute is not recognized in some countries).
  \item \textsuperscript{79} No. 2:15-CV-00253-DB, 2015 WL 4476734, at *1 (D. Utah July 22, 2015).
\end{itemize}
differently based on gender and sex classifications. The state argued that its position was supported by its interests in protecting the rights of biological fathers and maintaining accurate records of children’s biological parentage. The court rejected this argument, saying:

The Court is not convinced that the challenged Parenthood Statutes are substantially related or narrowly tailored to meet the stated interests of preserving the rights of biological fathers and maintaining accurate records of biological parentage . . . .

. . . . During oral argument, the State Defendant asserted that the birth mother should not name her husband as the father of the child when a third-party sperm donor is involved. However, as noted above, common sense says that she will name her husband as the father. Whether she names her husband as the father or states that she is not married to the father, the biological father's parental rights are not preserved and accurate records of biological parentage are not maintained. If the mother names her husband, the third-party sperm donor who is the biological father is not listed on the birth certificate. If the mother says she is not married to the father, the third-party sperm donor who is the biological father still is not listed on the birth certificate. In either event, the State's interests in preserving the rights of biological fathers and maintaining accurate records of biological parentage are not served. 80

Obergefell, the court said, “stands for the proposition that any benefit of marriage must now be extended to same-sex married couples on an equal basis with opposite-sex married couples. But this is exactly what the Plaintiffs seek—the extension of a benefit of marriage on an equal basis.” 81

Turning to the plaintiff’s due process claim, the court said:

The Supreme Court long ago recognized a fundamental liberty interest “to marry, establish a home and bring up children . . . .”

. . . . The Parenthood Statutes and the State Defendant's implementation of the statutes . . . significantly interferes (sic) with the Plaintiffs' exercise of the right to be a parent by denying them any opportunity for a presumption of parenthood which is offered to heterosexual couples. What Plaintiffs seek is for their families to be respected in their dignity and treated with consideration . . . . As previously stated, the Parenthood Statutes are not narrowly tailored to meet a compelling governmental interest. By refusing to grant the presumption of parenthood to same-sex married women, the State Defendant violates the Plaintiffs' fundamental right to parenthood under the Due Process Clause. 82

D. What About Married Gay Men?

As Susan Appleton has written, on policy grounds there seems to be no principled reason

81 Id. at *13.
82 Id. at *14–15.
that the marital presumption would not apply to two married men, one of whom is the biological father of a child who was born to a “surrogate” with the assistance of reproductive technology.\(^{83}\) However, for practical reasons, the marital presumption is not important for establishing the legal paternity of a biological father’s male spouse.

In some states, statutes determine the parentage of a child born through assisted reproductive technology, though they vary considerably.\(^{84}\) If the statutes allow the sperm donor/intended father to become the legal father, they will probably allow for his spouse to become a parent as well.

If there are no special statutes, generally applicable family law rules are applied, and some kind of legal process for establishing paternity of the man who provided the sperm to conceive the child will be required.\(^{85}\) If the biological mother of the child, the “surrogate,” is not married, she and the biological father could establish his legal parentage by signing and filing with the state a voluntary acknowledgment of paternity.\(^{86}\) On the other hand, if the mother is married, the presumption of her husband’s legal paternity must first be rebutted through some kind of legal proceeding.\(^{87}\) In either case, however, absent a special reproductive technology statute, the mother remains a legal parent, and ordinarily the parties will want to eliminate that legal relationship. This would require a legal proceeding, such as an adoption or an action for termination of parental rights. During that legal proceeding, the legal parentage of the biological father’s husband could be established as well.\(^{88}\) Thus, there is rarely, if ever, a practical occasion

\(^{83}\) Appleton, supra note 55, at 260–61.


\(^{85}\) On the legal position of unmarried fathers generally, see Part IV.A. infra.

\(^{86}\) For a discussion of voluntary acknowledgments of paternity, see infra text accompanying notes 100–114.


\(^{88}\) In 2016, a Mississippi federal district held that a Mississippi statute that barred couples of the same gender from adopting children was unconstitutional under Obergefell. The statute was the last remaining express statutory ban in the country. Campaign for S. Equal. v. Mississippi Dep’t of Human Serv. No. 3:15CV578-DPJ-FKB, 2016 WL 1306202, at *14 (S. D. Miss. Mar. 31, 2016).
for invoking the marital presumption when the married couple is male.\(^{89}\)

**E. Obergefell’s Implications for Rebutting the Marital Presumption**

Although at common-law the marital presumption for opposite-sex married couples was conclusive unless the husband had literally been out of the country when the child could have been conceived,\(^{90}\) in most states today, when the spouses are opposite-sex, the presumption may be rebutted with genetic evidence.\(^{91}\) But when the marital presumption is invoked in the context of a same-sex marriage, it would be nonsensical for this rebuttal rule to apply, since the spouse of the woman who bore the child will by definition not be related to the child (except in the case where she provided the egg that became the child). To recognize the marital presumption for same-sex couples is equivalent to recognizing that the spouse of the person who bore the child is a legal parent because she is the intended parent, the functional parent, or both. If the Constitution does indeed compel the conclusion that the marital presumption is a benefit of marriage to which same-sex couples are entitled, the Constitution compels recognition that at least sometimes legal parenthood must be based on function or intention. The question courts will have to confront is how this development affects the law governing rebuttal of the marital presumption for opposite-sex couples.

In many circumstances, state law precludes rebuttal of the marital presumption because the challenger lacks standing, a statute of limitations has run, the challenger is estopped from rebutting the presumption, or rebuttal is contrary to the child’s interests. For example, the Uniform Parentage Act (“UPA”) of 2002 grants standing to rebut the presumption to the child, the mother, a man whose paternity is to be adjudicated (including a legal father and an alleged father), the state child support enforcement agency, and adoption agencies.\(^{92}\) Under the UPA, an action must be brought within two years of the child’s birth,\(^{93}\) and courts have discretion to deny a motion for genetic testing based on findings that a party is estopped from denying paternity or

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\(^{89}\) Thanks to Professor Richard Storrow for helping me think this through.

\(^{90}\) At common law the marital presumption could be rebutted only by showing that the husband had been out of the kingdom of England for more than nine months. 1 WILLIAM BLACKSTONE, COMMENTARIES, *287. See generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 207–15 (1985) on developments in the American colonies. This rule was complemented by Lord Mansfield’s rule, which prevented either spouse from giving testimony that cast doubt on the husband’s biological paternity. Goodright v. Moss, 98 Eng. Rep. 1257, 1257 (KB 1777). Together these rules kept out of court highly reliable evidence that a child was not in fact the husband’s biological child.

\(^{91}\) A few states still recognize a conclusive presumption of paternity in limited circumstances. For example, in California and Oregon, third parties cannot challenge the presumption and the spouses object to the third party challenge. CAL. FAM. CODE §§ 7540–7541 (West 2004); OR. REV. STAT. § 109.070(2) (2015). The constitutionality of an earlier version of the California conclusive presumption was upheld against a biological father’s due process challenge in Michael H. v. Gerald D., 491 U.S. 110, 118–30 (1988).

\(^{92}\) UNIF. PARENTAGE ACT § 602 (2002).

\(^{93}\) Id. § 607(a). If the presumed father and the mother did not cohabit or engage in sex at the probable time of conception, and if the presumed father never held out the child as his, the action may be maintained at any time. Id. § 607(b).
that allowing testing or disestablishing paternity would be contrary to the child’s best interests.\textsuperscript{94} Even without a statute, a number of courts have held that genetic evidence offered to rebut the presumption can be excluded to protect the child's best interests.\textsuperscript{95} Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped from denying parentage because of the detrimental reliance of the other party or, sometimes, the child.\textsuperscript{96}

\textit{Obergefell} does not directly require that any of these rules apply when the couple is opposite-sex, since it does not address the rights of opposite-sex couples. On the other hand, the key assumption underlying the \textit{Obergefell} discussion of marriage and parenthood is that when a same-sex couple is raising a child together by mutual agreement, they \textit{are} both parents. As a matter of equal protection, members of opposite-sex couples should have the same protection when they are raising a child together, regardless of whether the husband is the biological father. At a minimum, outsiders to the marriage should not be able to challenge the husband’s legal parentage based on biology. Further, since neither spouse in a same-sex marriage should be able to rebut the marital presumption based on lack of biological relationship, the same should be true

\textsuperscript{94}Id. § 608. For a detailed discussion of similar provisions in current state statutes, see Harris, \textit{Reforming Paternity Law, supra} note 13 at 1308–13. At least six states statutes deny standing to men to challenge the marital presumption based on a claim to have fathered the child of a woman married to someone else. And a number have short statutes of limitations on challenges, grant courts authority to reject challenges to serve the child’s best interests, or both.

\textsuperscript{95}See Ban v. Quigley, 812 P.2d 1014, 1018–19 (Ariz. Ct. App. 1990) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); Williamson v. Williamson, 690 S.E.2d 257, 258–59 (Ga. Ct. App. 2010); In re Marriage of Ross, 783 P.2d 331, 338–39 (Kan. 1989) (remanding for determination of whether allowing mother's attempt to require blood tests would be in best interests of child); Turner v. Whisted, 607 A.2d 935, 940 (Md. 1992) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); B.H. v. K.D., 506 N.W.2d 368, 378 (N.D. 1993) (refusing putative father's attempt to require blood test to determine paternity); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872–73 (W. Va. 1989) (remanding for determination whether admission of blood tests showing husband was not father, at husband's request in divorce action, was in best interests of child); In re Paternity of C.A.S., 468 N.W.2d 719, 729 (Wis. 1991) (applying statute and refusing putative father's attempt to require blood test to determine paternity); In re Adoption of R.S.C., 837 P.2d 1089, 1092–94 (Wyo. 1992) (holding that presumptive but not biological father's status could not be challenged later by mother in effort to have child adopted by another man). For a discussion of this kind of case, as well as other judicial strategies to prevent challenges to the marital presumption to protect the child’s interests, see Harris, \textit{Reforming Paternity Law, supra} note 13, at 1314–17.

for spouses in an opposite-sex marriage. Whether the courts will agree with this claim is, however, uncertain, of course.

While Obergefell very likely required that same-sex couples have the benefit of the marital presumption, and while it provides support for protecting the parentage of spouses against challenges based on biology, the extent of that support is far from clear. Further, the opinion does not directly address the parentage of the many children who are born to unmarried couples, either same-sex or opposite-sex. The next section turns to that topic.

IV. The Legal Parentage of Non-marital Children

The routes to legal paternity for unmarried men are, for the most part, rooted in the biological relationship. However, several doctrines expressly or in effect allow men who are not biological fathers to attain legal parenthood (without adopting). In most states, though, a legal finding that an unmarried man is a child’s legal father is vulnerable to challenge on the basis that he is not the biological father.

On its face, Obergefell has nothing to say about the extension of these legal principles to same-sex couples because of its focus on marriage. Nevertheless, its implicit premise that functional parent-child relationships should be protected could support a refusal to allow challenges to legal parenthood based on lack of biological connection. Whether courts will be willing to take those steps is far from certain, and, at least in some states, seems unlikely.

A. Unmarried Fathers’ Routes to Legal Paternity

The only legal parent of a non-marital child at the time of birth is the mother. Nothing like the marital presumption exists to identify anyone else as a possible parent. Indeed, well into the twentieth century, many non-marital children simply did not have legal fathers who could claim custodial rights, though if the biological father could be identified, his paternity might be established through a legal proceeding for the purpose of imposing a child support obligation on him. However, under the law of most states today, once a man’s paternity is established, he has the same rights and duties as a married father, at least in theory. But still, his paternity must be legally established first.

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97 For other perspectives on this issue, see Carbone & Cahn, Marriage and the Marital Presumption Post-Obergefell, supra note 84, at 667; Paula A. Monopoli, Inheritance law and the Marital Presumption After Obergefell, 8 EST. PLAN. & COMMUNITY PROP. L.J. 437 (2016).

98 At common law, non-marital children were bastards—the children of no one. 1 BLACKSTONE, supra note 90, at *454, *458–59. By the early nineteenth century, they were recognized as the legal children of their mothers in most American states. GROSSBERG, supra note 90, at 207–15.

While all states have statutes that create legal proceedings to establish paternity (sometimes called filiation actions), the paternity of the great majority of children born outside marriage today is established by a voluntary acknowledgment of paternity (VAP). A VAP is a document signed by a child's mother and the putative father that identifies the man as the father.\textsuperscript{100} There is no requirement that genetic testing precede signing the documents, and most VAPs are signed at the time of birth at the hospital or other birthing facility, usually without genetic testing having been done.\textsuperscript{101} When the document is filed with the state office of vital statistics, it establishes legal paternity and has the effect of a judgment of paternity.\textsuperscript{102} In 2015, 1.07 million of the 1.49 million cases in which paternity was established were done by a VAP.\textsuperscript{103}

Federal and state laws provide that a VAP may be revoked at-will by either signatory for 60 days; after that, it can be set aside only on the basis of fraud, duress or material mistake of fact.\textsuperscript{104} The UPA provisions regarding challenges to VAPs after the first sixty days limit standing to the child, the mother, and a man whose paternity is to be adjudicated (the legal father or an alleged father), subject to a two-year statute of limitations running from the date of the VAP.\textsuperscript{105} Court-ordered genetic testing is the only basis for setting aside a VAP,\textsuperscript{106} and—as is the case with children born to married women—courts have authority to deny requests for genetic testing based on findings that the challenger is estopped from denying paternity and that allowing testing or disestablishing paternity would be contrary to the child’s best interests.\textsuperscript{107} Actual state law on

\begin{footnotesize}
\textsuperscript{100} 42 U.S.C. § 666(a)(5)(C).
\textsuperscript{101} Mich. Off. of Child Support, State of Michigan, One Year Pilot Summary, in 100% Paternity Establishment Program 8 (2001). In study of 1,660 unwed births at hospitals, paternity was voluntarily established in 78.5\% of the cases, but in only 112 cases was a genetic test requested before an acknowledgment of paternity was signed.
\textsuperscript{104} More specifically, either party must be able to rescind the acknowledgment within sixty days of the signing or the date of any judicial or administrative proceeding relating to the child, whichever occurs first. 42 U.S.C. § 666(a)(5)(D)(ii). Because the federal laws are so specific on these points, state laws are fundamentally similar. For examples, see Unif. Parentage Act §§ 307, 308 (2002).
\textsuperscript{105} Id. §§ 602, 609, 307, 308.
\textsuperscript{106} Id. § 631(1).
\textsuperscript{107} Id. §§ 608, 609.
\end{footnotesize}
challenges to VAPS is highly variable. While eight states have statutes substantially similar to
the UPA, more than half say that in some circumstances genetic evidence alone may be sufficient
to set aside a VAP. Eighteen of these states, like the UPA, give courts discretion to refuse to
set aside a VAP based on estoppel or the best interests of the child. In states without governing
statutes, case law is also mixed, often allowing a VAP to be set aside based on genetic evidence
(although the facts support an estoppel claim).

The 1973 and 2002 UPAs also provide a second, informal way for a man to become a
legal father. They provide that a man who takes a child into his home and holds out the child as
his is rebuttably presumed to be the father. Nineteen states have statutes modeled on the
uniform acts. The Uniform Act places the same limits on rebutting this presumption
as those

108 With the dramatic increase in voluntary paternity establishments early in a child’s life (and
the great improvements in genetic testing) has come an increase in the occasions for legal fathers
to question their paternity. Another driver of the increase in paternity disestablishment efforts is
the aggressive efforts by state governments to establish paternity of non-marital children as a
step toward collecting child support from nonresident fathers. Such suits are usually brought
against poor people (where both mother and child are receiving public assistance), and state
laws, in compliance with federal laws, allow the suits to be settled with default against the alleged father. See Reforming Paternity Law, supra note 13, at 1319–20.
109 See Reforming Paternity Law, supra note 13, at 1321–27.
110 Id.
111 Id. at 1327–35.
112 Unif. Parentage Act § 4 (1973). The 2002 Act’s requirements are stricter than those of the
1973 Act; most importantly, the man must have lived with the child for two years, starting at
113 The states with “holding-out” statutes are Alabama, California, Colorado, Delaware, Hawaii,
Indiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New
Mexico, North Dakota, Oklahoma, Pennsylvania, Texas, Washington, and Wyoming. Seven of
the states with holding out statutes follow the 2002 UPA by requiring that the man live with the
child during the first two years of the child’s life, and the other twelve impose no time limit.
Code Ann. § 31-14-7-2 (West 2016); Mass. Gen. Laws Ann. ch. 209C § 6(a)(4) (West,
Westlaw through ch. 260 (excluding ch. 218, 2016 2d Sess.) (man and mother must have
received child into their home and held out child as theirs); Minn. Stat. § 257.55 (2015); Mont.
that apply to the marital presumption. Just as state law about rebutting the marital presumption varies, so does state law about rebutting this presumption. In most states, unless a statute of limitation has run, a court has held that a challenger is estopped to deny the man’s paternity, or a court has held that rebutting the presumption is contrary to the child’s interest, genetic evidence will be admitted to rebut the “holding-out” presumption.

The leading exception to the principle that biology rebuts the holding-out presumption is developed in a line of California cases. The first case was In re Nicholas H., where the California Supreme Court held that the presumption is not necessarily rebutted by such evidence when the result would be to leave a child “fatherless and homeless.” In that case, the man had lived with the mother for some time during her pregnancy, and his name was on the child’s birth certificate, but everyone agreed that he was not the biological father. The biological father was known, but he had never had contact with the child, and his location was unknown. When the child came before the juvenile court on allegations that he was dependent because of his mother’s inability to care for him, the man came forward and claimed paternity, invoking the holding-out presumption. The juvenile court refused to rebut the presumption, and the California Supreme Court affirmed, citing supporting decisions from the intermediate California appellate courts. The effect was to provide a legal parent to a child who otherwise would have gone into the foster care system, perhaps never to be reunited with his mother or his absent biological father.

In a second juvenile court dependency case, In re Jesusa V., the California Supreme Court held that a husband who relied on the marital presumption as well as the holding-out presumption prevailed over the biological father, who was incarcerated for raping the mother and who also claimed the benefit of the holding-out presumption. The husband had been separated from the mother for three years, but she visited with him and supported his claim that he had held out as the father. In upholding the husband’s argument not to rebut the presumptions of paternity in his favor, the court said, “the Legislature did not envision an automatic preference for biological fathers, even if the biological father has come forward to assert his rights.”

114 See supra notes 92–94 and accompanying text. The UPA provisions regarding rebuttal of parentage presumptions are the same, regardless of the presumption. UNIF. PARENTAGE ACT §§ 602-608.

115 A recent case reaching this result is L.P. v. L.F., 338 P.3d 908, 908 (Wyo. 2014).

116 46 P.3d 932, 934 (Cal. 2002).

117 Id. at 937–41.

118 85 P.3d 2, 14 (Cal. 2004).

119 Id. at 11.

120 In re Jesusa V., 85 P.3d at 11–12 (citing CAL. FAM. CODE § 7612 (West 2004)). In all states, two or even three different men may benefit from a presumption of paternity: the husband from the marital presumption, another from the holding-out presumption, and a third man from a presumption based on positive results of genetic testing. Federal child support law requires state law to create a rebuttable presumption, or—at the option of the state—a conclusive presumption of paternity when genetic test results indicate a threshold probability that the alleged father is the
the court said, a court must consider whether rebutting a presumption would be “appropriate” under the circumstances. On these facts, ruling for the husband was appropriate because of his substantial relationship with the child and the biological father’s relative lack of involvement (not to mention his inability to care for the child because of his incarceration).121

While both the VAP and the holding-out presumption typically identify a child’s biological father, both can also serve to give legal protection to relationships between children and men who are raising them, even though the men and the children are not biologically related. Genetic testing is not a prerequisite to signing a VAP or a condition that must be satisfied before the presumption arises. If neither a VAP nor the presumption is challenged, no question is raised about the biological relationship, and a non-biological functional father can be recognized as a legal father. Further, in some states, a court may reject a challenge to a VAP or the holding-out presumption based on estoppel or the child’s interests.

B. Applying Unmarried Fathers’ Law to Same-Sex Partners

In six states, the holding-out presumption has been deployed to protect the relationship between a lesbian who raised a child with the child’s biological mother, but who was not married to the mother and who did not adopt the child.122 The effect is to give the women the status of legal parents.

father of the child. 42 U.S.C. § 666(a)(5)(G) (West, Westlaw through Pub. L. No. 114-229). Of course, two presumptions (or even all three) can also benefit the same man. When the presumptions clash, in most states, the presumption that prevails is the one that advances the child’s best interests, which often results in preserving the husband’s functional relationship with the child rather than establishing the legal paternity of the biological father. For another example, see N.A.H. v. S.L.S., 9 P.3d 354, 354–55 (Colo. 2000), for another example; see also Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013); Doe v. Doe, 52 P.3d 255 (Haw. 2002); G.D.K. v. State, 92 P.3d 834 (Wyo. 2004); Dept. of Revenue ex rel. Garcia v. Iglesias, 77 So.3d 878 (Fla. Dist. Ct. App. 2012); In re Paternity of B.J.H., 573 N.W.2d 99, 101–02 (Minn. Ct. App. 1998) (best interests is a factor but is not controlling in choosing between competing presumptions of paternity). In contrast, Courtney v. Roggy interpreted Missouri’s statute on clashing presumptions as favoring the presumption based on biological paternity. 302 S.W.3d 141, 146 (Mo. Ct. App. 2009). The 2002 Uniform Parentage Act does not address clashing presumptions explicitly, relying instead on the court’s authority to use estoppel to protect a child’s relationship to a presumed father. UNIF. PARENTAGE ACT § 204 cmt. background (2002).121

The court also cited decisions from other states holding that, on the right facts, the marital presumption of paternity is not rebutted by genetic evidence. In re Jesusa V., 85 P.3d at 14.121

See Leslie Joan Harris, Voluntary Acknowledgements of Parentage for Same-Sex Couples, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 471–72 (2012) [hereinafter Harris, Voluntary Acknowledgements], on second-parent adoptions for lesbian-couple-headed families. As the title of this article indicates, it makes an argument for extending VAPs to same-sex couples, including a sketch of the constitutional argument supporting this extension. Id. at 475–88. In Partanen v. Gallagher the Massachusetts Supreme Judicial Court assumed that a same-sex couple could sign
California cases relying on \textit{Nicholas H.} and \textit{Jesusa V.} were the first to extend the holding-out presumption to women partners of biological mothers. In \textit{Elisa B. v. Superior Court}, the court held that a lesbian who had planned for the birth of two children with her partner and who had lived as their mother since birth had held them out as her children was obliged, as a parent, to support them when the mothers split up.\textsuperscript{123} State supreme courts in Kansas,\textsuperscript{124} Massachusetts,\textsuperscript{125} New Hampshire,\textsuperscript{126} and New Mexico,\textsuperscript{127} and a Colorado appellate court\textsuperscript{128} subsequently held that unmarried women could be legal parents under the “holding-out” provision. A Nevada court also indicated in dicta that it would reach the same conclusion.\textsuperscript{129} The same outcome might have been reached had the courts adopted robust de facto parent rules, but that is not the route the courts took.

Functional parenthood is legally protected to a limited extent for children born outside marriage. At least in some states, courts have discretion to refuse challenges to paternity findings based on lack of biological relationship, either because the challenger is estopped from bringing the challenge, or to protect the child’s best interests. Further, one paternity law doctrine—the presumption of parentage from holding out—has been extended in a few states to same-sex couples. For the most part, however, the law bases legal parentage of non-marital children on biology unless the de facto parent doctrine or a similar rule, discussed in Part II above, applies.

\section*{V. The Impact of Obergefell, the Inadequacy of Current Law, and a Proposal}

The promise that \textit{Obergefell} would encourage states to recognize the legal parenthood of both partners to same-sex marriages is bearing fruit in the extension of the marital presumption to same-sex married couples. In some states, \textit{Obergefell} may be encouraging the development of

\begin{itemize}
\item a VAP and so could establish the partner who was not the biological parent as a legal parent. 59 N.E.3d 1133, 1139 (Mass. 2016).
\item Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005). In one companion case, \textit{K.M. v. E.G.}, 117 P.3d 673, 682 (Cal. 2005), the court held that a woman who donated her eggs to her partner—who conceived through in vitro fertilization—was also a legal mother, and that a statute providing that a sperm donor is not the legal father should not apply to her. In the second companion case, \textit{Kristine H. v. Lisa R.}, 117 P.3d 690, 690 (Cal. 2005), the court held that a biological mother who had stipulated to a judgment declaring that her lesbian partner was a legal parent was estopped from challenging that judgment.
\item Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013). This case holds that a woman who has held out a child as hers may have standing to bring an action to determine parentage; the woman prevailed not only because of the presumption, but also because of a co-parenting agreement signed by the biological mother. Id. at 553, 557.
\item \textit{See} Chatterjee v. King, 280 P.3d 283, 288 (N.M. 2012).
\item St. Mary v. Damon, 309 P.3d 1027, 1032 (Nev. 2013) (holding that when one lesbian partner provides the egg for the other to bear a child, both may be legal mothers under the state parentage act).
\end{itemize}
legal principles that protect functional parent-child relationships more broadly, but this development is very uneven. In some states, the protection for children raised by same-sex couples exists only if the couple is married, and in other states, the law does not apply equally to same-sex and opposite-sex couples and their children. Difficulties for same-sex families is exacerbated because most of the doctrines discussed in this paper require litigation to determine whether an adult will be recognized as a parent and the extent of that protection, since the doctrines do not provide an a priori way of establishing a parent-child relationship. For these reasons, new statutes to protect functional parent-child relationships more fully are needed.

A. The Uneven Protection from State to State

As this paper has shown, some jurisdictions have case law and statutes that provide broad protection to functional families across a range of situations, including recognizing de facto parent claims or their equivalent, protecting parenthood of both same-sex partners who raise a child together, and limiting efforts to rebut the marital presumption or disestablish the paternity of unmarried fathers. Examples include California, Colorado, D.C., Iowa, Massachusetts, Michigan, and New Mexico. In most states, however, protection, if it is available, is more limited.

130 See supra notes 120–125 and accompanying text (limitations on rebutting holding out doctrine); supra note 123 and accompanying text (extending holding out doctrine to same-sex couples); Harris, Reforming Paternity Law, supra note 13, at 1311 n.105–08 and accompanying text (limits on rebutting marital presumption), and 1326 n.192 (limits on disestablishing paternity).
133 Gartner v. Iowa Dept. Pub. Health, 830 N.W.2d 335, 351 (Iowa 2013) (parental status of married same-sex couples); Harris, Reforming Paternity Law, supra note 13, at 1310 n.99 (limits on rebutting marital presumption), and 1326 n.192 (limits on disestablishing paternity).
135 See Stankevich v. Milliron, 882 N.W.2d 194, 196 (Mich. Ct. App. 2015) (married same-sex couples’ parentage); Harris, Reforming Paternity Law, supra note 13, at 1312 n.113–16 and accompanying text (limits on rebutting marital presumption), and 1322 n.168 (limits on disestablishing paternity).
136 See Chatterjee v. King, 280 P.3d 283, 290–91 (N.M. 2012) (discussing the parental status of same-sex unmarried partners); see also Harris, Reforming Paternity Law, supra note 13, at 1309
For example, some cases extend protection for functional parents only to adults in same-sex relationships. They include recent decisions from Oklahoma and New York. In Ramey v. Sutton, the Oklahoma court said, “[t]oday we . . . acknowledge[] the rights of a non-biological parent in a same sex relationship who has acted in loco parentis.” In Brooke S.B., the New York Court of Appeals said that a person who is not biologically related to a child has standing to seek functional parent protection only where the person “proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents.” While on its face this language is gender-neutral, as a practical matter, it is likely to apply almost always to same-sex couples, since the state has a statute providing that a husband is the legal father of a child born to his wife by artificial insemination with his consent.

A number of states protect functional parent-child relationships of opposite-sex couples, but do not signal protection for same-sex parent-child relationships outside marriage. These states include North Dakota, Delaware, and Texas. Some states, such as Florida and Illinois, have laws that strongly tend to base legal parentage on biology when the parents are

n.83 (limits on rebutting marital presumption), and 1322 n.162 (limits on disestablishing paternity).

362 P.3d 217, 219 (Okla 2015). Oklahoma also limits efforts to rebut the marital presumption and to disestablish paternity. See also Harris, Reforming Paternity Law, supra note 13, at 1309 n.85 (limits on rebutting marital presumption), and 1322 n.164 (limits on disestablishing paternity).


N.Y. DOM. REL. LAW § 73 (McKinney 2016). An intermediate New York appellate court has held that the artificial insemination statute applied to the mother’s domestic partner. In re Kelly S. v. Farah M., 28 N.Y.S.3d 714, 720 (N.Y. App. Div. 2016). Harris, Reforming Paternity Law, supra note 13, at 1309 n.84 (limits on rebutting marital presumption), and 1322 n.163 (limits on disestablishing paternity).

Id. at 1309 n.82 (limits on rebutting marital presumption), and 1322 n.161 (limits on disestablishing paternity)

Id. at 1309 n.86 (limits on rebutting marital presumption), and 1322 n.165 (limits on disestablishing paternity); In re J.M.C., No. 04-06-00431-CV, 2007 WL 460691, at *3 (Tex. Ct. App. Feb. 14, 2007) (judgment based on admission of paternity without genetic testing cannot be set aside since mother’s alleged lie is intrinsic, not extrinsic, fraud).

D.M.T. v. T.M.H., 129 So. 3d 320, 345–46 (Fla. 2013) (recognizing parental rights of both parties in lesbian relationship but only because one provided the egg and the other one gestated child); Russell v. Pasik, 178 So. 3d 55, 61 (Fl. Dist. Ct. App. 2015) (refusing to recognize de facto parent doctrine, dicta saying marital presumption would not apply to same-sex couple because based on biology). See also Fla. STAT. § 742.18 (2016) (setting aside paternity determinations).

opposite-sex, even if they are married, and that do not recognize functional parenthood for same-sex parents outside marriage. Utah protects functional parenthood within heterosexual marriage but does not have laws that protect functional parenthood claims outside marriage or for same-sex couples.\textsuperscript{145} 

Finally, some cases that protect the parentage of unmarried same-sex couples suggest that this protection may evaporate now that these couples can legally marry. For example, \textit{Ramey v. Sutton}, the Oklahoma Supreme Court decision recognizing the de facto parent doctrine, says that one of the elements that must be proven is that the parties were legally unable to marry.\textsuperscript{146} Similarly, in 2015 the Oregon Court of Appeals reaffirmed a 2009 decision holding that a person who consents to the artificial insemination of her unmarried same-sex partner must be regarded as a legal parent of the child.\textsuperscript{147} At the time of the 2009 opinion, same-sex couples could not marry or enter domestic partnerships in Oregon. The court reasoned that the state’s artificial insemination statute, which by its terms applies only to married opposite-sex couples,\textsuperscript{148} violated the state constitution by creating a privilege, i.e., legal parentage by operation of law, that was not granted to all citizens on equal terms without adequate justification.\textsuperscript{149} By 2015, when the second case was decided, same-sex couples could marry, and the court held that the statute would not apply to children born to same-sex couples who could but chose not to marry. It said,

If an unmarried opposite-sex couple conceives a child by artificial insemination using sperm from a donor, the statute does not apply, even if the couple, in the words that the trial court used to describe petitioner and respondent, “lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child.” Accordingly, it would be inappropriate for courts to extend the statute to same-sex couples solely on the basis of one or both of the parties' intent to have the nonbiological party assume a parental role . . . . Just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice—commitment without marriage. Because ORS 109.243 would not apply to an opposite-sex couple that made that choice, it follows that

\begin{itemize}
  \item \textsuperscript{146} 362 P.3d 217, 219 (Okla. 2015).
  \item \textsuperscript{148} \textit{Or. Rev. Stat.} \textsuperscript{\textcopyright} 109.243 (2015), \textit{invalidated by} \textit{Shineovich}, 214 P.3d at 40.
  \item \textsuperscript{149} \textit{Shineovich}, 214 P.3d at 37–40. \textit{Shineovich} also held that the constitution does not require that the marital presumption apply to same-sex couples because of its presumption about biological paternity. \textit{Id. at 36.} \end{itemize}
the statute also should not apply to same-sex couples that make the same choice.150

B. The Limitations of After-the-Fact Remedies

The marital presumption, the voluntary acknowledgment of paternity, artificial insemination, and other assisted reproduction statutes can be applied to determine a child’s legal parent without litigation. However, many of the legal rules discussed in this paper that may be used to find that a functional but non-biological parent is a legal parent can be invoked only when the parental status of that person is challenged and litigation follows. The de facto parent and related rules require a court to examine in hindsight the relationships and actions of the legal parent and the claimed de facto parent to determine whether the doctrine’s elements are proven. Similarly, only a court can determine whether the conditions for invoking the holding-out statute were satisfied and, if so, whether the presumption of parentage has been rebutted, based on the specifics of the case. And if the marital presumption may be rebutted or a VAP set aside because the man is not the biological father litigation is again required to determine if the challenge should be barred because of estoppel or the child’s best interests.151

This characteristic of these rules means that they cannot provide certainty about a child’s legal parentage unless and until litigation occurs. Relationships remain vulnerable to disruption, and the expense and difficulty of litigation almost surely deters some functional parents from making claims that they could theoretically win.

C. The Characteristics of a Statutory Solution

To remedy the problems with existing legal avenues for protecting functional parent-child relationships, statutory solutions are needed.152 These statutes should create simple, inexpensive procedures for legal parents and their partners, who are or will become functional parents, to register the partners as legal parents, much as a VAP allows an unmarried mother and a man to register his legal paternity.153 Where an adult other than the man may have a claim to be the child’s legal parent (assuming for purposes of discussion that state law permits a child to have only two parents154), the law should at least create a simple, inexpensive procedure for that other person to relinquish his or her claim, as the Uniform Parentage Act permits.155

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150 In re Madrone, 350 P.3d at 501.
151 See Harris, Reforming Paternity Law, supra note 13, at 1336–38.
153 For a more extended development of this proposal specifically for same-sex partners, see Harris, Voluntary Acknowledgments, supra note 122, at 487–88.
155 Under the Uniform Parentage Act, a person can sign a document disclaiming paternity at the same time another man signs a VAP, and both can be filed at the same time. Unif. Parentage Act §§ 301–305 (2002).
If parentage of a child is disputed, so that litigation is necessary, the law should clearly provide that a de facto parent is a legal parent, on an equal footing with other legal parents. Several states have statutory provisions to this effect; the District of Columbia statutes are particularly complete.\textsuperscript{156}

These proposals probably would probably be rejected in states that are generally unfriendly to legally recognized functional parenthood or to same-sex families. However, in the many states that are amenable to recognizing same-sex families and functional parenthood, these changes should be received more favorably, since they facilitate the clarification of parent-child relationships at a time when parties are not hostile to each other. This would provide greater stability and certainty to families as well as reduce family law litigation.

\textsuperscript{156} D.C. Code §§ 16-831.01 to -831.13 (2016).