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Same-Sex Marriage and the "Reconceiving" of Children

Helen M. Alvare

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SAME-SEX MARRIAGE AND THE “RECONCEIVING” OF CHILDREN

Helen M. Alvaré[†]

ABSTRACT

Historically, the U.S. Supreme Court has consistently highlighted the importance of procreation in its consideration of marriage in constitutional cases. Recently, however, litigants seeking same-sex marriage and judicial decisions sympathetic to their arguments have ignored the language and holdings of this long-standing body of law. Instead, they have focused nearly entirely upon adults’ interests in state marriage recognition. To the extent children are mentioned, it is for the purpose of speculating that children living within same-sex marriage households might indirectly benefit from recognition of adults’ rights to same-sex marriage.

This Article discusses the importance of states’ interests in procreation and child rearing and the Supreme Court’s constant recognition of those interests. Ultimately, this Article argues that judicial decisions recognizing same-sex marriage have marginalized, or “reconceived,” the role of children in marriage, in several important ways, all to the marked disadvantage of children.

CONTENTS

INTRODUCTION	830
I. THE DISAPPEARANCE OF CHILDREN AND KINSHIP FROM THE GOODS OF MARRIAGE	831
A. <i>Procreation</i>	831
1. Supreme Court Decisions Linking Marriage with Procreation.....	831
2. Same-Sex Marriage Proponents Divorce Marriage and Procreation.....	833
3. Judicial Decisions Minimizing the States’ Interest in Procreation.....	837
a. <i>Pre-Windsor State Court Opinions</i>	837
b. <i>Windsor</i>	838
B. <i>Kinship and Biological Child Rearing</i>	840
II. RIGHTS BEFORE DUTIES? STATE BEFORE PARENTS?	843
A. <i>Parents’ Duties to Children</i>	844
B. <i>Same-Sex Marriage as an Indirect Benefit to Children?</i>	849
III. ENDING THE INQUIRY ABOUT CHILDREN’S WELFARE AND SAME- SEX MARRIAGE JUST AS IT IS BEGINNING IN EARNEST	853
A. <i>Examples of the Incomplete Inquiry</i>	853

† Professor of Law, George Mason University School of Law. The author is grateful to the Case Western Reserve University School of Law for hosting this symposium, and to Brian Miller for his copious research assistance.

B. Altering Children’s Existential Situation and Sense of Self 858
CONCLUSION 862

INTRODUCTION

This Article argues that judicial opinions creating same-sex marriage rights “reconceive” constitutional family law’s longstanding and basic grasp of the relationships between marriage and children and between parents and children. Any observer might perceive the most obvious elements of this shift: the birth of children is no longer an important part of states’ interests in recognizing marriage. Moreover, states do not express a preference for facilitating or preserving children’s embeddedness within a family composed of their kin—biological mother or father or siblings or extended family. These positions represent dramatic reversals of 120 years of constitutional family law decisions issuing from the United States Supreme Court.

Read carefully, however, both state and federal same-sex marriage opinions also communicate a great deal more concerning the situation and future of children within both society and family law. They perceptibly tilt the balance of responsibility for children away from the adults who are rearing them, in favor of the state and society. Further, by blessing and paving the way for more child rearing in homes led by same-sex couples, they shift the meaning of children to themselves and to others, away from notions like “gift” and “kin,” and toward notions such as “choice” or “object of desire.” They also shift the environment for children away from relationship and toward separation. This Article addresses each of these shifts as follows.

Part I presents representative same-sex marriage cases’ reversal of the U.S. Supreme Court’s longstanding position that state marriage recognition is importantly associated with procreation. It also considers such cases’ ignoring or disclaiming states’ interests in the goods that married, biological parents bring to their children.

Part II discusses the shift in the paradigm heretofore governing adults’ legal rights respecting children. In prior constitutional family law, when adults sought rights in conflict with customs or laws designed to protect children’s best interests, the Supreme Court asked first if the adults’ duties to children would be fulfilled by the adults’ exercise of their claimed rights. Opinions approving same-sex marriage, on the other hand, devote either no attention, or shallow or uninformed attention, to the matter of adults’ duties to children, despite the fact that same-sex marriage recognition will facilitate a host of rights for adults respecting children.

Part II also highlights a second change that same-sex marriage recognition brings about respecting adults’ rights over children. While prior Supreme Court decisions presumed that children’s welfare was a direct product of adults’ satisfaction of their duties toward children, cases approving same-sex marriage speculate that children will benefit only indirectly from the state’s granting of rights (marriage

recognition) to adults. This conclusion flows from a presumption often appearing in same-sex marriage opinions: if there is suffering experienced by children living in same-sex partner households, it is due to governmental and social mistreatment of the partners or household, not the family structure; therefore, granting rights to the adult partners will cause outsiders to treat the family better and create trickle-down economic and social benefits for the children in the household. In short, outsiders are assigned more of the responsibility for children’s welfare, while the adults rearing them are assigned less responsibility, as compared with prior relevant law.

Part III critiques same-sex marriage opinions’ short-circuiting of the inquiry into the welfare of children in same-sex households just as it is commencing in earnest. It also explores some potential effects of casting children into existential environments that portend difficulties for children and for the larger society.

I. THE DISAPPEARANCE OF CHILDREN AND KINSHIP FROM THE GOODS OF MARRIAGE

United States Supreme Court decisions from the early nineteenth to the late twentieth century repeatedly recognized with approval states’ interests in the procreative features of marriage: child birth and child rearing by the adults who conceived them. This Part considers those decisions and, thereafter, representative same-sex marriage cases’ reversal of the Court’s position.

A. Procreation

1. Historical Marriage Rights and a Reliance on Procreation

As detailed in this Part, the Court has written a great deal on the nature of the states’ interests in marriage in the context of evaluating state laws affecting entry into or exit from marriage or concerning parental rights and obligations. Typically, the Court has recognized that states are vitally interested in marriage, not only because it benefits adults but also because it offers distinct advantages to children and to the larger society. Regarding society’s interests, the Court has noted bluntly that children create society. It has not placed special weight on adults’ interests in marriage, nor has it vaulted the interests of limited categories of children over the interests of all children generally. This is not to deny that states value adults’ interests in marriage nor that prior constitutional family law has acknowledged these interests—including adult happiness, mutual commitment, increased stability, and social esteem. It is only to say that pre-*Windsor* constitutional law concerning marriage is not at all adult-centric, as distinguished from *Windsor* itself and state law cases recognizing same-sex marriage.

While it is difficult to disentangle completely the Court’s language affirming states’ interests in the birth of children from their interests in the healthy formation of children within marriage, it is possible to discern the former from a close analysis of the relevant cases. For example, in *Reynolds v. United States*,¹ rejecting a Free Exercise claim on behalf of polygamy,² the Supreme Court explained states’ interests in regulating marriage with this simple declaration: “Upon [marriage] society may be said to be built”³ This statement necessarily implies that marriage is inextricably linked to procreation, the means by which society is generated. Nearly 100 years later, in *Loving v. Virginia*,⁴ in an opinion striking down Virginia’s antimiscegenation law,⁵ the Court referred to marriage as “fundamental to our very existence and survival”⁶—again clearly recognizing the role of marriage in propagating society through childbearing.

Even in cases where only marriage or only childbearing was at issue, the Court consistently referred to the concepts of marriage and childbirth together in the same phrase, nearly axiomatically. The following cases illustrate: In *Meyer v. Nebraska*,⁷ which vindicated parents’ constitutional rights to have their children instructed in a foreign language,⁸ the Court referred not merely to parents’ rights to care for children but to citizens’ rights “to marry, establish a home and bring up children.”⁹ In *Skinner v. Oklahoma ex rel. Williamson*,¹⁰ concerning a law that imposed forced sterilization on certain felons,¹¹ the Court opined that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”¹²

In *Zablocki v. Redhail*,¹³ which struck down a Wisconsin law restricting marriage for certain child support debtors,¹⁴ the Court

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1. 98 U.S. 145 (1879).
 2. *Id.* at 166–67.
 3. *Id.* at 165.
 4. 388 U.S. 1 (1967).
 5. *Id.* at 2.
 6. *Id.* at 12 (rejecting Virginia’s law as violative of the Due Process Clause of the Fourteenth Amendment).
 7. 262 U.S. 390 (1923).
 8. *Id.* at 400–03.
 9. *Id.* at 399.
 10. 316 U.S. 535 (1942).
 11. *Id.* at 536–37.
 12. *Id.* at 541.
 13. 434 U.S. 374 (1978).
 14. *Id.* at 375–77.

wrote that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”¹⁵ As in *Loving*, the *Zablocki* Court reiterated that marriage is “fundamental to our very existence and survival”¹⁶ and recognized additionally the right to “decide to marry and raise the child in a traditional family setting.”¹⁷

The 1977 opinion in *Moore v. City of East Cleveland*,¹⁸ announcing a blood-and-marriage-related family’s constitutional right to co-reside,¹⁹ referenced the procreative aspect of family life, stating that “the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”²⁰

Similarly, in *Parham v. J.R.*,²¹ a case about parents’ rights to direct their children’s health care,²² the Court stated that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”²³

Thus, from *Reynolds* in 1879 to *Parham* in 1979, the Court sounded the theme that state marriage recognition is closely tied to the state’s interest in procreation. The arguments and judicial opinions favoring same-sex marriage, on the other hand, ignore or excise the Supreme Court’s language linking marriage with procreation. To these I now turn.

2. Same-Sex Marriage Proponents Divorce Marriage and Procreation

The view of marriage advocated by same-sex marriage proponents—and adopted in recent state and federal cases creating same-sex marriage—rejects states’ linking their interests in marriage with their interests in children. This Part considers representative litigants’ arguments about the meaning of marriage found in the

15. *Id.* at 386.

16. *Id.* at 383 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)) (internal quotation marks omitted).

17. *Id.* at 386.

18. 431 U.S. 494 (1977).

19. *Id.* at 506 (holding unconstitutional a city ordinance that narrowly defined “family” and prevented a woman from lawfully living with her biological grandchildren).

20. *Id.* at 503–04 (footnote omitted).

21. 442 U.S. 584 (1979).

22. *Id.* at 587.

23. *Id.* at 602.

briefs filed for *United States v. Windsor*²⁴ and *Hollingsworth v. Perry*,²⁵ the most recent Supreme Court cases concerning same-sex marriage. It also discusses the arguments about the meaning of marriage in the landmark Massachusetts case *Goodridge v. Department of Public Health*.²⁶

Turning first to legal arguments offered by same-sex marriage proponents in *Windsor* and *Hollingsworth*, one notices immediately that these proponents took great pains to excise references to children when quoting the Supreme Court’s prior family law opinions. In their complaint²⁷ and trial memorandum²⁸ in the challenge to California’s Proposition 8,²⁹ for example, plaintiff same-sex couples selectively quoted from *Loving* only the language about marriage as a “basic civil right[]”³⁰ of adults, or a “vital personal right[] essential to the orderly pursuit of happiness by free men.”³¹ They excised *Loving*’s immediately adjoining reference to marriage as the foundation of society,³² language that links state interest in marriage with procreation. These plaintiffs similarly quoted *Cleveland Board of Education v. La Fleur*³³ without noting that the central freedom at issue there involved a married teacher “deciding to bear a child.”³⁴

Perhaps the most egregious example of the *Perry* plaintiffs’ attempt to erase children from marriage was their misuse of *Turner v.*

24. 133 S. Ct. 2675 (2013).

25. 133 S. Ct. 2652 (2013).

26. 798 N.E.2d 941 (Mass. 2003).

27. Complaint for Declaratory, Injunctive, or Other Relief, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292-VRW) [hereinafter Compl.].

28. Plaintiffs’ and Plaintiff-Intervenor’s Trial Memorandum, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292-VRW) [hereinafter Trial Mem.].

29. California Marriage Protection Act, approved by voter referendum Nov. 4, 2008 (codified at CAL. CONST. art. I, § 7.5).

30. Compl., *supra* note 27, at 1, 7.

31. Trial Mem., *supra* note 28, at 3.

32. The full language from *Loving* is that marriage is “fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

33. 414 U.S. 632 (1974).

34. *Compare* Trial Mem., *supra* note 28, at 3–4 (discussing “‘freedom of personal choice in matters of marriage and family life’” (quoting *Cleveland*, 414 U.S. at 639)), *with Cleveland*, 414 U.S. at 640 (stating further that one has a “right ‘to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child’” and discussing the mandatory maternity leave rules at issue (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972))).

Safley,³⁵ a case in which the Supreme Court held that a near ban on inmates’ ability to marry was facially invalid.³⁶ The *Perry* plaintiffs cited *Turner* for the proposition that civil marriage is an “‘expression[] of emotional support and public commitment,’ an exercise in spiritual unity, and a fulfillment of one’s self.”³⁷ The district court’s opinion in *Perry v. Schwarzenegger*³⁸—an advocacy document in its own right—did likewise, selectively quoting only the adult-related aspects of the Court’s statements about the meaning of marriage and deliberately cutting out references to procreation.³⁹ But in *Turner*, the Supreme Court explicitly acknowledged in two ways states’ interests linking procreation with marriage recognition. First, *Turner* concluded that while adults’ interests constituted “elements” or a “significant aspect” of marriage, marriage possessed other “incidents” that prisoners would eventually realize.⁴⁰ The Court then referred specifically to consummation:⁴¹ heterosexual intercourse with a spouse.

Second, *Turner* distinguished the situation of the prisoners before the Court—who would someday be free—from the situation of prisoners sentenced for life; it acknowledged that the state could legitimately refuse to permit marriage by those imprisoned for life if denial of the right to marry was imposed as part of the penalty for the crime committed.⁴² The *Turner* Court implied that marriage could be denied to those imprisoned for life by noting that the Supreme Court had summarily affirmed⁴³ the case of *Johnson v. Rockefeller*,⁴⁴ in which inmates imprisoned for life were validly denied marriage.⁴⁵ In *Johnson*, the Southern District of New York reasoned that the

35. 482 U.S. 78 (1987).

36. *Id.* at 99.

37. Trial Mem., *supra* note 28, at 6 (quoting *Turner*, 482 U.S. at 95–96).

38. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

39. Compare *Schwarzenegger*, 704 F. Supp. 2d at 991 (“[T]he decision to marry is a fundamental right’ and marriage is an ‘expression[] of emotional support and public commitment.’” (quoting *Turner*, 482 U.S. at 95)), with *Turner*, 482 U.S. at 96 (noting inmates’ expectation to consummate their marriages upon release and the benefit marriage offers in legitimizing “children born out of wedlock”).

40. *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

41. *Id.* at 96.

42. *Turner*, 482 U.S. at 96.

43. *Id.* (citing *Butler v. Wilson*, 415 U.S. 953 (1974)).

44. 365 F. Supp. 377 (S.D.N.Y. 1973).

45. *Id.* at 380 (holding that an inmate could be deprived of the right to marry, along with other liberties, as punishment for a crime).

inmates under consideration would not have the opportunity to procreate or rear children. The *Johnson* Court said the following:

In actuality the effect of the statute [denying marriage] is to deny to Butler only the right to go through the formal ceremony of marriage. Those aspects of marriage which make it “one of the ‘basic civil rights of man’”—cohabitation, sexual intercourse, *and the begetting and raising of children*—are unavailable to those in Butler’s situation because of the fact of their incarceration.⁴⁶

Similarly, the *Windsor* respondent, in challenging the federal government’s decision to recognize same-sex marriages granted in a few states,⁴⁷ provided a lengthy discussion of the Equal Protection Clause without mentioning the governmental interest in encouraging procreation through marriage.⁴⁸ The respondent asserted, rather, that the federal government’s position was simply irrational, even hateful.⁴⁹ The *Windsor* majority accepted this position, ignoring over a century of prior marriage cases highlighting procreation and holding that the federal refusal to recognize the same-sex marriages before the Court had the “purpose and effect to disparage and to injure those whom the State . . . sought to protect in personhood and dignity.”⁵⁰

The plaintiffs in the Massachusetts same-sex marriage case, *Goodridge*, likewise excised children from the constitutional law of marriage, stating that marriage recognition would take away a social “badge of inferiority” and instead “instantly” communicate “their relationship . . . to third parties.”⁵¹ The Massachusetts Supreme Court opinion hewed closely to the plaintiffs’ arguments, excising children from its references to *Zablocki*, *Loving*, and *Skinner* and misusing *Turner* similarly.⁵²

46. *Id.* (citation omitted) (emphasis added).

47. See 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

48. See Brief on the Merits for Respondent Edith Schlain Windsor at 14–62, United States v. Windsor, 133 S. Ct. 2675 (Feb. 26, 2013) (12-307), 2013 WL 701228.

49. *Id.* at 32–59.

50. *Windsor*, 133 S. Ct. at 2696.

51. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 19, *Goodridge v. Dep’t of Pub. Health*, No. 01-1647-A (Mass. Super. Ct. 2002).

52. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957, 966 (Mass. 2003) (citing *Zablocki*, *Loving*, *Skinner*, and *Turner* for the proposition that the freedom to marry is a constitutionally protected right).

3. Judicial Decisions Minimalizing the States’ Interest in Procreation

This Part considers the ways in which judicial opinions recognizing same-sex marriage have ignored or cast aside the historic constitutional link between marriage rights and procreation. It first considers representative state court opinions and, thereafter, *Windsor*.

a. Pre-Windsor State Court Opinions

Turning to pre-*Windsor* judicial opinions creating same-sex marriage, one notices several aspects that minimize or even ignore children. First, these opinions devote the lion’s share of attention to adults, a matter of record that has been well documented previously.⁵³ Second, the entire subject of children is never raised on the state supreme courts’ own initiative but only in response to defendants’ claims that procreation is an important state interest in opposite-sex marriage. Responding to this claim, state courts take up the matter of children, at which point they insist that prior state decisions about marriage and about childbearing or child rearing indicate a lack of interest in marital procreation.

All of the leading state supreme court decisions recognizing same-sex marriage, for example, find it highly significant that states do not have a procreation condition for the granting of state marriage licenses.⁵⁴ In order to assume that this connotes a lack of interest in procreation on the part of the state, however, such opinions have to ignore the obvious privacy concerns associated with widespread premarital fertility testing, or the potential for married couples to change their minds, or the fact that, today, over eighty percent of opposite-sex couples in the United States become parents during their marriage.⁵⁵

State court opinions creating same-sex marriage also dwell on the variety of ways in which states show themselves willing to allow children to be reared outside marriage or by homosexual individuals or couples.⁵⁶ But as Part I.B considers, these observations do not

53. See, e.g., Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL’Y REV. 135, 171–82 (2005).

54. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 902 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

55. *Fertility of American Women: Women by Reporting Status on Children Ever Born, by Race, Hispanic Origin, Nativity Status, and Selected Characteristics: June 2010*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/fertility/files/cps/2010/table4-10-allraces.xls> (last visited Mar. 11, 2014) (reporting that nineteen percent of married women between the ages of fifteen and forty-four reported themselves as childless in 2010).

56. For a summary of such state court recitations, see Alvaré, *supra* note 53, at 165, 168–71.

effectively undercut the existence of a state interest in linking marriage with procreation.

Thereafter, these opinions focus nearly exclusively on identifying adult-centered meanings of marriage. In *Goodridge*, for example, the Massachusetts court concluded that it is the “exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”⁵⁷ In the Vermont Supreme Court’s *Baker v. State*,⁵⁸ the court described marriage as “state-sanctioned human relations” and an “avowed commitment to an intimate and lasting human relationship.”⁵⁹

b. Windsor

Turning now to the Supreme Court’s *Windsor* opinion, one observes that it is quite similar to earlier state court same-sex marriage recognition cases, but it is even more single-mindedly focused on adults’ interests. When children are mentioned, it is only those children presently living in households with adult same-sex partners, whose situation is considered from the perspective of how they would be affected by granting rights to the adults in the home.⁶⁰ State courts and the *Windsor* Court assume without citing any expert sources that this discrete group of children will gain social regard and government benefits when the same-sex adult pair in their household is permitted legal marriage. The *Windsor* majority claimed, for example, that state marriage recognition highlights for observers the “integrity and closeness” of the household of children living with two adults of the same sex, as well as their “concord with other families in their community” and “concord with other families . . . in their daily lives.”⁶¹

It must be noted here, however, that neither *Windsor* nor state same-sex marriage opinions acknowledge that the vast majority of the children living in same-sex partner households are unlikely to be affected by same-sex marriage recognition in the ways the courts speculate, for the simple reason—never mentioned by any of the courts—that these children are usually (in 86% of cases) the offspring of a prior heterosexual relationship involving one of the adults in the same-sex household.⁶² Consequently, the child usually already has two

57. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

58. 744 A.2d 864 (Vt. 1999).

59. *Id.* at 889.

60. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (indicating that the law’s differentiation “humiliates tens of thousands of children now being raised by same-sex couples”).

61. *Id.*

62. *See* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family*

legally recognized parents—both a biological mother and father—and the law’s failure to recognize same-sex marriage will not change their legal family relationships in any way.

Although *Windsor* devoted little attention to children when it considered adults’ interests in marriage, it did evaluate adults’ interests at length and with the use of notably emotional language. The Court called marriage a means for two people to “define themselves by their commitment to each other,”⁶³ and a way the public “affirm[s] their commitment” to one another.⁶⁴ Marriage was also characterized as a tool for achieving equality for same-sex partnerships, allowing “two persons of the same sex [to] aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.”⁶⁵ It is a path to pride in oneself individually and to pride in one’s partnership with one other person, and toward living in and being seen to live in a partnership equal to that between opposite-sex people.⁶⁶ The court added that marriage is a vehicle for same-sex couples to “enhance their own liberty”⁶⁷ and achieve “protection[],”⁶⁸ for conferring “dignity” and a “status of immense import,”⁶⁹ and for marking “personhood.”⁷⁰ Finally, the Court declared

Structures Study, 41 SOC. SCI. RES. 752, 756–57 (2012) (providing that “a failed heterosexual union is clearly the modal method” by which same-sex couples become parents); *see also* Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NAT’L COUNCIL ON FAM. REL.: FAMILY FOCUS, Winter 2011, at F1 [hereinafter Gates, *Family Formation*] (“[One research study] suggest[s] that offspring of lesbian and gay parents are more often the product of different-sex relationships that occur before individuals are open about their sexual orientation.”); GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES (2013) (providing a statistical summary of the demographics of lesbian, gay, bisexual, and transgender (LGBT) households); Ronald Bailey, *The Science on Same Sex Marriage*, THE REASON FOUND. (April 15, 2013), <http://www.reason.com/archives/2013/04/05/the-science-on-same-sex-marriage> (“Nearly 20 percent of same-sex households . . . reported having children, and 84 percent contained children biologically related to one of the householders.”).

63. *Windsor*, 133 S. Ct. at 2689.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 2695.

68. *Id.* at 2690.

69. *Id.* at 2692.

70. *Id.* at 2696.

that same-sex marriage is a way for the law to acknowledge the “intimate relationship between two people.”⁷¹

This review of arguments advanced by proponents of same-sex marriage, as well as the arguments adopted by state courts and the U.S. Supreme Court, demonstrates clearly that same-sex marriage recognition advances the disappearance of children from an area of family law—marriage—previously highly attentive to children. This is significant not only because it is contrary to prior law but also because marriage was effectively the last remaining facet of family law concerned with preserving children’s stable links with the adults conceiving and rearing them. As Part III notes, the other leading areas of family law that once served this purpose are gone.

B. Kinship and Biological Child Rearing

This Part considers a second distinction between prior Supreme Court family law precedents and same-sex marriage recognition cases. A prominent theme in the Supreme Court’s prior marriage cases is the unique importance of the family unit and bonds among kin originating in marriage. A leading feature of this material is the Court’s discussion of the possibility that blood or natural relationships contribute to parents’ dedication and success in forming their children. Same-sex marriage recognition cases, however, regularly ignore or disclaim this feature of prior constitutional cases.

In cases in which natural parents’ interests in directing children’s upbringing conflicted with others’ claims about child welfare, the pre-*Windsor* Supreme Court approvingly noted the significance of the bond between parents and their natural children. This is found in *Parham*, when the Court observed that states presume that “natural bonds of affection lead parents to act in the best interests of their children.”⁷² Similar statements were made in *Smith v. Organization of Foster Families for Equality and Reform*⁷³ and in the grandparents’ rights case of *Troxel v. Granville*.⁷⁴

In 1977, the *Smith* Court refused to extend equal parenting rights to foster parents, writing about the relationships between family life and the good of children and the larger society:

71. *Id.* at 2692.

72. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *190).

73. 431 U.S. 816 (1977) (“It is cardinal with us that the custody, care, and nurture of the child reside first in the parents” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

74. 530 U.S. 57, 68 (2000) (“[T]here is a presumption that fit parents act in the best interests of their children.”).

Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promot[ing] a way of life” through the instruction of children, as well as from the fact of blood relationship.⁷⁵

One final case stressing the significance of kin relations in promoting children’s well-being is *Moore v. City of East Cleveland*.⁷⁶ There, the Supreme Court considered a local zoning ordinance that would have forced an extended family to live in separate residences.⁷⁷ The majority wrote:

Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children. . . . Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State.⁷⁸

In recent same-sex marriage opinions, by contrast, courts have ignored or explicitly denied the significance of child rearing within a naturally related family. I have considered this subject before,⁷⁹ but a brief summary is appropriate here. State court opinions’ most frequent response to an argument about the good of biological parenting is to accuse the state of abandoning that goal at an earlier time, thus rendering suspect the state’s use of the argument to oppose same-sex marriage.⁸⁰ The opinions highlight a variety of policies and situations that they claim reveal a state’s lack of interest in linking parents with their biological children or in ensuring heterosexual parenting: for example, giving custody of a child born to a heterosexual union to a parent who now identifies as homosexual;

75. *Smith*, 431 U.S. at 844 (citation omitted).

76. 431 U.S. 494 (1977).

77. *Id.* at 495–96.

78. *Id.* at 505–06 (citation and footnote omitted).

79. *See generally* Alvaré, *supra* note 53, at 163–71 (discussing and responding to arguments adopted by courts ruling that marriage and procreation or child rearing are no longer linked state interests).

80. *Id.* at 164–65 (citing *Baker v. State*, 744 A.2d 864, 881–82 (Vt. 1999); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963–64 (Mass. 2003)).

placing children for adoption with a homosexual individual; and allowing open access to assisted reproductive technologies (ARTs)—both by homosexual and heterosexual individuals—for those seeking donor (unrelated) gametes.⁸¹

None of these state policy decisions, however, are equivalent to a state disclaiming the importance of biological parenting. In the first scenario above—granting a now-homosexual parent custody of his or her child from a previous heterosexual union—is an affirmation of the importance of preserving biological parenting, not its denial.⁸² The second scenario—individual adoption by a homosexual—represents a decision made in the face of no possibility for biological parenting for that particular child.⁸³ And the third scenario—the increasingly commonplace use of donor gametes by both homosexuals and heterosexuals—does not represent an exercise in state policy making because the legality of a market in gametes and embryos was not achieved by a “process of thorough deliberation by the people of a state or their representatives to the point where it can be said that the state has knowingly abandoned its interest in marital childbearing.”⁸⁴ It is more accurate to acknowledge that these “[d]ecisions to allow such assisted procreation were [rather] initiated by individuals acting privately . . . and by fertility clinics and doctors who accepted the clients they chose, and who were not restrained by any law.”⁸⁵

In sum, none of these state decisions represent the deliberate execution of a state policy affirmatively expressing neutrality as between marital and nonmarital childbearing.

As for the Supreme Court’s opinion in *Windsor*, it did not even broach the matter of the possible good of linking children with their genealogical inheritance. Further, although the Court claimed to rely on language from the official U.S. Congress House Report on the Defense of Marriage Act⁸⁶ (“DOMA”) in order to claim that section 3 of the Act⁸⁷ rested on a “bare congressional desire to harm”

81. *Id.*

82. *See id.* at 168 (further elaborating this argument and citing cases allowing custody provided the “parent’s lifestyle is shown not likely to harm the child”).

83. *See id.* at 169 (further elaborating this argument, citing other commentary, and discussing *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1992)).

84. *Id.* at 170.

85. *Id.*

86. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated in part by* United States v. Windsor, 133 S. Ct. 2675 (2013).

87. § 7, *invalidated by Windsor*, 133 S. Ct. 2675.

homosexuals,⁸⁸ it completely ignored that report’s sustained attention to the goods of linking marriage with procreation and child rearing.⁸⁹ Instead, and as detailed in Part I.A.3.b, *Windsor* viewed marriage recognition as nearly exclusively concerned with vindicating adults’ interests.

At the end of Part I, it is fair to conclude, upon a review of the Supreme Court’s pre-*Windsor* family law jurisprudence, that the Supreme Court has persistently and positively affirmed governmental interest in the procreational and child-rearing aspects of marriage, for the good of the children and of society. Same-sex marriage arguments and decisions, however, especially *Windsor*, deny or ignore the possible goods of procreation and child rearing by natural parents within marriage.

II. RIGHTS BEFORE DUTIES? STATE BEFORE PARENTS?

This Part discusses the shift in the family law paradigm heretofore guiding adults’ legal rights respecting children in the context of new or uncertain circumstances. Previously, when adults wanted to make decisions about children in tension with custom or the law—about, for example, unmarried fathering, education or child labor laws, or children’s health—the Supreme Court always looked first to the matter of adults’ duties to children and then considered whether parents needed the requested rights in order to satisfy those duties. Opinions approving same-sex marriage, on the other hand, devote either no attention, shallow attention, or uninformed attention to the matter of parents’ duties to children. This is obviously problematic from a children’s rights perspective given how same-sex marriage recognition will open up a host of rights for same-sex partners respecting children. These rights are considered below.

This Part also highlights another change that same-sex marriage cases have brought to the law governing parents’ rights respecting children. While prior Supreme Court decisions presumed that children’s welfare was a *direct* product of adults’ satisfaction of their duties toward children, cases approving same-sex marriage speculated that children will benefit *indirectly* from the state’s granting rights (i.e., marriage recognition) to the petitioning adults. A corollary of

88. *Windsor*, 133 S. Ct. at 2693.

89. *Compare id.* at 2693 (quoting the report for the proposition that “interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute”), with H.R. REP. NO. 104-664, at 13 (1996) (“At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreating and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.”).

this move is the following: courts creating same-sex marriage often have remarked that the suffering experienced by children living in same-sex partner households is likely due not to family structure but to unfair governmental and social treatment of the unmarried same-sex couple heading their household. The courts presumed, therefore, that granting marriage rights to this couple will cause trickle-down economic and social benefits for children. In short, outsiders (for example, the state and members of the community interacting with same-sex households) are assumed to bear relatively more responsibility for children’s welfare, while the adults rearing them are assigned relatively less responsibility.

A. *Parents’ Duties to Children*

For more than 100 years, the Supreme Court has generally assumed that parents have duties to prepare their children to be adult citizens in our democratic society. In *Murphy v. Ramsey*,⁹⁰ for example, the Court opined:

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.⁹¹

The 1888 decision of *Maynard v. Hill*⁹² referred to marriage as “having more to do with the morals and civilization of a people than any other institution,” and thus it was continually “subject to the control of the legislature.”⁹³ And in the 1943 decision of *Prince v. Massachusetts*,⁹⁴ in the course of an opinion affirming parents’ authority over their children within the limits of child labor laws,⁹⁵ the Court explicitly linked good child rearing practices to a healthy society, saying, “A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens, with all that implies.”⁹⁶ In its 1983 “unmarried fathers’ rights” case *Lehr v.*

90. 114 U.S. 15 (1885).

91. *Id.* at 45.

92. 125 U.S. 190 (1888).

93. *Id.* at 205.

94. 321 U.S. 158 (1944).

95. *Id.* at 166.

96. *Id.* at 168.

Robertson,⁹⁷ the Supreme Court continued this theme when it described the marital family as playing a “critical role” in the formation of “democratic society.”⁹⁸

Justice Black’s dissent in *Boddie v. Connecticut*⁹⁹—a case about the affordability of divorce process¹⁰⁰—confirmed states’ particular interests in children in connection with both marriage formation and dissolution, writing, “The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages.”¹⁰¹

The pattern in prior Supreme Court opinions is clear: when adults ask for rights respecting children in contested situations, the Court always looked first to the matter of adults’ duties to children and then considered whether granting adults the requested rights would capacitate them to fulfill their duties. Nor were the Court’s investigations into parents’ abilities to fulfill their duties simply pro forma. The material in *Wisconsin v. Yoder*¹⁰² is quite instructive in this regard.

In *Yoder*, Amish families challenged a Wisconsin law mandating two additional years of education following elementary school.¹⁰³ Amish parents declared that they should have the right—both as a matter of their free exercise of religion and as a matter of their rights to direct their children’s education—to instead educate their adolescent children in the arts and skills of Amish life.¹⁰⁴ The Court acknowledged that a “State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests,” but the Court said that the claimed parents’ rights merited consideration only “*so long as they . . . ‘prepare [them] for additional obligations.’*”¹⁰⁵ The Court then proceeded to evaluate at considerable length the 200-year-long Amish practice of post-elementary school training and its results. Following pages of its opinion occupied with this investigation, the Court concluded as follows:

97. 463 U.S. 248 (1983).

98. *Id.* at 256–57.

99. 401 U.S. 371 (1971).

100. *Id.* at 372.

101. *Id.* at 389 (Black, J., dissenting) (objecting to the expansion of due process).

102. 406 U.S. 205 (1972).

103. *Id.* at 207.

104. *Id.* at 208–12.

105. *Id.* at 214 (citing *Pierce*, 268 U.S. at 535) (emphasis added).

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those [state] interests. Respondents’ experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

The State attacks respondents’ position as one fostering “ignorance” from which the child must be protected by the State. No one can question the State’s duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional “mainstream.” Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

....

... The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.¹⁰⁶

By contrast with *Yoder*, recent same-sex marriage opinions have failed nearly entirely to take up the question of parents’ duties to children, let alone as the framework for evaluating the advisability of granting marriage recognition affording same-sex partners new rights respecting children.

106. *Id.* at 222–25 (footnote and citation omitted).

At the same time, same-sex couples never invited the courts to do so. They never claimed that they sought marriage as an important means of satisfying duties to children. This distinguishes same-sex couples from the parent-plaintiffs who preceded them in cases like *Yoder*, who were asking the Court for rights respecting children in contested situations while *simultaneously* delineating and embracing their preexisting duties toward children.

I turn now to the matter of how marriage recognition will result in same-sex couples gaining a variety of additional rights over children, even while those seeking same-sex marriage rights insist that state marriage recognition laws have nothing whatsoever to do with children’s procreation or their well-being, except insofar as any children presently residing in same-sex-partner homes might indirectly benefit from the adult partners’ gaining marriage recognition.¹⁰⁷

There are numerous possible ways for this result to occur. First, it is already apparent that legalizing same-sex marriage is increasing the number of same-sex couples seeking children via assisted reproductive technologies.¹⁰⁸ There is also little doubt that a reproductive technology clinic’s refusal to offer services to a married same-sex couple would be challenged as sexual orientation discrimination. This has already been confirmed in California.¹⁰⁹

Furthermore, the “paternity” presumption—previously used to assure legal fatherhood to a husband married to a woman who gave birth during or shortly after a marriage—is also being extended to the same-sex partner of a biological parent of a child.¹¹⁰ Adoption will also be more available to legally married same-sex couples via adoption agencies required to recognize same-sex marriage in the states in which they operate.¹¹¹

107. See, e.g., Trial Mem., *supra* note 28, at 6–7.

108. Michael Cook, *The Link Between Rented Wombs and Gay Marriage*, NEW MEDIA FOUND.: MERCATORNET (July 19, 2012), http://www.mercatornet.com/articles/view/the_link_between_rented_wombs_and_gay_marriage [hereinafter Cook, *Rented Wombs*] (reporting an Indian surrogacy clinic’s account that it has “seen an increase in the number of gay couples and single men approaching our clinic as soon as legitimacy to their public union is granted in their respective states or country” and noting that “[a] leading US infertility doctor . . . told *BioEdge* he got a surge of inquiries whenever a jurisdiction legalised gay marriage”).

109. *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty.* Superior Court, 189 P.3d 959, 970 (Cal. 2008).

110. See, e.g., *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 582 (Colo. App. 2013) (“[I]n the context of a same-sex relationship, a child may have two legal mothers . . .”).

111. See Laurie Goodstein, *Bishops Drop Program Over Bias Rule*, N.Y. TIMES, Dec. 29, 2011, at A16.

The family law categories of de facto or psychological-parent are already employed to extend custody and visitation to same-sex partners associated with a child’s conception or child rearing.¹¹² This might apply also to gay or lesbian adults living with children born to their same-sex partner during a former heterosexual relationship by virtue of co-residence and the gaining of informal authority respecting such children’s day-to-day existence.¹¹³

Despite these many new opportunities for the exercise of parental rights by married same-sex partners, judges approving same-sex marriage have devoted scant attention, if any, to the matter of parental duties, and then only in response to states’ insistence that states possess a legitimate interest in preserving child rearing within a related family. The *Windsor* Court, having ignored the possibility that children generally form any part of states’ interests in marriage, did not engage the matter of same-sex couples’ duties to children in any manner whatsoever.¹¹⁴ And, in the state supreme court opinions approving same-sex marriage, judges found that same-sex parents were satisfying their duties to children without engaging in anything like a thorough *Yoder*-like analysis of parents’ duties.¹¹⁵ Sometimes, in fact, a state court would instead rely heavily on the admission of a state attorney general or a nonexpert state witness that same-sex couples were doing a good job rearing the children in their

112. See, e.g., *In re H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (noting that, in considering whether visitation is in the best interest of the child, a child of a nontraditional adult relationship “needs and deserves the protection of the courts as much as a child of a dissolving traditional relationship”).

113. Cf. Judith Wallerstein & Julia M. Lewis, *Sibling Outcomes and Disparate Parenting and Stepparenting After Divorce: Report from a 10-Year Longitudinal Study*, 24 PSYCHOANALYTIC PSYCHOL. 445, 452 (2007) (finding that stepparents “could and did exercise a powerful, often decisive, influence” on a biological parent’s decisions regarding children from a previous marriage).

114. *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013) (discussing children only in the context of claims that they are humiliated and suffer financial harm as a result of DOMA).

115. *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (noting only in passing and without analyzing the quality of parenting that “there is no dispute that a significant number of children today are actually being raised by same-sex parents”). The *Baker* court only broached the topic of quality of parenting, briefly and without explicitly mentioning parental duties, when it addressed the government’s claim that opposite-sex parents provided the optimal setting for child rearing. *Id.* at 884–85.

households¹¹⁶—as if such an admission could substitute for an expert analysis of a notoriously complex area.¹¹⁷

On other occasions, judges relied on studies issued by partisans, based on widely acknowledged insufficient or erroneous research methods.¹¹⁸ Alternatively, a judge might assert consensus on the quality of same-sex parenting,¹¹⁹ although it is eminently clear that the matter remains hotly empirically contested.¹²⁰ In no case creating a right to same-sex marriage was there a thorough analysis of the relevant literature, or even the appearance of reasoned language about the need for caution or the passage of time to allow the development of a more complete research literature regarding the well-being of children reared in same-sex adults’ households.

B. Same-Sex Marriage as an Indirect Benefit to Children?

There is a second aspect of the constitutional law guiding parents’ rights respecting children that underwent modification in the cases creating same-sex marriage. While prior Supreme Court decisions presumed that children’s welfare was a direct product of adults’ satisfaction of their duties toward children, cases approving same-sex marriage have speculated that children will benefit indirectly from the state granting rights (that is, marriage recognition) to the petitioning adults. This is a corollary of courts assuming that the difficulties

116. *See, e.g., Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (relying in part on the fact that “the department readily concedes that people in same-sex couples may be ‘excellent’ parents”).

117. The question of the success in child rearing between different types of parents is a complex question that should be based on an intensive factual analysis. *See, e.g., Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164–67 (2001) (discussing the difficulties inherent in studying same-sex parenting, including definitional problems and the vast experiences of same-sex couples and their children).

118. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009) (noting summarily that the government lacked “reliable scientific studies” to support its claim that “dual-gender parenting is the optimal environment for children” and instead finding persuasive the “abundance of evidence and research, confirmed by [the court’s] independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents”).

119. *Id.* at 899 n.26 (“The research appears to strongly support the conclusion that same-sex couples foster the same wholesome environment as opposite-sex couples and suggests that the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else.”).

120. *See, e.g., Baker*, 744 A.2d at 884 (noting that, regarding the comparison of opposite-sex and same-sex parenting, “child-development experts disagree and the answer is decidedly uncertain”).

experienced by children living in same-sex partner households flow from governmental and social mistreatment of their parents or household and not from their family structure itself. This leads such courts to presume that granting the adult partners rights to marriage will cause trickle-down economic and social benefits for children. In short, outsiders are assigned more of the responsibility for children’s welfare, while the adults rearing them are assigned less than in prior relevant law.

By way of contrast, Part II.A included a discussion indicating that when parents ask for rights to make controversial decisions regarding their children, the Supreme Court asked first whether granting parents such rights would assist them in fulfilling their duties to serve the best interests of children as these were promoted by the relevant law. Only when the Court was satisfied that granting rights to parents would allow the adults to directly serve the children in line with their prescribed duties were the rights given. Thus parents were allowed to send their children to religious schools that met certain criteria for adequacy, to teach their children in a foreign language in addition to English instruction in school, or to train their children in manual labor and community mores for an adult future in which manual labor and community mores would play crucial roles in their ability to support themselves and their family.

In same-sex marriage recognition cases, on the other hand, courts gave rights to parents not in order to serve their children directly¹²¹ but, first and foremost, to give the parents what the court believed to constitute emotional happiness or liberty or equality. As a secondary matter, courts would often make the unexamined assumption that the children would benefit indirectly from a flow of state-provided economic benefits and social recognition for the household. This new approach to considering child welfare is impoverished in several ways.

First, it is quite possible that no matter what federal or state law holds, third parties will not regard children living in same-sex couple households any differently—in ways that will boost children’s well-being—when the adults are legally married to one another. Social mores have a life of their own. Abortion has been legal for over forty years, but it is still taboo as a subject of conversation.¹²² Observers who have deep philosophical, practical, or religious objections to same-sex partnerships or parenting might, in fact, be more, not less, resistant to same-sex households when living within a legal framework

121. Indeed, the plaintiffs insisted that marriage recognition rights are wholly unrelated to the presence or absence of children. *See supra* note 107 and accompanying text.

122. *See* Sydney Lupkin, *Abortion 40 Years After Roe v. Wade*, ABC NEWS, (Jan. 18, 2013), <http://abcnews.go.com/Health/roe-wade-abortion-america-40-years/story?id=18242770>.

recognizing same-sex marriage and requiring various public and private actors to do the same.¹²³

Furthermore, current literature has shown that marriage is associated with tax and other economic liabilities,¹²⁴ not merely advantages. So if, for example, some same-sex parents suffer a tax-related “marriage penalty,” then by the logic of the courts’ opinions, the children in their households are penalized too.

Additionally, as detailed in Part I, same-sex marriage recognition will not affect the family status of the vast majority of children now being reared in same-sex couple environments because they already have legally recognized opposite-sex parents.¹²⁵ Their legal parents, mother and father, will continue to reside in different places and remain unmarried to one another. It is, therefore, quite difficult to see how marriage recognition for the two adults with whom these children live some or much of the time will elevate their sense of family “integrity and closeness” as *Windsor* surmises.¹²⁶

Finally, same-sex marriage opinions impoverish family law’s concern for child welfare by assigning the state and society more responsibility for children’s flourishing while downplaying parents’ responsibilities. Not only are the benefits hypothesized to flow to children from the state and society uncertain, but prior attempts to hand the state more responsibility for children have regularly failed. Foster care is but one example.¹²⁷ One should also consider policies about matters like the availability of ART without prior human or

123. At least one commentator has argued that the reason Justices Breyer, Kagan, and Ginsburg found no standing in *Perry* was to avoid the public backlash that would result from constitutional protections for same-sex marriage. See Nancy Scherer, *Viewing the Supreme Court’s Marriage Cases Through a Political Science Lens*, 64 CASE W. RES. L. REV. 1131 (2014). This public-backlash theory cuts directly against any judicial assertion that children of same-sex marriage households would indirectly benefit from recognition of same-sex marriage.

124. Martha M. Hamilton, *Gay Couples Weigh Financial Rewards of Marriage*, WASH. POST, Oct. 18, 2013, at G1; Mark R. Randall, *Married Same-Sex Couples with Kids May See Higher Taxes*, EZINE ARTICLES (Aug. 19, 2013), <http://ezinearticles.com/?Married-Same-Sex-Couples-With-Kids-May-See-Higher-Taxes&id=7945227>.

125. See *supra* note 62 and accompanying text; see also DAPHNE LOFQUIST, U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS: AMERICAN COMMUNITY SURVEY BRIEFS 2–3 & tbl.2 (2011) (showing 84.1% of same-sex households, including both married and unmarried, had at least one child from birth, marriage (stepchild), or adoption).

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

127. Theo Liebmann, *What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLIN J. PUB. L. & POL’Y 141 (2006) (describing the failure of the current foster care system to truly protect and provide for children).

animal safety testing or systematic inquiry concerning the psychological welfare of children parented by anonymous donors.¹²⁸ Another matter for consideration is no-fault divorce without safeguards for families that include minor children.¹²⁹ Thus, the state has not shown itself willing or demonstrably able to take on the needs of a large number of diverse children. Previous assumptions that children might benefit, or at least would not be hurt, when one or both of the biological parents were removed from the scene (such as with divorce and ARTs), or when their biological parents were not married to one another (such as with cohabitation and single parenting), have proved hasty and incorrect. Cynics might point out that this might be due to the fact that children neither vote nor contribute to political campaigns, and therefore laws and lawmakers are not effectively judged or governed by how the state takes care of children. No matter the reason, however, considering biological families' common and superior willingness to invest in their children¹³⁰

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128. See, e.g., LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 207–21 (1999) (“Everywhere I look, new reproductive and genetic technologies are being offered, without sufficient thought about their impact or desirability.”); THE ANONYMOUS US PROJECT 29–34 (Alana S. Newman ed., 2013) (presenting themes from stories shared anonymously by people who were conceived by sperm or egg donation); Jennifer J. Kurinczuk & Carol Bower, *Birth Defects in Infants Conceived by Intracytoplasmic Sperm Injection: An Alternative Interpretation*, 315 *BRIT. MED. J.* 1260, 1262 (1997) (concluding that children born after intracytoplasmic sperm injection were, with statistical significance, twice as likely to have to have a major birth defect).
129. See ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* 91 (2005) (“Perhaps the most significant moral decision many children of divorce have to make . . . is the choice between [their] parents.”); ANDREW ROOT, *CHILDREN OF DIVORCE: THE LOSS OF FAMILY AS THE LOSS OF BEING* 23 (2010) (“[There is] a problem that we have yet to solve, one that with the rise of no-fault divorces has affected millions of people. When the two selves are allowed to depart the union when there is no longer love, the product of this love, the children, who need the family in order to understand themselves, are left without it.” (footnote omitted)); JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY*, at xxii (2000) (“If the truth be told . . . the history of divorce in our society [including the development of no-fault divorce] is replete with unwarranted assumptions that adults have made about children simply because such assumptions are congenial to adult needs and wishes.”).
130. Cf. Simon M. Laham et al., *Darwinian Grandparenting: Preferential Investment in More Certain Kin*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 63, 63 (2005) (“Because differing levels of genetic relatedness between individuals have been recurrent selective forces over human evolutionary history, psychological adaptations are hypothesized to have

and the fact that the state has not previously succeeded in prioritizing children’s interests or in securing investment into children by non-relatives, the same-sex marriage cases were unwise to shift responsibility for children onto third parties and the state.

For all of these reasons, same-sex marriage recognition cases represent an important break with prior family law’s standards and methods for protecting children, as articulated by the U.S. Supreme Court prior to *Windsor*. Under the terms of this new, adult-centric marriage dispensation, all children, including children living in married, same-sex households, are less visible and less important relative to adults. They are also less empowered to make demands on adults or the state than they were in the past.

III. ENDING THE INQUIRY ABOUT CHILDREN’S WELFARE AND SAME-SEX MARRIAGE JUST AS IT IS BEGINNING IN EARNEST

This Part suggests that courts’ recognizing same-sex marriage are putting an end to the legal inquiry about children’s welfare in connection with same-sex marriage, just as the substantive inquiry among scholars, experts, and members of the public appears to be getting underway in earnest. In this way, the legal path charted by same-sex marriage has a great deal in common with the path taken by divorce law¹³¹ and the law (really the failure to legislate) concerning ARTs,¹³² where systematic inquiry into related harms for children took place only years after widespread changes in family law. More than a few developments suggest that this pattern is repeating itself where same-sex marriage is concerned.

A. *Examples of the Incomplete Inquiry*

First, the first nationally representative studies about children reared in same-sex households were only published in 2012 in the United States¹³³ and in 2013 Canada.¹³⁴ They raise important questions about emotional, familial, educational, and other outcomes for children reared in same-sex households, suggesting that children in such households suffer disadvantages overall as compared with

evolved to regulate investment in accordance with reliable cues to genetic relatedness.”).

131. See, e.g., Alvaré, *supra* note 53.

132. *Id.*

133. Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, 11 REV. ECON. HOUSEHOLD 635, 638–39 (2013) (discussing how the study addressed the shortcomings of previous same-sex parenting studies).

134. Regnerus, *supra* note 62, at 755 (discussing the highlights of the study design compared to others).

children raised with their biological parents in intact marriages.¹³⁵ Whether these disadvantages spring from children’s experiences of familial separation and instability in same-sex households, or other factors, is not known with certainty. More research is required. Simultaneously, there is appearing for the first time in the United States thoughtful, detailed, first-person accounts of distress experienced by children reared in same-sex households who labor under the hesitation of hurting the adults they also love.¹³⁶

Second, data indicating higher rates of instability among same-sex couples are emerging as an important mediator of child outcomes in its own right.¹³⁷ Studies from the Netherlands, in addition to the studies from the United States and Canada, indicate that instability is a factor for children living in same-sex households in three ways. First, some report that adults in same-sex partnerships are more likely to pursue multiple sexual relationships while in an established same-sex union.¹³⁸ Second, one report suggests that same-sex couples are also more likely to dissolve their unions as compared with opposite-sex unions,¹³⁹ with female couples being dramatically less

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135. Allen, *supra* note 133, at 639 (concluding that children living in same-sex homes are significantly less likely to graduate high school); Regnerus, *supra* note 62, at 761 tbl.2 (demonstrating that children of several family situations fare significantly less well than children of currently intact, biological families on several measures).
136. See, e.g., Robert Oscar Lopez, *Growing Up With Two Moms: The Untold Children’s View*, PUB.\DISCOURSE (Aug. 6, 2012), <http://www.thepublicdiscourse.com/2012/08/6065> (detailing the confusion and pain experienced by a child living in a same-sex household).
137. Cf. Paula Fomby & Andrew J. Cherlin, *Family Instability and Child Well-Being*, 72 AM. SOC. REV. 181, 199 (2007) (“[C]ognitive development [is] weakly associated with family structure instability when mothers’ antecedent characteristics are accounted for, while children’s behavior may be causally related to instability[.]”).
138. See Maria Xiridou, et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029, 1030–32 (2003) (extrapolating mathematically from a prospective cohort study of homosexual men younger than thirty years and estimating for purposes of an HIV/AIDS transmission model that “men with a steady partner acquire casual partners” at a rate of eight per year); Mark Brennan Rosenberg, *Are Gay Men Scared of Monogamy?*, HUFFPOST GAY VOICES (Dec. 6, 2013), http://www.huffingtonpost.com/mark-brennan-rosenberg/are-gay-men-scared-of-monogamy_b_4377924.html?utm_hp_ref=gay-voices (opining on the perceived high frequency of multiple external sexual partnerships among gay couples).
139. Gunnar Andersson et al., *Divorce-Risk Patterns in Same-Sex “Marriages” in Norway and Sweden* 16 (Nov. 2004) (unpublished manuscript), available at http://www.uni-koeln.de/wiso-fak/fisoz/conference/papers/p_andersson.pdf (finding divorce rates among male same-sex couples fifty percent higher than among heterosexual couples).

stable¹⁴⁰ although they have been shown more likely to have children in their households.¹⁴¹ Third, because the majority of children reared in same-sex households come from a preexisting heterosexual relationship between one of the same-sex partners and an opposite-sex partner,¹⁴² the shift into a same-sex partner household represents a significant transition in the children’s lives.

Third, a recently published volume of essays by leading experts on gender and parenting contains findings indicating that fathers and mothers make unique contributions to children, not only overlapping ones.¹⁴³ It also contained an essay by one of the most prominent scholars of fatherhood, Professor Ross Parke.¹⁴⁴ There he concluded that children appear to benefit from sex-differentiated parenting styles.¹⁴⁵ Professor Parke hypothesized that while it is theoretically possible that same-sex couples could deliver such parenting, more time and more research would be required to find out but would also be exceedingly difficult to produce.¹⁴⁶ He also stated that researchers in the area of gender and parenting have not even begun to investigate systematically what men and women together bring to children via their natural “complementarity.”¹⁴⁷ Further regarding the matter of complementarity, at the end of 2013, a well-regarded study showed markedly different brain patterns between males and females, potentially affecting not only their individual but also their interacting or complementary behaviors.¹⁴⁸ Courts creating same-sex

140. *See id.* (finding that divorce risk in female same-sex couples is about double that of male same-sex couples).

141. *APA Policy Statement: Sexual Orientation, Parents, & Children*, AM. PSYCHOL. ASS’N (July 28 & 30, 2004), <http://www.apa.org/about/policy/parenting.aspx> (“In the 2000 U.S. Census, 33% of female same-sex couple households and 22% of male same-sex couple households reported at least one child under the age of 18 living in the home.”).

142. *See supra* note 62 and accompanying text.

143. David J. Eggebeen, *Do Fathers Uniquely Matter for Adolescent Well-Being?*, in *GENDER AND PARENTHOOD: BIOLOGICAL AND SOCIETAL SCIENTIFIC PERSPECTIVES* 249 (W. Bradford Wilcox & Kathleen Kovner Kline eds., 2013).

144. Ross D. Parke, *Gender Differences and Similarities in Parental Behavior*, in *GENDER AND PARENTHOOD*, *supra* note 143, at 120.

145. *Id.* at 133 (reviewing studies that “examine the relative merits of family arrangements in which there is either little differentiation between the styles of parents of different genders or marked differences in parental style” and finding that children from differentiated families fared better with regard to social interactions).

146. *Id.* at 147–50.

147. *Id.* at 134.

148. Madhura Ingahlalikar et al., *Sex Differences in the Structural Connectome of the Human Brain*, 111 *PROC. NAT’L ACAD. SCI.* 823,

marriage have given shallow or no treatment to the question of children’s possible need for sex-differentiated parenting. Newly available evidence suggests they have acted precipitously.

Fourth, research is also newly available regarding whether children reared in divided families suffer due to external influences—for example, social disapproval—or, rather, internal factors arising from their family structures.¹⁴⁹ In a recent U.S. study, researchers measuring children’s educational and psychological outcomes in both externally “high-tolerance” and externally “low-tolerance” social environments found that, no matter the external context, children living outside married, biological-parenting families experience more difficult emotional and social lives.¹⁵⁰ This is directly relevant to the speculations of courts approving same-sex marriage, which regularly suggest that legalizing same-sex marriage would benefit children by means of garnering external social support for the relationship of the adults rearing them.¹⁵¹

Fifth, issues specific to same-sex parenting are just beginning to surface and generate discussion. These issues include the particular difficulties experienced by some lesbian partners over sharing the maternal role that leads to poor consequences for stability and parenting.¹⁵² There is also a growing amount of commentary by gay

823 (2014) (“The developmental trajectories of males and females separate at a young age, demonstrating wide differences during adolescence and adulthood. The observations suggest that male brains are structured to facilitate connectivity between perception and coordinated action, whereas female brains are designed to facilitate communication between analytical and intuitive processing modes.”).

149. D. Paul Sullins, *Child Emotional Problems in Non-Traditional Families* (Oct. 3, 2014) (unpublished manuscript) (on file with the Case Western Reserve Law Review).
150. *Id.* at 19–22; see also Astrid Wurtz Rasmussen, *Family Structure and Children’s Health, Behavior, and Educational Outcomes* 21–29 (Aarhus Univ., Working Paper No. 09-15, 2010), available at http://www.hha.dk/nat/wper/09-15_awu.pdf (detailing the difficulties borne by children growing up in single-parent households or experiencing family-structure changes).
151. For a discussion on courts that have claimed indirect benefit courts have claimed same-sex marriage recognition will have on children, see discussion *supra* Part II.B.
152. See Mari Herreras, *The Other Mom: A Fight for Equal Custody Is an Example of Why Marriage Equality in Arizona Is Needed Now*, TUCSON WKLY., June 27–July 3, 2013, at 12 (describing a lesbian mother’s custody battle for her nonbiological son). Fertility clinics have come up with some innovations allowing both mothers to take part in the biological process by implanting one mother’s eggs into the other mother. See Marilyn Marchione, *Fertility Clinics Help More Gay Couples Have Children*, SUNDAY CAPITAL (Annapolis, Md.), Oct. 20, 2013, at D4 (“‘It allowed us both to participate,’ Sarah Marshall said. ‘I had to mentally

men about the increased pressure they feel—from their peers in the gay community and from their families—to obtain children in order to appear as fully legitimate married couples, equal in every respect to opposite-sexed couples.¹⁵³ This phenomenon, in addition to some gay men’s personal hopes for parenting, is leading a rising demand for surrogate mothers,¹⁵⁴ despite all of the moral hazards surrogacy intrinsically raises.¹⁵⁵ These include the “physical and psychological risks” suffered by the surrogates,¹⁵⁶ the documented income and racial gaps between buyers and sellers in the surrogacy market,¹⁵⁷ and even evidence that some percentage of reproductive trafficking can now be linked to surrogacy.¹⁵⁸

Sixth and finally, the past few years have witnessed a surge of reports and first-person narratives about the experience of donor-

and psychologically give up the idea of, is she going to look like me or my family. But from the time I started carrying her up to now, she is definitely mine.”).

153. See Rachel Swarns, *Male Couples Face Pressure to Fill Cradles*, N.Y. TIMES, Aug. 10, 2012, at A1 (“But some gay men who have no plans to have children view the shift [in public opinion supporting same-sex parenting] as something of a mixed blessing. On one hand, they welcome the sense of inclusion that comes with always being asked about children. On the other hand, they are always being asked about children.”).
154. Marchione, *supra* note 152; Frances Fang Le & Du Liya, *Surrogacy Industry Sees Boom in U.S.*, GLOBAL TIMES (Dec. 11, 2013, 1:23 PM), <http://www.globaltimes.cn/NEWS/tabid/99/ID/831475/Surrogacy-industry-sees-boom-in-US.aspx>.
155. See ANDREWS, *supra* note 128, at 103–22 (discussing some of the issues that can arise in surrogacy arrangements); see, e.g., BREEDERS: A SUBCLASS OF WOMEN? (The Center for Bioethics and Culture 2014), available at <http://breeders.cbc-network.org> (featuring surrogate mothers who tell about their experiences with surrogacy).
156. See *id.* at 108 (“‘Surrogacy does present potential psychological and physical risks to the women involved,’ says surrogate mother . . . ‘But generally our society has allowed people to undertake potentially risky activities so long as they have given voluntary consent.’”).
157. See, e.g., Byrn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 J. PHIL., SCI. & LAW (Feb. 2002), <http://jpsl.org/archives/commercial-surrogacy-and-redefinition-motherhood/> (detailing the wide disparity of income between the commissioning couple and the surrogate); Daisy Deomampo, *Transnational Surrogacy in India: Interrogating Power and Women’s Agency*, 34 FRONTIERS 167, 183–84 (2013) (discussing the rise of surrogacy in India as a means of supplementing working-class income and the impact on both surrogate mothers and their families).
158. See Hedva Eyal, *Genewatch: Reproductive Trafficking*, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=313> (last visited Mar. 11, 2014).

conceived children.¹⁵⁹ It is impossible to miss the gap between the stories told on sites such as AnonymousUs.org, about the longing for kin, for identity, and for a family history,¹⁶⁰ and the cheerful, idealistic, or even “right-to-a-child” material on gay-advocacy websites touting surrogacy such as ItsConceivableNow.com.¹⁶¹

B. Altering Children’s Existential Situation and Sense of Self

A final reflection on the matter of same-sex marriage and children concerns the way same-sex marriage potentially alters children’s existential situation, in the sense that their experience of themselves and their place in their family and society are at stake. It seems possible to observe generally that children living in same-sex partner households are, ontologically speaking, less “received” or “gifted” into the household than they are gotten—gotten via contract, negotiation, technology, or even a legal action against a former opposite-sex partner. In opposite-sex households, the hand of nature, God, or whatever the couple chooses to call the creative order, is more obviously at work, thus making the child more incrementally or more clearly “received” than “obtained,” more “gifted” than “gotten.”

Experience and research demonstrate the importance of children’s emotional environment as a factor in their development.¹⁶² There is literature on this subject in connection with adoption,¹⁶³ ARTs,¹⁶⁴ and

159. See, e.g., ANONYMOUS US PROJECT, *supra* note 129 at 29–34; ELIZABETH MARQUARDT ET AL., INST. FOR AM. VALUES, MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION (2010); see also *Stories from Donor Conceived*, ANONYMOUSUS.ORG, <http://anonymousus.org/stories/index.php#UvaZXHnZVg0> (last visited Mar. 11, 2014) (detailing through blog postings the experiences of donor conceived children).

160. ANONYMOUSUS.ORG, *supra* note 159.

161. It’s Conceivable: The Path to Parenting Isn’t Always Straight, <http://itsconceivablenow.com> (last visited Mar. 11, 2014).

162. See, e.g., T. BERRY BRAZELTON & STANLEY I. GREENSPAN, THE IRREDUCIBLE NEEDS OF CHILDREN: WHAT EVERY CHILD MUST HAVE TO GROW, LEARN, AND FLOURISH, at x (2000) (“Early childhood is both the most critical and the most vulnerable time in any child’s development. . . . [I]n the first few years, the ingredients for intellectual, emotional, and moral growth are laid down.”); ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 158–61 (1968) (describing how a child’s relationships and experiences at different ages affect that child’s developing identity); HARVILLE HENDRIX, GETTING THE LOVE YOU WANT: A GUIDE FOR COUPLES 15–34 (20th ann. ed. 2008) (linking childhood experiences to expectations in adult relationships).

163. See Sharon Vandivere et al., *Adoption USA: Summary and Highlights of a Chartbook on the National Survey of Adoptive Parents*, ADOPTION ADVOCATE, Mar. 2010, at 9 (“[T]he majority of adopted children far[e] well on measures of physical health, social and emotional well-being, cognitive development, and educational achievement. . . . [Compared to]

child custody actions.¹⁶⁵ It is even part of the literature about children whose siblings were aborted while they were not.¹⁶⁶

Children living in same-sex partner households experience particular environmental factors. They are in every case, severed from their kin network, missing one or both genealogical parents, siblings, and extended family. They were never brought into being by an act of sexual intimacy or love between the married adults living in their household, which then links them with a preexisting network of family, on both sides, with their own histories, cultures, and religions.

Same-sex marriage recognition cases, with their insistence that same-sex parenting is not different in any important way from opposite-sex parenting, neglect these existential realities. Of course, not every child within an opposite-sex marriage is the result of the sexual intimacy of her married mother and father, nor do all children within opposite-sex marriages possess a kin network by reason of living in an opposite-sexed household. Some of their parents committed adultery, remarried, or employed adoption or ARTs. We know, however, that over ninety-one percent of children living in opposite-sex married households are biologically related to both of their married parents,¹⁶⁷ while in same-sex marriages, 100% of children are necessarily obtained through methods such as ART, adoption, or custody arrangements.

Volumes have been and could be written about what it means in the life of a person to be loved into existence, received as a gift, and raised within a web of relations, as distinguished from being gotten or desired into being and separated from one’s genealogical kin. A great

children in the general U.S. population[,] . . . adopted children fare less well on certain measures of well-being (e.g., special health care needs, diagnose of physiological disorders, and school engagement), [while] they fare better than the general population of children on other measures (e.g., consistency and adequacy of health insurance, being told stories or sung to daily as young children, and participating in family and community activities.”); CHILDREN’S BUREAU, U.S. DEP’T HEALTH AND HUMAN SERVS., IMPACT OF ADOPTION ON ADOPTED PERSONS 2–8 (2013) (discussing some issues faced by adopted individuals and suggesting management strategies); *Facts for Families: The Adopted Child*, AM. ACAD. CHILD AND ADOLESCENT PSYCHIATRY, Mar. 2011, at 1–2 (“All adolescents go through a stage of struggling with their identity, wondering how they fit in with their family, their peers, and the rest of the world [T]he adopted child is likely to have an increased interest in his or her birth parents.”).

164. See *supra* note 128 and accompanying text.

165. See WALLERSTEIN ET AL., *supra* note 129, at 205–22.

166. Philip G. Ney, *A Consideration of Abortion Survivors*, 13 CHILD PSYCHIATRY AND HUMAN DEV. 168, 171–75 (1983).

167. ROSE KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND Stepchildren: 2000, at 14 (2003).

deal is contained in the material referenced within this Article in which children reared in the contexts of anonymous¹⁶⁸ or separated¹⁶⁹ parents, or parents more consumed with their own identity struggles,¹⁷⁰ express their existential sufferings and questions. They wonder openly about their cultural and personal identity and about whether they are loved or worthy of love.¹⁷¹ What might be some of the additional implications of this new situation of children raised by same-sex parents?

Various implications might be deduced, beginning from the reflections of the French philosopher Marcel Gauchet in his apt and well-known essay “Les Enfants du Désir” (*Children of Desire*).¹⁷² Gauchet proposes that adults rearing children in such environments might easily understand themselves less as stewards of children, or in service of their growth and emancipation, and more as proprietors. After all, the adults labored, spent, waited, and negotiated under stressful conditions in order to obtain these children’s birth and presence in the household. This disposition is obviously related to the possibility that children in same-sex households will experience pressure to be something in *particular*,¹⁷³ a standard-bearer of some kind, a potential vindicator of the adults’ unconventional choices. Conversations about children on gay blogs, for example, often refer to the children as “gaybys,” indicating that the child’s very identity is about what the *parents* are.¹⁷⁴ One wonders, muses Gauchet, what the effects will be on parents’ and children’s willingness to sacrifice for the

168. See, e.g., ANONYMOUS US PROJECT, *supra* note 128 at 29–34.

169. See *supra* note 129.

170. See, e.g., Anonymous Us Project, *supra* note 128, at 29–34; Elizabeth Marquardt et al., Inst. for Am. Values, My Daddy’s Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation (2010); see also *Stories from Donor Conceived*, AnonymousUs.org, <http://anonymousus.org/stories/index.php#.UvaZXHnZVg0> (last visited Mar. 11, 2014) (detailing through blog postings the experiences of donor conceived children).

171. AnonymousUs.org, *supra* note 160.

172. Marcel Gauchet, *L’Enfant du Désir*, 47 CHAMP PSYCHOSOMATIQUE 9 (2007).

173. See *Same-Sex Couples May Feel Pressure to Raise Heterosexual Kids*, HEALTH DAY (Sept. 17, 2010), <http://consumer.healthday.com/kids-health-information-23/child-development-news-124/same-sex-couples-may-feel-pressure-to-raise-heterosexual-kids-643160.html> (“Social pressure for gay parents to raise heterosexual children can cause stress for these families and make it harder for gay children of gay parents to get the support they need . . .”).

174. See, e.g., April Martin, *Issues for Lesbian- and Gay-Parented Families*, PARENTHOOD IN AMERICA (1998), <http://parenthood.library.wisc.edu/Martin/Martin.html>.

common good, given the possibility that their families understand themselves as hard-won, or otherwise special.

Gauchet even links the phenomenon of “desired” children to the possibility of their experiencing difficulty living in an egalitarian society containing preexisting “institutions.”¹⁷⁵ He suggests that adults rearing “desired” children can be seen demanding that each of their children be accepted as an entirely individual creature, with special needs and gifts, versus one of the vast number of entirely equal persons in society.¹⁷⁶ Gauchet points out that there have always been, and will always be, social institutions with standards to which successful participants must rise and conform in order to achieve success.¹⁷⁷ He also recalls that life is full of circumstances we do not choose and that our “individuation” is accomplished not by refusing to acknowledge these, but by learning to live with reality, making choices toward reaching goals in the face of constraints, and living with a willingness to extend, to discipline, and to transform ourselves.¹⁷⁸ The “child of desire,” he notes, may be raised insufficiently capacitated to meet such challenges. Instead of thinking “*Je suis mon proper auteur*” (“I am my own author”), he may believe “*Je ne suis pas le fruit du hasard, j’ai été désiré comme je suis*” (“I am not the product of chance, but I was desired as I am”).¹⁷⁹

It is worth noting here that the area of marriage was the last corner of family law tying children to the two adults who made them, thus preserving conception and child rearing as a sort of gift within an act of sexual intimacy and within a network of kin relations. Previously, there existed bodies of law penalizing illegitimacy or forbidding fornication, cohabitation, and adultery—all of which attempted to preserve the interlinking of marriage and childbearing to the end of children’s flourishing. For various reasons ranging from humanitarian concerns for children to nonenforcement of laws and elevated notions of privacy, all of these laws have essentially disappeared from the family law landscape. Additionally, ARTs have entered the scene, both confounding and rendering anonymous formerly basic and socially understood family relationships. Family law still has the “paternity presumption,” performing some of the work of linking children to married parents, but even that has been effaced due to its usage in collaborative reproduction settings involving either heterosexual or homosexual couples.

175. Gauchet, *supra* note 172, at 12, 17–18.

176. *Id.* at 11, 18.

177. *Id.* at 10.

178. *Id.* at 21.

179. *Id.* at 22.

Thus marriage was the last major area of family law left to perform the task of interlinking parents with the children they conceive.

CONCLUSION

Current arguments and judicial opinions favoring same-sex marriage have entirely neglected over a century of Supreme Court opinions linking state marriage recognition with the procreation of children and the formation of society itself. Due to their ignoring of the links between marriage and children, and ways in which they reoriented and recalibrated the relationships between parents, children, and the state, these arguments and opinions have weakened children's position in family law. They also raise existential questions for the children brought into same-sex marriage households.

It is ironic that children have been reconceived to their disadvantage by means of a struggle over same-sex marriage. For this is a struggle in which the movants consistently assured observers that marriage had nothing whatsoever to do with children, and in which the courts involved dedicated almost no thoughtful attention to the welfare of children. Yet the position of children has been affected significantly just the same, and not in a positive direction.