

OBERGEFELL: A GAME-CHANGER FOR WOMEN

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On June 26, 2015, the ancient institution of marriage in the United States was permanently changed from an institution centered on biological truths and the protection of women and children to one centered on individual autonomy, consent, and desire.¹

In the majority opinion of *Obergefell v. Hodges*, written by Supreme Court Justice Anthony Kennedy, the High Court expanded the definition of marriage to include same-sex couples by basing the purpose of the institution on evolving societal norms.² Though Justice Kennedy cited the Fourteenth Amendment's Due Process Clause and its protection of liberty through the Due Process and Equal Protection Clauses,³ he failed to base the Court's rationale on those laws, while also failing to capture marriage at its most basic understanding—an institution based around its inherent procreative function.⁴

Our thesis is that the decision in *Obergefell* is a game-changer for women in three areas. First, *Obergefell* changes women's relationships with men. Second, it affects and alters equality for women in many ways. Third, *Obergefell* modifies the relationship between women and their children by removing a required complementary party of opposite gender in parenting, and thus loading a double-burden of parenting on a greater number of mothers.

We will illustrate this thesis by introducing the topic with a description of the Court's intentional movement from conjugal norms in marriage to a pure consent-based theory of marriage. In Part I, we discuss how *Obergefell* changes women's relationships with men. Part II then examines how the case affects and alters equality for women. Part III illustrates how *Obergefell* modifies the relationship between women and their children, by removing a required complementary party of opposite gender in parenting. The decision in *Obergefell* is indeed a grave game-changer for women.

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

2. That is, rather than on any established statute, law or constitutional principle. *Id.*

3. *Id.* at 2597, 2602–03.

4. See Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 248, 253–56, 266 (2012).

INTRODUCTION: FROM CONJUGAL NORMS TO CONSENT BASED MARRIAGE LAW

A. *Conjugal Marriage Norms*

At its most basic understanding, the purpose of marriage is “to bring a man and a woman together as husband and wife” initially, to pave the way for them to later establish a stable environment as “father and mother” to the offspring of their sexual union.⁵ Conjugal marriage⁶ fosters durable unions, encourages spouses to remain sexually faithful, and provides a safe environment to raise biological children jointly.⁷ Only man-woman couples do this.⁸ Because marriage connects mothers and fathers through biological procreation, it provides security, stability, and particularly works to benefit those in disenfranchised communities.⁹ The conjugal view “is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so.”¹⁰

The redefinition of marriage undermines the vital role of marriage by disconnecting sex, procreation, and childrearing.¹¹ The norms of conjugal marriage include several vital elements that provide social order.¹²

5. Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, 2775 HERITAGE FOUND. 1 (2013).

6. Conjugal marriage is the view that marriage is a comprehensive union between man and woman that includes a physical bond with a view of lifelong fidelity. Girgis, George & Anderson, *supra* note 4, at 253.

7. Brief of *Amici Curiae* Scholars of the Welfare of Women, Children, and Underprivileged Populations in Support of Respondents at 4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter Eastman Brief].

8. Eastman Brief, *supra* note 7, at 14.

9. *Id.* at 5.

10. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013).

11. Eastman Brief, *supra* note 7, at 3, 8.

12. These vital elements include five elements in particular: (1) “[E]very child has a right to be reared by and to bond with [his or] her biological father and mother . . .” (2) “[A] child should at least be raised by a mother and father who are committed to each other and to the child . . .” (3) “Men and women should postpone procreation until they are in a committed, long-term relationship . . .” (4) Raising children in a setting with both a mother and father is “socially valuable;” and (5) “Men and women should limit themselves to a single procreative partner . . .” Brief of *Amici Curiae* 100 Scholars of Marriage in Support of Respondents at 7–8, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574) [hereinafter Marriage Scholars Brief]. Even the Court’s opinion in *Obergefell* noted that “[t]he Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.” *Obergefell*, 135 S. Ct. at 2601. Ironically, the Court still determined it was time to change that institution.

B. Consent-Based Marriage

Changes in law alter societal views, expectations, and, ultimately, behavior.¹³ The latest transformation in marriage, based primarily on privacy, transforms the public meaning of marriage in several ways.¹⁴ First, it removes gender diversity from marriage. Second, it eliminates the preferences for biological kinship. Third, and arguably, most importantly, it separates marriage from sex and procreation. The shift in focus on adults rather than children fosters autonomy that “creates a wedge in the notion of marital oneness.”¹⁵ This separation “weaken[s] the marital bond”¹⁶ and drives a wedge between parents and their children.

Professor Helen Alvaré discusses this altered view on marriage as the notion of a more egocentric, adult-centered approach, which views “marriage as more of a self-seeking than a self-giving institution, and thus steer[ing] marriage and families in a direction precisely opposite that which is needed to reconnect these institutions to children and to the larger society.”¹⁷ “For many centuries, marriage was about bridging families, but ‘[t]oday, we see marriage as a commitment between two individuals.’”¹⁸ Marriage is not about protecting women or children anymore; it is about sexual attraction.¹⁹ This article will

13. Eastman Brief, *supra* note 7, at 11.

14. Note the changes in the legal parameters of marriage:

The movement toward marriage expansion and away from the conjugal definition of marriage has been largely based on notions of privacy and autonomy, jurisprudential rationales introduced into family law and well-developed in *Roe*. The constitutional foundation for privacy was established in *Griswold v. Connecticut*, a case protecting marital privacy for contraceptive use as a liberty interest of the married couple. The marital context was abandoned, however, in affording that same privacy interest to unmarried persons in *Eisenstadt v. Baird*. That ruling served to distance marriage from sexual intimacy, and that privacy rationale became the foundation for *Roe*. This creates some correlation between *Roe* and the separation of sexual intimacy from marriage.

Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1367 (2014) (footnotes omitted).

15. *Id.* at 1365.

16. *Id.*

17. 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, 136 (2005).

18. Kohm, *supra* note 14, at 1368 (alteration in original) (quoting MEG JAY, THE DEFINING DECADE: WHY YOUR TWENTIES MATTER—AND HOW TO MAKE THE MOST OF THEM NOW 87 (2012)).

19. See, e.g., Dustin Siggins & David Flynn, *Why Same-Sex Marriage Will Never Measure Up to the Real Thing*, FEDERALIST (Aug. 24, 2015), <http://thefederalist.com/2015/08/24/why-same-sex-marriage-will-never-measure-up-to-the-real-thing> (some scholars argue that if marriage is now based on ideas of autonomy and attraction, where will the expansion of marriage end? Do all sexually attracted people have the right to marry (including minors and multiple partners)?). See also Anthony D' Ambrosio, *5 Reasons We Can't Handle Marriage Anymore*, APP.COM (Apr. 6, 2015), <http://www.app.com/story/life/family/relationships/2015/04/06/reasons-marriage-just-work-anymore/25349495> (offering a prime example of a discussion that sex is indeed the most important aspect of a relationship) (offering no discussion of the benefits of marriage to women or children).

focus on the adverse effects that the redefinition of marriage will have to women over time.

I. *OBERGEFELL* CHANGES WOMEN'S RELATIONSHIPS WITH MEN

Connections between women and men have been dramatically changed by Supreme Court jurisprudence in *Griswold*,²⁰ *Roe*,²¹ and *Casey*,²² with each case basing a move from normative procreative standards—that generally work to protect women—to stronger privacy for all of the parties involved.²³ These cases are all critical to the *Obergefell* rationale for marriage expansion.²⁴ This strategic, privacy-jurisprudence progression, however, has negatively affected women by continually allowing men to be released from their procreative responsibility.²⁵

The redefinition of marriage, completed in *Obergefell*, will almost certainly result in a greater exodus of heterosexual men from marriage,²⁶ from the women they procreate with,²⁷ and from their children.²⁸ Marriage encourages men to commit to women and children.²⁹ “Marriage increases the

20. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

21. *Roe v. Wade*, 410 U.S. 113 (1973).

22. *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See also* Kohm, *supra* note 14, at 1362 (discussing how “the Court pushed a wedge between the husband and the wife” by allowing a wife to not notify her husband of her abortion).

23. *See Casey*, 505 U.S. at 833–34, 839, 845–47. Justice Blackmun’s opinion further notes that “when the State restricts a woman’s right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that th[e] Court long has deemed central to the right to privacy.” *Id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). *See Roe*, 410 U.S. at 153 (holding that the criminal abortion law violated the right to privacy as founded under “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . .”); *Griswold*, 381 U.S. at 483–86 (holding that the proscription of contraception violated the right to marital privacy, as found “in the penumbra[s]” of other constitutional protections); Kohm, *supra* note 14, at 1342–44.

24. “Indeed, the Court has noted it would be contradictory ‘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.’” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)).

25. In each case, privacy was applied to women and men, in the sacrifice of personal and sexual protections traditionally offered to women by marriage. For more along this line of analysis, *see generally* Kohm, *supra* note 14.

26. *See* Christina Sterbenz, *Marriage Rates Are Near Their Lowest Levels In History—Here’s Why*, BUS. INSIDER (May 7, 2014, 11:46 AM), <http://businessinsider.com/causes-of-low-marriage-rates-2014-5>.

27. Aparna Mathur, Hao Fu & Peter Hansen, *The Mysterious and Alarming Rise of Single Parenthood in America*, ATLANTIC (Sept. 3, 2013), <http://www.theatlantic.com/business/archive/2013/09/the-mysterious-and-alarming-rise-of-single-parenthood-in-america/279203>.

28. *The Extent of Fatherlessness*, NAT’L CTR. FOR FATHERING, <http://www.fathers.com/statistics-and-research/the-extent-of-fatherlessness> (last visited Mar. 28, 2016) (“[i]f it were classified as a disease, fatherlessness would be an epidemic worthy of attention as a national emergency.”).

29. Eastman Brief, *supra* note 7, at 5.

odds that a man will be committed to both the children that he helps create and to the woman with whom he does so.”³⁰

The culture of fatherhood changes in response to social and political changes. Scholars have recognized that fathers are more sensitive than mothers to contextual forces. The redefinition of marriage, forced upon all states in *Obergefell*, now includes same-sex couples—essentially working to make the involvement of men potentially “ancillary and optional.”³¹ As the redefinition of marriage treats gender as an unimportant aspect of marriage, heterosexual men could well believe they are unimportant aspects of the family.³² Indeed, some scholars have promoted the idea that fathers are dispensable to families.³³ New York University Professor, Judith Stacey, and a demographer from the University of Southern California, Timothy Biblarz, have argued that men may not be as essential to families as originally thought, stating that quality parenting matters more than gender.³⁴ Equating lesbian parents with a double dose of feminine parenting, Stacey and Biblarz argue that children raised by such parents are likely to spend more time with their parents, handle emotional issues better, and have fewer behavioral problems than children with heterosexual parents.³⁵ As such messages are sent to fathers—noting their unimportance as compared to that of mothers or noting that they are dispensable parental figures—men “will be less likely to marry or actively engage as fathers.”³⁶

“Over the past several decades, marriage rates have fallen dramatically in the U.S.”³⁷ Since 1970, marriage rates have declined by nearly sixty percent.³⁸ Numerous studies have determined that marriage is in decline among disparate groups for various reasons. For instance, the marriage decline has been particularly pronounced among millennials, where the marriage rate dropped from sixty-eight percent to twenty-six percent between 1960 and 2008.³⁹ One recent study has shown that the shortage of marriageable men is particularly

30. Anderson, *supra* note 5, at 1, 2.

31. Eastman Brief, *supra* note 7, at 21.

32. *Id.* at 20–21.

33. See Pamela Paul, *Are Fathers Necessary? A Paternal Contribution May Not be as Essential as we Think*, ATLANTIC (July/Aug. 2010), <http://www.theatlantic.com/magazine/archive/2010/07/are-fathers-necessary/308136>; see Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3 (2010).

34. Biblarz & Stacey, *supra* note 33, at 13. (They argue that the stereotypical feminine approach to parenting, best fostered by two lesbian parents, may provide a better environment for children than a male-female parenting dynamic). *Id.*

35. *Id.*

36. Eastman Brief, *supra* note 7, at 20.

37. Isabelle V. Sawhill, *Is There a Shortage of Marriageable Men?*, BROOKINGS (Sept. 22, 2015, 1:40 PM), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/09/22-shortage-marriageable-men-brief-sawhill>.

38. Sterbenz, *supra* note 26.

39. *Id.*

high among African Americans and well-educated white women, due to the increased economic independence of such women.⁴⁰ The cause of marital decline has been explained by economic reasons,⁴¹ shifting public attitudes, the increase of women in the workforce, and the increase in contraception use.⁴² A prominent cause behind marital decline is the decrease in marriageable men.⁴³ We contend that the redefinition of marriage is likely to only exacerbate the problem of the decrease in marriageable men.

In conjunction with the declining marriage rate in America, there is a significant crisis in America of fatherless children.⁴⁴ In fact, “one out of three [children]—live without their biological dad in the home.”⁴⁵ In 2013, thirty-five percent of children lived in single-parent families;⁴⁶ which “may include cohabitating couples and do[es] not include children living with married stepparents.”⁴⁷ When men exit marriage, they more often than not leave women alone to do the majority of parenting.⁴⁸ When such men do return to the mothers of their children, they often do so for personal and self-centered reasons, rather than to provide for or protect those women who are often the mothers of their children.⁴⁹

The already prevalent absence of fathers will likely only be exacerbated by the change to state-sanctioned marriage, diluting and diminishing the role of fathers in the conjugal view of the marital institution. These facts have illustrated that this exit of men from marriage will largely remove men from

40. Sawhill, *supra* note 37.

41. WENDY WANG & KIM PARKER, PEW RES. CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED: AS VALUES, ECONOMICS AND GENDER PATTERNS CHANGE 7 (2014).

42. Sterbenz, *supra* note 26.

43. Eastman Brief, *supra* note 7, at 20–21. See George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 614 (1999) (discussing the “relative scarcity of marriageable males . . .”); WANG & PARKER, *supra* note 41, at 7–8 (discussing the changes in the labor market that “have contributed to a shrinking pool” of marriageable men).

44. See Gretchen Livingston & Kim Parker, *A Tale of Two Fathers: More Are Active, but More Are Absent*, PEW RES. CTR. (June 15, 2011), <http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers> (noting a profound decline in “the share of fathers who are residing with their children . . .”).

45. Ryan Sanders, *The Father Absence Crisis in America*, NAT’L FATHERHOOD INITIATIVE (Nov. 12, 2013), <http://www.fatherhood.org/bid/190202/The-Father-Absence-Crisis-in-America-Infographic>.

46. *Children in Single-Parent Families*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/tables/106-children-in-single-parent-families> (last visited Dec. 9, 2015). Fifty-two percent of American Indian children, sixteen percent of Asian or Pacific Islander children, sixty-seven percent of Black or African American children, forty-two percent of Hispanic or Latino children, twenty-five percent of Non-Hispanic or White children, and forty-three percent of biracial (or more than two races) children lived in single-family homes. *Children in Single-Parent Families by Race*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/tables/107-children-in-single-parent-familiesby#detailed/1/any/false/36,868,867,133,38/10,168,9,12,1,13,185/432,431> (last visited Dec. 9, 2015).

47. *Children in Single-Parent Families*, *supra* note 46.

48. See *infra* Part 0.

49. See, e.g., Tony Parsons, *Why Men Leave*, INDEP. (Feb. 20, 1999), <http://www.independent.co.uk/life-style/why-men-leave-1072186.html> (discussing dissatisfaction and unmet expectations as the cause of men deserting their families and households).

the lives of women who father their children, causing harm to such women, particularly those of disenfranchised communities. Consequently, women will be left to fend for themselves and their children, causing more and greater individual parenting by mothers; such changes alter women's relationships with men in ways that do not promote what is best for women.

II. *OBERGEFELL* ADVERSELY AFFECTS EQUALITY FOR WOMEN

As the purpose of marriage shifts from one of permanence in opposite-sex households to genderless, private decisions, we contend that women lose certain measures of equality. In this section we will discuss that wealth, social, health, victimization, and procreative inequalities will grow for women. Essentially, these changes will create less equal opportunity generally. And as women's equality is undermined, women will inevitably experience expanded inequality.⁵⁰

A. *Strong Potential for Wealth Inequality*

It is a well-documented fact that marriage increases wealth.⁵¹ As the pool of heterosexual men who want to marry decreases, fewer women will marry as well. This will lead to a decrease in potential wealth for women, and an increase in single mothers and fatherless children.⁵² As the number of marriages between opposite-sex couples decreases, the number of non-marital births increases, causing an increase in the number of single-mother-headed households.⁵³ Non-marital birth rates steadily increased from the late 1970's to 2008, after which the number of non-marital births declined slightly.⁵⁴ "The recent declines in birth rates and numbers of births to unmarried women parallel to some extent the overall decline in birth rates during this period"⁵⁵ Over forty percent of children are now being born to unmarried women.⁵⁶

50. Eastman Brief, *supra* note 7, at 16.

51. Richard Satran, *Marriage Benefit: Couples' Money Secrets Everyone Can Use*, U.S. NEWS & WORLD REP. (Sept. 20, 2013, 2:35 PM), <http://money.usnews.com/money/personal-finance/articles/2013/09/20/marriage-benefit-couples-money-secrets-everyone-can-use>.

52. Eastman Brief, *supra* note 7, at 21.

53. *Id.* at 21–22.

54. Sally C. Curtin, Stephanie J. Ventura & Gladys M. Martinez, *Recent Declines in Nonmarital Childbearing in the United States*, in 162 NAT'L CTR. FOR HEALTH STAT. DATA BRIEF 1, 1 (2014).

55. *Id.* at 5.

56. Brady E. Hamilton, Joyce A. Martin, Michelle J.K. Osterman, Sally C. Curtin & T.J. Matthews, *Births: Final Data for 2014*, in 64:12 NAT'L VITAL STAT. REP. 1, 39 (2015). As of August of 2014, data from the Centers for Disease Control and Protection shows that "[n]onmarital births and birth rates have declined 7% and 14%, respectively, since peaking in the late 2000s." According to data from 2012, Hispanic women had the highest nonmarital birthrate, followed by black women, non-Hispanic white women, then

Marriage tends to generate more wealth for those who are married than those who remain single for several reasons.⁵⁷ Marriage allows for combined expenses between spouses and a stable environment in which couples can plan for long-term goals.⁵⁸ Gender differences can create wealth accumulation as well, as research shows “that men tend to be more confident with investing” and taking risks, whereas “[w]omen tend to be more conservative.”⁵⁹ The natural diversity in opposite-sex marriages “is a critical component of wealth accumulation.”⁶⁰ Because marriage generates wealth (and because marriage rates are decreasing with privacy jurisprudence) women will experience more inequality of wealth in the wake of *Obergefell*.

“Poverty is substantially higher among single mothers than married mothers.”⁶¹ Inevitably, when a married couple bears children, one, or at times both, “partner[s] will experience decreased financial worth and marketability for the sake of prioritizing child care and other domestic responsibilities.”⁶² This will create inequality in marketability for women.⁶³ “Women have traditionally relied on the promises of marriage” for security, support, and stability, both for themselves and the children that they care for.⁶⁴ Unmarried mothers are particularly vulnerable to the “so-called ‘motherhood wage penalty’”—lost wages due to costs and time of childcare and household chores.⁶⁵ Researchers have shown that while married mothers experience a three percent wage differential from their married, childless co-workers, unmarried mothers experience a 10.5% differential in the same comparison.⁶⁶

B. *Social Inequality*

The redefinition of marriage will not affect all social groups identically.⁶⁷ Communities that rely on social guidelines, or cues taken from legal changes,

Asian or Pacific Island women. Curtin, *supra* note 54, at 3. The percentage of nonmarital births to Hispanic women was more than twice the percentage of nonmarital births to Asian women. *Id.*

57. Satran, *supra* note 51.

58. *Id.*

59. *Id.*

60. *Id.*

61. Eastman Brief, *supra* note 7, at 22. See Apama Mathur, *The Cost of Being a Single Mother*, AM. ENTERPRISE INST. (Nov. 18, 2015), <https://www.aei.org/publication/the-cost-of-being-a-single-mother>.

62. Lynne Marie Kohm, *What's the Harm to Women and Children? A Prospective Analysis*, in WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOC'Y? 83 (Lynn D. Wardle ed., 2008).

63. *Id.*

64. *Id.*

65. Neil Shah, *The Earnings Gap Between Married and Non-Married Moms is Widening*, WALL STREET J. (Aug. 5, 2014, 1:47 PM), <http://blogs.wsj.com/economics/2014/08/05/the-earnings-gap-between-married-and-non-married-moms-is-widening>.

66. *Id.*

67. Eastman Brief, *supra* note 7, at 16–17.

to order their lives will be most influenced by the expansion of marriage.⁶⁸ This means that the consequences of the redefinition of marriage will likely fall with disproportionate weight on disadvantaged communities.⁶⁹ Disadvantaged communities are most vulnerable to changing societal understandings of marriage generally, as most of the decisions that they make are determined according to short-term consequences.⁷⁰

The expansion of marriage, now duly established by Supreme Court case law in *Obergefell*, will blur the poor's understanding of the institution of marriage, and the benefits of remaining faithful to one partner and jointly raising children.⁷¹ In contrast to disadvantaged communities, those who are religious generally have reasons to embrace the norms of conjugal marriage;⁷² likewise, regardless of religious belief, those "who are well-educated and wealthy tend to embrace the expectations and norms associated with traditional marriage more than the poor or uneducated."⁷³ Those who are not wealthy, or find themselves without an education, will be further disadvantaged in wealth inequality.

C. *Inequalities in Health Care*

Health care is vital to sexually-active women.⁷⁴ *Obergefell* assumes a strong measure of sexual activity among adults.⁷⁵ Sexual activity can pose significant risks to women—which men do not experience—and those risks are greater for women in disadvantaged communities.⁷⁶ This disadvantages women in areas of contraception and parenthood planning, and can even create a social stigma to contraception use in romantic encounters.⁷⁷

Conjugal marriage relationships provide built-in protections for these concerns,⁷⁸ but the sexual liberty endorsed by marital expansion will almost

68. *Id.* at 17–18.

69. *Id.* at 17–18, 23.

70. *Id.* at 18. These short-term consequences amount to more spending, whereas by contrast, long-term perspectives generally work to create wealth. *Id.* at 20.

71. *Id.* at 17–18. It is likely that this will continue to lead to an increase in the rate of extra-marital births and fatherless families. *Id.* at 18.

72. Marriage Scholars Brief, *supra* note 12, at 17.

73. *Id.*

74. See, e.g., Jennifer Wider, *New Concerns for Sexually Active Women*, OBGYN.NET (July 13, 2011), <http://www.obgyn.net/infertility/new-concerns-sexually-active-women> (discussing health concerns for sexually active women).

75. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (discussing the right of couples to enjoy intimate association).

76. These risks include conception, carrying a child, and the possibilities of abortion and child bearing as a result. Each of these outcomes may be more costly to disadvantaged women who may not have adequate health care to handle these possibilities.

77. See generally Kohm, *supra* note 14, regarding the social stigma of using birth control.

78. Girgis, George & Anderson, *supra* note 4, at 262, 270.

certainly create further non-marital sexual activity.⁷⁹ Sexual activity that may be without consequence to men,⁸⁰ may indeed carry with it myriad consequences to women—creating an expanded burden of contraception and abortion to shoulder without male support.

D. *Inequalities in Victimization*

The decreased marriage rate among opposite-sex couples could easily foster an increased risk of women being victims of rape and sexual assault because single, cohabiting women generally have higher rates of abuse than their married counterparts.⁸¹ Cohabitation has replaced marriage as the once-favored form of “coresidential union.”⁸² Although cohabitation has provided some short-term advantages for those who enter into it,⁸³ the number of women who are victims of intimate partner violence has also increased as a result.⁸⁴ “Married women with children suffer far less abuse than single mothers. In fact, the rate of spousal, boyfriend, or domestic partner abuse is twice as high among mothers who have never been married as it is among mothers who have ever married (including those separated or divorced).”⁸⁵ Studies have suggested that cohabiting couples are more likely to marry if the man has higher income and education levels—“which [have been] negatively associated with intimate-partner violence.”⁸⁶

If the pool of marriageable men continues to decrease,⁸⁷ women will likely have to settle for men who are less than the *cream of the crop*, or men who have lower income and educational levels. If such couples are more inclined to focus on short-term goals rather than a lifelong partnership, such couples

79. While there is no data to our knowledge that connects the line of cases expanding marriage to an increase in sexual activity, it is also not likely that that jurisprudence worked to limit or reduce sexual activity.

80. Men may incur social, emotional and physical consequences of sexual activity that could include sexually transmitted diseases, but they will not incur the same consequences of pregnancy that women will ultimately deal with concerning obstetric and maternity health care.

81. Catherine T. Kenney & Sara S. McLanahan, *Why are Cohabiting Relationships More Violent Than Marriages?*, 43:1 DEMOGRAPHY 127, 127 (2006).

82. *Id.*

83. Rachael Rettner, *Marriage, Cohabitation Provide Similar Health Benefit*, LIVE SCI. (Jan. 19, 2012, 6:15 PM), <http://www.livescience.com/18026-marriage-cohabitation-benefits.html> (stating that cohabitating persons experience greater levels of happiness than those who remain single).

84. Kenney & McLanahan, *supra* note 81.

85. Robert Rector, Patrick F. Fagan & Kirk A. Johnson, *Marriage: Still the Safest Place for Women and Children*, HERITAGE FOUND. (Mar. 9, 2004), <http://www.heritage.org/research/reports/2004/03/marriage-still-the-safest-place-for-women-and-children>.

86. Kenney & McLanahan, *supra* note 81, at 128.

87. Sawhill, *supra* note 37.

will be less inclined to marry, and a vicious intergenerational cycle of violence⁸⁸ will likely persist until there is a break in the cycle.

E. *Procreative Inequality*

Women, particularly those in disenfranchised communities,⁸⁹ lose as the pool of heterosexual men willing to permanently settle down decreases.⁹⁰ Women also lose as the risk of exploitation through the commoditization of babies increases.⁹¹ This procreative inequality will inevitably tend toward greater exploitation of women.

The expansion of marriage will undermine important marriage norms, such as joint-parenthood, decision-making paradigms where husbands and wives make parenthood decisions together, and will impact marriage and procreation for women in three specific ways. First, “removing the procreation-focused, man-woman definition [of marriage] will erode the message that society prefers that procreation occur within a marriage.”⁹² Second, the expansion of marriage will undermine marriage “norms among heterosexual men,” which will be particularly detrimental, as men “generally need more encouragement to marry than women.”⁹³ Thirdly, and most importantly, the increase of same-sex married couples looking for surrogates will very likely lead to a form of commoditization of women.⁹⁴

As the number of marriages between male, same-sex couples increases, the number of those couples who wish to parent and build a family, going outside of their relationship to create children, will likely rise as well.⁹⁵ As same-sex married couples cannot procreate on their own without biological donors of female reproductive cells, female reproductive organs, and medical reproductive assistance, the legalization of same-sex marriage is likely to

88. See Robert A. Pollak, *An Intergenerational Model of Domestic Violence*, 17:2 J. POPULATION ECON. 311 (2004).

89. Our focus on disenfranchised communities pertains to economic rather than political disenfranchisement. Economic disenfranchisement regards the inability to actively participate in the marketplace and become socially mobile. See, e.g., Pamela J. Smith, *Part I-Romantic Paternalism-the Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER RACE & JUST. 107, 120, 122 (1999) (discussing the economic disenfranchisement of white women who were unable to participate as equals in their careers even after gaining the right to vote).

90. WANG & PARKER, *supra* note 41, at 4, 7–8, 16.

91. Eastman Brief, *supra* note 7, at 33–34.

92. Marriage Scholars Brief, *supra* note 12, at 14.

93. *Id.*

94. Eastman Brief, *supra* note 7, at 33. We suggest that this could also lead to a commoditization of children; however, we defer this area to other scholars, and refer the reader to the article by Lynn D. Wardle focused on children from this Symposium. Lynn D. Wardle, *The Innocent Victims of Obergefell*, 14 AVE MARIA L. REV. 19 (2016). See Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66:1 WASH. & LEE L. REV. 203 (2009), for a scholarly perspective on parental rights being traded on the open market for children.

95. Eastman Brief, *supra* note 7, at 36–37.

stimulate increased demand for reproductive technologies.⁹⁶ Though commercial gestational surrogacy may seem like a dream come true for infertile women,⁹⁷ such arrangements can also work to exploit and harm women by treating them as commodities.⁹⁸ This exploitation is likely to occur most among women from “underprivileged communities,” as “they are more likely to accept the harms” that arise from “commercial surrogacy” in exchange for financial compensation that can assist in “their daily needs.”⁹⁹ In the face of such financial powerlessness, and the minimally regulated nature of assisted-reproductive technology, women will indeed experience severe procreative inequality toward exploitation.¹⁰⁰ Egg donors can be compensated from \$6,500 to \$15,000 for their donations, which illustrates this financial powerlessness and how monetary incentives can influence the decision-making of particularly vulnerable women.¹⁰¹ Advertisements for egg donors, specifically targeting young women,¹⁰² may be appealing due to the large amount of resources and the high degree of “altruistic” motivations.¹⁰³ This altruism, however, can lead to long-term complications that may even result in difficulties with and obstacles to the donor’s own future fertility.¹⁰⁴ Potential side effects include ovarian hyper-stimulation¹⁰⁵ (which may cause menstrual irregularities, increased subsequent incidences of spontaneous abortion, ovarian cysts, and an increased risk of ovarian cancer),¹⁰⁶ memory disturbance, stroke, heart attack, autoimmune disorders, infertility, and death.¹⁰⁷

Furthermore, exploitable women can find themselves politically powerless as well, due to the nature of surrogacy and assisted reproduction as a loosely

96. *Id.* at 33, 36.

97. *See Becoming an Egg Donor*, EGG DONATION INC., <https://www.eggdonor.com/donors> (last visited Apr. 16, 2016) (thanking egg donors for their donations, specifically stating that it is “the generosity of women like you who help make the dreams of becoming parents a reality for those struggling with infertility.”).

98. *See Doe v. Att’y Gen.*, 487 N.W.2d 484, 486 (Mich. Ct. App. 1992) (noting that “unbridled surrogacy for profit could encourage the treatment of babies as commodities.”). We will add here that children may also become greater as a commodity as well, but again, we leave that to scholars focused on that issue. *See, e.g.*, Wardle, *supra* note 94.

99. Eastman Brief, *supra* note 7, at 36.

100. Krawiec, *supra* note 94, at 244, 246–47.

101. *Egg Donation Compensation Rates*, EGG DONATION INC., <https://www.eggdonor.com/donors/egg-donor-compensation> (last visited Apr. 16, 2016).

102. *See* Melissa Dahl, *More Young Women Serving as Egg Donors, Report Says*, TODAY (Oct. 17, 2013, 5:11 AM), <http://www.today.com/health/more-young-women-serving-egg-donors-report-says-8C11408034> (noting that egg donors are “young women, usually between the ages of 21 and 35.”).

103. *Id.* (quotation omitted).

104. *Id.* For example, Raquel Cool, who donated her eggs at age twenty-six, developed a moderate case of OHHS; she described feeling alone and experiencing physical and emotional difficulties. *Id.*

105. *Frequently Asked Questions*, EGGSPLOITATION, <http://www.eggsploitation.com/faq.htm> (last visited Dec. 9, 2015).

106. *Id.*

107. *Id.*

or weakly regulated cutting-edge industry.¹⁰⁸ In states where surrogacy is legally endorsed and regulated, young, college-aged women are often openly and affirmatively targeted by the assisted-conception industry.¹⁰⁹ Though surrogacy contracts in some other states may be against public policy, and thus deemed “void and unenforceable” in certain jurisdictions,¹¹⁰ women may nonetheless agree to “‘rent’ their wombs” to “‘couples who want kids of their own.’”¹¹¹ Jessica Szalacinski, for example, became a surrogate mother with the specific intent of helping gay couples.¹¹² She became a surrogate on two separate occasions for two sets of male same-sex couples.¹¹³ Though Jessica bonded with the four fathers, by the time a third set of parents sought her services, at a much higher rate than she had received as a first time surrogate, she described the third agreement as a “business transaction” and “started calling [her]self a commodity.”¹¹⁴ In a recent surrogacy case, the Court of Appeals in Michigan aptly stated, “In a civilized society, there are some things that money should not be able to buy.”¹¹⁵ In our opinion, women and their

108. Though this article focuses on the negative impacts and effects of same-sex marriage on women, children are harmed through the open child market as well. For example, the domestic adoption market is split into the private market and the state run foster care system. Krawiec, *supra* note 94, at 244–47. The state run system is comprised of minority, special needs, and older children—children who are often looked over in the child selection process. *Reclaiming Our Children: Addressing Adoption Rates for Blacks*, NAT’L BLACK CAUCUS ST. LEGISLATORS, <http://www.nbcsl.org/public-policy/state-issues/state-issues-archive/item/932-reclaiming-our-children-addressing-adoption-rates-for-blacks.html> (last visited Dec. 9, 2015).

109. *Egg “Donation” and Exploitation of Women*, CTR. FOR BIOETHICS & CULTURE NETWORK, <http://www.cbc-network.org/issues/making-life/egg-donation-and-exploitation-of-women> (last visited Dec. 9, 2015); Michele Norris, *Egg Donation and the Free Market*, NPR (July 28, 2005), <http://www.npr.org/templates/story/story.php?storyId=4775655>. Women of appropriate age can be targets of global marketing as well. Scott Carney, *The Global Egg Trade*, PULITZER CTR. ON CRISIS REPORTING (Sept. 20, 2010), <http://pulitzercenter.org/audio/human-egg-donation-global-market>.

110. See New York state law, stating that “[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.” N.Y. DOMESTIC RELATIONS L. § 122 (McKinney 2015).

111. See Jane Ridley, *Confessions of a Surrogate Mother*, N.Y. POST (June 16, 2014, 11:20 PM), <http://nypost.com/2014/06/16/as-the-demand-for-children-skyrockets-surrogates-speak-out> (discussing couples, including same-sex couples, who can pay a fee to receive children of their own).

112. *Id.*

113. *Id.* She was paid \$20,000 for her first agreement. *Id.*

114. *Id.* (quotation omitted). The third (and wealthier) couple specifically expressed their desire to have a boy; they also chose the egg donor (based on the donor’s good looks) whose eggs were implanted in Jessica, “despite evidence that showed [the donor’s] eggs were subpar.” *Id.* Consequently, the “first two implantations failed to result in pregnanc[ies].” *Id.* Jessica’s “final straw” was when the couple asked her to terminate one of the female embryos, which they had finally agreed to, if both implantations were successful, as “[t]hey didn’t want to raise twin girls.” *Id.* Again, we suggest that children will be likewise commoditized, but defer once more to other scholars on that matter.

115. *Doe v. Att’y Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992) (referring to a similar quotation from *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988): “In a civilized society, there are some things that money [cannot] buy.”) (quotation omitted). The Court of Appeals of Michigan determined that the government has a compelling state interest in preventing the exploitation of women. It stated that “[s]urrogacy-for-profit arrangements have the potential for demeaning women by reducing them to the status of ‘breeding machines.’” *Doe*, 487 N.W.2d at 487. In Michigan, a surrogacy contract is “void and

reproductive capacities ought to be among those things. Women will experience greater reproductive inequality in the wake of *Obergefell*.

F. Parenting Inequality

Finally, women will experience greater inequality in parenthood. This area of inequality is so significant that we will discuss it in the next section, which will illustrate the larger potential for parenting inequality after *Obergefell*.

III. OBERGEFELL MODIFIES WOMEN'S RELATIONSHIP WITH THEIR CHILDREN

Chief Justice Roberts, in his dissenting opinion in *Obergefell*, pertinently stated, “Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.”¹¹⁶ Because, as discussed earlier, the redefinition of marriage will further separate marriage, sex, procreation, and child-rearing,¹¹⁷ it will also modify women’s relationships with their children. By basing marriage on consent rather than procreative abilities, the redefinition creates an adult-centric institution, which works to marginalize women and their connection with their children. “[B]y weakening the biological bonding and gender-diversity norms associated with traditional marriage, over time a redefinition would likely lead more married parents either to divorce . . . or to separate from their spouses without going through the formality of a divorce.”¹¹⁸ When such a future occurs, there will be more children—born through male-female sexual relations—reared apart from opposite-sex, parental-household stability.¹¹⁹

The redefinition of marriage marginalizes children because it creates an adult-centric institution.¹²⁰ Parents have traditionally been required to make

unenforceable as contrary to public policy.” MICH. COMP. LAWS ANN. § 722.855 (West 2015). Additionally, according to Michigan’s Surrogate Parenting Act, if there is a dispute over the custody of a child born to a surrogate mother pursuant to a contract, “the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child.” *Id.* at § 722.861.

116. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting).

117. *See supra* Part I.

118. Marriage Scholars Brief, *supra* note 12, at 22–23. Additionally, the expansion of marriage “would likely lead more people to engage in ‘serial polygamy’ [or] having children with multiple partners, with or without the formalities of marriage and divorce.” *Id.* at 23 (quoting Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 105 (2002)).

119. Marriage Scholars Brief, *supra* note 12, at 23.

120. Eastman Brief, *supra* note 7, at 15.

decisions based on the needs and best interests of their children.¹²¹ In the wake of *Obergefell*'s adult-centric view of families, parents—and, in our analysis here, particularly mothers—may now be encouraged, and even incentivized, to make parental decisions based on “personal interests rather than the interests of their children.”¹²² That decision-making paradigm shift will modify a mother's relationship with her children.

Numerous studies have shown that children flourish when raised by both biological parents.¹²³ “All of the large-sample studies show that children raised by their two biological parents in intact marriages do better, on average, than children raised in any other parenting arrangement, including step-parenting, single parenting, mother-grandmother parenting, and adoption—as valuable and important as those fallback arrangements are.”¹²⁴ Social science scholar A. Dean Byrd explains:

Mothers and fathers contribute in gender specific and in gender complementary ways to the healthy development of children. . . .

. . . .

Children raised in homes with both mothers and fathers navigate the developmental stages more easily, are more solid and secure in their sense of self and in their sense of gender identity, perform better in the school system, have fewer social and emotional problems and become better functioning adults.¹²⁵

These concerns work together to create less stability for both women and their children, when there is only one gender at home.

The effect “of father absence has been well-documented;”¹²⁶ studies reveal “that father hunger is [a] primary cause of the declining well-being of children in our society and is associated with social problems such as teenage

121. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337, 346–47 (2008).

122. Marriage Scholars Brief, *supra* note 12, at 16. This harms children for several reasons. First, it deprives children of being raised by both biological parents. Eastman Brief, *supra* note 7, at 14–15, 21–22. Second, it puts children in an unstable atmosphere, where children are no longer the focus—making it less likely for adults to remain committed to the marriage for the children. Marriage Scholars Brief, *supra* note 12, at 17, 23. Lastly, it particularly harms children of underprivileged homes and perpetuates cycles of poverty and violence. *Id.* at 16; Eastman Brief, *supra* note 7, at 23–24.

123. Marriage Scholars Brief, *supra* note 12, at 8–9, 23, 28a.

124. *Id.* at 23.

125. A. Dean Byrd, *Conjugal Marriage Fosters Healthy Human and Societal Development*, in WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOC'Y? 5 (Lynn D. Wardle ed., 2008).

126. *Id.* at 7. See Patricia Draper & Henry Harpending, *Father Absence and Reproductive Strategy: An Evolutionary Perspective*, 38 J. ANTHROPOLOGICAL RES. 255, 255 (1982); Cynthia C. Harper & Sarah S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ADOLESCENCE 369, 369 (2004).

pregnancy, child abuse, and domestic violence against women.”¹²⁷ This phenomenon will logically occur in an all-female parent household.

Mother absence will also occur in some male same-sex parenting households, and will also modify women’s relationships with their children. One study showed that the negative effects of “mother hunger” in an all-male parenting situation can occur “when a child is deprived of a mother or a mother figure.”¹²⁸ The report studied a case of a male child, Nick, who was conceived through a surrogate mother for a male, homosexual couple, cared for by several consecutive female nannies, and was ultimately referred to a female psychologist at the age of just four and a half years old.¹²⁹ The flux of maternal figures in his life, conjoined with his fantasies about “buying a new mother,” was comprehended as a result of “innate developmental forces” working to accommodate the child’s inherent need for a mother.¹³⁰

The value of gender diversity in having both a mom and a dad is exhibited through the unique relationships a child has with a mother and a father.¹³¹ There are worthy values and assets in “[w]hat a boy gets from experiencing the . . . deep personal experience of masculinity that is pro-social, pro-woman, pro-child”¹³² Similarly, a daughter-father relationship is of significant value, particularly in the sexual development of females. For instance:

[A] girl raised without a father does not come to adolescence with the same deep experience of what male love feels like when it is truly protective, not driven by a desire for sexual gratification [F]atherless girls may experience a hunger for masculine love and attention that leaves [them] particularly vulnerable to use and abuse by young adult males. Girls raised without fathers are at high risk for unwed motherhood.¹³³

There are empowerment issues that arise for women in relationship to their children. Learning how to be a full member of one’s own sex and relate to members of the opposite-sex requires the parenting of a mother and a father.¹³⁴ Women’s relationships with their children will be affected without a father in the picture on a daily basis, as mothers and fathers are simply not

127. Byrd, *supra* note 125, at 7.

128. *Id.* at 7–8.

129. *Id.* at 8.

130. *Id.*

131. See Marriage Scholars Brief, *supra* note 12, at 7, 10–11.

132. *Id.* at 10 (third alteration in original) (quotation omitted) (quoting Jenet Jacob Erickson, *Fathers Don’t Mother and Mothers Don’t Father: What Social Science Research Indicates About the Distinctive Contributions of Mothers and Fathers to Children’s Development*, SOC. SCI. RES. NETWORK, Nov. 6, 2014, at 1, 19 (quoting Maggie Gallagher, *(How) Does Marriage Protect Child Well-Being?*, in *THE MEANING OF MARRIAGE* 210–11 (Robert P. George & Jean Bethke Elshtain, eds. 2006))).

133. Marriage Scholars Brief, *supra* note 12, at 10–11 (quoting Erickson, *supra* note 132, at 20 (quoting Gallagher, *supra* note 132)).

134. Marriage Scholars Brief, *supra* note 12, at 11.

interchangeable; only opposite-sex couples can provide invaluable, complementary roles in a child's life.¹³⁵

Personal accounts of persons raised by same-sex couples show that the confusion which may arise from being raised in a same-sex marriage household can lead to detrimental long-term effects on children. California State University-Northridge Professor and children's rights activist Robert Oscar Lopez testified in front of the Senate Judiciary Committee about his experience growing up with a lesbian mother, estranged from his biological father. He discussed how "growing up with a lesbian mother . . . scarred him for life."¹³⁶ As a young adult, Lopez "[fell] himself into a life of drugs and promiscuity as a young gay man." However, Professor Lopez eventually "marr[ied] a woman and bec[ame] a father."¹³⁷ He described his difficult childhood as one of confusion.¹³⁸ In discussing peers, who grew up in opposite parent and even divorced parent homes, he stated:

"They learned, typically, how to be bold and unflinching from male figures and how to write thank-you cards and be sensitive from female figures. These are stereotypes, of course, but stereotypes come in handy when you inevitably leave the safety of your lesbian mom's trailer and have to work and survive in a world where everybody thinks in stereotypical terms, even gays."¹³⁹

Professor Lopez seems to prefer disassociation of the right to marry from the right to have children, calling the connection something akin "to acquir[ing] other people's children."¹⁴⁰ He argues that guaranteeing the right to have children to any individual or couple implicates the rights of a third party—that of a child whose right to a mother and father is "more fundamental than a spousal relationship."¹⁴¹ He argues that "[t]here must be an institution that safeguards the relationships that children have when they are born—the relationship to a mother and the relationship to a father," while equating

135. Byrd, *supra* note 125, at 8.

136. Beth Hawkins, *Same-Sex Marriage Opponent Robert Oscar Lopez Calls Himself a 'Children's Activist'*, MINNPOST (Mar. 18, 2013), <https://www.minnpost.com/politics-policy/2013/03/same-sex-marriage-opponent-robert-oscar-lopez-calls-himself-childrens-activi>.

137. *Id.*

138. *Id.* Life was not difficult because of prejudice, as most of his neighbors were not aware of what was going on within his home; to the outside world, he was a straight A student. Unlike his peers, however, he grew up without learning "traditionally masculine and traditionally feminine social mechanisms." *Id.*

139. *Id.* (quoting Robert Oscar Lopez).

140. *Id.* Dustin Siggins, *Bisexual Prof Raised by Lesbians Never Knows 'Whether I'm Going to Get Killed' Thanks to LGBT Lobby*, LIFE SITE (Oct. 27, 2014, 5:55 PM), <https://www.lifesitenews.com/news/bisexual-professor-raised-by-lesbians-never-knows-whether-im-going-to-bet-k>.

141. Siggins, *supra* note 140. In 2013, the Supreme Court of Virginia in *L.F. v. Breit* recognized a child's interest in knowing and having a relationship with her parents. *L.F. v. Breit*, 736 S.E.2d 711, 721 (Va. 2013). The court stated that "[t]he relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment." *Id.*

assisted-reproduction to a form of slavery, perceiving such children as chattel.¹⁴² It cannot be helpful to view children as chattel or property, as that certainly modifies, if not commoditizes, the mother-child relationship.

Though it will take time to study the long-term effects of same-sex marriage on children, “[c]omprehensive research published earlier this year by [a] Catholic University of America researcher Dr. Paul Sullins found that ‘[e]motional problems were over twice as prevalent . . . for children with same-sex parents than for children with opposite-sex parents.’”¹⁴³ Dr. Sullins’ study shows that children of same-sex parents have more emotional problems than those who reside with both biological parents.¹⁴⁴ Children with same-sex parents have less than twice the risk of emotional problems as children from single parent homes, however, children living with their same-sex parents have almost four times the risk of emotional problems as children who are living with their married, biological parents.¹⁴⁵ Stigmatization, though a powerful factor in emotional stability, does not account for the difference between same-sex and opposite-sex families.¹⁴⁶ “With respect to joint biological fertility, same-sex partners are different from opposite-sex partners by definition.”¹⁴⁷ This difference will modify women’s relationships with their children. “The importance of common biological parentage for optimal child well-being found in this study raises the difficult prospect that higher child emotional problems may be a persistent feature of same-sex parent families, since they are distinguished from opposite-sex parents on just this capacity.”¹⁴⁸ The “primary benefit of marriage for children” is “that it presents them with their own parents.”¹⁴⁹

The Court in *Obergefell* noted that “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”¹⁵⁰ Though it certainly is possible that same-sex couples can provide nurturing homes for their children, this cannot discount the overwhelming volumes of evidence that indicate that children flourish when raised in a home with a biological mother and father.¹⁵¹ The Court also cited *Zablocki v.*

142. Siggins, *supra* note 140.

143. Siggins & Flynn, *supra* note 19 (alteration in original) (quoting D. Paul Sullins, *Emotional Problems Among Children with Same-Sex Parents: Difference by Definition*, BRIT. J. EDUC., SOC’Y & BEHAV. SCI. 99, 99 (2015)).

144. See Sullins, *supra* note 143.

145. *Id.* at 99, 100, 105, 112–13.

146. *Id.* at 107, 110.

147. *Id.* at 114.

148. *Id.* Furthermore, “[I]t is hard to conceive how same-sex parents could ever replicate the level of benefit for child well-being that is the case in opposite-sex relationships involving two biological parents.” *Id.*

149. *Id.*

150. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

151. Children who are raised in mother-father households tend to excel academically, are more likely to attend college, are less likely to live in poverty, are less likely to engage in violence, are less likely to be

Redhail,¹⁵² in stating that “the right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”¹⁵³ Though the right to determine the upbringing of one’s children is prevalent in Supreme Court precedent,¹⁵⁴ the right to raise another’s child has not been deemed a similar “central part of the liberty protected by the Due Process Clause.”¹⁵⁵ With the comprehensive legalization of same-sex marriage throughout the United States, the right of adults to order their lives according to their pleasures has ostensibly been deemed a greater interest than the best interest of a child, clearly modifying a mother’s relationship with her child. In this manner, parenting is no longer about a child’s best interests, but rather, chiefly about parental rights. Individual parental rights completely detached from the best interests of the child will create a caustic and deleterious effect on the mother-child relationship.

Finally, the decision in *Obergefell* conflates sex and gender, which will also modify women’s relationships with their children. Studies that criticize gender-diverse marriage suggest that proponents of same-sex marriage conflate sex and gender.¹⁵⁶ Law Professors Ian Farrell and Nancy Leong define sex as a biological construct and gender as an identification categorization that is constructed by society and culture.¹⁵⁷ They concede that the status of being male or female “correlates to some degree with particular

victims of sexual violence, and are more likely to have successful marriages in the future. *See 30 Years of Research: A Child Deserves a Mother and a Father*, FOCUS ON THE FAMILY, <https://www.focusonthefamily.com/socialissues/marriage/teach-your-children-about-marriage/30-years-of-research> (last visited Dec. 9, 2015). This is not to ignore the reality that some parents may be unfit to raise their children, and in such cases it would be in the best interest of the children not to be raised by both parents. However, the evidence shows that in the vast majority of cases, children will flourish in a stable, permanent home based on biological connections and complementary roles of mother and father. *Id.*

152. *Zablocki v. Redhail*, 434 U.S. 374 (1978) (upholding the fundamental right to marriage as deserving strict scrutiny overruling state statutory provisions requiring payment of child support arrears before remarriage).

153. *Obergefell*, 135 S. Ct. at 2600 (quoting *Zablocki*, 434 U.S. at 384 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))).

154. *Troxel v. Granville*, 530 U.S. 57, 72 (2000) (holding that parents have the “fundamental right to make decisions concerning the care, custody, and control of [their children]”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (holding that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); *Meyer*, 262 U.S. at 400 (“[I]t is the natural duty of the parent to give his children education suitable to their station in life.”).

155. *Obergefell*, 135 S. Ct. at 2600 (quoting *Zablocki*, 434 U.S. at 384).

156. Ian Farrell & Nancy Leong, *Gender Diversity and Same-Sex Marriage*, 114 COLUM. L. REV. SIDEBAR 97, 98 (2014).

157. *Id.* at 99. This is hard to apply, particularly when trying to explain that premise to parents who are concerned with their little girls going to the bathroom with grown men who state that their gender is that of a female. *Id.* This concern is fostered by a conflation of gender and sex, but is an argument beyond the scope of this article. *Id.*

traits” between sexes.¹⁵⁸ They argue that such traits are general stereotypes rather than universal truths, conceding that such generalizations exist, but also stating that arguments for opposite-sex marriage necessitating gender diversity are flawed.¹⁵⁹ They state that children can be influenced by a number of other persons, such as extended family members, family friends, and others.¹⁶⁰ To the contrary, the upbringing of children by same-sex parents who are not biologically related to their children can work to disconnect the multigenerational family when there are no biological ties.¹⁶¹ Furthermore, these arguments are not helpful in discounting the argument that children are better off with biological parents. Regardless of the gender an individual person may feel or identify with, children are a result of procreation between a man and a woman.¹⁶² An amicus brief filed in *Obergefell* by the American College of Pediatricians shows that children of same-sex couples fare worse when the couple is married than when the couple remains unmarried.¹⁶³ Though “[t]he reasons for the disparity [were not] clear,” it was asserted that “[c]hildren raised by married same-sex couples showed markedly higher rates of depression, unhappiness, fear and anxiety than those raised by unmarried same-sex couples.”¹⁶⁴ This is inapposite to the effect on children of “opposite-sex couples, where marriage typically leads to improved outcomes for children.”¹⁶⁵

Furthermore, as discussed earlier, the redefinition of marriage will likely exacerbate the male exit from marriage.¹⁶⁶ This exodus will continue to contribute to an increase in the number of unmarried mothers left to raise their children without fathers.¹⁶⁷ Well-developed research has shown that children

158. *Id.* Farrell and Leong note that males exhibit dominance and females tend to be nurturing. *Id.*

159. *Id.* Farrell and Leong note that many people do not identify as male or female, but instead maintain a fluid gender identity. *Id.* Because the generalizations that typically distinguish males and females are not universal truths, the argument that an opposite-sex marriage will be gender diverse is based on nothing more than stereotypical suppositions. *Id.*

160. *Id.* at 100.

161. Eastman Brief, *supra* note 7, at 14.

162. Girgis, George & Anderson, *supra* note 4, at 256–57.

163. Gene Schaerr, *Children Raised by Same-Sex Couples May Do Worse When the Couples Marry*, DAILY SIGNAL (Apr. 20, 2015), <http://dailysignal.com/2015/04/20/children-raised-by-same-sex-couples-may-do-worse-when-the-couples-marry>.

164. *Id.*

165. *Id.* This evidence may parallel the confusion experienced by adopted children. Nicholas Zill, *The Paradox of Adoption*, INST. FOR FAMILY STUDIES (Oct. 7, 2015), <http://family-studies.org/the-paradox-of-adoption>. Children of same-sex parent homes may experience a sort of double confusion of handling the disconnection from biological parents and the intentional disconnect from a mother or a father. *Id.* Similar to a gender diverse parent adoption, there is simply no guarantee that children born through assisted reproductive techniques or are adopted into a same-sex marriage home will have contact with the family of the missing biological parent. *Id.*

166. *See* Parsons, *supra* note 49.

167. *The Extent of Fatherlessness*, *supra* note 28; *see* Sterbenz, *supra* note 26.

who are raised in single parent homes will likely experience a number of social, physical, and emotional difficulties.¹⁶⁸

Finally, because of the decline of marriage over the past generation,¹⁶⁹ and the expansion of marriage in *Obergefell*, we suggest that women's relationships with children will be further modified after *Obergefell* by greater mother-and-child poverty. Children who are raised with single parents, more often their mother, generally reveal a "higher percentage [of children] being raised in poverty; experiencing psychological or emotional problems; experiencing teenage pregnancy; doing poorly in school; engaging in substance abuse and committing crimes—all at significant cost to the state. It would also mean a higher percentage of girls who later undergo multiple abortions."¹⁷⁰ In fact, marriage is the greatest weapon against poverty for women and children, as marriage reduces the likelihood of poverty by approximately eighty-two percent.¹⁷¹ Higher rates of children raised by single parents often create perpetual cycles of poverty, as well as perpetual cycles of non-marital births.¹⁷² "Young men that grow up without a father present are likely to follow a pattern themselves of early childbearing and father absence."¹⁷³ When the alternative to such a problem would be to create policies that promote the importance of biological parental ties—and more specifically, policies that include fathers—*Obergefell* signals the lack of necessity for fathers. In fact, social-science research indicates substantial barriers to a father's ability to parent "outside of a caring, committed, collaborative marriage."¹⁷⁴ Unfortunately, fathers who do not live with their child and the child's mother often have a marginal relationship with that child.¹⁷⁵ This unavoidably places a greater burden of parenting on the mother. These children grow up to be adults without a strong, father relationship, which can render an adult who is not equipped to interact with and appreciate

168. *The Consequences of Fatherlessness*, NAT'L CTR. FOR FATHERING, <http://www.fathers.com/statistics-and-research/the-consequences-of-fatherlessness> (last visited Dec. 9, 2015). For example, studies have shown that children who are raised without fathers are more likely to live in poverty, are more prone to abuse drugs and alcohol, and have more problems externalizing and internalizing behavioral problems. *Id.*

169. Sterbenz, *supra* note 26.

170. Marriage Scholars Brief, *supra* note 12, at 16.

171. Robert Rector, *Marriage: America's Greatest Weapon Against Child Poverty*, in 117 SPECIAL REP. 1, 1–2 (Sept. 5, 2012), <http://www.heritage.org/research/reports/2012/09/marriage-americas-greatest-weapon-against-child-poverty>.

172. *Id.* at 1–2, 7.

173. Renata Forste & Jonathan Jarvis, "Just Like His Dad": *Family Background and Residency with Children Among Young Adult Fathers*, 5 FATHERING 97, 99 (2007).

174. Eastman brief, *supra* note 7, at 32. When a father lives apart from his child or his child's mother, he is less likely to trust the mother and is less committed to his child. Subsequently, he is less likely to invest time or money into such relationships. *Id.* at 32–33.

175. *Id.* at 32–33.

members of the opposite sex,¹⁷⁶ placing those individuals at a disadvantage from adults who were raised by parents who placed their children at the center of their marriage.¹⁷⁷ *Obergefell* necessarily modifies women’s relationships with their children.

CONCLUSION: LONG-TERM PREDICTIONS

As Justice Alito wrote in the dissents of *United States v. Windsor*¹⁷⁸ and *Obergefell v. Hodges*¹⁷⁹:

Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. . . .

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.¹⁸⁰

This article has suggested some of the effects that may occur over time to women and their relationships with men, children, and various measures of equality. These suggestions appear to be supported by various proofs.

Empirical evidence has shown that during the process of the legalization of same-sex marriage, America has also experienced a decrease of marriage rates among opposite-sex couples.¹⁸¹ Several same-sex marriage proponents have cited evidence from Massachusetts’ legalization of same-sex marriage in 2004 as evidence that the adoption of same-sex marriage has led to no adverse effects.¹⁸² For example, “a recent study by Marcus Dillender purport[s] to find ‘no evidence’” that the adoption of same-sex marriage has any adverse effect on divorce rates or opposite-sex marriage.¹⁸³ A flaw in the Dillender study is that it erroneously assumed that the full impact of the redefinition of marriage

176. *Id.* at 25, 33, 35.

177. *30 Years of Research: A Child Deserves a Mother and a Father*, *supra* note 151.

178. *United States v. Windsor*, 133 S. Ct. 2675, 2711–20 (2013) (Alito, J., dissenting).

179. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2640–43 (2015) (Alito, J., dissenting).

180. *Id.* at 2642 (Alito, J., dissenting) (quoting *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting)).

181. Marriage Scholars Brief, *supra* note 12, at 18.

182. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 972 n.4 (Mass. 2003). See Marriage Scholars Brief, *supra* note 12, at 17.

183. Marriage Scholars Brief, *supra* note 12, at 19 (quoting Marcus Dillender, *The Death of Marriage? The Effects of New Forms of Legal Recognition on Marriage Rates in the United States*, 51 *DEMOGRAPHY* 563, 582 (2014)). When accounting for methodological flaws in Dillender’s study, however, the data from Massachusetts illustrates how the legalization of same-sex marriage has indeed had “substantial adverse effects” upon the entire institution of marriage. Marriage Scholars Brief, *supra* note 12, at 18.

would be measurable immediately after the institution was redefined.¹⁸⁴ However, other “[m]arriage experts have frequently and correctly noted that major social changes operate with a ‘cultural lag’ that often requires years—sometimes a generation or two—to be fully realized.”¹⁸⁵ Another flaw in the Dillender study included a failure to capture the difference in impact on different communities; while religious or wealthy communities can embrace traditional marriage norms regardless of a change in marriage law, those from less religious or prosperous communities are more likely to take their cues from changes in the law.¹⁸⁶ A study of the Netherlands, conducted by Mircea Trandafir, adjusted for the problem of measuring the impact of a change in marriage laws on different social groups.¹⁸⁷ The study showed that the “net decline in marriage rates for women age[d] [eighteen to twenty-two] was 5.0%.”¹⁸⁸ The decline of marriage rates in urban areas was even larger.¹⁸⁹ The Trandafir study showed that the legalization of same-sex marriage was likely connected with an increase in marriage rates among religious groups, which briefly counterbalanced the decline in marriage rates of opposite-sex couples “among the more urban, less religious segments.”¹⁹⁰ Through his study, “Trandafir discovered th[e] differential effect,” which accounted for different effects of the change in marriage among different social groups.¹⁹¹

Data from U.S. state jurisdictions also illustrates this adverse impact of the adoption of same-sex marriage on opposite-sex marriage rates. Every state that adopted same-sex marriage, and kept the relevant data, has shown that in a short period of time after the passage of same-sex marriage, marriage among opposite-sex couples declined.¹⁹² Four states, Vermont, Iowa, Connecticut, and Massachusetts, kept relevant data that measured the number of marriages the year before same-sex marriage was adopted in each respective state, and the marriage rate after same-sex marriage was adopted.¹⁹³ Opposite-sex marriage experienced a 5.1% drop in Vermont and a 9.2% drop in Iowa over

184. Marriage Scholars Brief, *supra* note 12, at 18.

185. *Id.* at 19.

186. *Id.*

187. *Id.* at 20. The Netherlands legalized same-sex marriage in 2001, though it “had adopted same-sex civil unions in 1998.” *Id.*

188. *Id.*

189. *Id.* at 17a. The Netherlands study saw a “decline of 31.8 percent for young women in the four largest urban areas, and 13.4% for all native Netherlands young women.” *Id.*

190. *Id.* at 20.

191. *Id.* at 21. In studying the differential effect, Trandafir noted “that, [al]though the more religious segments of Dutch society” did not experience short term marriage declines, other, nonreligious segments of society encompassing different norms experienced a decline in opposite-sex marriages. *Id.* The differential effect accounts for the various differences among different segments and society and how such variables affect marriage rates in the short and long term. *Id.*

192. *Id.* at 3.

193. *Id.* at 14a. Vermont and Connecticut maintained data for one and two years after same-sex marriage was adopted, respectively. *Id.*

the measured period.¹⁹⁴ Connecticut experienced a 7.3% decline and Massachusetts experienced an 8.9% decrease.¹⁹⁵

Therefore, over the long run, a five percent reduction in the opposite-sex marriage rate “would likely result in an additional 1.275 million women eschewing marriage over the next fertility cycle ([thirty] years).”¹⁹⁶ These results are palpable: “[f]ewer opposite-sex marriages means more unmarried women, more children born to unmarried mothers, fewer total children born, and more children aborted.”¹⁹⁷

By keeping the focus on women’s concerns in the wake of *Obergefell*, we have endeavored to illustrate that the natural results of the ruling to legalize and mandate same-sex marriage in every state will mean increased rates of unmarried women, increased rates of poverty to women, and increased rates of reproductive exploitation of women. Our thesis is that the decision in *Obergefell* is a game-changer for women in three areas, namely, changing women’s relationships with men, affecting and altering equality for women in a variety of ways, and working to modify the relationship between women and their children by removing a required complementary party of opposite gender in parenting. The decision in *Obergefell* is indeed a grave game-changer for women.

194. *Id.* at 13a n.3. Massachusetts measured marriage rates for five and ten years after same-sex marriage was adopted. *Id.*

195. *Id.*

196. *Id.* at 22.

197. *Id.*