

THE INNOCENT VICTIMS OF *OBERGEFELL*

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INTRODUCTION: SAME-SEX MARRIAGE FOR THE SAKE OF CHILDREN?

Same-sex marriage was carried into American constitutional law upon the backs of children. The decision of the Supreme Court of the United States (SCOTUS) on June 26, 2015, in *Obergefell v. Hodges*,¹ interpreting the Constitution of the United States to require all American states to legalize (allow, license, celebrate, recognize, and give full legal respect to) marriages between same-sex couples, clearly implicates the social and legal meaning of marriage in this country. In the long run, the *Obergefell* decision may also influence how some other countries and international legal institutions define and understand marriage.² Perhaps surprisingly, however, in the first ten months after the SCOTUS decision no other nation decided to allow same-sex marriage.³ Importantly, the justification for the legal redefinition of marriage in *Obergefell* was based in significant part upon, and also has profound impacts upon, children. Indeed, the idealized, romanticized, emotionally appealing image of the salutary effects that legalizing same-sex marriage would have upon children was an important part of the rationale offered by the

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

2. See generally The Associated Press, *Supreme Court Same-Sex Marriage Ruling Could Have Global Impact*, CBS NEWS (June 27, 2015, 11:29 PM), <http://www.cbsnews.com/news/supreme-court-same-sex-marriage-ruling-could-have-global-impact>.

3. Same-sex marriage became legal in Ireland on November 16, 2015, but the referendum changing the marriage law to allow “two persons without distinction as to their sex” to marry was passed on May 23, 2015, more than one month before *Obergefell* was decided. See *Ireland Makes History and Says ‘Yes’ to Marriage Equality*, AMNESTY INT’L (May 23, 2015, 17:48 UTC), <https://www.amnesty.org/en/latest/news/2015/05/ireland-makes-history-and-says-yes-to-marriage-equality>. Indeed, the legalization of same-sex marriage in Ireland may have paved the way for the legalization of same-sex marriage in the USA. See generally Danny Hakim & Douglas Dalby, *Irish Legalize Gay Marriage by Big Margin*, N.Y. TIMES, May 24, 2015, at A1. Pew Research Center, *Gay Marriage Around the World*, <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013> (June 26, 2015) (Colombia legalized same-sex marriage by judicial decision on April 28, 2016, and Finland’s law will take effect in 2017.).

Court to justify reinterpreting the Constitution—requiring the universal legalization of same-sex marriage in the United States.

Obergefell also profoundly impacts the well-being of women. Their relational status and roles as wives and mothers have been diluted, if not sacrificed, by the Court for the sake of mandating that all states immediately legalize same-sex marriage.⁴ In the long run, the impatient Supreme Court same-sex decision may have significantly altered and diminished the trajectory of women's rights.

However, the redefinition of marriage to include same-sex couples may have its most profound, far-reaching, intergenerational impact upon children, both those who will be raised by same-sex couples as well as all other children in society. *Obergefell* will also impact parenting, both directly through parenting by same-sex married couples and indirectly through the reconceptualization of the institution of marriage and of its connection to parenting. Undoubtedly, *Obergefell* weakens the link between marriage and parenting, and it does so at a critical time in American history. The number and ratio of children born and raised out of wedlock are at historically high levels.⁵ *Obergefell* did not improve the situation, but—by diluting the meaning of marriage—has invited the exacerbation of those serious problems.

Moreover, the 5–4 majority opinion of the Court in *Obergefell* relied heavily upon the claim that children being raised by a homosexual parent and his or her partner are better off, and are more likely to benefit and flourish, if that parent is married to his or her same-sex partner. The benefit to children of same-sex marriage was a major reason to justify the Court's interpretation

4. See generally PETER SPRIGG, THE TOP TEN HARMS OF SAME-SEX "MARRIAGE" 3–4, 7 (2011) (fewer marriages, less fidelity, more divorce, pressure for polygamy); Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, 2775 BACKGROUND 1, 8 (2013) ("Redefining marriage would diminish the social pressures and incentives for husbands to remain with their wives and biological children and for men and women to marry before having children. Yet the resulting arrangements—parenting by single parents, divorced parents, remarried parents, cohabiting couples, and fragmented families of any kind—are demonstrably worse for children."); Bishop Harry R. Jackson, Jr., Opinion, *Same-Sex Marriage Will Hurt Families, Society*, CNN (Sept. 6, 2010, 1:33 PM), <http://www.cnn.com/2010/OPINION/08/07/jackson.same.sex.marriage/index.html>; Dennis Prager, *Same-Sex Marriage and the Insignificance of Men and Women*, TOWNHALL.COM (Aug. 17, 2010), http://townhall.com/columnists/dennisprager/2010/08/17/same-sex_marriage_and_the_insignificance_of_men_and_women/page/full ("men as men and women as women lose their significance."); Trayce Hansen, *Love Isn't Enough: 5 Reasons Why Same-Sex Marriage Harms Children*, TRUENEWS.ORG, http://www.truenews.org/Homosexuality/homosexual_marriage_harms_children.html (last visited Mar. 05, 2016).

5. See, e.g., Michelle Castillo, *Almost Half of First Babies in U.S. Born to Unwed Mothers*, CBS NEWS (Mar. 15, 2013, 3:03 PM), <http://www.cbsnews.com/news/almost-half-of-first-babies-in-us-born-to-unwed-mothers>. ("Birth rate for married women" has fallen from 156.6 in 1960 to 88.7 per 1,000 in 2007, while "births to unmarried women" has risen in that same period from 21.6 to 52.3.) See National Center for Health Statistics, *The Gap Between Married and Unmarried Birth Rates has Narrowed*, FAMILYFACTS.ORG (2017), <http://familyfacts.org/charts/213/the-gap-between-married-and-unmarried-birth-rates-has-narrowed> (referencing NATIONAL CENTER FOR HEALTH STATISTICS, NATIONAL VITAL STATISTICS REPORTS, BIRTH RATES BY MOTHER'S MARITAL STATUS, WOMEN AGE 15 TO 44 (2011)).

of the Fourteenth Amendment as requiring all states to legalize same-sex marriage.

This Article suggests, however, that the assumption—that children being raised by a homosexual parent are usually better off, and are more likely to flourish, if that parent is able to marry his or her same-sex partner—is seriously erroneous and contrary to the facts. Furthermore, this Article considers the potential impacts, both negative and positive, of the legalization of same-sex marriage parenting, same-sex parents, and upon their children. This Article also suggests that the potential for grave harm to the directly impacted children of same-sex marriage outweighs the potential for significant benefits. Additionally, this Article indicates that the legalization of same-sex marriage has harmfully and indirectly effected children in our society and will be severely detrimental. The future of children being raised in same-sex adult relationships is also very discouraging.

I. THE *OBERGEFELL* OPINIONS

James Obergefell and his partner, John Arthur, lived together for more than two decades as a same-sex couple in Cincinnati, Ohio.⁶ Ohio, like most states, did not allow or recognize same-sex marriage.⁷ In July 2013, after Mr. Arthur was diagnosed with amyotrophic lateral sclerosis (ALS), Lou Gehrig's disease, the couple made a special, one-day trip in a private jet to Maryland, where same-sex marriage was permitted.⁸ They were married in the plane on the tarmac and immediately returned to Ohio, where Mr. Arthur died three months later.⁹ In accordance with Ohio law, his death record (1) listed Arthur as "unmarried" at the time of his death, and (2) did not record Obergefell as Arthur's "surviving spouse."¹⁰ Mr. Obergefell filed suit in the U.S. District Court for the Southern District of Ohio against the Director of the Ohio Department of Health, asking the court to declare that the Ohio laws that disallowed recognition of out-of-state same-sex marriages were unconstitutional. Obergefell asked the court to order the state officials to issue death certificates listing Arthur as married, and to declare Obergefell as Arthur's lawful "surviving spouse."¹¹ The District Court granted those requests, finding that Ohio's refusal to recognize same-sex marriages violated the petitioner's "fundamental right to keep existing marital relationships

6. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013).

7. *Id.* at 974–75.

8. *Id.* at 975–76.

9. *Id.* at 976.

10. *Id.*

11. *Id.*

intact,”¹² without any rational justification.¹³ However, the U.S. Court of Appeals for the Sixth Circuit reversed, holding that Ohio’s limitation of marriage to male-female couples did not violate any constitutional rights of the same-sex couple protected by the Fourteenth Amendment.¹⁴ The Supreme Court of the United States reversed the Sixth Circuit and held that the Constitution requires states to permit and recognize same-sex marriage.¹⁵

The majority opinion for five justices of the Supreme Court of the United States in *Obergefell v. Hodges* was written by Justice Kennedy, who was joined by Justices Ginsberg, Breyer, Kagan, and Sotomayor. Interestingly, the Court interpreted the Constitution’s Fourteenth Amendment as requiring all states to permit same-sex couples to marry based upon the premise that children being raised by a homosexual parent are better off, flourishing and thriving, when that parent is able to marry his or her same-sex partner. Justice Kennedy’s opinion for the Court emotionally appealed to the potential benefits for children being raised by same-sex partners.

In doing so, the Court accepted arguments that the petitioner, James Obergefell, and several amici asserted—that children being raised by same-sex parents are better off if their parents are able to marry their partners. Four law professors at the University of Denver, Washburn University, and Georgia State University wrote an amicus brief for unidentified “scholars of constitutional rights of children” arguing that prohibiting same-sex marriage inflicted legal, economic, psychological, and social harms upon children of same-sex couples, and amounted to state “punish[ment of such] children for matters beyond their control.”¹⁶ They quoted the Court’s opinion in *United States v. Windsor*, which declared,

The differentiation [between same-sex and opposite-sex couples] . . . humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.¹⁷

12. *DeBoer v. Snyder*, 772 F.3d 388, 399 (6th Cir. 2014) (discussing *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997 (S.D. Ohio 2013)), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

13. *See generally Wymyslo*, 962 F. Supp. 2d 968, *rev’d sub nom. DeBoer*, 772 F.3d at 389 *rev’d sub nom. Obergefell*, 135 S. Ct. at 2593.

14. *DeBoer*, 772 F.3d at 421, *rev’d sub nom. Obergefell*, 135 S. Ct. at 2608.

15. *Obergefell*, 135 S. Ct. at 2608.

16. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners at 1, 4, 19, *Obergefell v. Hodges* 135 S. Ct. 2584 (2015) (No. 14–556) [hereinafter *Brief*].

17. *Id.* at 19–20 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (alteration in original)).

They also declared that the *Windsor* Court had noted the economic suffering caused by the federal Defense of Marriage Act (DOMA) ban on federal recognition of same-sex marriage.

DOMA brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.¹⁸

On June 26, 2015, the Supreme Court of the United States announced its 5–4 decision in *Obergefell v. Hodges* interpreting the Fourteenth Amendment to the Constitution as requiring all states to allow same-sex couples to marry. The majority opinion for the Court was written by Justice Anthony Kennedy, who was joined by all three women justices (Ruth Bader Ginsberg, Sonia Sotomayor, and Elena Kagan) and by Justice Stephen Breyer. It asserted that the Fourteenth Amendment of the Constitution requires states to allow two people of the same sex to marry because the basic freedoms protected by that amendment extend to personal choices that are linked to autonomy and dignity, including the intimate decisions about identity and beliefs, such as marriage.¹⁹

The *Obergefell* majority asserted that four important principles and aspects relating to the right to marry apply to same-sex couples just as well as they apply to male-female couples. First, the right to personal choices about marriage is inherent in the concept of individual autonomy.²⁰ Second, the fundamental right to marry provides unique, invaluable support to the committed union of two people.²¹ Third, the right to marriage provides safeguards for children and families that protect and support the related rights of parenting, procreation and education.²² Fourth, marriage is the cornerstone of the nation's social order, with no difference between couples of the same or opposite sex.²³ The majority also found support for the constitutional protection of same-sex couples to marry in the Equal Protection Clause of the Fourteenth Amendment²⁴ and in substantive Due Process.²⁵ The Court pointed out that new perspectives and social understandings revealed that restricting marriage to male-female couples created injustices not before recognized or questioned.²⁶ The Court reiterated that the right to marriage is a fundamental

18. *Id.* at 20–21 (quoting *Windsor*, 133 S. Ct. at 2695 (internal citation omitted)).

19. *Obergefell*, 135 S. Ct. at 2599.

20. *Id.*

21. *Id.* at 2599–600.

22. *Id.* at 2600–01.

23. *Id.* at 2601.

24. *Id.* at 2602–04.

25. *Id.*

26. *Id.* at 2602–05.

freedom of the person and states cannot deprive same-sex persons of that right and freedom.²⁷ It noted that persons of faith and their churches retained the liberty “to advocate” and “to teach” their own views opposing same-sex marriage,²⁸ but the majority pointedly failed to state that persons and groups of faith were at liberty to act upon those views, which dissenters noted in the dissenting opinion of Chief Justice Roberts.²⁹

Finally, the majority rejected deference to state legislation or delay to allow the issues to ripen through more legislative debate, discussion and litigation. Rather, while acknowledging that legislation is the appropriate process for democratic change, the majority concluded that—since the Constitution protects the right of same-sex couples to marry—individuals who are suffering injury from the inability to enter into same-sex marriages cannot wait for legislative action to protect their fundamental right.³⁰

Four powerful dissenting opinions were filed. Chief Justice John Roberts, joined by Justices Antonin Scalia and Clarence Thomas, began by noting that the Supreme Court “is not a legislature” and lacked the constitutional authority necessary to define marriage for the states.³¹ He noted that just two years earlier, in *United States v. Windsor*, the Court had emphasized that the Constitution leaves it to each state to make its own rules about marriage. He added that the fundamental right to marry does not include a right of the judiciary to change a state’s definition of marriage, and a state’s decision to retain the meaning that marriage has had in every culture throughout human history is not irrational. The Constitution of the United States does not consecrate a theory of marriage, but the people of each state are free to expand or maintain the traditional definition of marriage. The majority ruling is radical. Logically, it also justifies the legalization of polygamy and imperils religious liberty. He concluded that the Constitution “had nothing to do with” the Court’s decision to compel states to legalize same-sex marriage, which was just the personal policy preference of five justices.³²

Justice Scalia filed a dissent joined by Justice Thomas.³³ Two years earlier in a dissenting opinion in *Windsor*, Justice Scalia had famously—and accurately—predicted that the Court in that case had set up the imposition of same-sex marriage and that it would not be long until “the other shoe” would drop requiring the states to legalize same-sex marriage.³⁴ In his *Obergefell*

27. *Id.* at 2604–05.

28. *Id.* at 2607.

29. *Id.* at 2625 (Roberts, C.J., dissenting).

30. *Id.* at 2605–07.

31. *Id.* at 2611 (Roberts, C.J., dissenting).

32. *Id.* at 2626 (Roberts, C.J., dissenting).

33. *Id.* (Scalia, J., dissenting).

34. *United States v. Windsor*, 133 S. Ct. 2675, 2705, 2710 (2013) (“As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.”) (Scalia, J., dissenting).

dissent, Justice Scalia disclaimed any interest in the content of marriage law but displayed great concern about “who it is that rules me” and expressed dismay that on the issue of same-sex marriage he was ruled by whoever happened to be in the majority of nine justices.³⁵ That “robs the People of the most important liberty . . . the freedom to govern themselves.”³⁶ He decried the majority’s “naked judicial claim to legislative—indeed, *super*-legislative—power A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.”³⁷ Judges have no qualifications to decide the same-sex marriage issue. The Constitution leaves the issue to the people of the various states to decide. He criticized the flowery, pseudo-poetic majority opinion by stating, “The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.”³⁸

Justice Thomas, joined by Justice Scalia, reviewed in detail the history of the guarantee of due process of law emphasizing that it focused on protecting personal physical liberty and freedom from government restraints, but provided no legitimate protection for the litany of additional liberties that just happened to be preferred by a majority of the Supreme Court such as same-sex marriage. He noted the negative impact of the majority ruling upon democracy, and especially upon religious liberty.³⁹

For Justice Alito, the issue was not what to do about the state of same-sex marriages, but whether the Constitution gives a response to that question. The Constitution does not answer the question but leaves it to be decided by the people of each state. The majority decision, he noted, is a simple power-grab by five justices that deprives the people of their popular sovereignty.⁴⁰

Thus, the *Obergefell* majority noted that the right to marry “dignifies couples who ‘wish to define themselves by their commitment to each other.’”⁴¹ Marriage “offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”⁴² It also “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁴³ Excluding same-sex couples from marriage conflicts with a central premise of the right to marry, and it harms and humiliates the children of same-sex couples.⁴⁴ “Without the

35. *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

36. *Id.* at 2627 (Scalia, J., dissenting).

37. *Id.* at 2629 (Scalia, J., dissenting) (emphasis in original).

38. *Id.* at 2630 (Scalia, J., dissenting).

39. *Id.* at 2631–40 (Thomas, J., dissenting).

40. *Id.* at 2640–43 (Alito, J., dissenting).

41. *Id.* at 2600 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013)).

42. *Id.*

43. *Id.*

44. *Id.* at 2600–01.

recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”⁴⁵

However, the *Obergefell* dissenters are correct: the ruling in *Obergefell* is illegitimate and devalues marriage and marital families. In the words of a distinguished legal scholar from Argentina, Jorge Nicolas Lafferriere, “[T]he judgment of the Supreme Court of the United States has chosen to ignore the richness of the complementarity of male and female and has given prevalence to the wishes of adults above the interests of children.”⁴⁶ The diminution of marriage weakens society, and reduces protection for those who invest in marital families—especially in childrearing. As Helen Alvare put it, “[I]n the name of compassion for people who experience same-sex attraction, the decision ignores 200 years of marriage policy in the United States and millennia of historical experience on the centrality of the natural family. [It] also explicitly favors the desires of adults [over] children.”⁴⁷

II. CHILDREN IN *OBERGEFELL*

The consequences of disallowing same-sex couples to marry was emphasized by the petitioner and supporting amici in the briefing and argument of *Obergefell* in the Supreme Court. The Legal Information Institute at Cornell University Law School explained:

Obergefell and supporting amici argue that Ohio’s recognition ban diminishes the rights of children of same-sex parents by depriving them of legal, financial, and societal benefits. *See* Brief for Petitioner at 20; Brief of Amicus Curiae The County of Cuyahoga, Ohio at 6. The County of Cuyahoga, Ohio contends that Ohio’s recognition ban obstructs children’s ability to develop meaningful legal relationships with their parents. *See* Brief of Amicus Curiae The County of Cuyahoga, Ohio at 6. Moreover, the Family Equality Council argues that the legalization of same-sex marriage has provided “powerful emotional and psychological benefits” for tens of thousands of children in America. Brief of Amicus Curiae Family Equality Council in Support of Petitioners at 19. Similarly, the American Psychological Association (“APA”) maintains that hundreds of studies confirm that factors contributing to a child’s healthy adjustment—parental warmth,

45. *Id.* at 2600.

46. Jorge N. Lafferriere, *Corte Suprema de Estados Unidos Legaliza Como Matrimonio la Unión de Personas del Mismo Sexo* [US Supreme Court Legalized Marriage as the Union of Same-Sex], CENTRO DE BIOÉTICA, PERSONA Y FAMILIA [CTR. FOR BIOTHICS, INDIVIDUAL AND FAMILY], <http://centrodebioetica.org/2015/06/corte-suprema-de-estados-unidos-legaliza-como-matrimonio-la-union-de-personas-del-mismo-sexo> (last visited Feb. 6, 2016) translated in GOOGLE TRANSLATE, <https://translate.google.com>.

47. *Id.* (quoting Helen Alvare).

consistency, and security—do not depend on a parent’s gender or sexual orientation. See Brief of Amicus Curiae American Psychological Association in Support of Petitioners at 18. The APA and the American Sociological Association both highlight scientific studies confirming that same-sex parents are equally as capable as heterosexual parents and that the children of same-sex and heterosexual couples are equally psychologically healthy.⁴⁸

Thus, the assertion that allowing same-sex couples to marry will contribute to the best interests of their children was a strong argument raised by the petitioner and supporting amici in the Supreme Court briefs and oral arguments in *Obergefell*.⁴⁹

Likewise, the welfare of children was a dominant, if not *the* dominant, argument emphasized in the Court’s majority opinion to justify the forced legalization of same-sex marriage imposed upon all states. The opinion for the Court, written by Justice Kennedy and signed by Justices Ginsburg, Breyer, Kagan, and Sotomayor, contains twenty-seven references to “child” and its cognate terms (such as “children”). The four dissenting opinions combined, together totaling more than twice as many pages of text as the majority opinion, also used such words an equal number of times, twenty-seven times.⁵⁰ Clearly, both the majority and the dissenting justices believed that the welfare of children is strongly implicated by the legalization of same-sex marriage. The majority depicts children as benefiting from same-sex marriage, and the dissenters mark children as potentially being disadvantaged or harmed by same-sex marriage.

48. Alice Chung & Allison Eitman, Review of *Obergefell v. Hodges* (14–556); *Tanco v. Haslam* (14–562); *DeBoer v. Snyder* (14–571); *Bourke v. Beshear* (14–574), CORNELL U. L. SCH., LEGAL INFO. INST. SUPREME CT. BULL., <https://www.law.cornell.edu/cert/14-556> (last visited Oct. 9, 2015).

49. See ELLEN C. PERRIN ET AL., AMERICAN ACADEMY OF PEDIATRICS TECHNICAL REPORT e1374 (131 vol. 2013), concluding that:

Extensive data available from more than [thirty] years of research reveal that children raised by gay and lesbian parents have demonstrated resilience with regard to social, psychological, and sexual health despite economic and legal disparities and social stigma. Many studies have demonstrated that children’s well-being is affected much more by their relationships with their parents, their parents’ sense of competence and security, and the presence of social and economic support for the family than by the gender or the sexual orientation of their parents. *Lack of opportunity for same-gender couples to marry adds to families’ stress, which affects the health and welfare of all household members.*

(emphasis added).

50. The word “child” or terms containing that word were used twenty-seven times in Justice Kennedy’s opinion for the Court; eighteen times in Chief Justice Roberts’ dissenting opinion, six times in Justice Thomas’ dissenting opinion, three times in Justice Alito’s dissenting opinion, and was not used at all in Justice Scalia’s dissenting opinion. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–26 (2015) (Roberts, C.J., dissenting). *Id.* at 2626–31 (Scalia, J., dissenting). *Id.* at 2631–40 (Thomas, J., dissenting). *Id.* at 2640–46 (Alito, J., dissenting).

The four reasons given to mandate the legalization of same-sex marriage focused on the perception of the five justices in the majority that legalizing same-sex marriage would benefit children being raised in homes headed by two adult partners of the same-sex.⁵¹ Justice Kennedy, for the majority, wrote that “[a] third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁵² The Court has recognized these connections by describing the varied rights as a unified whole. “[T]he right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause”⁵³ Under the laws of the several states, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”⁵⁴ Marriage also affords the permanency and stability important to children’s best interests.⁵⁵ As the majority in *Obergefell* put it:

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

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

51. The four “principles and traditions” cited by the majority to explain why marriage is constitutionally protected as a fundamental right are (1) the “abiding connection between marriage and liberty,” (2) the unique nature of the marital “intimate association,” (3) the “suffer[ing]” of children raised outside of marriage, and (4) the central role of marriage in the legal and “social order.” *Id.* at 2599–601.

52. *Id.* at 2600. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

53. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Meyer*, 262 U.S. at 399).

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

55. *See Brief, supra* note 16, at 22.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.⁵⁶

However, this evades the core questions of constitutional interpretation and federalism.

Similarly, some advocates of no-fault divorce reforms fifty years ago argued that adoption of no-fault divorce would not have any significant harmful consequences for children.⁵⁷ Indeed, many advocates of the adoption of no-fault divorce laws claimed that they would benefit children by making family break-up less contentious and divorce more amicable—essentially arguing for no-fault divorce “for the sake of the children.”⁵⁸ However, these optimistic predictions have proven to be tragically and undeniably erroneous.⁵⁹ Divorce often does not end conflict between the divorcing parent-spouses,⁶⁰ and the evidence suggests that parenting quality generally does not improve following divorce but often declines after divorce.⁶¹ It is still true that:

Divorce is one of life’s most stressful experiences. In bad divorces acute stress can last for years and follow long [after] the official divorce is over. It has serious implications for both mental health and all stress related illnesses and the stress can extend beyond the divorcing couple *to injure their children as well*.⁶²

Also, since most divorces come from low-conflict marriages, not marriages that have high-conflict or significant abuse, the conflict avoidance

56. *Obergefell*, 135 S. Ct. at 2600–01 (internal citations omitted).

57. Television Interview with Barbara Dafoe Whitehead, Author of *THE DIVORCE CULTURE*, PBS NEWSHOUR (Feb. 24, 1997) (discussing her book *BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE* (1997)).

58. *Id.* (reviewing the scholarly and professional predictions of how an easy divorce would benefit children).

59. See C.D. HOWE INST., *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE* 67–68 (Douglas W. Allen & John Richards eds. 1999).

60. E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 138 (2002).

61. *Id.* at 126–40.

62. Sam Margulies, *Managing the Stress of Divorce*, SAM MARGULIES (Oct. 30, 2012, 3:46 PM), <http://sammargulies.com/2012/10/30/managing-the-stress-of-divorce> (emphasis added).

attendant to divorce is marginal⁶³ and is likely offset by the painful discord, separation, and disputes that almost always accompany such a tearing apart of family relationships.⁶⁴ Moreover, the evidence does not indicate that divorce leads consistently to greater personal happiness for the divorcing parties.⁶⁵

However, some advocates of relationship pluralism have criticized *Obergefell* because

[T]he decision advances a new and troubling doctrine of marital superiority that explicitly undercuts the dignity and worth of non-marital relationships. Much to the dismay of those who may have wished to allow states to experiment with other, more progressive relationship-recognition forms, *Obergefell*'s marital superiority rhetoric may guarantee that marriage will, for the foreseeable future, remain the only recognized relationship in town.⁶⁶

Thus, in some sense it boils down to the reality that gender matters in marriage, that male and female genders are different, and that the union of one man and one woman creates a profoundly unique kind of relationship than the union of two men or the union of two women.⁶⁷ If so, requiring gender integration in marriage is a very reasonable, if not the only reasonable, policy. However, if men and women are fully interchangeable with respect to the purposes of marriage, then forbidding gender-apartheid unions in the state-regulated institution of marriage would be very difficult to justify.

Concern about the disintegration of marriage and its harmful consequences have been the subjects of significant recent scholarship. For example, two respected scholars have recently published books that document not only the decline of marriage and the corresponding rise of non-marital cohabitation, but that also acknowledge and detail how the decline of marriage

63. PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 220 (1997). Paul R. Amato & Bryndl Hohmann-Marriott, *A Comparison of High-and Low-Distress Marriages That End in Divorce*, 69 J. OF MARRIAGE & FAM. 621, 621 (2007).

64. See, e.g., Sam Margulies, *Litigation, Mediation and the Psychology of Divorce*, SAM MARGULIES (Mar. 27, 2012, 9:48 PM), <http://sammargulies.com/2012/03/27/hello-world> ("For most people divorce is one of life's most stressful experiences. For healthy personalities divorce is a severe challenge, and for personalities with significant pathology the stress of divorce can cause an emotional crisis."). See also *id.* ("[W]e will argue that the nature of the adversary system is the primary source of the pathology that flows from divorce. We will show how the norms and rules of the adversary system shape and augment conflict by interfering with the adaptive behavior necessary to successfully deal with the challenges divorce poses to both individual and family systems.").

65. LINDA J. WAITE ET AL., DOES DIVORCE MAKE PEOPLE HAPPY?: FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES 4 (2002).

66. Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L. J. ONLINE 124, 124 (2015).

67. Mark Milburn, *Assessing Justice Kennedy as a Marriage Counselor*, MERCATORNET (July 21, 2015), <http://www.mercatornet.com/conjugality/view/assessing-justice-kennedy-as-a-marriage-counselor> ("Gay marriage may indeed evolve into something categorically different from what most straight folks at least pretend marriage to be. The simple reason is that gay Americans are different. We may not fully recognize this for twenty years, but by that time it will not matter anymore.").

has harmed children. “[E]ach scholar acknowledges the powerful scientific evidence that the decline of marriage has hurt children.”⁶⁸ Sadly, both scholars are pessimistic about the possibility of a revival of a marriage culture in contemporary society.

In *Labor’s Love Lost*,⁶⁹ subtitled *The Rise and Fall of the Working-Class Family in America*, Andrew Cherlin provides “a sweeping review” of decades of census data to present his thesis about the ascent and decline of the marital family.⁷⁰ He asserts that the rise of marriage and marital families in the mid-twentieth century when decline in both the income gap and the marriage gap between the well-to-do and the less-well-off in America was a historical anomaly. He also shows that, facing unstable and insecure economic conditions today, “less-educated young adults are increasingly forgoing marriage and are having children within unstable cohabiting relationships. This has created a large marriage gap between them and their more affluent, college-educated peers.”⁷¹ Cherlin explains, “The breakdown of a stable family structure has serious consequences for low-income families, particularly for children, many of whom underperform in school, thereby reducing their future employment prospects and perpetuating an intergenerational cycle of economic disadvantage.”⁷²

While, historically, the families of middle-class Americans shadowed those of upper-class Americans, that is changing. Increasingly, middle-income, working-class American families are more closely resembling the insecure, fragmented, informal families of lower-class Americans. “[T]he stolid, churchgoing working-class family is imploding, with divorce and nonmarital births now as routine as a high-school football game.”⁷³ Due to uncertainties about employment, work stress, and precarious family relationships, the precariat working class today is angry, alienated, anxious, and unmarried.⁷⁴

Similarly, in *Generation Unbound: Drifting into Sex and Parenthood Without Marriage*, Isabel V. Sawhill links aimless non-marital sex to childbearing outside of marriage and that to a host of long-term, economic,

68. Maggie Gallagher, *Why Stick with Marriage?*, NAT’L REV. (Jan. 16, 2015, 12:30 PM), <http://www.nationalreview.com/article/396536/why-stick-marriage-maggi Gallagher?target=author&tid=1876>.

69. ANDREW J. CHERLIN, *LABOR’S LOVE LOST: THE RISE AND FALL OF THE WORKING-CLASS FAMILY IN AMERICA* (2014).

70. Guy Standing, *Andrew Cherlin Labor’s Love Lost: The Rise and Fall of the Working-Class Family in America*, 41(3) PDR 544 (2015) (book review).

71. RSF Review, Book Review, *Andrew Cherlin on Income Inequality and the Marriage Gap*, RUSSELL SAGE FOUND. (2014) (book review).

72. CHERLIN, *supra* note 69, at back cover.

73. Kay Hymowitz, *The Fractured Working-Class Family*, WALL ST. J. ONLINE (Jan. 6, 2015), <http://www.wsj.com/articles/book-review-labors-love-lost-by-andrew-j-cherlin-1420502861>.

74. CHERLIN, *supra* note 69, at 192.

and social disadvantages for non-marital children.⁷⁵ She agrees that “marriage has shown itself over time to be the best environment in which to raise a family,” and that about seventy-five percent of children born outside of marriage (now forty percent of all children born in America) will experience what Sawhill calls the “family-go-round” of “instability, less parenting, fewer resources, and poorer physical and me[n]tal health because of absent fathers, parents with multiple partners, or a rotation of cohabiting partners.”⁷⁶ To overcome the growing class divide in American families, Sawhill advocates for a policy of teaching youths to become “planners,” who deliberately delay childbearing until after marriage, instead of “drifters,” who are having unplanned non-marital children.

In 2012, University of Texas sociologist Mark Regnerus published a powerful study based upon information in the New Family Structures Study of American young adults ages eighteen to thirty-nine who were raised in different family structures. He was able to compare how the young-adult children of a parent who had a same-sex romantic relationship fared on forty different social, emotional, and relational outcome variables when compared with six other family-of-origin types. The results reveal numerous, consistent differences, especially between the children of women who have had a lesbian relationship and those with still-married (heterosexual) biological parents. Children raised by parents who had a lesbian relationship scored lowest on most of the forty outcomes.⁷⁷

The University of Texas sociologist found a substantial difference between children raised by intact biological families and children raised by lesbian mothers.⁷⁸ For example:

Children of lesbian mothers:

- Are more likely to be currently cohabiting
- Are almost [four] times more likely to be currently on public assistance
- Are less likely to be currently employed full-time

75. ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* (2014).

76. Rosemary Ferrera, *Review: ‘Generation Unbound’ by Isabel Sawhill*, WASH. FREE BEACON (Oct. 12, 2014, 5:00 AM), <http://freebeacon.com/culture/review-generation-unbound-by-isabel-sawhill> (Some what inconsistently, “Sawhill is unenthusiastic about attempts to revive the institution of marriage popular among conservatives. But both government and civil society can and should help the prospects of married adults, and thus improve the attractiveness of the institution as a whole, by taking a hard line on requiring child support payments, reducing tax penalties for marriage, and helping men to be better economic providers.”).

77. Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same-Sex Relationships?: Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 764 (2012), <http://www.sciencedirect.com/science/article/pii/S0049089X12000610>.

78. *Id.* at 761–64.

- Are more than [three] times more likely to be unemployed
- Are nearly [four] times more likely to identify as something *other than* entirely heterosexual
- Are [three] times as likely to have had an affair while married or cohabiting
- Are an astonishing [ten] *times more likely* to have been *touched sexually by a parent or other adult caregiver*
- Are nearly [four] times as likely to have been “physically forced” to have sex against their will
- Are more likely to have *attachment* problems related to the ability to depend on others
- Use marijuana more frequently
- Smoke more frequently
- Watch TV for long periods more frequently
- Have more often pled guilty to a non-minor offense.⁷⁹

Indeed “the outcomes for children of homosexuals rated ‘suboptimal’ (Regnerus’ word) in almost every category.”⁸⁰ “[T]he children of homosexuals did worse (or, in the case of their own sexual orientation, were more likely to deviate from the societal norm) on [seventy-seven] out of [eighty] outcome measures.”⁸¹ Like all other social science research, the Regnerus study is not perfect, and has been faulted for some lack of “data-cleaning.”⁸² It seems, however, to be a very reliable and thorough ground-breaking study about the outcomes of same-sex parenting.⁸³

The argument that legalizing same-sex marriage will benefit tens of thousands of children is deceptively simple and simply misleading. It can be stated in three short sentences. First, marriage provides significant benefits and advantages for children. Second, many children are being raised by a same-sex parent and his or her partner outside of marriage. Third, the children being raised by an unmarried same-sex parent and his or her partner would benefit if their parent and his or her partner were able to marry.

The flaws in this induction, however, are abundant. First, the assertion that marriage provides significant benefits to children is based on research that accepted and applied the definition of marriage as being the union of one man

79. Peter Sprigg, *New Study on Homosexual Parents Tops All Previous Research*, ISSUE BRIEF IF12F08 FAM. RES. COUNCIL 1, 3–4 (2012) (quoting Regnerus, *supra* note 77, at 761–62) (emphasis in original).

80. *Id.* at 1 (quoting Regnerus, *supra* note 77, at 764).

81. *Id.* at 3 (emphasis in original).

82. Jesse Singal, *How Scientists Debunked the Biggest Anti-Gay-Marriage Study*, SCI. OF US (May 19, 2015, 11:15 AM), <http://nymag.com/science/ofus/2015/05/biggest-anti-gay-marriage-study-was-debunked.html> (internal quotation marks omitted).

83. Bryce J. Christensen & Robert W. Patterson, *Mark Regnerus Gets It Right*, FAMILY IN AM. (2012), <http://familyinamerica.org/journals/fall-2012/mark-regnerus-gets-it-right/#.Vp0cDo-cHIU>.

and one woman, not same-sex partners. Research about the benefits and detriments to children from being raised by married same-sex couples is very immature and incomplete and, to date, is largely advocative (not unbiased) work.

Second, the number of children being raised by same-sex partners is not clear. Some estimates have been wildly inflated. For example, the American Association for Marriage and Family Therapy published an estimate that “between [one] and [nine] million children in the United States have at least one parent who is lesbian or gay. There are approximately 594,000 same-sex partner households, according to the 2000 Census, and there are children living in approximately [twenty-seven] percent of those households.”⁸⁴ Yet in 2005, an online medical information website published an estimate that “[b]etween [one] million and [six] million children in the U.S. are being reared by committed lesbian or gay couples.”⁸⁵

More responsible estimates provide much more modest numbers. For example, in about 2000, a law professor’s calculations using reliable Census data indicated that between 300,000 and 400,000 children were being raised by about 160,000 same-sex couples.⁸⁶ In 2009, a professor with the LGBT Williams Institute estimated that “[i]n the United States [twenty-seven point five percent] of same-sex couple households are raising children Thirty-five percent of lesbians aged eighteen to forty-four have given birth Sixteen percent of gay men have a biological or adopted child living with them.”⁸⁷

Several influential psychologists and their professional organization have endorsed same-sex parenting as harmless for, if not beneficial to, children. For example, widely-recognized psychology expert and advocate for lesbian and gay parenting, Charlotte J. Patterson, Ph.D., reports:

Results of research to date suggest that children of lesbian and gay parents have positive relationships with peers and that their relationships with adults of both sexes are also satisfactory. The

84. Deanna Linville & Maya O’Neil, *Same Sex Parents and Their Children*, AM. ASS’N FOR MARRIAGE AND FAM. THERAPY, http://www.aamft.org/imis15/aamft/Content/Consumer_Updates/Same-sex_Parents_and_Their_Children.aspx (last visited Oct. 6. 2015).

85. Louise Chang, *Study: Same-Sex Parents Raise Well-Adjusted Kids*, WEBMD (Oct. 12, 2015), <http://www.webmd.com/mental-health/news/20051012/study-same-sex-parents-raise-well-adjusted-kids>.

86. Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J.L. & FAM. STUD. 59, 66 (2004).

87. See Todd Brower, *It’s Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL’Y & L. 1, 15 (2009); Nadine A. Gartner, *Lesbian (M)otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 L. & SEXUALITY REV. 45, 48 (2007) (recognizing the “surge of lesbian motherhood” as part of the “gay-by boom”).

picture of lesbian mothers' children that emerges is one of general engagement in social life with peers, with fathers, with grandparents, and with mothers' adult friends—both male and female, both heterosexual and homosexual. Fears about children of lesbians and gay men being sexually abused by adults, ostracized by peers, or isolated in single-sex lesbian or gay communities have received no support from the results of existing research.⁸⁸

In another APA report, Dr. Patterson summarized some of the evidence and concluded:

In summary, there is no evidence to suggest that lesbian women or gay men are unfit to be parents or that psychosocial development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents. Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.⁸⁹

However, a closer look at some of the studies cited in the older literature and some of the more recent research belies the no-harm-to-children claim. For example, nearly two decades ago a 1996 study by Sotirios Sarantakos compared 174 children living in heterosexual-married homes, heterosexual-cohabiting homes, and homosexual-cohabiting homes, and concluded that “[o]verall, the study has shown that children of married couples are more likely to do well at school, in academic and social terms, than children of co-habiting heterosexual and homosexual couples In this study, married couples seem to offer the best environment for a child's social and educational development.”⁹⁰

III. DISTINGUISHING *PALMORE V. SIDOTI*

Advocates for same-sex parenting might well invoke the Supreme Court decision in *Palmore v. Sidoti* in which the Court unanimously reversed a Florida state trial court order, affirming the intermediate appellate ruling that granted a white father's motion to transfer custody from his child's caucasian

88. Charlotte Patterson, *Lesbian and Gay Parents and Their Children: Summary of Research Findings*, in AMERICAN PSYCHOLOGICAL ASSOCIATION, *LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS* 5, 12 (2nd ed. 2005).

89. *Id.* at 5, 15.

90. Sotirios Sarantakos, *Children in Three Contexts: Family, Educational, and Social Development*, 21 *CHILD. AUSTL.* 23, 23–31 (1996).

biological mother to him because she was cohabiting with, and during proceedings married, a black man.⁹¹ The state courts had noted the widespread racism in Florida at the time and the order to transfer custody reflected the courts' concern to protect the child from the negative social hostility toward inter-racial romance and inter-racial marriage. The trial court expressed concern that the child would suffer discrimination and ridicule as a collateral effect of the custodial mother's inter-racial relationship, which was "unacceptable to the father *and to society* The child . . . is, or at school age will be, subject to environmental pressures not of choice."⁹² The Supreme Court of the United States unanimously overturned the lower court, holding that the effects of racial prejudice in a society, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Court emphasized that while the Constitution cannot control such prejudice, neither can the Constitution tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, endorse, approve or give them effect. As Chief Justice Burger wrote in the unanimous Court opinion, "[T]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."⁹³

Palmore does not support same-sex parenting, but supports dual-gender parenting. First, *Palmore* involved the use of racial—not sexuality—classifications by the state to determine a custody dispute. The United States Supreme Court noted that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."⁹⁴

Second, the Supreme Court applied the strictest level of judicial scrutiny because the use of racial classifications by the state triggered closest judicial review. The Court declared that "[s]uch [racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."⁹⁵

Third, the detrimental effects of state intrusion upon the existing, constitutionally protected mother-child relationship were noted. The Court declared,

91. See generally *Palmore v. Sidoti*, 466 U.S. 429 (1984).

92. *Id.* at 431 (emphasis and alterations adopted).

93. *Id.* at 434.

94. *Id.* at 432 (citations omitted).

95. *Id.* at 432–33 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (alterations adopted))).

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.⁹⁶

Fourth, the Fourteenth Amendment's prohibition of racial discrimination in government policies reflects a unique constitutional super-consensus that cost the nation a uniquely high price—a Civil War that left 600,000 American soldiers dead on battlefields throughout the nation. It cannot be said that contemporary public opinion polls manifest the same depth and breadth of harmony supporting same-sex parenting or same-sex marriage, much less anything like a constitutional super-majoritarian accord comparable to that behind the Fourteenth Amendment's repudiation of racism.

Fifth, *Palmore* implicitly endorses the value of dual-gender parenting. The home that the Court protected and in which the child was being raised was a home with two parents—the mother and her cohabiting boyfriend or new husband, the child's new step-father.

Sixth, the Court in *Palmore* emphasized the biological parent connection. Four times in its opinion the Court mentioned that the parental relationship it was protecting was a “natural” parent-child relationship.⁹⁷

Thus, *Palmore* provides no meaningful support for the forced legalization of same-sex marriage or parenting. Indeed, *Obergefell* appears to involve the same type of public policy (regarding gender identity instead of racial identity) that was repudiated by the Court in *Palmore* more than three decades earlier.

IV. THE FUNDAMENTAL NATURE OF PARENTAL RIGHTS AND SAME-SEX PARENTING

One of the thoughtful and comprehensive judicial descriptions of parental rights and the reasons for constitutional protection of them was given by the Utah Supreme Court in *In re J.P.*⁹⁸ The court invalidated two recently-enacted Utah statutes which permitted the permanent termination of parental rights

96. *Palmore*, 466 U.S. at 434.

97. *Id.* at 430 (“We granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child”); *id.* at 432 (“The Florida court did not focus directly on the parental qualifications of the natural mother”); *id.* at 433 (“The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother.”); *id.* at 434 (“The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”).

98. *See In re J.P.*, 648 P.2d 1364 (Utah 1982).

“upon a finding that ‘such termination will be in the child’s best interest.’”⁹⁹ Justice Oaks, writing for the court, emphasized the deep roots of parents’ constitutional right to maintain their relationship with their children.

This Court has recently declared that “the ideals of individual liberty which . . . protect the sanctity of one’s home and family” are “essential in a free society . . .” *In re Castillo*, Utah, 632 P.2d 855, 856 (1981). A parent has a “fundamental right, protected by the Constitution, to sustain his relationship with his child.” *State in re Walter B.*, 577 P.2d 119, 124 (1978) (plurality opinion). It is fundamental to our jurisprudence that “the custody, care and nurture of the child reside first in the parents,” *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), and that the parents’ right “to direct the upbringing and education of children under their control,” *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 573–74, 69 L.Ed. 1070 (1925), is protected by the Constitution. In *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), the Supreme Court included family relationships in the “liberty” of which a state cannot deprive any person without due process of law under the Fourteenth Amendment to the United States Constitution.

....

[T]he United States Supreme Court has now “recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978). For example, in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982), the majority refers to the “fundamental liberty interest of natural parents in the care, custody, and management of their child” The Court was unanimous on this point.

We deal here with a fundamental principle. The Constitution of Utah declares, “Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” Article I, § 27. The cornerstone of democratic government is the conviction that governments exist at the sufferance of the people, in whom “[a]ll political power is inherent” Utah Const. Art. I, § 2. A residuum of liberty reposes in the people. That liberty is not limited to the exercise of rights specifically enumerated

99. *Id.* at 1365–66 (quoting Children’s Rights Act, amending UTAH CODE ANN. § 78–3a–48 (West 1953)).

in either the United States or the Utah Constitutions. Thus, Article I, § 25 of the Utah Constitution states, “This enumeration of rights shall not be construed to impair or deny others retained by the people.” The Ninth Amendment to the United States Constitution states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” See generally *Griswold v. Connecticut*, 381 U.S. 479, 486–99, 85 S.Ct. 1678, 1682–90, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); L. Tribe, *American Constitutional Law*, § 11-3 (1978).

The rights inherent in family relationships—husband-wife, parent-child, and sibling—are the most obvious examples of rights retained by the people. They are “natural,” “intrinsic,” or “prior” in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property . . . Blackstone deemed “the most universal relation in nature . . . [to be] that between parent and child.” 1 W. Blackstone, *Commentaries* * 446.

The integrity of the family and the parents’ inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo American culture, presupposed by all our social, political, and legal institutions. “To protect the [individual] in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established . . .” *Lacher v. Venus*, 177 Wis. 558, 569, 188 N.W. 613, 617, 24 A.L.R. 403, 409 (1922). “The family is the basis of our society.” *In re Guardianship of Faust*, 239 Miss. 299, 307, 123 So.2d 218, 221 (1960). “The family entity is the core element upon which modern civilization is founded.” *In re Luscier*, 84 Wash.2d 135, 136, 524 P.2d 906, 907 (1974). *Accord Matarese v. Matarese*, 47 R.I. 131, 132–33, 131 A. 198, 199, 42 A.L.R. 1360, 1361 (1925); *Gilmore v. Kitson*, 165 Ind. 402, 410, 74 N.E. 1083, 1085 (1905). “This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 1541, 32 L.Ed.2d 15 (1972).

This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct. Thus, the United States Supreme Court has declared that “the liberty interest in family privacy has its source . . . in intrinsic human rights . . .” *Smith v. Organization of Foster Families*, 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977) . . . Similarly, this Court has stated that the parent’s right, as well as duty, to care for a

child “may be termed natural, as well as legal and moral.” *Mill v. Broivn*, 31 Utah. 473, 483, 88 P. 609, 613 (1907). More recently, this Court has spoken of “the natural right and authority of the parent to the child’s custody,” *State in re Jennings*, 20 Utah.2d 50, 52, 432 P.2d 879, 880 (1967), and of “the prior and fundamental right of a parent to rear his child” *In re Castillo*, 632 P.2d at 856.¹⁰⁰

In re J.P. unequivocally reaffirmed that “the rights embodied in family relationships are inherent, natural, and retained rights,” fundamental in nature, and that “[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”¹⁰¹

Likewise, in *J.R. v. Utah*, a federal district court reviewed some of the local and general precedents establishing the constitutional rights of parents including the right to become parents.

[T]he fundamental right to bear and raise children within the context of a marriage is already clearly established. *See, e.g., Roska v. Peterson*, 304 F.3d 982, 993–94 (10th Cir. 2002) (constitutionally protected liberty interest in family relationship between parents and child is clearly established; infringement of that interest by removing [a] child from parents’ custody without a hearing constitutes a denial of due process for which qualified immunity was not available); *Carey v. Population Services International*, 431 U.S. at 687, 97 S.Ct. 2010 (“[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *State ex rel. M.W.*, 12 P.3d 80, 83 (Utah 2000) (“The court of appeals correctly stated in its decision that ‘the Utah Constitution and the United States Constitution “recognize[] and protect[] the inherent and retained right of a parent to maintain parental ties to his or her child.’” (citations omitted)); *Matter of Adoption of B.O.*, 927 P.2d 202, 207 (Utah Ct.App.1996) (“We agree . . . that ‘a parent has a fundamental right to maintain a relationship with his or her child.’ This right is by now well established by both United States and Utah precedent.” (citations omitted)); *State in Interest of E.D. v. E.J.D.*, 876 P.2d 397, 400 n. 5

100. *Id.* at 1372–74 (alterations in original).

101. *Id.* at 1374 (quoting *Stanley v. Illinois*, 405 U.S. at 645, 651 (1972) (citation omitted) (italized in original)).

(Utah Ct.App.1994) (“It is well established that the Utah Constitution and the United States Constitution “[recognize] and [protect] the inherent right of a parent to maintain parental ties to his or her child.””¹⁰² *State ex rel. P.H. v. Harrison*, 783 P.2d 565, 569 (Utah App.1989) (quoting *In re J.P.*, 648 P.2d 1364, 1377 (Utah 1982)); accord *State ex rel. D.W. III v. W.M.*, 856 P.2d 363, 367 (Utah App. 1993).”¹⁰²

As the Utah Supreme Court decision in *J.P.* suggests, parental rights enjoy significant constitutional status and protection. For nearly a century, a long line of Supreme Court cases have explicitly held that the Constitution recognizes and protects many aspects of parental rights. Thus, in *Meyer v. Nebraska*, the Court overturned the conviction of a schoolteacher for violating a World-War-I-era Nebraska law that forbade the teaching of modern foreign languages to children who had not passed the eighth grade.¹⁰³ The Court declared the statute unconstitutional because the “liberty” protected by the Fourteenth Amendment includes the right of parents to “establish a home and bring up their children” and “to control the education of their own.”¹⁰⁴

In *Pierce v. Society of Sisters*, the Court invalidated an Oregon law that required all students to attend public schools.¹⁰⁵ The Court reaffirmed that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”¹⁰⁶ Indeed, the Court emphasized the priority of parents over states in controlling the education of their children: “The 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.”¹⁰⁷ Later, in *Prince v. Massachusetts*, the Court upheld a law banning commercial activity on sidewalks by children but, again, underscored the importance of parental rights.¹⁰⁸ “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁰⁹

Likewise, many more recent decisions reaffirm constitutional protection for parental rights. Perhaps the parent of the modern parental rights cases is *Stanley v. Illinois*, where the Court held that “[i]t is plain that the interest of a

102. *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1277–78 (D. Utah 2002) (invalidating a Utah statute prohibiting surrogate parent agreements—a conclusion that is at least debatable).

103. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

104. *Id.* at 399.

105. See *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

106. *Id.* at 534–35.

107. *Id.* at 535.

108. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”).

109. *Id.* at 166.

parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”¹¹⁰ That same year, in *Wisconsin v. Yoder*, the Court emphasized, “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”¹¹¹

Then, in *Quilloin v. Walcott*, the Court reiterated that it has “recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”¹¹² A year later, in *Parham v. J.R.*, affirming the right of parents to approve controversial medical treatment for their children, including in-patient mental health therapy, the Court reemphasized that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course”¹¹³ In *Troxel v. Granville*, the Court summarized that “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹¹⁴ Indeed, the Court noted that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹¹⁵

Thus, the qualities that make marriage and marital parenting so valuable to individuals and to society are qualities inextricably linked to the gender-integrating nature of marriage. It is the union of the gender differences, the becoming one, the bonding of the male and the female together, united in purpose, sacrifice, identity, and love that underlies and empowers the unique value of marriage.

110. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (alterations adopted).

111. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

112. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

113. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children”).

114. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

115. *Id.* at 65.

V. THE ELUSIVE FACTS: HOW FARE THE CHILDREN OF SAME-SEX PARENTS?

The status and stature of marriage within a society (and within individual families and communities) is the lodestar heralding good or bad prospects for children and for the rising generations. Professor Elizabeth Fox-Genovese once observed that “[i]t would be easy, although not without provoking outraged dissent, to chronicle the innumerable, and sometimes devastating woes inflicted upon children.”¹¹⁶ But to protect children, we must consider the possible negatives as well as the potential benefits of various family structures.

Professor Fox-Genovese also soberly observed that “[o]ur society has betrayed and abandoned its children.”¹¹⁷ Moreover, she asserted, “It is impossible to exaggerate our moral failures to children, but ultimately those failures are society’s as much as individual parents.”¹¹⁸ She put the lion’s share of the blame upon the disintegration of marriage. She declared that “[t]he disintegration of marriage bears a heavy responsibility for the devaluation of children”¹¹⁹ Further, she opined that “when we consider the current plight of children in our society, moral questions insistently impose themselves. And those questions relate closely to the crisis in marriage”¹²⁰

Same-sex parenting has been legal and socially-acceptable for a very short time in America—barely a decade. Massachusetts became the first state to permit same-sex marriages in 2004.¹²¹ Thus, the body of empirical evidence

116. ELIZABETH FOX-GENOVESE, *MARRIAGE THE DREAM THAT REFUSES TO DIE* 57–58 (2008).

117. *Id.* at 54.

118. *Id.* at 57.

119. *Id.* at 55 (She added also that: “[I]t does not help that the women’s movement, in its campaign to free women from primary responsibility for children, has effectively demoted the care of children to work fit only for servants.”).

120. *Id.* at 57.

121. The Massachusetts Supreme Judicial Council ruled in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), that it violated the state constitution to allow only opposite-sex couples to marry. Six months later, on May 17, 2004, same-sex marriages began to be performed legally in Massachusetts. Chief Justice Margaret Marshall recognized but rejected as groundless the concerns that same-sex marriage would undermine the institution and dilute the benefits of marriage for children and for society. She wrote:

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

about the effects of same-sex couples raising children is incomplete and very thin, and some of it is ideologically-tainted, advocative research. For example, last year family demographer Wendy D. Manning, the Director of the Center for Family and Demographic Research and Co-Director for the National Center for Family and Marriage Research, noted the problems with the small sample sizes in the surveys purporting to find “no difference” between children raised by heterosexual and same-sex parents. “Small sample sizes in quantitative surveys can be problematic because they may prevent distinguishing between key sources of variation Another issue with small sample sizes is statistical inferences may be challenging or harder to detect and may be biased.”¹²² However, she also stated the prevailing perception of social scientists:

[T]here is a clear consensus in the social science literature indicating that American children living within same-sex parent households fare just as well as those children residing within different-sex parent households over a wide array of well-being measures: academic performance, cognitive development, social development, psychological health, early sexual activity, and substance abuse.¹²³

Others have also expressed doubts about the methodological soundness of the no-difference, same-sex parenting studies. Meezan and Raugh, for example, noted that “[a]ll but one of the studies we examined employed samples composed of either totally or predominantly white participants. Almost all the participants were middle to upper-middle-class, urban, well educated, and ‘out.’ Most were lesbians, not gay men. Participants were often clustered in a single place.”¹²⁴

Likewise, Professor Mark Regnerus has explained that:

Concern has arisen . . . about the methodological quality of many studies focusing on same-sex parents. In particular, most are based on

Id. at 965. But race has nothing to do with the purposes or functions of marriage, while gender is essential to those core purposes and critical for those essential social functions. To compare the integration or segregation of races in marriage with genders is to reveal a fundamental failure to grasp what marriage is and is all about.

122. Wendy D. Manning, Marshal Neal Fetto & Esther Lamidi, *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33 *POPULATION RES. AND POL. REV.* 485, 490–92 (2014).

123. *Id.* at 485.

124. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 *FUTURE OF CHILD.* 97, 101 (2005).

non-random, non-representative data often employing small samples that do not allow for generalization to the larger population of gay and lesbian families. For instance, many published studies on the children of same-sex parents collect data from “snowball” or convenience samples.¹²⁵

Professor Loren Marks, responding to the American Psychological Association (APA) claim that there was not a single study that indicated that lesbian and gay couples were disadvantaged when making the comparison, cited fifty-nine separate studies finding “no difference.” However, Marks noted numerous flaws in those fifty-nine studies including the use of samples that were non-representative of the general population (not even racially representative). Indeed, one of those fifty-nine studies had cautioned that “[r]esults from this study must be interpreted cautiously due to several factors. First, the study sample was small (N=45) and biased toward well-educated, white women with high incomes. These factors have plagued other [same-sex parenting] studies, and remain a concern of research in this field.”¹²⁶ Furthermore, Marks noted that twenty-six of the fifty-nine studies did not have a clearly defined comparison group, and actually did not compare homosexual groups to heterosexual comparison groups. Marks also noted the subjectivity of standards in some of those fifty-nine studies, which relied on reports of how their children are doing from homosexual parents—who would hardly be unbiased about how their children are doing. Moreover, the APA actually knew of one famous study by Sarantokos that had found children raised by same-sex parents had lower performance outcomes compared to other children, but it had simply chosen to discount the study.¹²⁷ So Marks criticized reliance on such studies.

Are we witnessing the emergence of a new family form that provides a context for children that is equivalent to the traditional marriage-based family? Even after an extensive reading of the same-sex parenting literature, the author cannot offer a high confidence, data-based “yes” or “no” response to this question The available data, which [is] drawn primarily from small convenience samples, are insufficient to support a strong generalizable claim either way.¹²⁸

Thus, the prevailing viewpoint and conventional wisdom in the psychological and other professional worlds is that children raised by same-sex partner parents suffer no disadvantages compared to children raised by

125. Regnerus, *supra* note 77, at 753.

126. Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 738 (2012).

127. *Id.* at 742.

128. *Id.* at 736, 748.

heterosexual moms and dads.¹²⁹ However, the reasons to take that perspective with a large “grain of salt” are many.

For example, Stanford Professor Michael Rosenfeld published an article in the respected journal, *Demography*, purporting to show that children of same-sex couples are as likely to make normal progress through school as the children of most other family structures, and suggesting that the advantage of heterosexual married couples is mostly due to their higher socioeconomic status.¹³⁰ However, two years later the same prestigious journal published another article by three other economists who, using the same data set as Rosenfeld, found that “[c]ompared with traditional married households, we find that children being raised by same-sex couples are 35% less likely to make normal progress through school; this difference is statistically significant at the 1% level.”¹³¹ A year after that, a similar study of Canadian children confirmed the disadvantage to children from homes headed by same-sex couples.¹³²

Professor Margaret Brinig explained that, “[i]n general, children do better in both the short and long term if they live with married parents and if they are

129. See e.g., MICHAEL J. ROSENFELD, NONTRADITIONAL FAMILIES AND CHILDHOOD PROGRESS THROUGH SCHOOL, 47 DEMOGRAPHY 755, 755 (2010) (finding that “children of same-sex couples are as likely to make normal progress through school as the children of most other family structures.” Suggesting that “the advantage of heterosexual married couples is mostly due to their higher socioeconomic status.”); Margaret Weigel & Leighton W. Kille, *Same-Sex Marriage and Children’s Well-Being: Research Roundup*, JOURNALIST’S RESOURCE 3 (updated June 26, 2015) (Stanford University’s 2010 research published in *Demography*. “Findings: ‘Children of same-sex couples are as likely to make normal progress through school as the children of most other family structures . . . the advantage of heterosexual married couples is mostly due to their higher socioeconomic status. Children of all family types (including children of same-sex couples) are far more likely to make normal progress through school than are children living in group quarters (such as orphanages and shelters).’”); *id.* (“[c]hildren in lesbian families felt less parental pressure to conform to gender stereotypes, were less likely to experience their own gender as superior and were more likely to be uncertain about future heterosexual romantic involvement.”); HENNY BOS & THEO G.M SANDFORT, CHILDREN’S GENDER IDENTITY IN LESBIAN AND HETEROSEXUAL TWO-PARENT FAMILIES, 62 SEX ROLES 114, 119 (2009) (children in lesbian families felt less pressure to conform to gender stereotypes and were less likely to consider their own gender as superior); SCOTT RYAN, PARENT–CHILD INTERACTION STYLES BETWEEN GAY AND LESBIAN PARENTS AND THEIR ADOPTED CHILDREN, 3 J. OF GLBT FAM. STUD. 105, 105 (2007) (study finding that “[G]ay and lesbian adoptive parents in this sample fell into [a] desirable range of the parenting scale and their children have strength levels equal to or exceeding the scale norms.”). See ALICIA CROWL ET AL., A META–ANALYSIS OF DEVELOPMENTAL OUTCOMES FOR CHILDREN OF SAME–SEX AND HETEROSEXUAL PARENTS, 4 J. OF GLT FAM. STUD. 385, 385 (2008) (2008 mega-study from Michigan State University published in the Journal of GLFBT Family Studies: “Analyses revealed statistically significant effect size differences between groups for one of the six outcomes: parent-child relationship. Results confirm previous studies in this current body of literature, suggesting that children raised by same-sex parents fare equally well to children raised by heterosexual parents.”).

130. ROSENFELD, *supra* note 129129.

131. Douglas W. Allen, Catherine Pakaluk & Joseph Price, *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, 50 DEMOGRAPHY 955, 955 (2012).

132. Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, 11 REV. ECON. HOUSEHOLD 635, 635 (2013) (finding that Canadian children living in gay and lesbian families “were about 65% as likely to graduate compared to children living in opposite sex marriage families. Daughters of same-sex parents do considerably worse than sons.”).

biological or adopted children of these parents.”¹³³ Professor Brinig summarized the empirical evidence.

Over the long haul, family structure apparently matters Adult children [not raised by married parents] are slower to marry, more likely to cohabit, and quicker to divorce if their own parents divorced. While some 70 percent do not exhibit major psychological problems as adults, nearly a third to have issues that are long-lasting. Girls whose mothers never married are far more likely to have children without being married themselves They are less likely to finish high school or college and may find it difficult to become employed.¹³⁴

Thus, it is well-established that “[s]ocieties rely on families, built on strong marriages, to produce what they need As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.”¹³⁵ “[A]ccording to the best available sociological evidence, children fare best on virtually every indicator of wellbeing when reared by their wedded biological parents.”¹³⁶

[Moreover,] research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes.¹³⁷

The social science evidence strongly supports the conclusion reached by Girgis, Anderson, and George that “[m]arriage understood as the conjugal union of husband and wife really serves the good of children, the good of spouses, and the common good of society.”¹³⁸ The “social science shows that children tend to do best overall when raised by their married biological parents”¹³⁹

133. Margaret F. Brinig, *A Case for Integrated Parenthood*, NOTRE DAME L. SCH. 147, 147 (2010).

134. *Id.* at 156.

135. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 270 (2011).

136. *Id.* at 257, 259.

137. *Id.* at 258 (quoting Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD. TRENDS RES. BRIEF 1, 6 (2002)).

138. Girgis, George & Anderson, *supra* note 135, at 287.

139. Melissa Moschella, *The Rights of Children: Biology Matters*, PUB. DISCOURSE (Feb. 20, 2014), <http://www.thepublicdiscourse.com/2014/02/11620> (“[T]he parent-child biological bond really does matter in itself, because there is at least one unique and important benefit that biological parents—and only biological parents—can provide for their children: *their* parental love. My claim, in other words, is that children have a fundamental interest in being loved by their biological parents, and that, strictly speaking, no one else can replace biological parents in this regard.”).

Thus, it is beyond serious dispute that children have the most promising developmental and life-future opportunities when raised by their married, biological parents, and that the closer the family relationship comes to that gold standard, the better it is for the children. As Professor Bradford Wilcox from the University of Virginia has noted, “[T]he overwhelming body of research show[s] that children are more likely to succeed in an intact, married family No other institution reliably connects two parents, and their money, talent, and time, to their children in the way that marriage does.”¹⁴⁰

Professor Wilcox further noted that:

[S]trong and stable marriages play a crucial role in boosting children’s odds of making it in America. For individual children, we know that boys are about twice as likely to run afoul of the criminal justice system, girls are about three times as likely to become pregnant as teenagers, and young men and women are about one-third less likely to graduate from college when they come from non-intact families.¹⁴¹

Likewise, research by Harvard economist Raj Chetty and his colleagues verifies that “children from both two-parent and single-parent families are more likely to experience economic mobility when they hail from communities with a lot of two-parent families.”¹⁴² Similarly, Ron Haskins, co-director of the Brookings’ Center on Children and Families declared, “[w]e are not going to have an effective solution to the growing inequality and poverty in the U.S. unless we can do something about family structure.”¹⁴³

CONCLUSION: RECONCILING THE STATE’S DUTY TO PROTECT CHILDREN WITH ITS DUTY TO RESPECT THE RIGHTS OF SAME-SEX PARENTS

Respect for individual, sexual identity rights is a very important public-policy goal. Likewise, protection of vulnerable children is a critical public-policy goal. In the past two decades, there have been great advances towards protecting the rights and dignity of persons with same-sex attraction and same-sex couples. Today, the pressing question has become, in the words of Professor Bradford Wilcox, “Can anything be done to increase the odds that

140. W. Bradford Wilcox, *The New Progressive Argument: For Kids, Marriage Per Se Doesn’t Matter*, INST. FOR FAMILY STUDIES (Sept. 15, 2014), <http://family-studies.org/for-kids-marriage-per-se-doesn-t-matter-right>.

141. W. Bradford Wilcox, *Pro-Family Policies to Strengthen Marriage and Give Kids A Better Shot at the American Dream*, YG NETWORK 95, 99 (2014), <http://conservativereform.com/wp-content/uploads/2014/05/chapter-12-the-agenda-family.pdf>.

142. *Id.* at 100.

143. *Id.* See generally RON HASKINS & ISABEL SAWHILL, *CREATING AN OPPORTUNITY SOCIETY* (2009).

every American child has an equal opportunity to be raised by his or her own parents in a strong and stable marriage?”¹⁴⁴

Balancing the duty to protect children and the duty to respect the autonomy rights of parents is a difficult task. It is not unique to same-sex parents. It lies at the heart of some of the most vexing dilemmas faced by state welfare agencies, state child protective services, juvenile courts, and divorce courts, to name just a few of the state agencies that must routinely decide very difficult cases involving children and their parents.

For example, we do not want to repeat the mistake made by no-fault divorce reformers of not realistically assessing the negative impacts upon children and not adequately providing for their plight and suffering. Children have a natural, moral right to be raised by both of their parents whenever that is not dangerous or impossible. They have an inherent moral right to both a mother and a father—their biological parents—whenever possible.¹⁴⁵ The law should foster and protect that right when possible.

Religious liberty also is at some risk because of the legalization of same-sex marriage. The example of Kim Davis, the county clerk in Kentucky who was jailed for six days because she declined to issue marriage licenses to same-sex couples, is just the tip of the iceberg.¹⁴⁶ As one commentator put it, “The United States has seen a shocking display of intolerance and repression of religious freedom and conscience in the last year, over a profound dispute as to the meaning of marriage, surrounding the controversy over so-called same-sex marriage.”¹⁴⁷

More than two years before *Obergefell* was decided, Ryan Anderson presciently predicted the harmful impact of legalizing same-sex marriage. He wrote:

Redefining marriage does not simply expand the existing understanding of marriage. It rejects the anthropological truth that marriage is based on the complementarity of man and woman, the biological fact that reproduction depends on a man and a woman, and the social reality that children need a mother and a father. Redefining

144. Wilcox, *supra* note 140.

145. See Melissa Moschella, *The Rights of Children: Biology Matters*, PUB. DISCOURSE (Feb. 20 2014), <http://www.thepublicdiscourse.com/2014/02/11620>.

146. Upon her release from jail, Ms. Davis did not interfere as other personnel in her office issued marriage licenses. One wonders whether the federal court over-reacted and whether the ultimate outcome would have been the same without the judicial paranoia and media hype. See Mike Wynn, *Ky. Clerk Kim Davis Doesn't Interfere as Marriage License Issued*, USA TODAY (Sept. 14, 2015, 2:09 PM), <http://www.usatoday.com/story/news/politics/2015/09/14/kentucky-clerk-kim-davis-returns-work/72242438>.

147. PATRICK TALBOT, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY CLASHES IN THE U.S., AFTER *OBERGEFELL V. HODGES*: (AN AMERICAN CONSTITUTIONAL CHALLENGE) 1 (2015).

marriage to abandon the norm of male-female sexual complementarity would also make other essential characteristics—such as monogamy, exclusivity, and permanency—optional. Marriage cannot do the work that society needs it to do if these norms are further weakened.

Redefining marriage is also a direct and demonstrable threat to religious freedom because it marginalizes those who affirm marriage as the union of a man and a woman. This is already evident in Massachusetts and Washington, D.C., among other locations.¹⁴⁸

After *Obergefell*, the legal status of, protection for, and future of conjugal marriage, marital families, children, democracy, and religious liberty are uncertain and at risk. It is likely *Obergefell* will go down in legal history beside *Roe v. Wade*,¹⁴⁹ *Plessy v. Ferguson*,¹⁵⁰ and *Dred Scott v. Sanford*¹⁵¹ on the list of the worst Supreme Court decisions, which most profoundly distorted American life, law, and society.

The Court's decision in *Obergefell* clearly has some potentially drastic structural implications for constitutional government in the United States.¹⁵² It judicially amended the Constitution to create a new fundamental, substantive right to same-sex marriage. *Obergefell* also shifted the authority to decide the marriage issue from the states—where the Founders had allocated it—to the Federal Government's Supreme Court. It transformed the structure of the allocation of government powers between the states and the national government in a way that seriously diminished our pre-existing constitutional system of self-government.¹⁵³

Equally as significant to those structural changes of government were the changes in family policy imposed by the Court in *Obergefell* upon the people in all of American states. Justice Kennedy's opinion for the majority shamelessly overstated the changes in the social understanding of marriage, describing them as “deep transformations in” the “structure [of marriage], affecting aspects of marriage long viewed by many as essential.”¹⁵⁴ The majority opinion grandly noted that “[t]he history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex

148. Anderson, *supra* note 4, at 2.

149. *Roe v. Wade*, 93 S. Ct. 705 (1973).

150. *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896).

151. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

152. See Travis Weber, *Critical Analysis of Obergefell v. Hodges*, FAM. RES. COUNCIL (Aug. 2015), <http://www.frc.org/criticalanalysis-obergefellhodges>.

153. See *The Equal Protection Clause Does Not Require States to License Same-Sex Marriage*, INTELLIGENCE SQUARED U.S. (June 2, 2015), <http://intelligencesquaredus.org/debates/past-debates/item/1333-the-equal-protection-clause-does-not-require-states-to-license-same-sex-marriages> (follow “Read Transcript” link).

154. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

relations—has evolved over time.”¹⁵⁵ However, such a notion is akin to justifying polygamy or child marriage because of rising rates of infidelity and child sexual exploitation.

The structural and conceptual changes in marriage imposed on the nation by *Obergefell* harms families and society in many ways. Sadly, children are likely to be the most severely injured by the judicially-mandated transformation of marriage. A reasonably functional, healthy marriage unquestionably provides the most promising environment for child development. As Ryan Anderson succinctly illuminated:

There are good reasons for the law of any society to define marriage as the union of husband and wife.

....

Marriage is unique for a reason, and it’s reasonable for the law to treat it as a unique institution because it serves the public good. It serves the common good because it’s based on human nature, and it unites men and women, husbands and wives, mothers and fathers.¹⁵⁶

There are “intimate relation[s] between marriage and children”¹⁵⁷ It is clear beyond dispute that the welfare of children is greatly enhanced if they are raised by married parents. There is a strong link between marriage and a child’s well-being. Alternative family forms do not benefit children as much as traditional, married families.

Professor Elizabeth Fox-Genovese saw the same-sex marriage movement as a threat to the institution of marriage itself. She wrote that for “hardcore [same-sex marriage] activists, the real goal is the destruction of marriage as the union of a man and a woman.”¹⁵⁸ Recent events in the United States provide an inkling of confirmation of her dire prediction. As goes marriage, so goes the future of children and even generations of children. It is ironic that the Supreme Court decision that mandated the legalization of same-sex marriage throughout the United States did so in large part ostensibly and explicitly in the name of protecting children. The tragic irony is that children, who are and will be in increasing numbers the innocent victims of the legalization of same-sex marriage, were the foil and excuse used by the Court

155. *Id.*

156. *Video: Dr. Ryan Anderson on Same Sex Marriage*, BERNEWS (Dec. 3, 2015), <http://bernews.com/2015/12/video-dr-ryan-anderson-sex-marriage>.

157. FOX-GENOVESE, *supra* note 116, at 58.

158. *Id.* at 60–61 (“Contrary to many prevailing views, marriage is not the seat of oppression but rather the last best ground for resistance against it. In binding men and women into loving relations and shared purposes, marriage acknowledges the reality of sexual difference even as it works to bridge that difference and lay a foundation for a vital and, yes, grown-up social life.”).

to justify overcoming the constitutional principle and long tradition of federalism, and to excuse the judicial mandate that all states must legalize same-sex marriage. Thus, children are not only the tragic and most innocent victims of *Obergefell*, but they were the purported reason and justification for that ruling.

The recent trend in marriage law and public policy in the Western World has generally been toward deregulation and privatization. The direction of legal change “has been characterized by a retreat from the attempt directly to impose a moral code imbued with traditional assumptions regarding the roles of men and women in marriage.”¹⁵⁹ The net result of these changes has been the creation of “a legal ‘vacuum’” so that, today, “it is easier to renounce a marriage than a mortgage.”¹⁶⁰ During the past century, there have been forty-three “substantial inroads into the doctrine of ‘unity’” in marriage.¹⁶¹ Private morality replaced public morality and resulted in the rejection of “the imposition of a strict moral code [about marriage] by public authorities.”¹⁶² Likewise, “[t]he reform of family law in the twentieth century has been characterized by a movement towards what might be termed ‘self-regulation’ (by the couple), in other words the privatization of decision making.”¹⁶³ Initially, the privatization of marriage regulation was restricted to adult-spousal issues, while the law “continue[d] to regulate their relations as parents.”¹⁶⁴ By the end of the twentieth century, law reforms were enacted “to embody both the idea that the decision to divorce should rest with the couple *and* the notion that men and women should take responsibility for sorting out their affairs, particularly in respect of their children.”¹⁶⁵ The dominant concern of the law has been to defer to and respect the decisions of couples regarding their breakup “without ceding the principle of state regulation completely.”¹⁶⁶

By the end of the twentieth century, the primary interest behind state regulation of parental decisions regarding children was to protect against harm to the child or children, including “physical harm, emotional harm, moral harm, and other kinds of harm.”¹⁶⁷ Advocates of same-sex marriage and adoption by LGBT adults argued that there is no evidence to support the claim of harm to children from being raised by LGBT adults and that the claim of harm is “unsupportable as a matter of law.”¹⁶⁸ They also pointed to examples

159. See generally JANE LEWIS, THE END OF MARRIAGE? INDIVIDUALISM AND INTIMATE RELATIONS 96 (2001).

160. *Id.* at 96.

161. *Id.* at 98.

162. *Id.* at 99.

163. *Id.* at 100.

164. *Id.* at 101.

165. *Id.* at 114–15.

166. *Id.* at 118.

167. MARK STRASSER, LEGALLY WED SAME-SEX MARRIAGE AND THE CONSTITUTION 85 (1997).

168. *Id.* at 84–99.

of foreign nations that have legalized same-sex marriage to suggest that there are, for both adults and children, substantial legal benefits from making their family life more secure.¹⁶⁹

As Professor Fox-Genovese noted, “The demands for same-sex marriage flow logically from the moral tenor of our culture.”¹⁷⁰ We must work to change that cultural morality. Legal scholars are prone to suggesting the need for more research. Certainly more research about the comparative impacts upon children of being raised by same-sex parents is needed and will be useful. We need to seriously research and design pro-family laws and policies in order to strengthen marriage for the sake and benefit of children.¹⁷¹

But it is also time for legal action and policy progression for the sake of the children of the rising generation. Courageous push-back to defend, strengthen, and promote dual-gender marriage and marital childrearing is needed. It is long overdue. But in the current *privacy* environment, it will not be easy.

The Court would learn and benefit from the assertion of bold public policy protecting and encouraging male-female marriage and a culture of marriage. Do not the children who are now living, and the next generations of children, deserve the benefits and blessings of being raised by married parents? No other family form can provide the same or comparable levels of benefits to children as the marital family. We must face the fact that—if we do not actively engage in designing, fostering, and promoting legal policies that protect, promote, and expand the culture of marriage for the sake of children—we, too, will be the perpetrators of harm for children now living and generations of children yet unborn.

169. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 134–67 (2006). *See also* Natalia Rabirez-Bustamante, *Marriage Between Two Changing and Unchanging Concepts of Family: The Case of LGBTI Rights Litigation on Family Issues in Columbia, in SAME SEX COUPLES—COMPARATIVE INSIGHTS ON MARRIAGE AND COHABITATION* 105 (Macarena Saez ed. 2015); *see further infra, passim*.

170. FOX-GENOVESE, *supra* note 116, at 59 (“Above all, having first acceded to the primacy of the individual over any semblance of a group, we are now capitulating to the non-negotiable demands of sexual desire.”).

171. Wilcox, *supra* note 141, at 103–04.