



Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction

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Much of the current groundswell of support for heterosexual-only marriage in the United States is grounded in the belief that children do best when raised by their married, biological parents. This sense of what marriage and biological ties mean to children individually and to society as a whole has led states to pass laws that directly or indirectly bar unmarried persons from becoming parents through adoption or assisted reproduction, contexts in which parent-child relationships often lack any biological component. Upon close examination, discrimination against the unmarried in adoption and assisted reproduction relates neither to the purposes of marriage nor to child welfare. In the context of assisted reproduction, marital-status discrimination fails to survive interpretivist scrutiny, a standard for policymaking requiring legislation to conform not only to constitutional strictures but also to contemporary legal principles and legislative trends. Marital-status discrimination in adoption,

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apparent in the law's differential treatment of step-parent adoption and second-parent adoption, fails to meet interpretivism's requirement that the law exhibit both neutrality and consistency. Only by satisfying an interpretivist standard can discrimination against the unmarried in assisted reproduction and adoption command broad public support — the essence of all sound public policy. By continuing to advocate vociferously for favored treatment of married couples in matters of legal parenthood, the heterosexuals-only marriage movement not only works against our legal traditions and values, but also ultimately undermines the welfare of many children whose best hope lies with parents the law does not allow to marry.

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INTRODUCTION

What marriage is and should be are matters of great preoccupation and concern in the United States today. By the end of 2005, the electorates of eighteen states had approved referenda to amend their constitutions to define marriage as a heterosexual-only union.¹ A similar measure to amend the federal Constitution failed in Congress,² but President Bush vowed to pursue the issue with renewed vigor during his second term.³ The judiciary has increasingly become a site where the definition of marriage is contested. In 2003, Massachusetts became the first state to legalize same-sex marriage, by order of its Supreme Judicial Court.⁴ Yet, some courts in other states continue to deny the extra-jurisdictional reach of Massachusetts law. To date, they have taken the nearly uniform position that it is within the prerogative of individual states to outlaw or refuse to recognize same-sex marriages in the interests of children and society.⁵ Most recently, however, the New York

¹ See Human Rights Campaign, *Map: Statewide Marriage Laws*, http://www.hrc.org/Content/ContentGroups/Library/Published_in_2000_2002/Maps_of_State_Laws_and_Policies.htm (last visited Jan. 15, 2005).

² See Sheryl Gay Stolberg, *Same-Sex Marriage Amendment Fails in House*, N.Y. TIMES, Oct. 1, 2004, at A14.

³ See Dan Savage, *The Gay Child Left Behind*, N.Y. TIMES, Feb. 17, 2005, at A29. Conservatives bemoan Bush's failure to fulfill his promise. See David D. Kirkpatrick, *The Nation: Wink and a Prayer; The Crisis of the Bush Code*, N.Y. TIMES, Oct. 9, 2005, § 4, at 1.

⁴ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1.

⁵ See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (upholding federal Defense of Marriage Act against challenge by same-sex couple who sought recognition of their Massachusetts marriage in Florida); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (rejecting claim of same-sex couples who had entered into civil unions in Vermont to entitlement to marriage licenses in Indiana).

Supreme Court declared the state's ban on same-sex marriage as violative of the New York Constitution,⁶ but the decision was overturned on appeal.⁷

The debate over same-sex marriage to date has been primarily a debate over three issues: (1) whether equality guarantees mandate same-sex marriage, (2) whether same-sex marriage discredits heterosexual-only marriage, and (3) whether heterosexual-only marriage is required for the good of children and society. Massachusetts's Supreme Judicial Court, in *Goodridge v. Department of Public Health*, refuted the argument that the doctrine of equal protection is consistent with bans on same-sex marriage by exposing the semantic fallacies upon which that argument is based. The argument that same-sex marriage belittles and undermines the marriages of heterosexuals has been soundly criticized as a mere distraction from the larger issues and is no longer a point of serious contention.⁸ At the present time, the debate over same-sex marriage has become one about the welfare of children and little else.

That children and society benefit from heterosexual-only marriage is hardly a new idea. The most common articulation of this notion is that children do best when raised by their married, biological parents in a single household. This concept has figured prominently in the debate over same-sex marriage since the very first challenges to heterosexual-only marriage policies arose in the early 1970s. At present, though, the issue has achieved new vitality as powerful media figures and scholars from both the legal and religious academies bolster their arguments with references to countless studies and reports on child welfare.⁹ On one side of the spectrum, marriage movement groups like the Family Research Council and Focus on the Family claim that society is imperiled whenever a child is not raised by a heterosexual married couple.¹⁰ On

⁶ See Sabrina Tavernise, *New York Judge Opens a Window to Gay Marriage*, N.Y. TIMES, Feb. 5, 2005, at A1.

⁷ See *Hernandez v. Robles*, No. 6598-6599, 2005 WL 3322959, at *6 (N.Y. App. Div. Dec. 8, 2005).

⁸ See, e.g., EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 57, 60, 71, 190 (2004) (denouncing and exposing such "sky is falling" arguments as mere scare tactics).

⁹ See Lynne Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 NEW ENG. L. REV. 643, 654 n.61 (2004) (listing studies and reports); JAMES DOBSON, *MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS BATTLE* (2004), available at <http://www.family.org/cforum/extras/a0032429.cfm> (quoting second argument entitled "Children Will Suffer Most (Eleven Arguments Against Same-Sex Marriage — Part 2 of 5)": "More than ten thousand studies have concluded that children do best when they are raised by loving and committed mothers and fathers.").

¹⁰ See Margery Beck, *Senators React to Advertisement*, J. STAR, June 29, 2004, at A1;

the other side of the spectrum, the Human Rights Campaign, a lobbying organization for gay and lesbian rights, urges policymakers to take note of the many same-sex couples who are raising children and are doing so well. In this debate, marriage, it seems, is not so much a question about commitment between adults as it is one about commitment to children and, by extension, to society as a whole. The issue of whether children can thrive when raised by unmarried persons has truly become the pivot around which the most important decisions about marriage currently rotate.

In the current climate, it is appropriate to take a fresh look at areas where marital status discrimination drives decisions about child welfare. This discrimination is most salient in contexts where the contours of parent-child relationships are determined by public policy rather than by constitutional rights. One of these is adoption, where the state plays the primary role in designating the parents of an adopted child. Another is assisted reproduction, where traditional approaches to parentage often fail to identify the parents of a child born via new and unfamiliar methods of procreation. In both of these contexts, the state assesses whether those petitioning for a declaration of parentage are fit to be parents and whether their being named as the parents of a particular child is in that child's best interests. If the petitioners are married, they may receive favorable treatment in the assessment for that reason alone.

This Article argues that the favoritism toward marriage in adoption and assisted reproduction relates neither to the purposes of marriage nor to child welfare. Part I subjects marital restrictions on access to assisted reproduction to an interpretivist microscope. This Part concludes that using marriage as a gatekeeping criterion in that context conflicts with the value our society places on consistency, neutrality, and integrity in the law. Part II begins with a comprehensive comparison of assisted reproduction and adoption. It then examines the role of the law in regulating step-parent adoption and second-parent adoption. In particular, Part II criticizes how marriage functions as a proxy for the parental fitness of individuals who seek to adopt their step-children. It does this by demonstrating the wrongheadedness of the possible justifications for allowing marriage to play this role. Part II concludes with an argument for harmonizing the law governing step-parent and second-parent adoptions. Both Parts I and II raise concerns that are

Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1; James Dao, *State Action Pursued on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2004, at A1.

further addressed in Part III. Part III looks at how the contemporary marriage movement, in advocating for favored treatment of married couples at all levels of society, ultimately undermines the welfare of children whose best hope lies with parents who, in most jurisdictions, are not allowed to marry.

I. MARRIAGE AND ASSISTED REPRODUCTION

Marriage has played a prominent role in the development of the law and policy that govern assisted reproduction. The effect has been to restrict the use of assisted reproduction to those in socially sanctioned intimate relationships and to erect barriers to its use against those who are not in such relationships. While these barriers are no longer as salient as they once were in the artificial insemination context, they continue to exist and are particularly prominent in the regulation of surrogacy.

A. *Marriage and Artificial Insemination*

Whereas heterologous artificial insemination was once considered adulterous,¹¹ restricting the use of this technology to married couples who employ their own gametes has become less and less common. The Uniform Parentage Act (“UPA” or “Act”), as first promulgated in 1973, contained a section addressing the use of artificial insemination by married couples.¹² The Act provided that if, under the supervision of a physician, a wife was artificially inseminated with a donor’s semen and with the consent of her husband, the husband would be the father of the resulting child.¹³ The UPA further provided that a donor of semen to a licensed physician was not the father of a resulting child unless the woman artificially inseminated was his wife.¹⁴ These provisions did not prohibit single women from being artificially inseminated, but neither did they permit them to disavow the paternity of sperm donors. The language referring to married couples and licensed physicians was eliminated in 2000 in order to “provide[] certainty of nonparentage for prospective donors.”¹⁵ The new provisions permit single women to become the sole parents of the children born to them via artificial

¹¹ See *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. 1963); *Strnad v. Strnad*, 78 N.Y.S.2d 390, 390 (N.Y. Sup. Ct. 1948).

¹² See UNIF. PARENTAGE ACT § 5 (repealed 2000), 9B U.L.A. 407 (2001).

¹³ *Id.* § 5(a).

¹⁴ See UNIF. PARENTAGE ACT § 5(b) (repealed 2000), 9B U.L.A. 408 (2001).

¹⁵ UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).

insemination.¹⁶ Notably, the language of the new UPA, unlike that of the former UPA, is inclusive not only of unmarried women,¹⁷ but also of unmarried opposite-sex couples, whether or not those couples are intimately involved.¹⁸ The provision is said to “reflect[] concern for the best interests of nonmarital as well as marital children of assisted reproduction.”¹⁹

Most states regulate access to and the ramifications of artificial insemination in one way or another. Some states specifically ban the use of artificial insemination by all but married couples,²⁰ a more restrictive position than even that taken by the 1973 UPA. Other states adopted the language of the 1973 UPA without revision²¹ or otherwise enacted provisions that refer only to married couples.²² Still other states altered the 1973 UPA’s provisions slightly so as not to sever the paternity of the donor where the recipient’s husband does not consent to the insemination.²³ Such provisions do not explicitly disallow single women

¹⁶ See *id.* (“The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.”).

¹⁷ See *id.* (“UPA (2000) further opts not to limit nonparenthood of a donor to situations in which the donor provides sperm for assisted reproduction by a married woman.”).

¹⁸ See UNIF. PARENTAGE ACT § 703, 9B U.L.A. 23 (Supp. 2003); cf. Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African American Adults Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 706 (1997).

¹⁹ See UNIF. PARENTAGE ACT § 703 cmt., 9B U.L.A. 25 (Supp. 2003).

²⁰ See, e.g., OKLA. STAT. tit. 10, § 553 (1998).

²¹ See, e.g., ALA. CODE § 26-17-21 (1992); MINN. STAT. § 257.56 (2000); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106(2) (2001); NEV. REV. STAT. § 126.061(2) (1989); VA. CODE ANN. § 20-158(3) (West 2000); VA. CODE ANN. § 32.1-257(D) (West 2000). A married woman is, of course, not required to obtain the consent of her husband to be artificially inseminated. See *Shin v. Kong*, 95 Cal. Rptr. 2d 304, 310 (Cal. Ct. App. 2000).

²² ALA. CODE § 26-17-21; ALASKA STAT. § 25.20.045 (2000); FLA. STAT. § 742.11(1) (2001); GA. CODE ANN. § 19-7-21 (1999); MD. CODE ANN., EST. & TRUSTS § 1-206 (LexisNexis 2001); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2005); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1997); MINN. STAT. § 257.56; MO. REV. STAT. § 210.824; MONT. CODE ANN. § 40-6-106 (2001); NEB. REV. STAT. § 126-061 (1989); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); OKLA. STAT. tit. 10, §§ 551-553 (1998); TENN. CODE ANN. § 68-3-306 (1996). But see *In re Michael*, 636 N.Y.S.2d 608, 609 (N.Y. Sup. Ct. 1996) (applying statute to woman unmarried at time of birth but who later married).

²³ See ALASKA STAT. § 25.20.045; ARK. CODE ANN. § 9-10-201 (West 1998); FLA. STAT. § 742.11(1); GA. CODE ANN. § 19-7-21; 750 ILL. COMP. STAT. 40/2 (2001); MD. CODE ANN., EST. & TRUSTS § 1-206; MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2005); MICH. COMP. LAWS ANN. § 333.2824(6); N.H. REV. STAT. ANN. § 168-B:3(II) (1994); N.M. STAT. ANN. § 40-11-6(A) (LexisNexis 2001); N.Y. DOM. REL. LAW § 73(1) (McKinney 1999); N.C. GEN. STAT. § 49A-1; N.D. CENT. CODE § 14-18-03; OKLA. STAT. tit. 10, § 552; TENN. CODE ANN. § 68-3-306.

from employing artificial insemination, but courts construing them have found them to provide no ammunition for single women who invoke them to combat assertions of paternity by sperm donors.²⁴ Another group of states sever the paternity of the donor in all cases where the recipient is not the donor's wife.²⁵ In this respect, these statutes mirror the language of the new UPA, which provides likewise.²⁶ None of this is to suggest that single women do not experience discrimination based on marital status in the provision of artificial insemination by private clinics.²⁷ When a single woman responds to this discrimination by electing to self-inseminate with the sperm of a known donor,²⁸ she runs the risk that a court will apply the distinction between known and unknown sperm donors that has been prominent in case law,²⁹ despite statutory plain language,³⁰ and recognize the donor's paternity.³¹ The

²⁴ See R. Alta Charo, *And Baby Makes Three — or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 240 (2000).

²⁵ See CAL. FAM. CODE § 7613(b) (West 1994); COLO. REV. STAT. ANN. § 19-4-106(2) (West 1999); CONN. GEN. STAT. § 45a-775 (2001); IDAHO CODE ANN. § 39-5405(1) (1998); KAN. STAT. ANN. § 38-1114(f) (1995); N.J. STAT. ANN. §§ 9:17-44(b) (West 1993); OHIO REV. CODE ANN. § 3111.95(B) (West 2000); OR. REV. STAT. § 109.239(1) (1990); WASH. REV. CODE § 26.26.705 (2005); WIS. STAT. § 891.40(2) (2000); WYO. STAT. ANN. § 14-2-902 (2005). *But see Shin*, 95 Cal. Rptr. 2d at 310 (concluding statute does not apply where husband's consent not obtained) (citing *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537-38 (Cal. Ct. App. 1986)).

²⁶ See UNIF. PARENTAGE ACT §§ 702-703, 9B U.L.A. 355, 356 (2001).

²⁷ See Charo, *supra* note 24, at 241; Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 150-51 (2000); Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 175 (1996); Audra Elizabeth Laabs, *Lesbian ART*, 19 L. & INEQ. J. 65, 82 (2001); *see also* Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1217 (1995-96) (noting disparities based on race in provision of fertility services); Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 940-42 (1996) (suggesting underlying causes of racial disparity in fertility treatment).

²⁸ See DeLair, *supra* note 27, at 163.

²⁹ See, e.g., *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (discussing statutory protection of recipient does not apply where parties had agreement that donor's parental rights would be preserved); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357, 362 (N.Y. App. Div. 1994); *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 12 (1994); *In Circuit Court*, CHI. DAILY L. BULL., Aug. 5, 1997, at 3 (reporting ruling that "the act does not intend to bar a known donor from trying to assert his parental rights"); *see* Charo, *supra* note 24, at 241-42, 247. *But see In re Matthew B.*, 284 Cal. Rptr. 18, 34 (Cal. Ct. App. 1991) (discussing surrogate who stipulated to paternity of intending father); *Leckie v. Voorhies*, 875 P.2d 521, 522 (Or. Ct. App. 1994) (holding known donor not entitled to legal recognition of paternity because he agreed not to assert paternity); *McIntyre v. Crouch*, 780 P.2d 239, 243 (Or. Ct. App. 1989) (holding statute applies even where physician does not perform insemination, donor is not anonymous, and recipient is unmarried).

³⁰ See, e.g., *In Circuit Court*, *supra* note 29 (reporting ruling that act barring paternity claim by donor who is not wife of recipient did not apply to bar known donor from trying

distinction made in case law between known and unknown donors is, curiously, nowhere acknowledged in the new UPA.³²

Institutions and commentators speaking on the topic of restricting artificial insemination have assumed various positions that are in some way related to marriage. On one extreme is the Catholic Church, which simply disapproves of assisted reproduction in any form.³³ On the other extreme are those who believe regulations limiting artificial insemination to married couples violate the constitutional guarantee of equal protection.³⁴ As a policy matter, many institutions and commentators disapprove of single parenthood and revile the growing single-motherhood-by-choice movement made possible by the lowering of discriminatory barriers to artificial insemination.³⁵ Others, more

to assert his parental rights); see Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 904 (2000) (“[A]lthough facially neutral, the law discriminates in practice between sperm donors who give directly to users and those who give to sperm banks.”).

³¹ See, e.g., *Jordan C. v. Mary K.*, 179 Cal. App. 3d 386 (Cal. Ct. App. 1986) (declaring donor to be legal father). Similarly, whereas a sperm donor’s agreement not to assert paternity may be enforceable, see *Leckie*, 875 P.2d at 521, an agreement releasing a sperm donor from any obligation for child support in exchange for his sperm is not, see *Ferguson v. McKiernan*, 855 A.2d 121 (Pa. Super. Ct. 2004), cert granted, No. 741 MAL 2004, 868 A.2d 378 (2005).

³² Indeed, some language appears to invite courts to continue drawing the distinction. Professor John Sampson, who served as the reporter for the new UPA, has commented that a donor who intends to be a father “can be found not to be a ‘donor’ [since] if the understanding between him and the mother was that they intended him to have parental rights,” he would resemble a husband who contributes his own sperm to be used by his wife for assisted reproduction. See *Uniform Parentage Act (2000) (with Unofficial Annotations by John J. Sampson, Reporter)*, 35 FAM. L.Q. 83, 162 n.73 (2001). The inclusion of unmarried opposite-sex couples in the 2002 revisions of the UPA may be an attempt to address the status of known donors.

³³ See Martin L. Cook, *Reproductive Technologies and the Vatican*, ISSUES ETHICS, Spring 1988, available at <http://www.scu.edu/ethics/publications/ie/v1n3/homepage.html>. There is disagreement within the church as to whether the techniques of gamete intrafallopian transfer and tubal ovum transfer are consistent with church doctrine. See Richard C. Sparks, *Helping Childless Couples Conceive*, ST. ANTHONY MESSENGER, Apr. 1997, available at <http://www.americancatholic.org/Messenger/Apr1997/feature1.asp> (“[T]he Catholic Church has made no definitive or official universal pronouncement about these two procedures.”).

³⁴ See *In re Michael*, 636 N.Y.S.2d 608, 609 (N.Y. App. Div. 1996) (citing *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (“[T]he court [is unaware] of any distinction, based upon marital status, being mandated by law with regard to a woman’s right to be artificially inseminated. It might very well be unconstitutional for the law to try to make such a distinction.”); Garrison, *supra* note 30, at 911 n.341 (reasoning from right-of-privacy jurisprudence that “the state cannot deny access to a means of achieving pregnancy based on marital status”); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 682, 683-84 (1985).

³⁵ See, e.g., Barbara Dafoe Whitehead, *The Decline of Marriage as the Social Basis of*

specifically, disapprove of “special” rules for artificial insemination that allow single women to become sole parents, but withhold the same option from single women who have children via coitus.³⁶ At least some of this concern about single motherhood appears related to concerns about legitimacy and support for children.³⁷

The debate over sole legal parenthood for single women who employ artificial insemination continues. Single women will more than likely continue to face private discrimination from fertility clinics that are, at least in the United States, subject to little regulation. At the level of law and policy, however, marriage has by and large lost its force as a regulatory barrier to artificial insemination.

B. Marriage and Surrogacy

Although most statutes governing surrogacy simply outlaw the practice,³⁸ a few states have enacted provisions that permit certain individuals to become parents via surrogacy.³⁹ Most of these statutory schemes permit only married couples to hire surrogates.⁴⁰ Thus, unlike in the context of artificial insemination, marriage remains a controlling influence on the law and policy governing surrogacy.

The majority of the National Conference of Commissioners on Uniform State Law’s (“NCCUSL”) enactments on surrogacy have restricted the use of surrogacy to married couples. The 1973 version of the UPA did not address surrogacy, but in the 1980s, NCCUSL promulgated a uniform act known as the Uniform Status of Children of

Childrearing, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 3, 5 (David Popenoe et al. eds. 1996) [hereinafter PROMISES] (describing “single mothers by choice” as women who are committed more to expressing their individuality than to welfare of their children, in chapter on how it is best for children to be raised by their married parents); see also Barbara Dafoe Whitehead, *Defining ‘Dad’ Down*, COMMONWEALTH, Aug. 12, 2005, at 9, available at http://www.taemag.com/issues/articleid.17047/article_detail.asp.

³⁶ See Garrison, *supra* note 30, at 843, 873, 879, 882.

³⁷ See UNIF. PARENTAGE ACT § 705(a)(1), 9B U.L.A. 357 (2001). If the husband and wife have not lived together since her insemination and if the husband never held the child out as his own, his lawsuit may be brought at any time. *Id.* §§ 705(b)(2)-(3).

³⁸ See Garrison, *supra* note 30, at 851.

³⁹ See ARK. CODE ANN. § 9-10-201 (1998); FLA. STAT. § 742.13(2) (2001); NEV. REV. STAT. §§ 126.045(4)(a)-(c) (2001); N.H. REV. STAT. ANN. §§ 168-B:1(XII) to -:17(III) (1994); VA. CODE ANN. § 20-160(B)(9) (West 2000).

⁴⁰ Statutes in Florida, Nevada, New Hampshire, and Virginia all contain provisions requiring at least one of the intending parents to be a genetic parent of the child. See FLA. STAT. § 742.13(2); NEV. REV. STAT. § 126.045(4)(a); N.H. REV. STAT. ANN. §§ 168-B:1(XII) to -:17(III); VA. CODE ANN. § 20-160(B)(9).

Assisted Conception Act (“USCACA”). The USCACA embodied two options relating to surrogacy: (1) Option A, permitting it, but closely regulating it, and (2) Option B, outlawing surrogacy. The act was largely unsuccessful and was repealed in the 2000 overhaul of the UPA. As a part of this overhaul, NCCUSL promulgated a comprehensive set of provisions, article 8 of the new UPA, to govern the ability of married couples to commission surrogates. These provisions incorporated the USCACA with little change except for the elimination of Option B.

In 2002, NCCUSL revamped the UPA’s article 8 to eliminate the restriction on the use of surrogacy to married couples. Article 8 now permits married or unmarried heterosexual couples to engage a surrogate. Whether this change of position was due to the tepid response of legislatures or the vociferous opposition of the American Bar Association (“ABA”) to the 2000 UPA has not been made public. What is known is that family law expert Professor Joan Heifetz Hollinger served as a liaison between NCCUSL and the ABA in a vigorous and sustained effort “to ensure that the principle of equal treatment of all children without regard to the marital status of their parents [was] followed throughout the new UPA.”⁴¹ Hollinger argued that a child born to an unmarried man and woman, including a child born through assisted reproduction or in the context of a gestational agreement, should have the same rights and relationship with his or her parents or intended parents as a child born to a married couple. Her successful effort seemed to have been motivated less by purely constitutional concerns than by the need to align the legal treatment of marital and nonmarital children — the hallmark of the UPA since its original promulgation in 1973.⁴²

Like the USCACA, the UPA’s article 8, in either its former or new and improved form, has been of little interest to state legislatures. Only two states, Virginia and North Dakota, made use of the USCACA,⁴³ and only Texas, the home state of the reporter of the new UPA, enacted the 2000

⁴¹ *Newsletter*, FAM. & JUV. L. SEC. (Ass’n of Am. Law Sch., Syracuse, NY), May 2005 at 6 (on file with author).

⁴² See *In re Raphael P.*, 118 Cal. Rptr. 2d 610, 626 (Cal. Ct. App. 2002) (quoting *Johnson v. Calvert*, 19 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 1993)).

⁴³ See N.D. CENT. CODE § 14-18-05 (2005); VA. CODE ANN. § 20-160(B)(9) (2000). Although it continues to disapprove of surrogate agreements, North Dakota now permits a couple to have a child using their gametes and a gestational surrogate. See H.B. 1121, 59th Leg., Reg. Sess. (N.D. 2005), available at <http://www.state.nd.us/lr/assembly/59-2005/bill-text/FANC0400.pdf>. The bill was signed into law on April 8, 2005. See North Dakota Measure Actions, available at <http://www.legis.nd.gov/assembly/59-2005/bill-actions/ba1121.html> (last visited Dec. 2, 2005).

form of article 8, albeit with some revisions.⁴⁴ Utah, the home state of another reporter, considered enacting article 8 in its 2000 form, but that initiative was defeated in the 2003-04 legislative session.⁴⁵ The bill was reintroduced in the last session and became law last May.⁴⁶ In Mississippi, a bill incorporating the 2000 version of article 8 died in committee during the last legislative session.⁴⁷ As for the 2002 form of article 8, a bill in substantially that form was introduced in Illinois, was left pending in committee at the end of the 2003-04 legislative session,⁴⁸ and has been reintroduced in the current session.⁴⁹ A similar bill brought in Maine in 2004 expanded the scope of article 8 to permit an individual as well as couples to engage a surrogate, but the bill died in committee at the end of the session.⁵⁰ Besides Illinois's, New Mexico's is the only legislature currently considering enacting the 2002 version of article 8.⁵¹

C. *Interpreting Marriage-Based Restrictions on Assisted Reproduction*

In 2002, I argued that functional theories of parenthood, not marriage, are what support intentional parentage in the context of assisted reproduction.⁵² In the course of that analysis, I took issue with Professor Marsha Garrison's argument that no good policy justifies different parentage rules for children born of assisted reproduction than for children born of coitus.⁵³ Although I continue to disagree with Garrison's articulation of traditional parentage principles and her views on parentage-determination policy in assisted reproduction cases, I did state then and continue to agree that her interpretive approach has much

⁴⁴ See TEX. FAM. CODE ANN. § 160.754 (Vernon 2005).

⁴⁵ See Status of Utah S.B. 45 (Second Substitute Uniform Parentage Act), available at <http://www.le.state.ut.us/~2004/status/sbillsta/sb0045s02.htm> (last visited Dec. 2, 2005).

⁴⁶ See Status of Utah S.B. 14 (Uniform Parentage Act), available at <http://www.le.state.ut.us/~2005/status/sbillsta/sb0014.htm> (last visited Dec. 2, 2005).

⁴⁷ See H.B. 773, 2005 Leg., Reg. Sess. (Miss. 2005) (Uniform Parentage Act), available at <http://billstatus.ls.state.ms.us/2005/html/history/HB/HB0773.htm#history>.

⁴⁸ See Bill Status of H.B. 4742, 93d Gen. Assem. Gen., Sess. (Ill. 2004) (Uniform Parentage Act 2000), available at <http://www.ilga.gov/legislation/default.asp?GA=93>.

⁴⁹ See Bill Status of H.B. 3618, 94th Gen. Assem. Spec. Sess. (Ill. 2005) (Uniform Parentage Act 2000), available at <http://www.ilga.gov/legislation/default.asp>.

⁵⁰ See Summary of LD 1851 (Me. 2004) (An Act To Implement the Recommendations of the Family Law Advisory Commission with Regard to the Uniform Parentage Act), available at <http://janus.state.me.us/legis/LawMakerWeb/summary.asp?ID=280012496>.

⁵¹ See S.B. 1057, 47th Leg., Reg. Sess. (N.M. 2005) (Uniform Parentage Act), available at <http://legis.state.nm.us/lcs/BillFinderNumber.asp?year=05>.

⁵² Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 640 (2002).

⁵³ See *id.* at 632-39.

to offer family policymakers. In the sections that follow, I employ the interpretive approach to demonstrate that marriage-based restrictions on surrogacy conflict with sound social policy.

1. The “Interpretive Approach”

Garrison’s interpretive approach is borrowed from the work of tax scholar Professor Edward McCaffery.⁵⁴ It is called “interpretivism” by McCaffery and constitutional law scholars.⁵⁵ The approach was central to the critical legal studies and process theory movements that had their inceptions in the late 1960s and early 1970s, and it remains an important underpinning of American liberalism.⁵⁶ The method itself is a multiprinciple dialectic consisting of constitutional requirements, contemporary laws, and legislative trends.⁵⁷ Employing this dialectic in the formulation of policy makes policymakers aware of actual societal practices and beliefs.⁵⁸ It thereby enables them to leaven their rulemaking with consistency⁵⁹ and neutrality⁶⁰ and to eschew myopic “top-down” sloganeering and mere intuition. Family policy crafted with

⁵⁴ See Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 46 n.30 (1998). In his article, McCaffery describes his preferred method of policy formulation:

The political freedom to seek new answers makes more important the grounding of [policy] on the at least implicit ideas and conceptions of a modern democratic society, and calls for a more careful and sensitive reading of our actual practices. Careful and sensitive interpretation, in turn, helps to lead politics to reasonable answers.

Edward McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 286-87 (1994).

⁵⁵ Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703-04 (1975); Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844-46 (1978); McCaffery, *supra* note 54, at 286. Mark Tushnet criticizes the interpretive and neutral-principles approaches to constitutional interpretation in Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-86 (1983) (finding these approaches internally incoherent).

⁵⁶ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 4-10, 48-59 (1996); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 5-14 (1986).

⁵⁷ See Garrison, *supra* note 30, at 844, 845, 878.

⁵⁸ See BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF THE LAW* 247 (1997); Garrison, *supra* note 30, at 842 (“A core tenet of interpretivism is that meaningful actions and beliefs substantially constitute social life.”).

⁵⁹ See Garrison, *supra* note 30 at 842, 878, 911.

⁶⁰ See *id.* at 897 (stating, “Gender neutrality . . . may be constitutionally required.”); *id.* at 920.

the aid of the interpretive approach is family policy of integrity,⁶¹ it is respectful of family law's expressive function,⁶² and it commands broad public support.⁶³ Applied in any legal context, interpretivism resembles the analogical reasoning underlying the traditional process of judicial decision-making.⁶⁴ At the same time, given its emphasis on consistency and neutrality in the law, interpretivism appears to set the standard for legislation at a higher than merely rational basis, somewhere in the broadly undefined realm of heightened scrutiny.⁶⁵ In other words, an "uncommonly silly law"⁶⁶ that would survive rational basis scrutiny might well fail to meet the demands of interpretivism.

2. Interpretivism and Marriage-Based Restrictions on Surrogacy

Marriage has been an important component of social systems worldwide for millennia. Its value to contemporary American society is primarily as a socially sanctioned locus for sexual activity, procreation, and support for children. Despite the importance of marriage to society generally, an interpretivist stance with regard to marriage-based restrictions on surrogacy demonstrates that such restrictions run afoul of sound social policy. First, surrogacy legislation has nothing to do with the primary purposes of marriage — the legitimation of sexual activity and the legitimation of children. Second, the marital relationship of the intending parents is insufficient to guarantee two-parent support for the child born of surrogacy. Third, marriage-based restrictions on surrogacy

⁶¹ See *id.* at 879.

⁶² Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000) (stating expressive function of law refers to how it signals "the underlying attitudes of a community or society"); see Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

⁶³ See Garrison, *supra* note 30, at 842.

⁶⁴ Garrison, *supra* note 54, at 47 n.32 ("The interpretive approach is consistent with the ideal of public reason as the means by which a society makes decisions."); see Garrison, *supra* note 30, at 843 ("The common law method employed by Anglo-American courts for generations is, of course, another application of the interpretive perspective."); *id.* at 873 ("The methodology could perhaps be described as a form of legal casuistry. Certainly it bears a strong resemblance to the traditional process of analogical reasoning utilized by judges."); *id.* ("The example of judicial decisionmaking helps to differentiate the interpretive approach from both the top-down methodology and the intuitive approaches . . ."); *id.* at 875 ("[The] process engaged in by judges offers an excellent model for a lawmaking heuristic . . ."); *id.* at 876 (stating that national commission's approach "strongly resembled the traditional process of judicial decisionmaking").

⁶⁵ At least one commentator has labeled this level of scrutiny "rational basis with bite." Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

⁶⁶ *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

do not encourage marriage. Finally, and perhaps most importantly, marriage-based restrictions on surrogacy conflict with interpretivism's commitment to consistency and neutrality in the law. For all of these reasons, marital status exclusions in the law of surrogacy lack the legal integrity that is interpretivism's overriding objective.

a. Sexual Intercourse

Marriage apologists tend to extol marriage with great generality. It has been lauded as the foundation of the family, as essential to the advancement of civilization and propagation of humanity, and even as critical to economic prosperity. While it is tempting to agree with such globalizing statements, the purpose of marriage, according to a meticulously documented article by Professor Sally Goldfarb, is heterosexual intercourse.⁶⁷ Goldfarb's assiduous research into this issue is further bolstered by its consistency with the longstanding belief that sexual activity outside of marriage is corrosive of the social fabric. Marriage has always been thought to be an effective repository for sexual energies that, if left unregulated, would wreak havoc on the integrity of society.⁶⁸ As a theoretical and practical matter, marriage makes sex legitimate for and readily available to the marital couple, diminishing their need to expend energy and resources pursuing sexual partners.

It goes virtually without saying that these beliefs about the proper place for sex have nothing to do with assisted reproduction. Indeed, procreation via sexual intercourse has explicitly been defined as lying beyond the scope of assisted reproduction.⁶⁹ It would defy logic, then, to argue that marriage-based restrictions on assisted reproduction have the effect of extolling the value of marriage as a repository for heterosexual intercourse. Limiting forms of assisted reproduction to married couples,

⁶⁷ See Sally F. Goldfarb, *Family Law, Marriage, and Heterosexuality: Questioning the Assumptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 285, 287-88, 293, 295-96, 301 (1998).

⁶⁸ This notion has resonance in religious writings explaining how "[m]arriage takes the demon out of sexual intercourse." JAMES H. OLTHUIS, I PLEDGE YOU MY TROTH 33 (1975). It is also consistent with the notion that marriage is not simply for procreation, but is "first of all for the partners." *Id.* at 45. The Catholic Church's Canon 1055 embodies a similar idea: marriage is "ordered toward the good of the spouses and the procreation and education of children." MICHAEL SMITH FOSTER, ANNULMENT: THE WEDDING THAT WAS: HOW THE CHURCH CAN DECLARE A MARRIAGE NULL 12 (1999). Indeed, an ecclesiastical annulment on the basis of impotence is not available for sterility but simply for an inability to perform sexual intercourse. See *id.* at 17; cf. JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 107 (1997) (presenting John Calvin's views on sterility and impotence).

⁶⁹ See UNIF. PARENTAGE ACT §§ 701, 801(d), 9B U.L.A. 355 (2001).

thus, cannot be justified as advancing marriage's role in the regulation of human sexual relations.

b. Legitimation of Children

Commentators have said that marriage's value to society lies in part in its power to legitimate offspring. Marriage-based restrictions on surrogacy, then, may be an attempt to channel legitimacy of birth. If it is, it fails to recognize that allowing only married couples to commission surrogates does not achieve legitimacy of birth. In fact, were legitimacy of birth still of importance in the regulation of family relationships, inheritance, and other matters, it would be necessary to acknowledge that no child born of a gestational agreement is the legitimate child of the commissioning couple. This is because the law has never recognized legitimation based on the fact of marriage alone. Legitimation by marital presumption has traditionally depended upon a child being born to a marriage.⁷⁰ This, in turn, has required that the wife perform at least the gestational function of reproduction.⁷¹ Moreover, the marital presumption of legitimacy is a presumption of paternity, not of maternity.⁷² This is not to suggest that presumptions of paternity do not apply to the establishment of maternity,⁷³ but simply that marriage does nothing to alter the presumption that the woman who gestates a child is the child's mother. By way of illustration, if a single woman gives birth to a child by a married man, the man's wife is not presumed to be the child's mother, even if the man's wife contributed her egg to the arrangement.⁷⁴

Not only do marital restrictions on surrogacy do nothing to promote legitimacy of birth, but the very argument that they are intended to do so

⁷⁰ See UNIF. PARENTAGE ACT § 204 (a)(1)-(4) & cmt., 9B U.L.A. 16 (Supp. 2005) (describing "simplest" and "best-known" marital presumption of paternity).

⁷¹ See UNIF. PARENTAGE ACT § 204 cmt., 9B U.L.A. 16 (Supp. 2005) (explaining that marital presumption of paternity is based on "birth of a child during the marriage between the mother and a man").

⁷² Compare UNIF. PARENTAGE ACT § 201(a)(1)-(4), 9B U.L.A. 15 (2005) (making no mention of marriage as relevant to establishment of maternity), with UNIF. PARENTAGE ACT § 204(a)(1)-(4), 9B U.L.A. 16 (2005) (making marriage relevant to establishment of paternity).

⁷³ Although rare, cases where a presumption of maternity is raised in favor of a woman with no biological link to the child do exist. See, e.g., *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002). The presumption in that case, however, was in no way related to the woman's marital status. *Id.*

⁷⁴ See, e.g., *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003); *Doe v. Doe*, 710 A.2d 1297 (Conn. 1998).

strains credulity. NCCUSL itself originally promulgated the UPA to end discrimination against nonmarital children, and this laudable objective has been carried forward in the UPA's new formulation.⁷⁵ It would be contradictory to issue a pronouncement of the inherent dignity of all children regardless of their birth status and simultaneously to express concern about the legitimacy of children born of surrogacy. Moreover, such a stance would render the UPA internally inconsistent: article 6 of the UPA permits alleged fathers to rebut the marital presumption of legitimacy, while article 7 promotes single motherhood by denying the paternity of sperm donors.⁷⁶ Thus, marriage-based restrictions on surrogacy are not intended to, and moreover, cannot ensure legitimacy of birth.

c. Two-Parent Support

Perhaps the most instantly appealing justification for marriage-based restrictions on surrogacy is the strong societal policy that favors charging at least two persons with support obligations for each child. Identifying the two parents at the earliest possible point in time makes it as unlikely as possible that the child will at any time become a public charge.⁷⁷ Marriage is without a doubt a particularly efficient tool by which to ground two-parent support. When a child is born to a married couple, gestational and marital presumption parentage are called into play and the law requires the couple to support the child. Under this rubric, there is no point in time when the identity of those responsible for the support of the child is in doubt.⁷⁸ Although it does not necessarily follow, this assumption about marriage brings along with it the view that unmarried couples, by contrast, will be less likely to provide children with two-parent support. This view applies in particular to unwed fathers, whose paternity is not always established as a legal matter.⁷⁹

As we have already seen in Part I.C.2.b, marital presumption parentage applies in surrogacy cases in ways the parties to gestational

⁷⁵ See UNIF. PARENTAGE ACT art. 2, § 202, 9B U.L.A. 315-20 (2001) (“[C]hildren born to parents who are not married to each other have the same rights . . . as children born to parents who *are* married to each other.”).

⁷⁶ UNIF. PARENTAGE ACT §§ 602, 702, 9B U.L.A. 355 (2001).

⁷⁷ Aside from the interest in child support, the two-parent model seems driven by the idea that each child should have one mother and one father, no more and no less. This basis for justifying marriage-based restrictions on surrogacy is discussed *infra* Part I.C.2.e.

⁷⁸ *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (equating marriage with bearing of full responsibility for children born to marriage).

⁷⁹ See *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

agreements wish to circumvent. When a child is born to a surrogate, the marital presumption points to the surrogate mother and her husband or the surrogate and the genetic father as the responsible parties. Two-parent support for children born of surrogacy, then, is not dependent upon restricting surrogacy to married couples. The aim of surrogacy legislation is not to identify the parties responsible for a child in the first instance. The objective is instead to shift responsibility for the child to other parties by overcoming the traditional presumptions and decreeing a different set of obligations. A state can achieve this objective in at least three different ways: (1) by requiring that the intended parents adopt the child after the child's birth,⁸⁰ (2) by mandating state approval of surrogacy agreements at the time of their creation and decreeing their ramifications,⁸¹ or (3) by issuing prebirth declarations of parentage.⁸² Under all three approaches, two-parent support is achieved through provisions that have nothing to do with marriage. They quite plainly involve judicial intervention that is *not* required when a married couple has a child via traditional means. Under the UPA's article 8 and similar statutory schemes, for example, the intending parents, whether married or not, must embody their intentions in a written document and submit this document to the court for judicial pre-approval.⁸³ If they fail to do so, they are not relieved of an obligation to support the child. The document is simply given no effect and traditional parentage rules apply.⁸⁴ Even if they are not recognized as the child's legal parents at its birth, the intending parents are still liable for support under the specific

⁸⁰ See *In re Baby M.*, 537 A.2d 1227, 1240-41, 1243-46 (N.J. 1988) (basing determination of surrogacy contract's invalidity on its inconsistency with adoption law).

⁸¹ See, e.g., UNIF. PARENTAGE ACT art. 8, 9B U.L.A. 355-60 (2000).

⁸² See, e.g., *Kristine H. v. Lisa R.*, 117 P.3d 690, 695-96 (Cal. 2005) (explaining court's jurisdiction to issue prebirth declarations of parentage); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1135 (Mass. 2001); *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 64 (1994). But see *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (disapproving of prebirth declarations as contrary to adoption law).

⁸³ See UNIF. PARENTAGE ACT § 801(a), 9B U.L.A. 362 (2001) (providing that agreement must be in writing); UNIF. PARENTAGE ACT § 803, 9B U.L.A. 364 (2001) (explaining requirements for judicial pre-approval of gestational agreement); FLA. STAT. ANN. § 63.212(1)(h) (West 2005) (providing for review by court of preplanned adoption arrangements, and requiring filing of petition in connection with preplanned adoption agreement); FLA. STAT. ANN. § 63.213(2) (outlining required terms of preplanned adoption agreement); N.H. REV. STAT. ANN. §§ 168-B:21 to -:25 (1994) (laying out judicial preauthorization provisions and mandatory signed surrogacy contract terms); VA. CODE ANN. § 20-159 (2000) (providing for validity of written surrogacy contracts); VA. CODE ANN. § 20-160 (regarding judicial preauthorization provision).

⁸⁴ See UNIF. PARENTAGE ACT § 809(a), 9B U.L.A. 369 (2000); VA. CODE ANN. §§ 20-158(E), 20-162.

terms of article 8 if they refuse to adopt the child.⁸⁵ Also, if the intending parents decide not to comply with the terms of the agreement at any time that it remains executory after impregnation of the surrogate, their obligation to support the child is unaffected.⁸⁶ Consequently, even if the intending couple's intentions toward the child change, they will not be relieved of their support obligation. Similar obligation attaches if the marriage of the intending parents ends in separation or divorce.⁸⁷ In the context of surrogacy, responsibility must be legally determined completely apart from traditional parentage rules. These provisions underscore the lack of familiar presumptions applicable to surrogacy cases.

This elaborate set of regulations demonstrates the absence of any role for marriage in either determining or solidifying support obligations for children born of surrogacy. Instead, the rules of obligation in article 8 are simply necessary substitutions for support obligations that would otherwise flow automatically from well-established presumptions of parentage, including those grounded in marriage, that the parties to surrogacy agreements wish to avoid. The rules mirror what Professor June Carbone has found to be a trend in other areas of family law. Carbone notes that there is a trend in the law to measure responsible parenthood less in terms of marriage and more in terms of demonstrating commitment to children by providing "both the material things that money can buy as well as love and attention, supervision and support."⁸⁸ Financial and emotional maturity are, of course, precisely what a court validating a gestational agreement wants most to ascertain about the intending parents. Evidence of marital status, though, is neither necessary nor sufficient for establishing these traits. Since the support provisions of article 8 and other similar regulations ensure two-parent support for *any* child born of a gestational agreement and do not look to marriage for any reason having to do with such support, interpretivism sustains the rejection of marriage-based restrictions on surrogacy.

⁸⁵ See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) ("[I]ndividuals who enter into nonvalidated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child."); UNIF. PARENTAGE ACT § 809(c), 9B U.L.A. 369 (2000).

⁸⁶ See N.H. REV. STAT. ANN. § 168-B:8(IV) ("A breach of a surrogacy contract by the intended parents shall not affect their support obligation.").

⁸⁷ See VA. CODE ANN. § 20-158(C).

⁸⁸ See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 51, xii, xiii, xv (2000).

d. Encouragement of Marriage

As a matter of public policy, we value marriage in part because we believe married couples will discharge a set of responsibilities toward each other and that their doing so will have many salutary effects on our society. Consequently, we bestow upon married couples “numerous benefits . . . and protections,”⁸⁹ with the intention of encouraging people to become and stay married. The vast majority of these protections and benefits have been associated with marriage for a very long time. They have become firmly established as indelible markers of marriage’s revered status. Perhaps marriage-based restrictions on surrogacy are drawn with this policy in mind. If so, these restrictions are in complete accord with established public policy.

While it has been true as a historical matter that along with marriage come numerous privileges and benefits, these benefits have remained relatively fixed through time. It is a notably rare occurrence that married couples are made the sole beneficiaries of newly created privileges. Instead, recent legislative initiatives to encourage or benefit marriage have taken one of three forms: (1) clarifying the definition of marriage at both the federal and the state levels, (2) lowering barriers to entry, and (3) lowering barriers to exit.

Those advocating for clarification that marriage may exist only between two persons of opposing genders seek less to benefit individual married couples than to reaffirm heterosexual marriage as the organizing principle essential to the integrity of society.⁹⁰ Much of the language developed by this initiative describes the “natural” or “traditional” family as attainable only through the marriage of one man with one woman.⁹¹ At the same time, any elitist or exclusionary overtones that might emanate from such a conception of marriage are tempered by making marriage easily available. Marrying demands less mental capacity than does either executing a will or entering into a simple contract.⁹² Even minors, with proper parental or court approval, are

⁸⁹ Act Biennium 1999-2000 Session, § 1(4), 2000 Vt. Laws 91 (explaining legislative findings relating to civil unions); see also WOLFSON, *supra* note 8, at 4-5 (2004) (mentioning General Accounting Office’s catalog of 1138 ways “married people are accorded special status under federal law”).

⁹⁰ See the discussion of the marriage movement, *infra* Part III.

⁹¹ See Tom McFeely, *Save the Family Save the World*, REP. NEWSMAGAZINE, http://www.nyx.net/~jkalb/rants/family_congress.html (last visited Jan. 15, 2005).

⁹² See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 165 (6th ed. 2000).

permitted to marry.⁹³ The court system has been cooperative in making marriage easily available. In his research, Professor Milton Regan has discerned a judicial trend toward applying a more exacting level of scrutiny to state regulation of marriage than was true forty years ago.⁹⁴ Barriers to exit also have been dramatically dismantled by the widespread appearance of no-fault divorce provisions throughout the 1970s. The impact of such provisions is the subject of intense debate.⁹⁵ Some expert commentators firmly believe that no-fault regimes encourage marriage if only because removing the coercive aspects of marriage helps make it more palatable to those who would otherwise be hesitant to give it a try.⁹⁶ Furthermore, no-fault divorce does not conflict with important policy favoring remarriage.⁹⁷ Statistics support, at the very least, the view that the effect of no-fault divorce provisions on the marriage rate may be benign. Despite the rise in the number of divorces that no-fault provisions have made possible in the last thirty years, the decline in the marriage rate is as likely to be explained by “the delaying of first marriage until older ages.”⁹⁸ Indeed, perhaps *because* of the existence of no-fault divorce, marriage is at present experiencing an increase in popularity.⁹⁹

⁹³ See HARRY D. KRAUSE & DAVID D. MEYER, *FAMILY LAW IN A NUTSHELL* 38-39 (2003).

⁹⁴ See Milton C. Regan, Jr., *Marriage at the Millennium*, 33 *FAM. L.Q.* 647, 652, 655 (1999) (describing present application of more demanding level of scrutiny to state regulation of marriage than was applied 40 years ago). Professor Mary Ann Glendon attributes this more demanding level of scrutiny to the recognition of marriage as a “fundamental right” in *Loving v. Virginia*, 388 U.S. 1 (1967). See Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 *VA. L. REV.* 663, 668 (1976).

⁹⁵ See, e.g., Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage and Its Predecessors*, 16 *STAN. L. & POL’Y REV.* 135, 143, 150, 152 (2005) (lamenting absence of expressions of concern about children in discussions that led to widespread enactment of no-fault divorce provisions); F. Carolyn Graglia, *A Non-Feminist’s Perspectives of Mothers and Homemakers Under Chapter 2 of the ALI Principles of the Law of Family Dissolution*, 2001 *B.Y.U. L. REV.* 993, 994, 998, 1004 (2001) [hereinafter Graglia, *Non-Feminist*]; F. Carolyn Graglia, *The Housewife as Pariah*, 18 *HARV. J.L. PUB. POL’Y* 509, 510, 512 (1995) [hereinafter Graglia, *Housewife*].

⁹⁶ See Richard L. Abel, *Law Books and Books About the Law*, 26 *STAN. L. REV.* 175, 226 (1973) (reviewing MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* (1972)) (examining Rheinstein’s view of divorce as social good that promotes “the capacity for infinite progress”).

⁹⁷ See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 *MO. L. REV.* 527, 584 n.415 (2001).

⁹⁸ See THE NATIONAL MARRIAGE PROJECT, *THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 16 (2005), available at <http://marriage.rutgers.edu/Publications/SOOU/SOOU2004.pdf>.

⁹⁹ Barbara Dafoe Whitehead & David Popenoe, *For Richer and for Poorer, Marriage Makes a Comeback*, *BOSTON GLOBE*, May 12, 2002, at E8. *But see* David Blankenhorn, *The Marriage*

There is good reason to doubt that marriage-based restrictions on surrogacy encourage marriage. NCCUSL initially included a marriage requirement in its uniform surrogacy provisions not to encourage marriage but out of sympathy for married couples who, after struggling for years to procreate only to discover they had waited too long to adopt, turned to surrogacy as a last act of desperation.¹⁰⁰ From this perspective, gestational surrogacy actually appears to be something that most couples would *not* want from marriage. Restricting gestational surrogacy to married couples, then, would have little impact on a couple's decision to marry. Although marriage-based surrogacy restrictions provide little encouragement to marry in the first instance, they perhaps provide an incentive for couples near the end of a long and painful journey of infertility to *stay* married so that they may pursue surrogacy. That aim would certainly comport with the public policy of fostering the longevity of intact marriages. That aim, though, could just as effectively be accomplished in the absence of marriage-based restrictions on surrogacy. It is quite hard to see, in other words, how the inclusion of *unmarried* couples in surrogacy legislation would inspire couples who are already married to divorce before entering into a surrogacy agreement. As a final possibility, then, marriage-based restrictions might actually force unmarried couples, who have not been able to procreate and now want to execute a gestational agreement, to get married at last. Such a scenario is not impossible to envision, though it would no doubt very seldom arise. In any event, a marriage entered into for the sole purpose of executing a gestational agreement is probably not at all what the policy of encouraging marriage is meant to accomplish. At the very least, such a marriage is not the "deserving" one NCCUSL was referring to when it initially included marriage-based restrictions in the 2000 UPA.¹⁰¹ In the final analysis, marriage-based restrictions on surrogacy appear to have very little or nothing to do with encouraging marriage.

e. Concerns About Consistency and Neutrality

Interpretivism requires social policy to exhibit consistency and neutrality if it is to command broad public support.¹⁰² In the context of

Problem, AM. EXPERIMENT Q., Spring 2003, at 61, 66, available at http://www.propositionsonline.com/html/the_marriage_problem.html (explaining that belief in "marriage turnaround" is based on weak and inconclusive demographic evidence).

¹⁰⁰ UNIF. PARENTAGE ACT art. 8, 9B U.L.A. 355-60 (2001).

¹⁰¹ *See id.* (emphasis added).

¹⁰² *See Garrison, supra* note 30, at 874, 880, 881.

surrogacy, interpretivism calls marriage-based restrictions into question. It does this on the basis of both their inconsistency with well-settled constitutional principles related to procreative liberty and their differential treatment of marital and nonmarital children.

(1) Restrictions on Access to Reproductive Options

Although it is permissible to limit the procreative freedom of prisoners and probationers,¹⁰³ it is not consistent with the American constitutional tradition to condition procreative liberty upon marital status. Even if one could argue that a case like *Skinner v. Oklahoma* expresses an essential linkage between marriage and procreative liberty,¹⁰⁴ such a reading ultimately falters under the weight of more recent Supreme Court pronouncements guaranteeing procreative liberty to the married and the unmarried alike. The marriage-procreation link is also absent from parental-autonomy jurisprudence. *Parham v. J.R.*, for example, nowhere suggests a relationship between marriage and the presumption that parents act in the best interests of their children.¹⁰⁵ If the presumption were dependent upon a marital relationship, *Parham* would have asserted as much, since the Supreme Court recognized the procreative rights of unmarried persons several years before it decided that case.¹⁰⁶ Unmarried parents benefit as fully from the presumption as do their married counterparts.

Without a link between marriage and procreative liberty, the issue for surrogacy is whether it falls within the ambit of procreative freedom. If it does, it falls beyond of the realm of behavior that the state can restrict on the basis of marital status. Some commentators and courts believe that assisted reproduction, including surrogacy, is constitutionally protected procreation. Professor John Robertson, perhaps the best known commentator on the constitutional dimensions of assisted reproduction, has concluded that “collaborative reproduction [including surrogacy] is an important part of procreative liberty.”¹⁰⁷ Some courts hold similar views on assisted reproduction, at least in part. The New Jersey Supreme Court, for example, has stated that artificial insemination

¹⁰³ *Gerber v. Hickman*, 291 F.3d 617, 619 (9th Cir. 2002); *State v. Oakley*, 635 N.W.2d 760 (Wis. 2001).

¹⁰⁴ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”).

¹⁰⁵ See *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979).

¹⁰⁶ See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

¹⁰⁷ JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 145 (1994); see also Garrison, *supra* note 30, at 856.

is a constitutionally protected procreative interest.¹⁰⁸ At least one federal court agrees, and when other federal decisions are considered, it appears there may be support for considering surrogacy to be similarly protected.¹⁰⁹ Insofar as equal protection is concerned, a New York court, in *In re Michael*, stated in dicta that it might be a violation of equal protection for a statute to allow only married women the right to employ assisted reproduction.¹¹⁰ NCCUSL itself has described one of the aims of its newly revamped UPA as the “constitutional protection[] of the procreative rights of unmarried . . . women.”¹¹¹ Older cases and commentary sometimes take a different view. They suggest that surrogacy is a far cry from procreative freedom and is, moreover, unethical.¹¹² Legislation outlawing surrogacy sends the strong message that it is in conflict with important social policies and deeply held values.¹¹³

These various viewpoints on the procreative character of surrogacy leave unresolved the constitutionality of surrogacy. They also indicate that, as a method of having children, surrogacy is not widely embraced. Given that most jurisdictions have no legislation on surrogacy and, of the ones that do, most simply outlaw the practice,¹¹⁴ we realize that our society is at the very least undecided whether surrogacy is acceptable. If interpretivism were merely concerned with the scope of constitutionally

¹⁰⁸ See *In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1988).

¹⁰⁹ *Cameron v. B. of Educ.*, 795 F. Supp. 228, 237 (S.D. Ohio 1991) (artificial insemination); see also *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) (embryo transfer). In *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002), the genetic-parent plaintiffs argued that Utah’s statutorily mandated determination of parentage in surrogacy cases violated their constitutional right to procreative liberty. The court saw the issue less as whether surrogacy was a constitutional right (the statute did not outlaw surrogacy per se, and the court admitted the U.S. Supreme Court had made no pronouncement on the matter, see *id.* at 1275), and more as whether the statute unduly restricted their parental rights by forcing genetic parents to adopt their own children. See *id.* at 1279. In combination, *Lifchez*, *Cameron*, and *J.R.* suggest that procreative liberty encompasses surrogacy, since in all three cases third parties collaborated in the reproductive process. This conclusion is of necessity tentative and may need to be narrowed to say that privacy protection extends only to intending parents who contribute their gametes to the reproductive process. This would mean that both intending parents could have a privacy interest in gestational surrogacy but not traditional surrogacy.

¹¹⁰ See, e.g., *In re Michael*, 636 N.Y.S.2d 608, 609 (N.Y. 1996) (“Nor is the court aware of any distinction, based upon marital status, being mandated by law with regard to a woman’s right to be artificially inseminated. It might very well be unconstitutional for the law to try to make such a distinction.”).

¹¹¹ UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).

¹¹² See, e.g., *Doe v. Attorney Gen.*, 487 N.W.2d 484, 486 (Mich. Ct. App. 1992).

¹¹³ See *Garrison*, *supra* note 30, at 851.

¹¹⁴ See *id.*

protected procreative activity and contemporary views on surrogacy, it would not be offended by the outright prohibition of surrogacy or the reservation of it to married couples. As a matter of our contemporary values, then, an outright rejection of gestational agreements would not offend the interpretive approach.

Furthermore, even where surrogacy is condoned, it may be that marriage-based restrictions, although not encouraging marriage, express a profound respect for marriage. This sentiment was precisely what drove the inclusion of a marriage-based restriction on surrogacy in the 2000 version of the UPA. Indeed, NCCUSL's express position in support of the restriction was that married couples entering gestational agreements are "*the most deserving class of persons* that would participate in these agreements."¹¹⁵ Moreover, legislative initiatives aimed at creating special rights for married couples, albeit rare, are hardly unknown. The Family and Medical Leave Act of 1993, in spite of its stated policy that workplace leave should be available in ways that support family integrity, narrowly defines an "immediate family member" as a "spouse, child, or parent" so as to exclude unmarried couples from the ambit of its protections.¹¹⁶ Married couples received a sweeping exemption from taxation in 1981 when Congress supplemented our unified transfer tax system with the unlimited marital deduction.¹¹⁷ Even President Bush's "healthy marriage initiative" could be construed as a measure enshrining "special rights" for married couples only.¹¹⁸ When Vermont passed its civil union legislation in 2000, the legislature cataloged about thirty ways in which marriage was accorded special status under Vermont law.¹¹⁹ Marriage-based restrictions on surrogacy may simply be another way our society elects to express that marriage is valuable, significant, and revered.

As explained above, however, interpretivism is not concerned merely with one set of contemporary values or constitutional guarantees. Other values, constitutional guarantees, and consistency in the law are equally important. Equal protection, for example, could be raised as a barrier to permitting only married couples to participate in gestational

¹¹⁵ UNIF. PARENTAGE ACT art. 8, 9B U.L.A. 355-60 (2001) (emphasis added).

¹¹⁶ EMPLOYMENT STANDARDS ADMINISTRATION, WAGE AND HOUR DIVISION U.S. DEPT. OF LABOR, FACT SHEET # 28: THE FAMILY AND MEDICAL LEAVE ACT OF 1993, available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm> (last visited Jan. 25, 2006).

¹¹⁷ See DUKEMINIER & JOHANSON, *supra* note 92, at 1043.

¹¹⁸ See *Marriage Proposal*, SALT LAKE TRIB., Jan. 17, 2004, at A10.

¹¹⁹ See VT. STAT. ANN. tit. 15, § 1204 (2004).

agreements.¹²⁰ Even if surrogacy itself is not widely embraced, equality of treatment certainly is and is arguably what lies behind the general trend, sighted by Professor Mary Ann Glendon almost thirty years ago, to erase legal distinctions between the married and the unmarried.¹²¹ Finally, consistency in the law appears undermined by treating nonsexual forms of reproduction differently from sexual forms of reproduction.¹²²

The force of these observations is that it is neither essential to determine whether surrogacy is a fundamental right nor is it essential to worry that surrogacy is not a widely embraced method of reproduction in order to establish that a state that chooses to endorse surrogacy must do so in a way that does not exclude unmarried couples. The fact that our legal system condones discrimination on the basis of marital status, unless that discrimination lacks a rational basis, does nothing to undermine this conclusion. For social policy to achieve broad social acceptance, interpretivism demands that it aim higher than mere rationality. In other words, whereas “an uncommonly silly law” might have a rational basis to shield it against constitutional attack, such a law would not survive under interpretivism’s more exacting microscope. Even if discrimination on the basis of marital status is likely to survive low-level rational basis scrutiny in many contexts, society’s commitment to equal treatment and interpretivism’s commitment to consistency in the law challenge the integrity of embodying such discrimination in surrogacy regulation.

(2) Equal Treatment of Nonmarital Children

A final problem with marriage-based restrictions on surrogacy is their inconsistency with interpretivism’s commitment to neutrality. As explained above, these restrictions are neither intended to have nor do they have the effect of promoting legitimacy of birth.¹²³ In addition, they fail to play a role in securing child welfare.¹²⁴ To the extent that these restrictions are meant to function expressively to create the illusion of legitimacy of birth, they nonetheless run afoul of what are now firmly established constitutional and social commitments to equal treatment.¹²⁵

¹²⁰ See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

¹²¹ Glendon, *supra* note 94, at 665.

¹²² See Garrison, *supra* note 30, at 904.

¹²³ See *supra* notes 70-76 and accompanying text.

¹²⁴ See *supra* notes 77-88 and accompanying text.

¹²⁵ See KRAUSE & MEYER, *supra* note 93, at 104.

In brief, the law should be neutral toward a class of persons that is blameless in incurring unfavorable treatment.¹²⁶ Regulating surrogacy to permit only the birth of children who appear to be legitimate undermines neutrality. It does so by perpetuating the very legitimacy/illegitimacy distinction that has been fully discredited at the highest level of our judiciary.¹²⁷ Not only would such regulation be inimical to equal treatment, but it would also be an improper use of the law to give public effect to private biases.¹²⁸ Thus, any purpose of using a marriage requirement to promote legitimacy of children is out of step with constitutional principles and contemporary views of children's rights. Moreover, it is not in keeping with the need for neutrality in the formulation of sound social policy.

The exclusion of unmarried couples from entering into surrogacy agreements is unjustified when examined through the lens of interpretivism. The exclusion does not encourage marriage or promote the purposes of marriage. Instead, it appears to conflict with important constitutional tenets opposed to state interference with procreative choices and provides no corresponding enhancement of our society's interest in securing two-parent support for each child. At the same time, the exclusion undermines significant commitments to consistency and neutrality in the law that are the hallmarks of sound social policy. Therefore, any state considering regulating gestational agreements would be well-advised not to restrict the ability of unmarried couples to execute such agreements.

II. MARRIAGE AND ADOPTION

As it does in assisted reproduction, marriage plays a prominent role in the law and policy that govern adoption. Marriage's significance in this area of the law is particularly apparent in the sharply contrasting approaches the law assumes toward step-parent and second-parent adoption. Whereas marriage triggers breathtakingly streamlined adoption procedures in step-parent adoption cases, a court may deny a gay or lesbian individual, because she is not married, standing to adopt

¹²⁶ See JOHN DEWITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 114 (2d ed. 2001) (asserting that social stigma of illegitimacy "has never been the fault of the child").

¹²⁷ See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Reed v. Campbell*, 476 U.S. 852, 854 (1986); *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982); *Trimble v. Gordon*, 430 U.S. 762, 775 n.16 (1976); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968).

¹²⁸ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

her domestic partner's child as a co-parent. In the alternative and again in contrast to step-parent adoption cases, a court hearing a petition for second-parent adoption may subject the petitioner to a full battery of requirements for demonstrating her parental fitness.

A. *Adoption and Surrogacy: Comparisons and Contrasts*

The question of how surrogacy should be regulated invariably invites comparisons between surrogacy, of which little regulation exists,¹²⁹ and adoption, which is highly regulated. Although the question has been debated for almost twenty years,¹³⁰ the extent to which surrogacy should track adoption's regulatory model is still far from settled.¹³¹ Some see surrogacy and adoption as substantially congruent in their objectives and, thus, adoption as the appropriate template for surrogacy.¹³² Others find important and even stark differences between the two that inspire them to reject situating surrogacy within an adoption framework.¹³³

Differences of opinion on this matter appear to depend upon whether one believes surrogacy is like adoption because it is not procreative¹³⁴ or less like adoption because it is.¹³⁵ In exercising their procreative liberty, coital progenitors benefit from a presumption of fitness that frees them

¹²⁹ See Associated Press, *Many States Still Lacking Surrogacy Laws*, MSNBC.COM, June 1, 2004, <http://msnbc.msn.com/id/5113759>; *Surrogate Mom's Custody Fight* (CBS News television broadcast July 9, 2004), available at <http://www.cbsnews.com> (search CBSnews.com for video using broadcast's title).

¹³⁰ See, e.g., *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209, 212-13 (Ky. 1986).

¹³¹ See also Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, in *FAMILIES BY LAW: AN ADOPTION READER* 299, 302 (Naomi R. Cahn & Joan Heifetz Hollinger eds. 2004). Compare UNIF. PARENTAGE ACT art. 8, 9B U.L.A. 355-60 (2001) (requiring adoption-like home study to assess fitness of prospective parents) with LD 1851 *supra* note 50 (proposing surrogacy regulation dispensing with adoption-like evaluations of parental fitness and best interests of child).

¹³² See, e.g., *In re Baby M.*, 537 A.2d 1227, 1240, 1241, 1243-46 (N.J. 1988) (basing determination of surrogacy contract's invalidity on its inconsistency with adoption law); *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000).

¹³³ See, e.g., *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1138 (Mass. 2001), *cited in* *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1288 (D. Utah 2002).

¹³⁴ Adoption, a nonprocreative quest for parenthood, is not a constitutionally protected right. See *Griffith v. Johnston*, 899 F.2d 1427, 1437 (5th Cir. 1990); *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. 2001) (Payne, J., concurring).

¹³⁵ It remains the subject of considerable debate whether assisted reproductive techniques are exercises of procreative liberty. There has been no pronouncement binding on all states on this issue. See *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992). If surrogacy is a fundamental right, then restricting its use to married, intending parents is unquestionably inconsistent with contemporary American constitutional guarantees. As discussed above, it is also contrary to sound social policy.

to exercise the parental prerogatives that stem from their act of procreation.¹³⁶ To regulate access to adoption or surrogacy in a particular way, then, becomes a question of to what extent the state should be permitted to pass judgment on one's decision to become a parent.

Surrogacy and adoption *are* similar in many ways. Both typically originate with infertility, provide methods for establishing legal parentage outside of the context of biological relationships,¹³⁷ and invest one's intentions to become a parent with legal significance.¹³⁸ Both often involve the presence of third parties in the reproductive process and, thus, raise questions about the importance of genetic and gestational ties to the determination of parentage. Other social policy questions triggered by both adoption and surrogacy are the value of secrecy over transparency,¹³⁹ the commodification of children,¹⁴⁰ and the exploitation of women.¹⁴¹ Finally, both surrogacy and adoption trigger deeply ingrained suspicions and fears about mothers who "reject" their children.¹⁴²

There is also much to distinguish surrogacy from adoption.¹⁴³ The most salient difference is that adoption begins after a child or fetus already exists; surrogacy, however, is used to start the reproductive process in the first place.¹⁴⁴ Adoption, a child-focused service, requires the would-be parents to demonstrate parental fitness and the child's best interests to the satisfaction of the court; surrogacy, an adult-focused service, requires only a showing of fitness to parent.¹⁴⁵ The two are not equally valued by society, given the nearly overwhelming desire for and

¹³⁶ *J.R.*, 261 F. Supp. 2d at 1284 n.24, 1288; ROBERTSON, *supra* note 107, at 31.

¹³⁷ *See generally* PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 119 (1993).

¹³⁸ Madelyn Freundlich, *Adoption and Assisted Reproduction*, in ADOPTION AND ETHICS 2001, at xii (2001). The intent to parent may be insufficient to determine parentage in surrogacy cases. *See, e.g.*, *Belsito v. Clark*, 644 N.E.2d 760, 766 (Ohio 1994).

¹³⁹ *See* Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 398 & n.28.

¹⁴⁰ *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1929 (1987); Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 352 (1991).

¹⁴¹ *See* JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 141-43 (1993).

¹⁴² *In re Baby M.*, 537 A.2d 1227, 1238 (N.J. 1988) (stating surrogacy contract called for termination of maternal rights and adoption by father's wife "regardless of any evaluation of the best interests of the child").

¹⁴³ *See generally* JOAN HEIFETZ HOLLINGER, 3 ADOPTION LAW AND PRACTICE § 14.04 (2004) (discussing alternative forms of reproduction).

¹⁴⁴ *See* *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209, 211 (Ky. 1986).

¹⁴⁵ *See* Freundlich, *supra* note 138, at 19.

bias in favor of genetically-related children.¹⁴⁶ Thus, the possibility of a genetic tie to a child born through assisted reproduction may make that choice appear more understandable and legitimate in a society that extols consanguineous relationships and regards nonconsanguineous relationships with suspicion, if not derision.¹⁴⁷

Since adoption is substantially older than is surrogacy, states regulate adoption much more than they do assisted reproduction.¹⁴⁸ Although existing surrogacy regulation reveals the definite influence of adoption law, adoption law typically requires assessments of both the prospective parents' fitness and the best interests of the child before the adoption becomes final. Existing surrogacy regulation, by contrast, is concerned only with parental fitness. Post-birth assessments of a child's best interests do not occur under existing surrogacy regulation as they do post-placement in adoption.¹⁴⁹

B. *The Role of Marital Status in Adoption Law*

Marriage is not a necessary condition for exercising procreative liberty, nor does the powerful presumption that coital progenitors are fit parents who will act in their offspring's best interests require the progenitors to be married. Yet, marital status is an important eligibility criterion for both adoption and surrogacy. In both contexts, marital status acts, albeit in different ways, both procedurally as a standing requirement and substantively as a measure of parental fitness. As we saw in Part I, surrogacy regulation nearly invariably permits only married couples to engage surrogates to help them have children. Although adoption law does not require adoptive parents to be married, it goes a long way toward expressing a preference for married couples. Adoption law generally prohibits an unmarried couple from adopting an unrelated child jointly,¹⁵⁰ and a single person may adopt only where a willing

¹⁴⁶ See *id.* at 2-3; see also Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, in FAMILIES BY LAW: AN ADOPTION READER, *supra* note 131, at 313, 315 (discussing scope of "genetic essentialism").

¹⁴⁷ See Elizabeth Bartholet, *Adoption and the Parental Screening System*, in FAMILIES BY LAW: AN ADOPTION READER, *supra* note 131, at 72, 73; Irving Leon, *Nature in Adoptive Parenthood*, in FAMILIES BY LAW: AN ADOPTION READER, *supra* note 131, at 88 (stating there exists a "prejudice, often subliminal but pervasive, against" nonbiological parenthood").

¹⁴⁸ See Freundlich, *supra* note 138, at 75.

¹⁴⁹ See Storrow, *supra* note 97, at 661 n.446.

¹⁵⁰ But see *In re Carl*, 709 N.Y.S.2d 905, 910 (N.Y. 2000); *In re Joseph*, 684 N.Y.S.2d 760 (N.Y. 1998) (permitting stranger adoption by unmarried couple). Courts have allowed two individuals not in an intimate relationship to adopt the same child. See, e.g., *Sharon S. v. Superior Court*, 2 Cal. Rptr. 3d 699, 719 (Cal. 2003) (discussing kinship adoptions); *In re*

married couple is lacking.¹⁵¹ Under the view of adoption and surrogacy as mere privileges, legislation denying standing on the basis of marital status is not constitutionally suspect, even though it may not satisfy the more exacting rigors of interpretivism.¹⁵² Nonetheless, despite our societal commitment to the institution of marriage, the reason why the privilege of adoption is not always reserved for married couples is that such a bright-line rule will fail to serve the interests of children in all cases, in contrast to the view of some that institutionalized care for children is preferable to their being raised by unmarried parents.¹⁵³

Despite the fact that one need not be married to adopt, marriage does impose certain constraints on how adoption proceeds. For example, the spouse of a married person who wishes to adopt must join the petition.¹⁵⁴ Under step-parent adoption provisions, a parent whose spouse wishes to adopt her child need not terminate her parental rights.¹⁵⁵ Unmarried couples are considered singles and, as mentioned above, in most jurisdictions are not permitted to adopt jointly. In certain jurisdictions, the legally recognized parent of a child may consent to the adoption of the child by the parent's nonmarital partner. Known as "[s]econd or co-parent adoption,"¹⁵⁶ such a procedure can be used where the child is

Michael, 636 N.Y.S.2d 608, 609 (N.Y. 1996) (ordering adoption process to move forward where petitioner was prospective adoptive child's former step-father and biological mother would retain her parental rights). In *In re A.R.*, 378 A.2d 87, 88 (N.J. 1977), the court permitted an unwed father to adopt his own child as a "stepfather" where he was prevented from marrying the mother because of her incapacity. *Id.* A Louisiana court has rejected the application of biological parents to adopt their own child. See *In re Meaux*, 417 So. 2d 522 (La. Ct. App. 1982).

¹⁵¹ See HOLLINGER, *supra* note 143, § 3.06[5] (noting in discussion of increasing number of single-parent adoptions that married couples may not adopt special-needs children); SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 174 (2003) (explaining that the force of marriage as a placement factor is particularly evident in the adoption of healthy white newborns); Garrison, *supra* note 30, at 907 (explaining that adoption agencies favor married couples and "allow [] single-parent adoptions only in the case of hard-to-place children"). See generally Barthelet, *supra* note 147, at 73 ("It is only in the area of adoption that our system proudly proclaims not simply the right to discriminate [on the basis of marital status and sexual orientation] but the importance of doing so.").

¹⁵² See *supra* notes 54-66 and accompanying text.

¹⁵³ See GLENN T. STANTON, *WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY* 171 (1997) ("Orphanages have worked well in the past. They shouldn't be ruled out in the present."); William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 *CAP. U. L. REV.* 787, 788 (2003) (recommending institutionalized care for adoptable children in absence of "ideal" heterosexual married couples).

¹⁵⁴ HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 908 (1988).

¹⁵⁵ See Hollinger, *supra* note 131, at 235.

¹⁵⁶ *Id.*

biologically related to the parent. The procedure can also be employed to permit the unmarried couple to adopt the same child, not jointly but in tandem. However, new laws in some states may outlaw adoptions by cohabiting unmarried couples altogether, even adoption in tandem. The best interests of children is declared by these jurisdictions never to lie with unmarried parents.¹⁵⁷

C. Step-Parent and Second-Parent Adoption

The special cases of step-parent and second-parent adoption are especially good lenses through which to examine more closely how marital status functions in adoption. The successful completion of either procedure allows adopted children to have at least two legally recognized parents.¹⁵⁸ But the marital status of the petitioners influences in very different ways how each type of case makes its way through the legal system.

1. Step-Parent Adoption

Step-parent adoption is recognized in all states and permits a parent's new spouse to adopt and become a coparent of the child. It is typically engrafted upon an adoption statute as an exception to the rule that a child's former parents' parental rights must be terminated before the adoption can be approved.¹⁵⁹ In this way, step-parent adoption differs from "stranger" adoption. The right of the child to inherit from or through the parent whose rights are terminated varies from state to state.¹⁶⁰

The typical adoption trajectory takes the prospective adoptive couple through an initial home study, a waiting period, and a post-placement home study before a hearing is commenced and a final decree issued.¹⁶¹

¹⁵⁷ See MISS. CODE ANN. § 93-17-3(2) (2005); UTAH CODE ANN. § 78-30-1(3)(b) (2000).

¹⁵⁸ See *In re Sharon S.*, 2 Cal. Rptr. 3d 699, 703 n.2 (2003).

¹⁵⁹ See, e.g., *Lee v. Kepler*, 197 So. 2d 570, 573 (Fla. Dist. Ct. App. 1967).

¹⁶⁰ Compare 20 PA. CONS. STAT. § 2108 (2005) (severing right to inherit from natural parent but not other natural kin), with MD. CODE ANN. EST. & TRUSTS § 1-207(a) (West 2005) (severing right to inherit from and through natural parent), and TEX. PROB. CODE ANN. § 40 (Vernon 2005) (retaining inheritance rights). The Uniform Probate Code severs the right of adopted children to inherit from and through their natural parents except in the case of step-parent adoption. See UNIF. PROBATE CODE § 2-114(b) (Vernon 2005).

¹⁶¹ The trend is toward more evaluation of the adoptive couple and the placement, making pre- and post-placement home studies increasingly mandatory. See, e.g., TEX. FAM. CODE ANN. § 162.003 (Vernon 2005); UNIF. ADOPTION ACT pref. note (5) ("[P]lacement . . . as well as post-placement evaluations of prospective adoptive parents are required . . ."); see UNIF. ADOPTION ACT § 2-101 cmt. (noting increase in number of states requiring both

Step-parent adoption provisions, however, streamline the process in order to give great weight to a parent's spouse's petition to adopt the child. Most significant is that, in contrast to the trend mandating pre- and post-placement home studies in adoption cases, such evaluations and even waiting periods are routinely waived in step-parent adoption cases.¹⁶² Waiver occurs unless the adoption is contested.¹⁶³ Moreover, the duration of the marriage is typically of no significance in step-parent adoption,¹⁶⁴ though some states do impose a waivable requirement that the marriage have endured for at least one year.¹⁶⁵

The fact that the petitioner already lives with the child before an adoption petition is filed accounts in some measure for relaxing typical adoption requirements in step-parent adoption cases.¹⁶⁶ In this context, it is said that a pre-placement assessment would not "fit the facts" of the case.¹⁶⁷ But a post-placement study, though it *does* fit the facts, is also not required.¹⁶⁸ Naturally, such a lack of evaluation does not free a court from its responsibility to make a best-interests determination in step-parent adoption cases.¹⁶⁹ However, without the objective evaluations typically required in adoption, the body of evidence available for making such a determination will understandably be under the control of the petitioners themselves.¹⁷⁰ This will thus likely reflect only favorably on them¹⁷¹ and will typically lack assessments by independent child welfare professionals.¹⁷² Even more disconcerting is that no one present at the hearing will be inspired to ask the court to take judicial notice of studies showing that children are at greater risk of harm at the hands of step-

pre- and post-placement evaluations).

¹⁶² KATZ, *supra* note 151, at 175; see *In re Galen*, 680 N.E.2d 70, 73 n.2 (Mass. 1997) (citing REPORT OF THE CITIZENS' TASK FORCE ON ADOPTION FOR THE COMMONWEALTH OF MASSACHUSETTS (1996)).

¹⁶³ See, e.g., *In re Wagner*, No. 97-T-0224, 1999 WL 689971, at *32 (Ohio Ct. App. June 30, 1999) (disapproving of truncated evaluation in contested step-parent adoption case).

¹⁶⁴ See *In re Adoption No. 90072022/CAD*, 590 A.2d 1094 (Md. 1991); Douglas E. Abrams & Sarah H. Ramsey, *A Primer on Adoption Law*, JUV. & FAM. CT. J., Summer 2001, at 23, 25.

¹⁶⁵ See *In re Webber*, 859 P.2d 1074, 1076 (N.M. Ct. App. 1993) (construing one-year requirement not to be jurisdictional).

¹⁶⁶ See *In re Adoption No. 90072022/CAD*, 590 A.2d at 1095 n.2.

¹⁶⁷ See UNIF. ADOPTION ACT art. 4 cmt., 9 U.L.A. 103 (1999).

¹⁶⁸ See UTAH CODE ANN. § 78-30-3.5(5)(b) (2002); UNIF. ADOPTION ACT § 4-111 cmt., 9 U.L.A. 110 (1999).

¹⁶⁹ See KATZ, *supra* note 151, at 175 (stating, "judicial approval is still required").

¹⁷⁰ See *In re Galen*, 680 N.E.2d 70, 72 (Mass. 1997) (noting that in waiver cases only, evidence submitted to court is evidence "submitted by the petitioners").

¹⁷¹ See *id.* at 74 (O'Connor, J., dissenting)

¹⁷² See *id.* at 72.

parents than they are from biological parents living together or from a biological parent living without a partner.¹⁷³ The studies may well not contemplate the class of step-parents who desire to adopt their step-children,¹⁷⁴ but a mere desire to adopt is insufficient to support a best-interests determination in any adoption context.¹⁷⁵ Moreover, experts have not hesitated to criticize the relaxation of requirements for step-parent adoption as contributing to child abuse in the home.¹⁷⁶

It could be said that in relaxing the requirements for adoption, the law is merely pursuing the constitutionally mandated presumption that the parent will act in the best interests of her child in choosing a new parent for the child. But granting a parent such power would appear anomalous, especially since, under traditional law, legal parentage does not exist in the absence of a genetic, gestational, presumed, or adoptive relationship, and an already legally recognized parent, no matter the force of the best-interests presumption, has no power to vest a new parent of her choice with any of these.¹⁷⁷ What this analysis of step-parent adoption provisions makes clear, then, is that relaxation of the requirements for adoption in this context is due solely to the fact that the legal parent has remarried. In sharp contrast to the traditional adoption trajectory, the quality of the marriage, the duration of the marriage, and especially the quality of the step-parent/step-child relationship are virtually irrelevant to the step-parent adoption decision.

¹⁷³ See WILLIAM J. DOHERTY ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* 17 (Institute for American Values 2002). Succession cases point out how a step-parent's interests can be inimical to his or her step-children's. See, e.g., *Via v. Putnam*, 656 So. 2d 460, 460-61 (Fla. 1995). Moreover, adoption by a step-parent may impair a child's right to inherit from or through either biological parent and may at the very least create intrafamily disharmony. See, e.g., *In re Brittin*, 664 N.E.2d 687, 688-89 (Ill. App. Ct. 1996).

¹⁷⁴ See STANTON, *supra* note 153, at 154 (describing study finding "that adoptive parents were not likely to abuse their children because they actively sought their present role as parents and found it rewarding").

¹⁷⁵ See Garrison, *supra* note 30, at 861 ("Even in cases of adoption . . . intentions are insufficient to effect a rights transfer . . .").

¹⁷⁶ See Abrams & Ramsey, *supra* note 164, at 25.

¹⁷⁷ Employing equitable principles, the American Law Institute's *Principles of the Law of Family Dissolution* contemplate that a legally recognized parent may enter into a coparenting agreement with one who thereafter, through her actions, achieves the status of a de facto or a parent by estoppel. The legally recognized parent would be barred from denying the parental status of the de facto parent or parent by estoppel in a dispute over custody or visitation. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* § 2.03(1)(b) (2000). An appropriate case for the applicability of these principles would be a lesbian couple that jointly decides to raise a child together, arranges for one of them to conceive through artificial insemination, and then assumes joint parenting responsibilities for the child. See *id.* § 2.03(1)(b)(iii) *illus.*

2. Second-Parent Adoption

Second-parent adoption is a procedure whereby a legally recognized parent's committed partner may adopt and become a coparent of the child. It is statutorily permitted in some states.¹⁷⁸ It is, however, more typically justified by provisions authorizing adoption by "any individual,"¹⁷⁹ liberal construction of step-parent adoption provisions,¹⁸⁰ the clear import of or inferences drawn from other express provisions,¹⁸¹ and its consistency with the policy of adoption law.¹⁸² Because step-parent adoption provisions do not directly authorize second-parent adoption, this procedure may be unavailable in states whose statutes mandate that all types of adoption except step-parent adoption result in the termination of parental rights prior to the final decree.¹⁸³ Where termination is not statutorily mandated but is merely expressed as the usual consequence of an adoption, the theory of waiver of statutory rights and benefits permits a court to grant a second-parent adoption with no effect on the original parent's rights.¹⁸⁴

In all, second-parent adoption is recognized in twenty-six states.¹⁸⁵ A handful of other states have concluded that second-parent adoptions are not authorized under their adoption laws, but have otherwise declined to express any opinion about whether such adoptions could serve the best interests of children.¹⁸⁶ Several states, though, have made

¹⁷⁸ See Hollinger, *supra* note 131, at 237.

¹⁷⁹ See, e.g., *In re Sharon S.*, 2 Cal. Rptr. 3d 699, 717 (2003); *In re K.M.*, 653 N.E.2d 888, 893 (Ill. App. Ct. 1995); *In re H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995); *In re R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002); *In re E.O.G.*, 28 Pa. D. & C.4th 262, 265 (Pa. D. & C. 1993).

¹⁸⁰ See, e.g., *In re H.N.R.*, 666 A.2d at 538.

¹⁸¹ See, e.g., *In re Baby Z.*, 699 A.2d 1065, 1072 (Conn. Super. Ct. 1996) (discussing waiver of "statutory parent" requirement); *In re K.M.*, 653 N.E.2d at 894 (interpreting "related child" provision); *In re R.B.F.*, 803 A.2d at 1201 (citing 23 PA. CONS. STAT. § 2901 (2005)) (holding statute provides for waiver of requirements for adoption upon showing that requirements' purposes have otherwise been met or are irrelevant).

¹⁸² See, e.g., *In re Sharon S.*, 2 Cal. Rptr. 3d at 715-20, 729 (Baxter, J., concurring); *In re Baby Z.*, 699 A.2d at 1072; *In re K.M.*, 653 N.E.2d at 895; *In re M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (listing state's interest in stable homes through "permanent placement of children with adoptive families" and "legal protections and advantages that a two-parent adoption provides"); *In re H.N.R.*, 666 A.2d at 538; *In re E.O.G.*, 28 Pa. D. & C.4th at 265.

¹⁸³ See, e.g., *In re Sharon S.*, 2 Cal. Rptr. 3d at 706 (citing *Murdock v. Brooks*, 38 Cal. 596, 602 (1869)); *In re Luke*, 640 N.W.2d 374, 377 (Neb. 2002) (determining child not to be adoptable because not relinquished).

¹⁸⁴ See, e.g., *In re Sharon S.*, 2 Cal. Rptr. 3d at 707, 708, 712.

¹⁸⁵ See HOLLINGER, *supra* note 143, § 3.06[6].

¹⁸⁶ See, e.g., *In re Luke*, 640 N.W.2d at 376.

affirmative strikes against second-parent adoption. Florida explicitly outlaws adoption by gay and lesbian persons.¹⁸⁷ Mississippi bans adoption by same-gender couples.¹⁸⁸ Utah bans adoption by unmarried cohabiting couples.¹⁸⁹ Oklahoma refuses to recognize second-parent adoptions completed in other states; the effect of this refusal is to nullify the legal parenthood of one of the parties to the adoption.¹⁹⁰ Administrative agency rules in Arkansas and Nebraska disqualify gays and lesbians from serving as foster parents, effectively preventing them from adopting children in state care.¹⁹¹

Although analogous to step-parent adoption, second-parent adoption does not require the parent to be married to the party seeking to adopt the child. Thus, second-parent adoption is in most jurisdictions the only mechanism an individual can use to adopt his or her partner's children. For gay and lesbian couples, who cannot marry in most jurisdictions, second-parent adoption is the only way to provide children with protections they would otherwise achieve through step-parent adoption. This legal device has been described as consistent with the reality of children's lives. It has also been calculated to forge the strongest legal bond possible between a child and the adult functioning as the child's parent.¹⁹²

Commentators opposed to second-parent adoption opine that it is contrary to children's best interests,¹⁹³ beyond the competence of family

¹⁸⁷ See FLA. STAT. § 63.042(3) (2005).

¹⁸⁸ See MISS. CODE ANN. § 93-17-3(2) (2005).

¹⁸⁹ See UTAH CODE ANN. § 78-30-1(3)(b) (2005). The Utah legislature passed legislation to prevent judges from construing the broad language of the adoption statute as permitting second-parent adoptions. Critics of these "stealth" adoptions considered them beyond the scope of the legislatively conferred authority to grant adoptions, see Rebecca Walsh, *Blending In*, SALT LAKE TRIB., Dec. 31, 2000, at A1, and as per se not in a child's best interest, see UTAH CODE ANN. § 78-30-9(3)(a) (2005). The new legislation prohibits any unmarried and cohabiting couple from adopting a child jointly or any single person from adopting his cohabiting partner's child. See *id.* "Cohabiting" is specifically defined in the statute as living together and having a sexual relationship. UTAH CODE ANN. § 78-30-1(3)(b). The statute does not expressly forbid adoptions by committed partners living in separate residences and would appear to allow kinship adoptions by relatives living in the same household. *Id.*

¹⁹⁰ See OKLA. STAT. tit. 10, § 7502-1.4(A) (2001).

¹⁹¹ See Mary Bissell, *Ban on Gay Foster Parents Damaging to Children*, ARK. DEMOCRAT-GAZETTE, May 9, 2004, available at <http://www.newamerica.net/index.cfm?pg=article&DocID=1569>.

¹⁹² See Sharon S. v. Superior Court, 73 P.3d 554, 569 (Cal. 2003) (showing no suggestion made by any party, amicus, or court that second-parent adoption cannot achieve objectives of adoption); *id.* at 568-69 (cataloging legal and nonlegal benefits to children adopted through second-parent adoption).

¹⁹³ See Duncan, *supra* note 153, at 798-800; Lynn D. Wardle, *The Potential Impact of*

court judges,¹⁹⁴ and even unnatural and unstable.¹⁹⁵ Other commentators believe second-parent adoptions to be devoid of any serious inquiry into the best interests of the child and based on an erroneous view of adoption as a fundamental right. They criticize second-parent adoptions as precursors of “new and bizarre” family structures that will inexorably lead to judicial recognition of three-, four-, and five-parent families.¹⁹⁶

D. Parental Fitness and Children’s Interests

From a policy perspective, it is impossible not to discern the wide gulf between perfunctory inquiries in step-parent adoption cases and outright prohibitions on second-parent adoption. If nothing more, setting up a procedural obstacle to second-parent adoption deprives the court of making the individualized assessments that the best-interests inquiry contemplates.¹⁹⁷ Inevitably, into this gulf will fall children who would benefit from being adopted by a second parent because they will otherwise never have two legal parents. Particularly poignant are cases of artificial insemination where, as a matter of law in many jurisdictions and as a practical matter in others, a child has only one legal parent.¹⁹⁸ In order that all children benefit from the full legal recognition of their parents, it is time to harmonize the law of step-parent adoption and the law of second-parent adoption.

1. Streamlining: Parental Fitness by Proxy

Emerging from the foregoing discussion of step-parent adoption is the sense that the marriage of a child’s parent raises a presumption that step-parent adoption is in the child’s best interests. Marriage in these cases is strongly linked with the notion of the permanent, loving home that every child deserves. By contrast, the absence of marriage at best carries with it no such notion and at worst suggests that the child will suffer

Homosexual Parenting on Children, 1997 U. ILL. L. REV. 833, 882. Duncan and Wardle also attack second-parent adoption as a restyling of adoption as a fundamental right, see Duncan, *supra* note 153, at 801, and as exaggerations, see Wardle *supra* at 883 (questioning how these extra-legal configurations of adults and children could be characterized as families).

¹⁹⁴ Wardle, *supra* note 193, at 882.

¹⁹⁵ See Emily Wagster, *Bill to Ban Adoptions by Same-Sex Couples Advances*, CLARION-LEDGER (Jackson, Miss.), Feb. 23, 2000, at 5B.

¹⁹⁶ *In re Sharon S.*, 2 Cal. Rptr. 3d at 726 (Baxter, J., concurring and dissenting).

¹⁹⁷ See Abrams & Ramsey, *supra* note 164, at 25 (noting that best interests standard looks to what “would serve the child’s welfare”).

¹⁹⁸ See *In re Sharon S.*, 2 Cal. Rptr. 3d at 718 n.19.

untold indignities that will inevitably be visited on society at large. This conception of the importance of marriage is certainly not unknown in articulations of family policy generally,¹⁹⁹ but an attempt should be made to square its purported importance in step-parent adoption cases with our existing legal tradition. Perhaps a parent's marriage to someone who wishes to adopt her child can be said to raise a presumption of parentage and thereby raise the related presumption that a parent acts in the best interests of his child. A court hearing a step-parent adoption petition could take notice of this presumption and grant the adoption in the absence of any evidence that would rebut it. This speculative explanation for the existence of streamlining in step-parent adoption is admittedly convoluted and forced and finds no support in family law. Perhaps a more convincing explanation is simply that the presumption that legal parents act in the best interests of their children validates any legal parent's choice of another parent for her child. This explanation, though easier to articulate, also has no place among established family law principles. Common to the two explanations is the notion that as long as there is marriage, very little in the way of further inquiry is needed to validate the adoption.

Neither of the foregoing explanations justifies streamlining in step-parent adoption. First, marital presumption parentage requires that the child be born *to* the marriage so as to lend credence to what that presumption supposes about procreative facts. This presumption fails in the step-parent adoption context, since the most basic premise behind marital presumption parentage is absent. If marital presumption parentage cannot be made to fit a possibly procreative context like surrogacy,²⁰⁰ it certainly cannot be made to fit adoption, which wholly lacks any procreative aspect. Second, the presumption that a parent acts in the best interest of her child is not a presumption that *establishes* parentage but one that arises from an already recognized parent-child relationship. The presumption is inoperative where no genetic tie, marital presumption, or already decreed adoption exists. The presumption that a parent acts in the best interests of her child simply has no application to a pending adoption matter.

As we saw in Part I, a marriage requirement in the context of surrogacy fails to serve any justifiable purpose. It also fails to raise any presumptions that we associate with marriage. Thus, streamlining on the basis of marriage in step-parent adoption cases is similarly

¹⁹⁹ See THE NATIONAL MARRIAGE PROJECT, *supra* note 98.

²⁰⁰ See *supra* notes 70-74 and accompanying text.

unprincipled because it also has no basis in familiar parentage presumptions. Furthermore, it does not comport with the need to rigorously evaluate the best interests of the child in every adoption case.

2. Making Children Unadoptable: In Whose Interest?

In contrast to streamlining the procedures undertaken in step-parent adoption cases and rendering the inquiry into the best interest of the child perfunctory at best, second-parent adoption, where permitted, requires the full range of evaluations of the adopted child's best interests to take place. This approach focuses squarely on the interests of children in adoption cases instead of on the relationship or interests of the prospective parents.²⁰¹ Where second-parent adoption is not permitted, only by marrying the domestic partner may an individual be deemed fit to become the coparent of the domestic partner's child. As we have already seen, however, marriage is not a suitable proxy for parental fitness or for children's best interests. Given that second-parent adoption is the only way some children can ever hope to have two legally recognized parents, either refusing to allow second-parent adoption or making it a more burdensome procedure than step-parent adoption seems more geared toward granting privileges to married couples than toward promoting children's best interests.

Furthermore, in contrast to the criticisms of step-parent adoption, second-parent adoption decisions rest on painstaking examinations of the circumstances of the individual children in each case and thoughtful decision-making about what will most promote their best interests. Despite second-parent adoption's clear analogy to step-parent adoption,²⁰² there is never any waiver of home studies or waiting periods in second-parent cases. Even where the law allows a second-parent adoption petitioner to apply for a waiver, invariably such requests must be supported by "numerous affidavits and letters attesting to the longevity and strength of the relationship between the prospective adopters and legal memoranda in support of such a waiver."²⁰³ By contrast, a step-parent's request for a waiver is almost always routinely

²⁰¹ See *In re R.B.F.*, 803 A.2d 1195, 1198 (Pa. 2002); *In re E.O.G.*, 28 Pa. D. & C.4th 262, 265 (1993).

²⁰² See *In re Baby Z.*, 699 A.2d 1065, 1072 (Conn. Super. Ct. 1996); *In re Galen*, 680 N.E.2d 70, 73 n.2 (Mass. 1997) (citing REPORT OF THE CITIZENS' TASK FORCE ON ADOPTION FOR THE COMMONWEALTH OF MASSACHUSETTS (1996) (describing step-parent adoption as second-parent adoption's closest model)); Hollinger, *supra* note 131, at 235.

²⁰³ See *In re Galen*, 680 N.E.2d at 73 n.2 (citing REPORT OF THE CITIZENS' TASK FORCE ON ADOPTION FOR THE COMMONWEALTH OF MASSACHUSETTS).

granted with no supporting documentation.²⁰⁴ Moreover, the evaluations required for a second-parent adoption often include a costly bonding assessment by a licensed psychologist *in addition to* the significantly less expensive home study by a social worker. Invariably, courts hearing these petitions focus on the financial benefits that will accrue to the child, including support, inheritance rights, Social Security benefits, and health insurance.²⁰⁵ Courts also focus on the emotional benefits a child reaps from adoption.²⁰⁶ But beyond this, the courts recognize that second-parent adoptions differ significantly from stranger adoptions. A child is not being “reborn” into a new family where all ties to his prior family are erased; instead, “the [child’s] existing familial bonds” are respected and given legal recognition.²⁰⁷ Nothing about how the child experiences love, care, and commitment changes after these adoptions, apart from the greater assurance of *continuity* of love, care, and commitment that accompanies an adoption decree.²⁰⁸ The effort is plainly to afford the children involved the greatest legal protection in the most permanent, stable, supportive, and nurturing home these children can hope to have.²⁰⁹

Notably, none of these cases proceeds along the lines of vindicating the petitioner’s “right” to adopt the child.²¹⁰ Completely absent from these decisions is any sense that the marital status of the committed couples is in any way contrary to the best interests of the children or that it renders the petitioners unfit to be parents. In contrast to the step-parent cases, where the marriage itself appears to establish a right to adopt the child, courts in second-parent cases remain open to hearing evidence that living in the home of a same-sex couple will harm the child. In other words, courts in such cases seek to balance whatever “negative effects” might be present with the benefits to be acquired.²¹¹

²⁰⁴ *See id.*

²⁰⁵ *In re Baby Z.*, 699 A.2d 1065, 1067 (Conn. Super. Ct. 1996); *In re M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (listing disability insurance, education, housing, and nutrition assistance); *In re R.B.F.*, 803 A.2d 1195, 1198 (Pa. 2002); *In re E.O.G.*, 28 Pa. D. & C.4th at 266.

On the question of how second-parent adoption affects inheritance rights under the Uniform Probate Code, see DUKEMINIER & JOHANSON, *supra* note 92, at 105.

²⁰⁶ *In re Baby Z.*, 699 A.2d at 1067-68.

²⁰⁷ *In re H.N.R.*, 666 A.2d 535, 541 (N.J. Super. Ct. App. Div. 1995); *In re R.B.F.*, 803 A.2d at 1198; *see also In re Baby Z.*, 699 A.2d at 1070.

²⁰⁸ *In re H.N.R.*, 666 A.2d at 541; *In re E.O.G.*, 28 Pa. D. & C.4th at 267.

²⁰⁹ *See, e.g., In re Sharon S.*, 2 Cal. Rptr. 3d 699, 715-16 (2003) (cataloging legal and nonlegal benefits for children adopted by second parent); *In re Baby Z.*, 699 A.2d at 1077.

²¹⁰ *See In re Sharon S.*, 2 Cal. Rptr. 3d at 716, 720-21 (stating partner not seeking to adopt based on past relationship as caregiver).

²¹¹ *In re E.O.G.*, 28 Pa. D. & C.4th at 267.

Such a painstaking balancing of the factors is utterly absent from step-parent cases, where the fact of marriage alone renders the otherwise mandatory best-interests inquiry superfluous.

Critics of second-parent adoption are more concerned with finding new ways to bolster the privileged position of married couples in society than they are with promoting the best interests of each and every child according to his or her personal circumstances. Brigham Young University family law professor Lynn Wardle, for example, was among those who testified in favor of Utah's adoption ban. At the time, Wardle described feeling troubled that a number of Utah's judges were sympathetic to gay and lesbian couples who sought legal recognition of the parent-and-child relationships within their families.²¹² The resulting Utah law definitively pronounces that it is *never* in the best interest of *any* child to have unmarried parents.²¹³ This pronouncement effectively serves as a standing requirement preventing a cohabitant from petitioning to adopt a child as a second parent. The requirement preempts a fact-based inquiry into the best interests of the child in question.

Wardle's justification for his anti-adoption advocacy was that, at any given time in Utah, there are enough married couples petitioning to adopt all of Utah's adoptable children.²¹⁴ Even if this were not a particularly sound basis for prohibiting certain types of adoptions well into the future, Wardle seems perfectly willing to ignore the fact that second-parent adoption petitions are *never* brought for the adoption of children in state custody. Rather, second-parent adoption petitions are brought by an individual who seeks to adopt and become a coparent of a domestic partner's child.²¹⁵ What Wardle would like to overlook is that the children who are the subject of second-parent adoption petitions are extremely unlikely ever to be available for adoption by a married couple. Most of these cases involve artificial insemination using donor sperm of women who with their same-sex partners have planned and prepared for the conception, birth, and rearing of the child.²¹⁶ In all of these cases,

²¹² See Greg Burton, *Couples to Challenge Utah Adoption Ban*, SALT LAKE TRIB., Dec. 31, 2000, at A14.

²¹³ See UTAH CODE ANN. § 78-30-1(b) (2005).

²¹⁴ Interview with Lynn Wardle, Professor of Law, Brigham Young University at the Conference on Adoption and the Family System, Brigham Young Univ., Provo, UT (Sept. 25, 2003).

²¹⁵ See Rebecca Walsh, *Lesbian Couple Challenging Gay Adoption Ban in Utah*, SALT LAKE TRIB., July 7, 2003, at A1 (explaining how at least 40 families have been affected by adoption ban in Utah).

²¹⁶ See, e.g., *In re Baby Z.*, 699 A.2d 1065, 1067 (Conn. Super. Ct. 1996); *In re Galen*, 680

both women have reared the children since birth. It is unsurprising that the children have bonded with and consider both of them to be their parents.²¹⁷ Even more than in step-parent cases, where the step-parent more than likely has *not* been committed to or reared the child since his or her birth, the adoptions in second-parent adoption cases seem tailor-made to promote the child's best interests.²¹⁸

In his academic writing, Wardle assumes a more tempered stance toward second-parent adoption than he did when he lobbied the Utah legislature. Writing on the "least detrimental alternative" approach to adoption, Wardle has conceded that certain "less-than-perfect . . . adoption arrangements are the best options for a particular child," even if those arrangements are "exceptional cases" involving "less-than-ideal parents,"²¹⁹ including gay and lesbian ones. Unfortunately, Wardle did not bring his scholarly opinion to the attention of the Utah legislature in 2000 when he lobbied *against* permitting adoption, even in such exceptional cases. The result of his legislative advocacy was that Utah courts are no longer permitted to consider even the least detrimental alternative in second-parent adoption cases, since an unmarried cohabitant can no longer achieve standing to bring an adoption petition in the first instance. Second-parent adoptions are altogether prohibited.

Restrictions on standing to petition to adopt, under any microscope, seem extraordinary. This is especially so given that the best interest of the child is the paramount concern in any adoption.²²⁰ Some courts agree with Wardle that the possibility that a "least detrimental alternative" exists in any given case means that standing to petition to adopt should be liberal in scope to permit courts to assess "the potential [of the applicant] to successfully parent a child in foster care or adoption."²²¹ Even the Utah Supreme Court has embraced the least detrimental alternative principle. It stated that the issue in every adoption should be "whether children who are subject to adoption have a right to have as adoptive parents those who may be the only people who can give the children the reasonable nurture, care, guidance, and love as a foundation

N.E.2d 70, 71 (Mass. 1997); *In re H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995); *In re R.B.F.*, 803 A.2d 1195, 1198 (Pa. 2002); see Hollinger, *supra* note 131, at 235-36.

²¹⁷ See, e.g., *In re Sharon S.*, 2 Cal. Rptr. 3d 699, 704 (2003); *In re Galen*, 680 N.E.2d at 74 (O'Connor, J., dissenting) ("The child is already united with his mother, having lived with her since birth."); *In re H.N.R.*, 666 A.2d at 541.

²¹⁸ See *In re H.N.R.*, 666 A.2d at 537, 539; Hollinger, *supra* note 131, at 236.

²¹⁹ Wardle, *supra* note 193, at 843.

²²⁰ See *In re W.A.T.*, 808 P.2d 1083, 1086 (Utah 1991).

²²¹ *In re Luke*, 640 N.W.2d 374, 384 (Neb. 2002) (Gerrard, J., dissenting) (internal quotation marks omitted) (quoting county court's order).

for realizing their highest potential as human beings.”²²² Although recognizing the prerogative of the legislature “to determine how the most basic social unit in society should be organized,”²²³ the court nonetheless described adoption as “the kind of case in which a trial judge should not be bound by . . . rigid standards.”²²⁴ In short, the court recognized that the best interests inquiry is “fact-specific” — one focusing on whether “the interests of *these children* will [] be promoted by permitting their adoption by *these petitioners*.”²²⁵ As such, “a blanket exclusion” of an entire class of persons from standing is simply bad public policy.²²⁶

Even if Wardle’s legislative priorities are not congruent with his academic ones, he has demonstrated that in the final analysis he favors depriving certain children of the chance to have two legally recognized parents if doing so adds luster to the meaning of marriage. Were critics like Wardle at all concerned about child welfare, they would devote their energy to promoting two-parent support for every child rather than working strenuously to foment disapproval of gay and lesbian couples and diminished legal protections for their children. Since the best interests of *every* child were far from Wardle’s mind when he advocated adoption reform in Utah, he presumably also supports Oklahoma’s new policy of *nullifying* the legal tie between a child and a gay or lesbian parent who has adopted the child in another state. If this became the law in Utah, legally recognized parent-child relationships in over a hundred Utah families would vanish. As we will see below, Wardle’s willingness to work harm on children and families is in alignment with the priorities and commitments of the contemporary American “marriage movement.”

²²² *In re W.A.T.*, 808 P.2d at 1087 (Stewart, J., concurring).

²²³ *Id.* In *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383 (S.D. Fla. 2001), *aff’d sub nom. Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004), the court, applying the rational basis test in response to a constitutional challenge, upheld a ban on petitions for adoption brought by gays and lesbians.

²²⁴ *In re W.A.T.*, 808 P.2d at 1087 (Stewart, J., concurring); *see also id.* at 1085 (describing role of trial court in “highly sensitive area of child adoption”); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 942 (2000) (“functional justifications [that] support this institutional design”).

²²⁵ *In re W.A.T.*, 808 P.2d at 1086 (emphasis added).

²²⁶ *Id.*; *cf. In re “E,”* 279 A.2d 785, 789, 796 (N.J. 1971) (reversing trial court’s determination that petitioners were unfit to adopt given their lack of belief in “Supreme Being”).

III. THE MARRIAGE MOVEMENT

The American marriage movement is a loose amalgam of initiatives reacting to the decline of the heterosexual, marital, nuclear family,²²⁷ defined as a heterosexual married couple raising the children born to the two of them in one household. The movement views heterosexual marriage as central to societal integrity and aims to identify and dismantle or deflect any forces that threaten its primacy. To accomplish this aim, the movement pursues two objectives: (1) strengthening the status of heterosexual marriage in the formulation of social policy, and (2) assisting individual heterosexual couples in contracting enduring and satisfying marriages.²²⁸ In general, the movement targets any family system, legal mechanism, or social force that undermines or stands as an alternative to heterosexual marriage. Specific targets consist largely of manifestations of “individualism”: no-fault divorce, same-sex marriage, unmarried and single parenthood, and even step-parent families.²²⁹

This Part undertakes a close reading of the literature of the marriage movement. It argues that the claims of the movement, presented as broad, encompassing, and progressive, are in actuality much narrower and more retrograde than they are made to appear. First, the movement’s articulation of the important public role of marriage — the glue that holds the whole of society together — is based on functions that no longer have currency in contemporary postindustrial society. Second, the form of marriage the movement seeks to reinvigorate has been deemed violative of the equality principles of a civilized society. Perhaps most surprising is the movement’s position on children. Like Professor Wardle’s stand on second-parent adoption, children’s welfare, although figuring prominently in the marriage movement’s literature, turns out at best to be of secondary concern and at worst to be

²²⁷ See DAVID POPENOE, *DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES* 34 (1988), *quoted in* *REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* 14 (David Blankenhorn et al. eds., 1990) [hereinafter *REBUILDING*]; see also Blankenhorn, *supra* note 99, at 61.

²²⁸ David Blankenhorn accuses critics of the marriage movement of “undermin[ing] the possibility of evaluating a collective interest in marriage” by improperly shifting the terms of the dialogue “from a sociological and anthropological discussion of marriage as an institution to a therapeutic discussion of individual (good and bad) marriages.” Blankenhorn, *supra* note 99, at 68. This article focuses solely on marriage as an institution; the pre- and post-marital counseling initiatives of the marriage movement are beyond its scope.

²²⁹ *PROMISES*, *supra* note 35, at 12 (explaining that children may be resentful of or hostile to step-parent); *REBUILDING*, *supra* note 222, at 10-11 (indicating individualism as primary contributor to moral decay because of its damage to marriage, societal integrity, and child welfare).

antithetical to the movement's primary objective of elevating the status of heterosexual married couples by any means available.

A. *Historical Antecedents of the Marriage Movement*

From a historical perspective, there has perhaps always been a marriage movement. Marriage has played an important role in the development of both Western and Eastern civilization, although it has taken on different forms and functions throughout history.²³⁰ The ancient Egyptians and Israelites revered marriage, as did the ancient Greeks and Romans. In American history, heterosexual marriage has been extolled as “the foundation of the family,”²³¹ and as essential to the advancement of civilization,²³² democracy,²³³ the propagation of humanity,²³⁴ and economic prosperity.²³⁵ Not surprisingly, the law has long favored and continues to favor the institution of marriage.²³⁶ In order to promote marriage,²³⁷ the law provides easy access to marriage between opposite-sex couples,²³⁸ fosters harmony within existing

²³⁰ See WOLFSON, *supra* note 8, at 3 (“[I]t is clear that marriage has been a defining institution in virtually every society throughout history.”).

²³¹ See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

²³² See Loving v. Virginia, 388 U.S. 1, 12 (1967); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 17-18, 26, 46, 77, 116-18, 121, 219 (2000); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 502 (1992) (quoting JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 156 (1967)).

²³³ See Katherine Shaw Spaht, *Marriage: Why a Second Tier Called Covenant Marriage?*, 12 REGENT U. L. REV. 1, 1 (1999).

²³⁴ See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (“[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.”).

²³⁵ See Bashaw v. State, 9 Tenn. (1 Yer.) 177, 178 (1829); Maddox v. Maddox, 52 Va. (1 Gratt.) 804, 806, 810 (1854) (describing marriage, and its concomitant procreation, as essential to national prosperity); see also COTT, *supra* note 232, at 81-82, 121, 157, 179; Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1159 (1999) (quoting testimony from 1996 House of Representatives’s Defense of Marriage Act debates describing “traditional [marital] family as the foundation of prosperity and happiness”); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1551 n.10 (1998) (“[T]he link . . . between a healthy family and a robust economy . . . is clear and firm.” (quoting Daniel Yankelovich, *Foreign Policy After the Election*, 71 FOREIGN AFF. 1, 3-4 (1992))).

²³⁶ See *supra* notes 115-19 and accompanying text.

²³⁷ See Stubbs v. Ortega, 977 S.W.2d 718, 722 (Tex. App. 1998) (“[I]t is still the public policy of this state to foster and protect marriage and to discourage divorce . . .”).

²³⁸ See, e.g., Turner v. Safley, 482 U.S. 78, 99-100 (1987) (holding state may not refuse to allow prisoners to marry except for compelling reasons); Zablocki v. Redhail, 434 U.S. 374,

marriages,²³⁹ and, when marriages end in divorce, encourages the parties to remarry.²⁴⁰ These same ideas, along with the message that marriage is divinely sanctioned,²⁴¹ are also present in religious perspectives on marriage.²⁴²

B. Fundamental Tenets of the Marriage Movement

The contemporary American marriage movement's primary appeal to history is its view that marriage has been revered by every society and has played a critical role in the development of civilization. Instead of focusing and elaborating on the meaning of marriage throughout history, however, the marriage movement devotes its energy to championing the marital American family of the early to mid-1960s. It further expresses concern about contemporary trends shifting away from that model.²⁴³ The marriage problem we face today, in short, is that, since the early 1960s, American society has undergone an alarming shift from "familism" to "individualism."²⁴⁴ The price of this shift has been the decline of marriage.

The early work of the contemporary marriage movement was in reaction to the "divorce culture" of the United States. The divorce culture was a product of the increasing individualism in American society, and society optimistically embraced this new culture as an antidote to unhappiness.²⁴⁵ The marriage movement has published research on the detrimental effects of divorce on individuals and society

389-90 (1978) (holding state may not condition permission to marry on compliance with child support order); Regan, *supra* note 94, at 652, 655 (describing present application of more demanding level of scrutiny to state regulation of marriage than was applied 40 years ago).

²³⁹ See *Niemann v. Niemann*, 317 S.E.2d 472, 474 (S.C. Ct. App. 1984) ("[P]ublic policy relating to marriage is to foster and protect it.").

²⁴⁰ See *In re Estate of Wagner*, 159 A.2d 495, 499 (Pa. 1960) ("[T]he policy of looking with favor upon remarriage"). To reconcile the policy favoring remarriage with the policy disfavoring divorce, the law developed the nisi divorce decree, which delays the divorce decree from becoming absolute in order to provide both "a cooling-off period to encourage reconciliation" and the prevention of immediate remarriage. *Ladd v. Ladd*, 640 A.2d 29, 33 (Vt. 1994) (Morse, J., dissenting).

²⁴¹ See *OLTHUIS*, *supra* note 68, at 20.

²⁴² See, e.g., *FOSTER*, *supra* note 68, at 6.

²⁴³ See David Blankenhorn, *American Family Dilemmas*, in *REBUILDING*, *supra* note 227, at 7-9 (describing "the dimensions and consequences of changes in the family during the past quarter century" as primary point at issue between opponents in current discussion about marriage and family).

²⁴⁴ Blankenhorn, *supra* note 99, at 61.

²⁴⁵ See Maggie Gallagher, *Re-Creating Marriage*, in *PROMISES*, *supra* note 35, at 233-34.

(even step-families and remarriage are said to be detrimental) and has lobbied for more restrictive divorce laws, covenant marriage, and preferential welfare regulation for the married poor.²⁴⁶ In particular, the movement has pointed to feminism and two-career couples as having injurious effects on marriage and the family.²⁴⁷ More recently, the movement has expressed concern over cohabitation and single parenthood, said to be among the deleterious fallout of the divorce culture. Undergirding all of the marriage movement's initiatives is the call "to create and lead a marriage movement that spans the world."²⁴⁸

The claims of the marriage movement that are of particular relevance to the current discussion are as follows: (1) marriage is the building block of society, (2) marriage contributes to the well-being of children, and (3) marriage is currently in crisis. Each of these will be examined in turn.

1. Marriage Is the Building Block of Society

The historical evidence shows that marriage has played a central role in the organization of society going back millennia.²⁴⁹ Marriage has been essential to the trajectory of civilization²⁵⁰ and continues to ensure the integrity of society.²⁵¹ Building on these principles, a basic tenet of the marriage movement is that marriage is not simply a personal choice

²⁴⁶ Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 342 (2002) (detailing initiatives); Nina Bernstein, *Strict Limits on Welfare Benefits Discourage Marriage, Studies Say*, N.Y. TIMES, June 3, 2002, at A1; available at <http://patriot.net/~crouch/pro.html> (divorce reform website).

²⁴⁷ DON BROWNING, MARRIAGE AND MODERNIZATION: HOW GLOBALIZATION THREATENS MARRIAGE AND WHAT TO DO ABOUT IT 19, 27, 41, 213 (2003) [hereinafter BROWNING, MODERNIZATION]; DON BROWNING, MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE 109, 297 (Martin King Whyte ed., 2000); BRIAN C. ROBERTSON, THERE'S NO PLACE LIKE WORK: HOW BUSINESS, GOVERNMENT, AND OUR OBSESSION WITH WORK HAVE DRIVEN PARENTS FROM HOME 72-79 (2000); Graglia, *Non-Feminist*, *supra* note 95, at 1002.

²⁴⁸ See David Blankenhorn, *Should Public Policy Favor Marriage and Children?*, FAM. AM., Sept. 2000, at 1, 7; see also COUNCIL ON FAMILIES IN AM., MARRIAGE IN AMERICA: A REPORT TO THE NATION 3 (1995) (calling for rebuilding "a family culture based on enduring marital relationships").

²⁴⁹ DOHERTY ET AL., *supra* note 173, at 6, 18; see Blankenhorn, *supra* note 248, at 6.

²⁵⁰ See COUNCIL ON FAMILIES IN AM., *supra* note 248 at 4 (describing marriage as "the institution which most effectively teaches the civic virtues of honesty, loyalty, trust, self-sacrifice, personal responsibility, and respect for others").

²⁵¹ See Carl Hulse, *Senate Hears Testimony on a Gay Marriage Amendment*, N.Y. TIMES, Mar. 4, 2004, at A22 ("[M]arriage is a key social institution.") (reporting testimony of Federal Marriage Amendment proponents).

grounded in the right to privacy, but is also an important social good.²⁵² The individual goods that accrue in larger measure to heterosexual married couples than to unmarried persons — primarily physical and mental health, physical security, sexual satisfaction, and wealth — ensure a healthy, happy citizenry.²⁵³ But more than this, marriage generates “social capital” — interfamily and intergenerational bonds that embed married couples and their children within larger social networks and direct their efforts to the good of all.²⁵⁴ By contrast, the unmarried lack the significant family support that would devolve to them from their combined kinship groups acting on the coded obligations that their “being married” would trigger.²⁵⁵ In sum, marriage has beneficial and transformative effects on the attitudes and behavior of society as a whole. For this reason, some marriage movement commentators have dubbed marriage a “seedbed[] of American democracy.”²⁵⁶

Since societal integrity depends on marriage, marriage movement commentators claim that threats to marriage create the risk of society’s downfall.²⁵⁷ On a small scale, the contemporary divorce culture makes unmarried and married people alike unhappy, lonely, and increasingly suspicious of any form of commitment.²⁵⁸ But on a larger scale, divorce, nonmarital births, the absence of fathers, and the deinstitutionalization of marriage — called collectively “family disruption” — exacerbate world hunger, overpopulation, destruction of the environment, and AIDS.²⁵⁹ These ills arise not only from rampant individualism but also

²⁵² DOHERTY ET AL., *supra* note 173, at 18.

²⁵³ *See id.* at 9-10, 13-17. *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000) (examining beneficial and transformational power of marriage for individuals and society).

²⁵⁴ *See* Barbara Dafoe Whitehead, Co-Director, Nat’l Marriage Project, Testimony Before U.S. S. Comm. on Health, Education, Labor and Pensions, Subcomm. on Children and Families (Apr. 28, 2004), *available at* <http://marriage.rutgers.edu/Publications/Print/Print%20Whitehead%20TESTIMONY.htm>.

²⁵⁵ *See id.*

²⁵⁶ DAVID BLANKENHORN, *Conclusion to SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* 271, 274, 280 (Mary Ann Glendon & David Blankenhorn eds., 1995).

²⁵⁷ Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *ATLANTIC MONTHLY*, Apr. 1993, at 47.

²⁵⁸ *See* COUNCIL ON FAMILIES IN AM., *supra* note 248, at 7.

²⁵⁹ BROWNING, *MODERNIZATION*, *supra* note 247, at 31. Although marriage is believed to contribute to economic prosperity, *see supra* note 235 and accompanying text, the crisis in marriage has not been linked with an economic downturn. Indeed, to some, it seems likely that the individualistic impulses that give momentum to the economy are likely to cause

from larger forces such as modernization and globalization.²⁶⁰ Given the importance of marriage to the maintenance of a healthy society, all marriage movement commentators call on the government to channel public funds into marriage-promotion initiatives.²⁶¹

2. Marriage Contributes to the Well-Being of Children

Since marriage is essential to societal integrity, it naturally has an important public function from which all of society, including children as a class, benefits. But marriage also plays an important private role in the lives of individual children. Indeed, the marriage movement believes it is within the intact, biological married family that individual children do best. Children raised in step-parent, single-parent, adoptive, or gay or lesbian households do not fare nearly as well. In particular, to the extent the movement acknowledges the blended families that result from divorce, it believes “[c]hildren who live with a parent and stepparent do not fare much better than children who live with a single parent.”²⁶² At least one marriage movement commentator has gone so far as to claim that heterosexual marriage is the “*only* institution ever shown to be capable of raising children well.”²⁶³

The marriage movement’s concern about the devaluation of children and child-rearing resulting from our divestment from marriage²⁶⁴ leads it to conclude that the quality of life of American children grows worse each year.²⁶⁵ The deleterious effects of divorce on children are of particular concern.²⁶⁶ In general, children of divorce have a tendency to disbelieve in the permanency of relationships; they consequently experience varying degrees of insecurity in their lives, including an inability to forge meaningful connections with other human beings.²⁶⁷

workers to devalue marital ties. Moreover, a weak economy can wreak havoc even on otherwise strong marital and familial ties. See ALAN WOLFE, MORAL FREEDOM: THE IMPOSSIBLE IDEA THAT DEFINES THE WAY WE LIVE NOW 48 (2001) (noting linkage between workplace and marital disloyalty).

²⁶⁰ BROWNING, MODERNIZATION *supra* note 247, at 1, 9-10, 41, 215.

²⁶¹ Blankenhorn, *supra* note 248, at 7; see, e.g., Whitehead, *supra* note 254.

²⁶² COUNCIL ON FAMILIES IN AM., *supra* note 248, at 5; cf. STANTON, *supra* note 153, at 151, 158 (suggesting that children in stepfamilies fare worse than children raised by single parents).

²⁶³ See MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE 141 (1996) (emphasis added).

²⁶⁴ *Id.* at 7.

²⁶⁵ See, e.g., POPENOE, *supra* note 227, at xiv.

²⁶⁶ See COUNCIL ON FAMILIES IN AM., *supra* note 248, at 4, 6.

²⁶⁷ See INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 5

Not only does divorce harm children, but so does being raised by cohabiting, same-sex, or single parents. Like children of divorce, such children supposedly experience disadvantages that haunt them well into their adult lives. These disadvantages lead such children to make antimarriage choices that then send damaging ripple effects into society for generations to come.

In the course of its work, the marriage movement has taken strong positions on adoption. Describing the purpose of adoption as placing the adoptive child in as "ideal" a setting as possible, the movement urges restricting adoption to married couples. Single persons may adopt, but only where the adoption is the least detrimental alternative.²⁶⁸ Naturally, the movement opposes the trend toward open adoption in domestic placements²⁶⁹ since such arrangements tend to blur the boundaries of the marital, nuclear family. Although the movement has concerns about the integrity of step-parent families, it nonetheless approves of step-parent adoptions. The belief is that step-parent adoption provides even greater certainty for a child than does the mere remarriage of his or her parent. The movement does not, of course, approve of second-parent adoptions by same-sex partners.

In an effort to disseminate widely the message that marriage benefits children and nonmarriage harms them, the Institute for American Values published *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences*.²⁷⁰ *Why Marriage Matters* discusses social science studies of the effects of family disruption and how the conclusions we can draw from those studies suggest the need for a renewed commitment to marriage. *Why Marriage Matters* laments that children who grow up with unmarried parents are likely to have no relationship with their fathers. It further claims that, later in life, these children will themselves divorce or become unwed parents.²⁷¹ These children are more likely than children with married parents to experience poverty, achieve less educationally

(noting that children whose parents divorced are more likely to divorce).

²⁶⁸ This view that adoption should create marital, nuclear family look-alikes has been criticized as "biologistic," see generally ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, FERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (1999), and as having its origins in myths that harm birth mothers, adopted children, and adoptive parents alike, see E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 209-12 (1998).

²⁶⁹ See CARP, *supra* note 268, at 214-15 (detailing objections of National Committee for Adoption and religious right). See generally *id.* at 196-222 (discussing open adoption).

²⁷⁰ DOHERTY ET AL., *supra* note 173, at 4.

²⁷¹ See *id.* at 7-8.

and professionally, and suffer substance abuse.²⁷² They are less physically and emotionally healthy²⁷³ and are more likely to commit criminal acts and commit suicide.²⁷⁴

Since heterosexual marriage is the institution “most likely to meet children’s needs and safeguard their interests,”²⁷⁵ the marriage movement advocates revitalizing this battered institution. It wants to accomplish this in a form in which the interests of children come first.²⁷⁶ In advocating for social policies that promote childbearing and child-rearing within marital, nuclear-family structures, the movement aims to reinscribe marriage both practically and symbolically “as the unique repository of sexual life and procreation.”²⁷⁷

3. Marriage Is Currently in Crisis

According to the marriage movement, for all the good that marriage brings to society and to children, it nonetheless is currently suffering an unprecedented crisis that threatens to destroy our way of life.²⁷⁸ This “marriage problem” is described in various ways. Marriage is “in trouble.”²⁷⁹ It is in decline.²⁸⁰ Marriage “has now been greatly eroded”²⁸¹ and discarded.²⁸² It is under a “withering, sustained attack”²⁸³ by a “philosophical wrecking ball.”²⁸⁴ The root of the crisis appears to be that there is not as much marriage as there used to be²⁸⁵ because people have lost faith in its permanency²⁸⁶ and its role as a bastion of self-sacrifice and

²⁷² See *id.* at 9-12.

²⁷³ See *id.* at 11, 14.

²⁷⁴ See *id.* at 15-16.

²⁷⁵ COUNCIL ON FAMILIES IN AM., *supra* note 248, at 4.

²⁷⁶ See *id.*

²⁷⁷ See INST. FOR AM. VALUES, THE EXPERTS’ STORY OF COURTSHIP 8 (2000); see also Dan Cere, *Courtship Today: The View from Academia*, PUB. INT., Spring 2001, available at <http://www.thepublicinterest.com/archives/2001spring/article2.html>.

²⁷⁸ See WILLIAM J. BENNETT, THE BROKEN HEARTH: REVERSING THE MORAL COLLAPSE OF THE AMERICAN FAMILY 10 (2001) (“The scale of marital breakdown in the West since 1960 has no historical precedent and seems unique” (internal quotation marks omitted)); *id.* at 16 (describing current state of affairs as “perilous moment”).

²⁷⁹ JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 19 (2002).

²⁸⁰ See BENNETT, *supra* note 278, at 38.

²⁸¹ WILSON, *supra* note 279, at 175.

²⁸² See BENNETT, *supra* note 278, at 12.

²⁸³ *Id.* at 21 (emphasis omitted).

²⁸⁴ *Id.* at 23.

²⁸⁵ See WILSON, *supra* note 279, at 4.

²⁸⁶ See BENNETT, *supra* note 278, at 11; WILSON, *supra* note 279, at 174.

duty. With a loss of faith in marriage comes disturbing ramifications:

[F]ewer people are marrying, they are doing so later in life, they are having fewer children, they are spending less time with the children they do have, and they are divorcing much more frequently. Those who do not marry are having sexual relations at an earlier age and contracting sexually transmitted diseases at much higher rates, cohabiting in unprecedented numbers, and having a record number of children out of wedlock. Finally, more children than ever before live with only one parent.²⁸⁷

Today, when people do enter into marriage, it is only for so long as each member of the married couple experiences personal satisfaction.²⁸⁸ In the wake of this “carnage,”²⁸⁹ gone is any sense that marriage has an important public function;²⁹⁰ it has become just another way of pursuing private ends.²⁹¹ Against this backdrop of marital crisis, the marriage movement remains committed not only to restoring marriage’s tattered reputation but also to helping more individual marriages succeed.²⁹² Since this Article focuses on large-scale marriage initiatives, the pre- and post-marital counseling efforts of the marriage movement are beyond its scope.²⁹³

C. *The Literature of the Marriage Movement*

1. The Mainstream Press

The most well-known texts in the marriage movement are understandably intended for a wide audience. These texts are written by

²⁸⁷ BENNETT, *supra* note 278, at 14; *see also* WILSON, *supra* note 279, at 197.

²⁸⁸ *See* WILSON, *supra* note 279, at 174 (“When people vow at their weddings to live together ‘till death do us part’ or ‘as long as we both shall live,’ they really only promise to remain a couple ‘as long as we both shall love’ or ‘as long as no one better comes along.’”).

²⁸⁹ BENNETT, *supra* note 278, at 169.

²⁹⁰ *See* WILSON, *supra* note 279, at 40 (discussing marital family’s public function).

²⁹¹ *See* BENNETT, *supra* note 278, at 12 (“In the quest for fulfillment, spouses and children are often looked upon . . . as objects to be acquired, enjoyed, and discarded.”).

²⁹² *See* DOHERTY ET AL., *supra* note 173, at 7.

²⁹³ *See* DAVID R. MACE, *The Marriage Enrichment Movement*, in PREVENTION IN FAMILY SERVICES: APPROACHES TO FAMILY WELLNESS 98 (David R. Mace ed., 1983) (describing beginning of marriage enrichment movement); PAUL JAMES BIRCH ET AL., ASSESSING THE IMPACT OF COMMUNITY MARRIAGE POLICIES ON U.S. COUNTY DIVORCE RATES (2004), <http://www.smartmarriages.com> (describing objectives of church-based community marriage initiatives).

authors who choose a conversational, journalistic writing style for ease of reading. Both social historian Barbara Dafoe Whitehead's and journalist Maggie Gallagher's writings on marriage possess this appeal. Whitehead's essay *Dan Quayle Was Right*, published in the April 1993 issue of the *Atlantic Monthly*, placed her in the national spotlight. She later expanded the ideas contained in the essay into the book *The Divorce Culture*. Gallagher is best known for her provocative, early marriage movement book *Enemies of Eros* and for her more recent collaborative effort *The Case for Marriage*.

In *Dan Quayle Was Right*, Whitehead focused squarely on the detrimental effects of familial disruption on children and society.²⁹⁴ She concluded it is good for children to grow up in intact families where they live with both of their married biological parents and not as good if they grow up in disrupted families.²⁹⁵ She premised her conclusion on the difference between "intact" and "disrupted" families.²⁹⁶ Familial disruption encompasses the full range of circumstances under which a child is not raised by his or her married biological parents.²⁹⁷ It includes not only the disintegration of a child's biological parents' marriage through separation or divorce, but also the fact of a child's being born out of wedlock.²⁹⁸ A child born to an unmarried committed couple also suffers disruption because of the risk that the cohabiting couple will break up.²⁹⁹ A child living in a step-parent family is a victim of familial disruption for the same reason.³⁰⁰ Even a single woman and the child she intentionally plans and prepares to have and to raise by herself are an example of a disrupted family, not so much because the child lacks an identifiable father, but because the child "must come to terms with [the mother's] love life and romantic partners."³⁰¹ Whitehead equivocated on whether adopted children are victims of disruption, but the emphasis in her discussion on the value of the biological tie suggests that adopted children, too, are victims of familial disruption.³⁰² With the incidence of familial disruption on the rise, concluded Whitehead, too many children are growing up in circumstances that are not as good for them as

²⁹⁴ See Whitehead, *supra* note 257, at 50.

²⁹⁵ See *id.* at 80.

²⁹⁶ *Id.* at 52.

²⁹⁷ See *id.* at 69.

²⁹⁸ See *id.* at 84.

²⁹⁹ See *id.* at 75.

³⁰⁰ See *id.*

³⁰¹ See *id.* at 72.

³⁰² See *id.* at 70.

growing up with their married biological parents.³⁰³

It is understandable that Whitehead's article created the stir it did when it was published over ten years ago and that it continues to be cited in discussions of the marriage problem, particularly the "dilemma" of single motherhood. A similar chord was struck by Maggie Gallagher's *Enemies of Eros* five years earlier. Through chapters with titles such as *Baby Lust*, *Mother Love*; *The Murder of Marriage*; and *Sex Acts Phil Donahue Never Taught You*, Gallagher, a journalist, riveted readers with her sustained diatribe against the destabilizing effects of no-fault divorce and other manifestations of the rampant individualism that had overtaken the United States at that time.³⁰⁴ Punctuated by tragic stories of people whose lives have been forever damaged by individualism, *Enemies of Eros*, highly acclaimed upon its publication, continues to be a "wake-up call" for a society supposedly hobbled by its own lack of respect for the public role of marriage.

2. Religious and Academic Perspectives

The marriage movement is not merely advanced by the mass media contributions described above. Able legal and social science scholars have also contributed to the discussion. I discuss the academic and theological contributions to the marriage movement literature together because of the large degree of overlap between the two. In general, academic writing within the marriage movement is informed by a Christian-based approach to morality.³⁰⁵ It is reflected in the longstanding collaboration between the Religion, Culture and the Family Project at the University of Chicago Divinity School and the National

³⁰³ Whitehead's most recent effort to tackle the marriage problem is an examination of professional women who want love, marriage, and commitment, but who lack it in a divorce culture devoid of romance. See BARBARA DAFOE WHITEHEAD, *WHY THERE ARE NO GOOD MEN LEFT: THE ROMANTIC PLIGHT OF THE NEW SINGLE WOMAN* (2003). Whitehead's "urban gynecology" proceeds as follows: (1) while pursuing their careers, women "hook up" for casual sex and delay relationships, (2) when their foothold in the career ladder is firm and they are ready for romance and marriage, they have very few available men to consider and set their expectations too high, (3) at that point in their lives, all these women have left is a succession of commitment-phobic men who fail to live up to their expectations of being rescued by a knight in shining armor. *Id.* at 21-60. Whitehead then describes the "new courtship system" she discerns is emerging to help these melancholy women find lasting love. *Id.* at 187-89.

³⁰⁴ MAGGIE GALLAGHER, *ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT* 161-64, 193-215 (1989).

³⁰⁵ See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18-19 (noting that, between 1990 and 1995, "full" defenses in American law reviews of heterosexuals-only marriage were on religious grounds).

Marriage Project of Rutgers University.

Professor Lynn Wardle, discussed above in Part II, is the leading legal academic figure in the marriage movement. He believes the legal academy has erected a taboo against any public defense of heterosexuals-only marriage.³⁰⁶ He hopes to enrich the resulting impoverished academic discourse by arguing not only that the Constitution guarantees no right to same-sex marriage³⁰⁷ but also that legal recognition of same-sex marriage necessarily requires legal protection for socially objectionable practices such as polygamy, bigamy, and incest.³⁰⁸ In addition to fashioning legal arguments against same-sex marriage, Wardle also makes philosophical ones. He has asserted, for example, that the essence of marriage is the blending of opposing sexual identities, something same-sex marriage cannot achieve.³⁰⁹

Those in agreement with Wardle have articulated similar arguments about the scope of the Constitution³¹⁰ and the soundness of a heterosexuals-only definition of marriage.³¹¹ But Professors Teresa Stanton Collett and Richard Wilkins take a more pointedly religious and metaphysical view of marriage than does Wardle. Although Collett agrees with Wardle that the importance of marriage lies in its “union of sexual difference,” her emphasis is squarely on the potential of heterosexual sexual intercourse to create new human life.³¹² Wilkins

³⁰⁶ See *id.* at 18, 22-23. An issue of the *Regent University Law Review* seeks to combat the same taboo through its publication of articles on homosexuality. David Lee Mundy, *Editor's Note*, 14 REGENT U. L. REV. vii, viii (2002) (introducing issue entitled *Homosexuality: Truth be Told*).

³⁰⁷ See Wardle, *supra* note 305, at 28-58, 62-95.

³⁰⁸ See Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1201.

³⁰⁹ See Lynn D. Wardle, *Marriage, Relationships, Same-Sex Unions, and the Right of Intimate Association*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 190, 196 (Lynn D. Wardle et al. eds., 2003) [hereinafter SAME-SEX UNIONS]. Cf. Teresa Stanton Collett, *Should Marriage Be Privileged? The State's Interest in Childbearing Unions*, in SAME-SEX UNIONS 152, 157 (defining marriage as “union of sexual difference”); Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277, 278, 285 (1998) (discussing “sexual complementarity”).

³¹⁰ See, e.g., Lino A. Graglia, *Single-Sex "Marriage": The Role of the Courts*, 2001 BYU L. REV. 1013, 1014, 1016-20 (vilifying “activism” of courts that articulate constitutional rationales in support of same-sex marriage).

³¹¹ See, e.g., William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119, 125 (2002) (polygamy).

³¹² See Collett, *supra* note 309, at 157; see also Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245, 1249-50 (1998). Wardle touches only briefly on the symbolic importance of heterosexual coitus in Lynn Wardle, *Image, Analysis, and the Nature of Relationships*, in SAME-SEX UNIONS, *supra* note 309, at 115, 117, and in Lynn Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of*

focuses solely on the sexual act. In his view, the fundamental importance of heterosexual marriage is the reproductive “look” of heterosexual copulation, no matter the sterility of the participants or the contraception employed in the act.³¹³ To Wilkins, a husband’s phallic penetration of his wife’s vagina is a potent symbol that transcends the actual fertility of individual married couples and channels and promotes responsible procreative behavior on a societal level.³¹⁴ Indeed, because of its reproductive appearance, heterosexual coitus is the only sexual act by which two persons become one flesh.³¹⁵ Both Collett and Wilkins emphasize that the sexual act must have “reproductive potential,” even if the participants are infertile.³¹⁶ They disagree, however, on whether the choice to be infertile through contraception vitiates the procreative purpose of marriage.³¹⁷ No matter their disagreement on the significance of different approaches to coitus, these scholars believe the march of civilization has depended upon the enshrinement of this powerful symbol in the institution of marriage. In their view, to open up the institution of marriage to participants who lack the capacity to engage in heterosexual coitus would threaten the very disintegration of civilization.

Social science perspectives round out the academic work of the marriage movement. The most prominent social scientist in the movement is undoubtedly Professor Linda J. Waite, a sociologist at the University of Chicago and co-author, with Maggie Gallagher, of *The Case for Marriage*. Although not an academic monograph (Harvard University Press withdrew from the project upon reviewing the manuscript),³¹⁸ *The Case for Marriage* has been defended by Waite herself as similar in

State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL’Y 771, 800 (2001).

³¹³ Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U. L. REV. 121, 132 (2003).

³¹⁴ *Id.* at 131.

³¹⁵ *See id.* at 133.

³¹⁶ Collett, *supra* note 309, at 157. Professor Robert George states that the act must be “reproductive in type.” *See* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2497 (1997). Neither “reproductive potential” nor “reproductive in type” accurately describes the coitus of infertile couples. Solely in an effort to clarify the analysis of these scholars presented here, I elect to use the terms “reproductive look” and “reproductive in appearance.”

³¹⁷ *Cf.* Wilkins, *supra* note 313, at 132 (finding no difference between use of contraception and infertility), *with* Collett, *supra* note 312, at 1261 (noting contraception vitiates marriage because of “willful refusal to enter full communion”).

³¹⁸ *See* Evelyn Reilly, *Why Did Harvard Refuse This Important Book?*, MASS. NEWS, Jan. 20, 2001, http://www.massnews.com/past_issues/2001/jan%202001/0101marriage3.htm (commenting on controversy surrounding Harvard’s decision).

scholarly value to her other academic work.³¹⁹ The book draws on a decade of research and begins with the premise that Americans have developed an ambivalence towards marriage, at once aspiring to it as an important, even sacred, step on the road to happiness and fulfillment but simultaneously suspecting it to be an arrangement in which the participants must abandon their cherished personal freedom.³²⁰ Generating the ambivalence are legal and demographic forces. First, in developed nations, the agrarian economy of the pre-industrial age has given way to a postindustrial economy where marriage is less critical to human survival.³²¹ Second, no-fault divorce has rendered marriage nothing more than any other unilaterally terminable “adult affair.”³²² In short, marriage has become privatized, just one of many options for arranging intimate relationships. The result of these developments, according to Waite, is that marriage has lost its public function of channeling people into new units of production in which they commit to creating goods for themselves, their children, and the rest of society, and for which, in return, society offers recognition, respect, and benefits.³²³ Marriage’s public role must be reacknowledged and supported to enable marriage’s “unique power” to provide a better society for everyone.³²⁴

Whereas marriage has an important public function that must be reaffirmed, *The Case for Marriage* asserts that cohabitation does not. As an arrangement easy to put on and then cast off, cohabitation lacks the type of permanent commitment we associate with marriage and which strengthens society. Not surprisingly, cohabitation appeals to those who desire above all not to relinquish independence and personal freedom by bearing responsibility for another. Without the “deeper partnership” of marriage, though, cohabitation neither promises nor offers the many private goods that marriage does.³²⁵

³¹⁹ *Id.*

³²⁰ See WAITE & GALLAGHER, *supra* note 253, at 2-3, 34, 174.

³²¹ See *id.* at 174. Vanderbilt University Professor Virginia Abernethy made this same point 30 years ago. See Virginia D. Abernethy, *American Marriage in Cross-Cultural Perspective*, in CONTEMPORARY MARRIAGE: STRUCTURE, DYNAMICS, AND THERAPY 33, 38 (Henry Grunbaum & Jacob Christ eds., 1976). She also made the additional point that marriage no longer functions in American or other postindustrial societies as a mechanism for forging alliances that consolidate wealth or confirm politicoeconomic arrangements. See *id.* at 36-37.

³²² WAITE & GALLAGHER, *supra* note 253, at 7.

³²³ See *id.* at 17, 20-23.

³²⁴ *Id.* at 11, 17, 34.

³²⁵ *Id.* at 45.

The bulk of *The Case for Marriage*, like *Why Marriage Matters*,³²⁶ is devoted to cataloging these many private goods. Not only does the married couple benefit (better health, sex, and money), but so do their children (better health, education, and prospects for happiness and prosperity going into adulthood). The reader is then left with the task of linking these goods with the social goods described earlier. On the topic of same-sex marriage, *The Case for Marriage* takes no explicit stand; the authors themselves cannot agree on the matter.³²⁷ The strong implication made by the book, however, aligns well with Whitehead's view that children do best when raised in one household by their married biological parents. As such, the book is most forcefully aimed at strengthening societal commitment to opposite-sex marriage,³²⁸ and unsurprisingly, no agenda for legislating same-sex marriage is included in the authors' talking points for "Renewing Marriage."³²⁹ *The Case for Marriage*, then, provides no support for same-sex marriage and offers many of the arguments against it made by other marriage movement commentators.

D. Interpretive Problems in Marriage Movement Rhetoric

The literature of the marriage movement conveys strong messages about the good of marriage, the danger to a society not adequately committed to marriage, and the need to recommit to the idea of marriage. Couched in broad, encompassing language and bolstered by appeals to the important role marriage has played throughout history, the claims relied on by the marriage movement nonetheless do not withstand logical scrutiny. They are, in fact, much narrower than they appear, contain notions antithetical to the ethic of equality upon which our society is based, and use concerns about child welfare as a makeweight to bolster pleas for special benefits for married couples.

1. Illogical and Narrow Claims

One of the problems with Whitehead's conception of familial disruption is its overbreadth. Her analysis posits that the marriage of a child's biological parents is itself a sufficient indicator of familial

³²⁶ See *supra* notes 270-74 and accompanying text.

³²⁷ See WAITE & GALLAGHER, *supra* note 253, at 200.

³²⁸ See *id.* at 188 (introducing talking points to "help more men and women succeed in . . . marriage.").

³²⁹ See *id.* at 200-01 (expressing ambivalence about same-sex marriage).

intactness. Families not conforming to this model are disrupted in some way and, if not exactly doomed to lives of poverty and misery, are at least worse off than intact families. But to describe a family headed by an unmarried, committed couple as already disrupted makes little sense. If families that are likely to self-destruct are the ones Whitehead considers already disrupted, then she should include married couples who as a class are as likely to divorce as not. She should at least explain why divorce itself is not merely the symptom of a marital family that never was intact to begin with. Similarly, if as Whitehead claims, the classic case of familial disruption is a child's suffering the loss of a parent, it is unclear how the woman who plans and prepares to give birth to a child and to raise the child alone warrants being labeled as somehow disrupted or broken apart in the first instance. Applied consistently, Whitehead's overbroad definition of disruption ends up swallowing the very category of intactness she so earnestly sets out to defend.

Another problem with Whitehead's analysis is that her broad conclusions are not supported by her narrow premises. Although she concludes that intact families are best for children, her evidence shows that among intact families, only *well-functioning* ones do a laudable job of meeting children's needs. Indeed, in her recent testimony before a Congressional subcommittee discussing plans to bankroll marriage initiatives for the poor, Whitehead's praise was for low-conflict, long-lasting marriages.³³⁰ Utterly missing from her testimony was the categorical association of marriage with intactness that was so prominent in *Dan Quayle Was Right*.³³¹ Instead of urging Congress to support marriage *per se*, then, Whitehead lobbied the legislature to devote public funds to dismantle barriers to *healthy* marriage.³³² But beyond referring several times to how divorce harms children, she failed to specify the barriers Congress should help dismantle. Additionally, she did not explain how the proposed legislation would accomplish that task. In the end, it appeared Whitehead had brought her arguments before the wrong body. As a practical matter, Congress has little control over the ease with which a divorce can be obtained, since divorce provisions are largely a matter of state law. Furthermore, the subcommittee that solicited her testimony was not considering legislation aimed at saving

³³⁰ Indeed, she stated that it was these marriages in particular that benefit adults, children, and society.

³³¹ See *supra* notes 294-303 and accompanying text.

³³² Whitehead, *supra* note 254.

already contracted marriages, but was instead concerned about what steps Congress might take to promote marriage among single individuals.

Whitehead and other marriage movement commentators, for all their talk of a marriage crisis, give us no reason to believe that their primary concern is and always has been the high divorce rate. Experts have made a convincing case that divorce affects children in insidious and devastating ways well into their adult lives,³³³ and the high rate of divorce in this country does suggest that many heterosexual marriages are not the well-functioning ones that benefit society. These ideas are difficult to assail, if only because divorce does signal marital breakdown, and no one seriously disputes that children do best when their parents have a well-functioning relationship. But concern about divorce does not translate into the broad theory of family disruption that has become Whitehead's signature argument. Many couples do not marry, yet they do the hard work of maintaining a household and raising children. They are as connected to expansive family and social networks as are many married couples and in some cases are more so. Like married couples whose marriages function well, these are not the couples who are contributing to a divorce culture that harms society. Nonetheless, within Whitehead's inflexible framework, well-functioning unmarried couples are disrupted, while even the most dysfunctional married couple is intact. The illogic of Whitehead's reasoning is typical of the marriage movement's awkward attempts to breathe new life into its cause by transforming "the divorce problem" into "the marriage problem." This attempted shift in scope has brought with it many inconsistencies and contradictions. Not surprisingly, then, the marriage movement has to date been largely unsuccessful in convincing the broader public that the wide availability of no-fault divorce in this country has placed marriage, and by extension, society, in crisis.³³⁴

2. Equality Concerns

In addition to adopting narrow premises in its attempt to support broad, encompassing assertions, the marriage movement betrays an unsettling commitment to a form of marriage marked by inequality.

³³³ See, e.g., JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000) (examining suffering that divorce causes children well into adult lives).

³³⁴ See, e.g., WAITE & GALLAGHER, *supra* note 253, at 179, 180 (explaining marriage crisis as product of divorce culture).

While expressly rejecting the inequality model of marriage at every turn, the movement continues to champion the ability of marriage to contribute to economic prosperity. The contradiction here lies in the fact that the form of marriage that contributes most to economic prosperity is laden with rigidly balkanized gender roles long decried from the highest levels of our judiciary as being in conflict with our most cherished constitutional guarantees.

Social historian John Demos's account of marriage suggests that the ability of marriage to contribute to economic stalwartness historically lay in its strictly defined roles for men and women.³³⁵ Women within this framework provide the sustenance, shelter, and sexual outlets men need to restore themselves for renewed forays into the marketplace. This description of the history of marriage recalls the marriage movement's insistence that marriage is the building block of our society. The notion is probably linked to the important organizing and subsistence functions that marriage formerly fulfilled but which have lost currency in our age.³³⁶ The historical form of marriage has been described as a tool for the political and economic subjugation of women, an oppression of long duration in which the law continues to be complicit.³³⁷ In particular, Professor Martha Fineman has developed an intricate and compelling theory positing that within the rhetoric about the importance of marriage to society lies the privatization of dependency on a grand scale.³³⁸ According to Fineman's theory, this rhetoric masks the traditional nuclear family's true function of serving as a locus for inevitable and derivative dependency.³³⁹ With the onslaught of marital breakdown, Fineman urges that marriage is no longer capable of fulfilling this role and advocates its abolition as a legal category.³⁴⁰ To replace marriage,

³³⁵ John Demos, *Images of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 43 (Virginia Tufte & Barbara Myerhoff eds., 1979).

³³⁶ See Abernethy, *supra* note 321, at 39.

³³⁷ See COTT, *supra* note 232, at 62-67; Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 169-70 (1999) (cataloguing inequities); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 289-306 (1997) (associating marriage with slavery and involuntary servitude); Regan, *supra* note 94, at 649-50 (cataloguing inequities).

³³⁸ See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 400-02.

³³⁹ Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2200, 2205 (1995); see Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 92 (1998).

³⁴⁰ See MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 164, 228 (1995); Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 542 (1998)

Fineman advocates a re-envisioned family focusing on the mother and child caretaking relationship as the core unit of family intimacy.³⁴¹

The marriage movement purports to reject the inequality model of marriage so vividly exposed by Demos and Fineman. The movement also claims to be committed to refashioning marriage into an equal partnership where both spouses bear responsibility for breadwinning, housekeeping, and child-rearing.³⁴² Such shared roles, of course, create an increased demand for third-party childcare, which commentators in the marriage movement criticize as detrimental to children.³⁴³ While creating more financial wealth for individual couples, these shared roles also create inflationary pressure, which can lead to more time spent working and less time in the home. Faced with this inconsistency, other marriage movement commentators make clear that the equal-partners-in-marriage model is *not* a desirable way to place marriage back on solid footing or at least should not be an overriding concern. One view posits that a culture committed to children cannot be fixated on equality and autonomy but upon dependence and obligation.³⁴⁴ This position certainly sounds a lot like Fineman's, except for its insistence that shoring up creaky marriages instead of working to subsidize dependency within the family is the best possible policy choice. Another, more metaphysical view posits that role-sharing in marriage today is dangerously "androgynous,"³⁴⁵ robbing marriage of the opposing forces that generate a form of sexual desire essential to conjugal fidelity. This view boasts few adherents. In the final analysis, the marriage movement will not relinquish the talisman of marriage as fixed and natural instead of "ultimately dependent upon social and economic structures."³⁴⁶

To its credit, the marriage movement on some level seems to recognize that it faces a difficult dilemma. On the one hand, the goals it claims

("Marriage is no longer able to serve its historic role as the repository for dependency.").

³⁴¹ See FINEMAN, *supra* note 340, at 228, 230-32.

³⁴² See WAITE & GALLAGHER, *supra* note 253, at 171-73, 187.

³⁴³ See Graglia, *Housewife*, *supra* note 95, at 516 (referring to "the vagaries of surrogate care").

³⁴⁴ See Maggie Gallagher, *A Reality Waiting to Happen: A Response to Evan Wolfson*, in SAME-SEX UNIONS, *supra* note 309, at 12.

³⁴⁵ See Graglia, *Housewife*, *supra* note 95, at 515; see also Graglia, *Non-Feminist*, *supra* note 95, at 995-96, 1002.

³⁴⁶ DENNIS ALTMAN, *GLOBAL SEX* 43 (2001); see also David B. Cruz, *Mystification, Neutrality, and Same-Sex Couples in Marriage*, in JUST MARRIAGE 52, 55 (Joshua Cohen & Deborah Chasman eds., 2004) (discussing religious and mystical notions of marriage promulgated by natural law theorists).

marriage achieves cannot be satisfied without returning to anachronistic gender roles. On the other hand, extolling such marriages too vigorously would cause the movement to lose coveted political ground. For the time being, the movement is forced to proclaim its commitment to equality in marriage in the vaguest of terms. It accomplishes this without acknowledging that its commitment to heterosexuals-only marriage at all costs contradicts many of its most adamantly held positions. The debate within the marriage movement about how best to sell the idea of heterosexual-only marriage continues. What seems certain, however, is that the marriage movement has not as yet dealt thoughtfully and forthrightly with how, in its efforts to reinvigorate marriage within a heterosexuals-only framework, it can avoid breathing new life into long-rejected, gender-based inequities.

3. Inadequate Concern for Child Welfare

Much of the marriage movement's efforts to promote marriage are actually detrimental to children. In Focus on the Family's latest effort in support of a Federal Marriage Amendment to outlaw same-sex marriage, a forlorn young boy stares out from a newspaper advertisement and asks: "Why don't [certain senators] believe every child needs a mother and a father?"³⁴⁷ A warning follows: "[H]omosexual marriage intentionally creates fatherless families or motherless families. Think about it."³⁴⁸ The advertisement is but one example of how the marriage movement uses images of suffering children in its quest to engraft a heterosexual definition of marriage into the Constitution. The advertisement tells readers that not supporting the Marriage Amendment will deprive children of a mother and a father. But in the telling, the advertisement misassociates marriage with parenthood in a rhetorical tactic that has become the trademark of the heterosexuals-only marriage movement.

Little of substance lies behind the appeals to children's welfare in the campaign to outlaw same-sex marriage. On its website, Focus on the Family warns readers that same-sex marriage will "rip kids apart emotionally."³⁴⁹ The argument proceeds as follows. Unmarried people

³⁴⁷ Commercial Closet, *Don't Senators Believe Every Child Needs a Mother and Father?* (displaying newspaper advertisement from Focus on the Family Action, Inc.), available at <http://www.commercialcloset.org/cgi-bin/iowa/portrayals.html?record=1954> (last visited Nov. 1, 2005).

³⁴⁸ *Id.*

³⁴⁹ DOBSON, *supra* note 9.

have too much sex with too many partners.³⁵⁰ Individual gays and lesbians are the worst offenders, typically tallying a thousand or more sexual partners over a lifetime.³⁵¹ That's not good for children.³⁵² What's more, in the wake of the rising divorce rate among heterosexuals, blended families and shared-custody arrangements that confuse children have mushroomed.³⁵³ While this parade of horrors might support arguments for planned parenthood or pre- and post-marital counseling, it has nothing to do with same-sex marriage or its effect on children's emotional lives. The website offers clarification: "More than ten thousand studies have concluded that children do best when they are raised by loving and committed mothers and fathers."³⁵⁴ Yet, this declaration, recalling our discussion of Whitehead, merely restates, in part, a well known truism that has nothing to do with marriage. That children do best when raised by good parents who function well together is not the least bit controversial, but it happens not to support a call for heterosexuals-only marriage. Underneath both Focus on the Family's and Whitehead's calls for marriage reform is a simple message that children suffer without love and support and that love and support may falter if parents become overwhelmed in their struggle to get along. Using this message about child welfare as a way of promoting a ban on same-sex marriage at best seems counterintuitive. The ban will not guarantee love and support even for children who live together with their married heterosexual parents, and it will do nothing to assuage the ravages of divorce. Moreover, if the married family is a locus in which children thrive, we should do what we can to promote *more* marriage, not less.

Efforts to outlaw same-sex marriage, if successful, are destined to harm certain children. Part of the objection to same-sex marriage is that it would allow married gay and lesbian couples to adopt each other's children under step-parent adoption statutes. Such adoptions would give the children of same-sex couples all the legal protections and benefits of having two parents — one of the primary goals of parentage law.³⁵⁵ As explained above in Part II, children of assisted reproduction, who in some cases have only one legal parent and perhaps a second functional parent they have known since birth, would benefit the most.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ See Garrison, *supra* note 30, at 904.

Although cognizant of this fact, the marriage movement must nonetheless believe that the welfare of these particular children is the cost required to protect opposite-sex marriage with a constitutionally enshrined ban on its same-sex equivalent. In the end, however, the argument that privileging heterosexual marriage is critical to ensuring the welfare of children falls apart when it comes to light that some children will actually suffer under such a myopic and rigidly exclusionary view of the value of marriage.

CONCLUSION

Marital status-based restrictions on adoption and assisted reproduction arise from the belief that children do best when they are raised by their married, biological parents. The emphasis on marriage has fallen away from the regulation of artificial insemination, and single persons are universally permitted to adopt children (albeit not on equal footing with married couples). However, new proposals to regulate surrogacy invariably restrict the use of surrogacy to married couples. Such restrictions, when viewed under an interpretivist microscope, fail to exhibit the minimum standard of consistency and neutrality so integral to our system of justice. Furthermore, particularly in adoption, favoritism toward married couples can render some children unadoptable, an outcome that seems particularly out of step with well accepted views on how legal recognition of parent-child relationships benefits children.

Given that marriage has for millennia been an important feature of societies throughout the world, the belief that the world would be unrecognizable in its present form without marriage is completely understandable. The marriage movement has worked strenuously to reverse what it sees as a societal decline produced by a culture increasingly devoted to individual fulfillment and its inevitable manifestation — divorce. To its credit, the movement seems genuinely passionate about engineering a safer, more salutary society for all. Its efforts, however, have a certain alarming consistency. Not only do they appear to be unrelated to any serious consideration of or fundamental devotion to child welfare, but their logical outcome would require a return to a form of marriage that has been discredited as inimical to the equality guarantees of our constitutional system. Under close scrutiny, the broad, encompassing claims of the marriage movement can be reduced to a narrow and uncontroversial truism: children do best when they are raised by loving and supportive parents. But this understanding of child welfare does not support the grand claims about

marriage the movement has been making for well over a decade. Were this truism to be embraced and implemented to the fullest extent, marital restrictions on adoption and assisted reproduction would cease to command serious attention from our leaders and policymakers.