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"[R]elegated Through No Fault of Their Own to a More Difficult" System: Applying the *Obergefell* Opinion to Custody Principles

“[R]ELEGATED THROUGH NO FAULT OF THEIR OWN TO A MORE DIFFICULT”¹ SYSTEM: APPLYING THE OBERGEFELL OPINION TO CUSTODY PRINCIPLES

Melanie Kalmanson*

The language of the U.S. Supreme Court’s ruling in Obergefell v. Hodges will be interpreted and scrutinized for years to come due to the opinion’s wide breadth of impact across multiple areas of law. This paper exposes an impact in an unexpected area of law. This piece aims to acknowledge implications woven into the Court’s language, which are not recognizable at first glance, that could potentially transform child custody law and the controlling best interests framework. Specifically, Obergefell imposes a per se presumption that marital relationships create stability and continuity for parenting. This paper explains the majority and dissenting opinions’ reasoning and structure, then dissects statements within the opinions that could damage the balance necessary to maintain the current, delicate child custody system. This paper discusses the assumptions underlying the Court’s statements and offers arguments and empirical evidence to the contrary. Then, this paper proposes solutions to mitigate the effects of an unjustified presumption of stability within a marriage before custody law is overtaken by such presumption.

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I. INTRODUCTION

The United States Supreme Court's recent opinion in *Obergefell v. Hodges*² has already resulted in a firestorm of discussion and will undoubtedly continue to spark debate and conversation. One U.S. Circuit Court of Appeals, separating itself from the rest,³ created sufficient disagreement for this country's highest court to review one of the most debated modern topics: same-sex marriage.⁴

In 103 pages, the nine Justices of the United States Supreme Court consolidated decades of American constitutional jurisprudence to form their arguments on both sides of the decision.⁵ Ultimately, a slim majority, followed by several dissents, struck down state bans on same-sex marriage, establishing that marriage is a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.⁶ Just as the Court's precedential application demonstrated, the implications of the *Obergefell* opinion will

have an intersectional, nationwide impact.

As expected, many repercussions will come from the landmark *Obergefell* opinion—discussions on the right to marry, backlash from disagreeing states,⁷ new insight into the law of sexual-orientation discrimination at work, and battles over the balance between religious liberty and civil rights.⁸ This Paper exposes a possibility for grave consequences in an unexpected body of law: child custody.

Agreement among the several *Obergefell* opinions is sparse.⁹ Within each opinion, however, the careful reader finds an emphasis on the importance of marriage for providing stability to children. The statements relevant to this sentiment could have a significant impact on custody analyses throughout the United States. By creating a *per se* stability presumption within a marital relationship, the U.S. Supreme Court created precedent that could harm the outcome of future custody analyses and the children they involve. This Paper evaluates the effects that the *Obergefell* opinion will likely have on the

child custody system and suggests ways that courts can proactively mitigate such biased and unjustified impact. Part I dissects Justice Kennedy’s heartfelt majority opinion and two of the four subsequent dissents. Starting with a general overview of their structure and arguments, this Part then narrows in on the ever-so-subtle landmines for custody law within the *Obergefell* opinions. Part II explores the implications that these statements, aimed to highlight the importance of marriage to support same-sex marriage rights, will have on custody determinations moving forward—including how best interests analyses will change, how the changes likely to follow *Obergefell* compare to longstanding custody doctrines, and how these changes will impact a particular class of parents. Part III offers policies to mitigate the adverse effects such implications could have on the delicate balance of a child’s best interests and the parents’ fundamental rights in custody determinations. Part IV concludes.

II. THE *OBERGEFELL V.*

HODGES, ET AL. MAJORITY AND DISSENTING OPINIONS

“When the justices speak, our world changes. Whether lauded or scorned, their decisions shape our future.”¹⁰ Such is true for an unsuspecting class of parents seeking custody in court actions after *Obergefell*. While the dissenting opinions strongly criticized the *Obergefell* majority, the Justices found one common ground: that marriage provides the ideal familial foundation for raising children.¹¹ This Part outlines each opinion’s statements regarding the stability of marriage and what those assertions imply for the law of custody and parenting.¹²

A. Justice Kennedy’s Majority

In what may have been the decade’s most anticipated decision, Justice Kennedy delivered an important victory for liberals and same-sex couples.¹³ “Kennedy is a generative constitutional theorist, willing to work with raw principles of liberty, equality, and dignity to address the great questions of our age.”¹⁴ It

is no wonder, then, that he authored this landmark opinion, answering a fundamental question of modern society grounded on liberty.¹⁵ The majority opinion is full of insightful,¹⁶ romantic,¹⁷ and emotional¹⁸ one-liners that provide tremendous perspective into the one vote that carried the otherwise politically split Court to a majority.¹⁹ Notwithstanding its passion, the majority opinion is grounded in constitutional doctrine and legal reasoning.²⁰ This section explores Justice Kennedy's majority opinion: its significance, structure and intersectional discussion, and statements on parenting.

1. A Historical Holding

Constitutional jurisprudence gave the Court two doctrinal options upon which to base its decision that it is unconstitutional for states to statutorily ban same-sex marriage. Each option, both grounded in the Fourteenth Amendment, would require different elements, reasoning, and structure. First, the Court could have established that homosexuals are a protected class,²¹ invalidating bans on Equal Protection

grounds.²² Instead, though, the Court concluded that the Due Process Clause of the Fourteenth Amendment establishes a fundamental right to marry that cannot be denied to those in same-sex relationships.²³ In other words, the Court predominantly founded its holding on Substantive Due Process grounds, ruling that states cannot limit same-sex couples' fundamental right to marry. Nevertheless, the reasoning was not isolated in Due Process. Justice Kennedy effectively acknowledged Equal Protection concerns, stating that a deprivation of a fundamental right is a violation of both of these clauses.²⁴ Likewise, in a thorough protection of the established fundamental right, the Court held that states must recognize valid same-sex marriages from other states.²⁵

First, the Court extensively discussed the history, importance, and jurisprudence of the right to marry. Justice Kennedy recapitulated how marriage regimes have developed from an arranged union by a couple's parents, to legal subordination of

women through coverture, to the current regime in which both parties are presumed to obtain equivalent property rights.²⁶ Second, the Court articulated the significance of marriage as the foundation of our social structure and the provision of exclusive rights and privileges to its constituents.²⁷ Third, the Court explained the development of the right to marry, which started on Equal Protection footing, from its inception in *Loving v. Virginia*—striking down bans on interracial marriage—through its clarifications in *Zablocki v. Redhail*—holding that bans on marriage for parents who were in arrears on child support obligations, and otherwise, are unconstitutional.²⁸ This historical analysis is reflective of the Due Process Clause conclusion of the decision.²⁹

Despite its ultimate reliance on substantive due process, the Court contended that its decision was influenced by Equal Protection concerns due to a close nexus between the two Clauses.³⁰ Justice Kennedy presented an interdependence between the two theories and argued that one could not

exist without the other, and that violations of one signal violations of the other, and vice versa. Whether the majority decision was expected is immaterial to the decision's significance.³¹ “[The decision] is a huge step forward. June 26, 2015 thus will be remembered . . . as the Court taking a historic step forward in advancing liberty and equality.”³²

2. Cross-Application of Case Law

The fundamental right to marry established by *Obergefell* is derived from the word “liberty” in the Due Process Clause of the Fourteenth Amendment. It is not an enumerated right, or not explicitly provided by the Constitution, but has been established within the implications of the liberties granted by the Fourteenth Amendment.³³ “Justice Kennedy described, at length, the many Supreme Court cases that have established aspects of the right to marry as a fundamental right.”³⁴ Several corresponding rights have also been found within the term “liberty,” including the right to procreation,³⁵ abortion,³⁶ etc. Together, these rights form

the more general liberty to autonomously define one's own identity.

Justice Kennedy's majority opinion includes expansive discussion and cross-application of case law. This case law discussion puts this wide applicability into practice, exemplifying the wide-range of liberties within the right to personal identity.³⁷ "An unmistakable constant . . . is that Kennedy is driven by strong beliefs about the Court's duty to protect liberty."³⁸

The right to marry, as part of the larger liberty to make "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs,"³⁹ implicates various facets of one's life. Most significantly, Justice Kennedy used *Lawrence v. Texas* to chronicle the struggles that homosexuals have faced in seeking justice since 2003 when *Lawrence* was decided.⁴⁰ Finding a right to personal intimacy and privacy, the *Lawrence* Court struck down a statute criminalizing homosexual sodomy. In one line, Justice Kennedy, referring to

Lawrence, conveys history, emotion, and the need for change in homosexuals' rights: "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."⁴¹ Justice Kennedy's emphasis on *Lawrence* demonstrated the interconnectedness of jurisprudence surrounding liberty interests, as *Lawrence* created a starting point for Justice Kennedy broadening the liberties guaranteed by the Due Process Clause to be enjoyed equally by homosexuals.

Further supporting the liberty of individual autonomy,⁴² the Court cited *Griswold v. Connecticut*⁴³ and *Eisenstadt v. Baird*.⁴⁴ In the former, the Court, striking down a Connecticut law prohibiting contraceptive actions, established the right to privacy, specifically with respect to marital and intimate activities, within the "liberties" protected by the Fourteenth Amendment.⁴⁵ In the latter, the Court, striking down a Massachusetts law on Equal Protection grounds, held that unmarried couples cannot be denied the right to contraception and

have an equal right to non-reproductive sexual intercourse as married couples.⁴⁶ In *Eisenstadt*, the Court made the right to contraception a more individual right rather than a relational right, or a right dependent upon a specific relationship—here, exclusive to those in marital relationships.⁴⁷ Thus, the right to marry and the greater liberty of personal autonomy are applicable to several aspects of family life and are enjoyed individually, meaning such right is not dependent upon a relationship with another person.

3. A Focused Look: What the *Obergefell* Opinion Says About Children and Parenting

The previous two subsections covered what may be gathered from a close reading of the majority's opinion. What blends into the page as rhetoric, though, when read outside the four corners of *Obergefell*, is the damaging part for custody law and its constituents. The third principle of Justice Kennedy's "four principles and

traditions [which] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples"⁴⁸ is that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."⁴⁹ Note that Justice Kennedy was careful not to say that marriage is *founded upon* procreation because that would undermine his granting an equivalent fundamental right to marry to homosexual couples, for obvious biological reasons.⁵⁰ This principle of protecting children was then reaffirmed by two of the following three dissents, despite the dissents' overarching disagreement and hostility towards the majority's other arguments.⁵¹

Going into the custody framework, which is guided by an analysis of several factors surrounding the child's best interests,⁵² Justice Kennedy explicitly addressed the benefits that marriage—homosexual and heterosexual equally—provides to familial structures and the downstream effects such benefits have on the children being raised in

those marriages. The majority states, “[b]y giving recognition and legal structure to their parents’ relationship, marriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”⁵³ In other words, Kennedy suggested that children, as well as the majority of society, recognize an increased legitimacy in a married relationship. Further, as if speaking directly to the statutory custodial emphasis on continuity and stability within the best interests framework,⁵⁴ Kennedy wrote, “Marriage also affords the permanency and stability *important to children’s best interests*.”⁵⁵ He added:

Without the recognition, stability, and predictability marriage offers, [unmarried parents’] children suffer the stigma of knowing their families are somehow lesser. [The children] also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a *more difficult and uncertain family life*. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.⁵⁶

The inverse of the majority’s statements here is that children of unmarried, or single, parents sense a feeling of dishonor and disconnect within their familial structure. Justice Kennedy is, thus, assuming that marital structure inherently affects a parents’ ability to provide pride and protection to a child; that non-marital relationships are inherently unstable for childrearing. Thereby, he justified his decision to grant all-encompassing marital rights to same-sex couples to protect children being raised within their homes. Perhaps Justice Kennedy did not recognize what he was doing here with language that could be applied so broadly. He seems to assume, for purposes of this argument, that same-sex couples’ children are the *only ones* affected in this way. But, the absoluteness of his language suggests otherwise—that this detrimental impact of being raised by unmarried parents is overarching to all children.

Justice Kennedy’s reasoning

seems to frustrate common knowledge about the parent-child relationship. He assumed that non-marital relationships fail to demonstrate or symbolize commitment and/or love to children and society and those children are thereby publicly humiliated when growing up within an unmarried family structure. Society intuitively assumes that children, as offspring depending upon their parents for care and protection and completely unaware of any characteristics that may seem disqualifying to an adult community, admire and idolize their parents. Justice Kennedy's assumptions about imposed humiliation based upon societal formalities controverts this fundamental understanding of parenting and children.⁵⁷ Though likely unintended, Kennedy's *dicta* carries great weight into an area of law involving society's most innocent

victims. These statements will be further analyzed within the child custody context in Part III.

B. Justice Thomas's Dissent⁵⁸

The general theme of Justice Thomas's dissenting opinion is that the majority misunderstands the meaning of "liberty" as it was intended in the Constitution.⁵⁹ He reasoned that the Due Process Clause generally prohibits undue restrictions on rights, but argued that the government did something of the opposite here. Justice Thomas argued that petitioners' claim fell outside the scope of the Fourteenth Amendment because they asked the government to give them governmentally imposed rights.⁶⁰ In other words, Justice Thomas argued that you cannot claim a deprivation of due process for a lack of regulation or recognition by the government when you are, naturally to the contrary, allowed to carry on without government restraint. This is the positive versus negative rights dichotomy, or that the government not granting marriage benefits is not a

restriction or denial of an existing right. To

that end, Justice Thomas argued:

Petitioners cannot claim, under the most plausible definition of ‘liberty,’ that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children [and conduct other parts of private life] in peace [without government restriction].⁶¹

Basically, Justice Thomas argued that the Due Process Clause is not a source of new rights wherein same-sex couples may find recognition and the accompanying dignity, privileges, and benefits. Instead, he contends that due process guarantees the right to be free of government intrusion on same-sex couples’ intimate lives. Therefore, he argues, that petitioners and all other same-sex couples shall carry on as they have, in the privacy of their homes and able to define their identity by their relationships, albeit unofficial. But states are not affirmatively obligated to provide the couples anything—including formal recognition of their relationship through

marriage.

Notwithstanding his disagreement with the majority, Thomas, like Kennedy, centralized the relationship between childbearing and marriage. Thomas took the parenting stability argument a step further, by making it the founding purpose of the marital union. He contends that marriage “arose not out of a desire to shore up an invidious institution like slavery, but out of a desire ‘to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.’”⁶² In other words, marriage was created to bind two adults for the purpose of securing the children created within that parental relationship. Contextualizing this argument within the framework of the *Obergefell* majority to which he is dissenting, Thomas seems to contend that recognizing same-sex marriage is unnecessary, or incorrect, because same-sex couples are incapable of procreating.⁶³

Further, Justice Thomas partially

implied that the two-adult family structure alone provides stability.⁶⁴ He wrote, “[p]etitioners misunderstand the institution of marriage when they say that it would ‘mean little’ absent governmental recognition.”⁶⁵ Here, he suggested that simply having two parents—or adults—in a household provides stability, regardless of the couple receiving the marriage accompanying rights from the government when their relationship is formally recognized as a marriage. In some sense, this is consistent with Kennedy’s “material benefits” statement.⁶⁶ Both suggested that by virtue of having two adults in the house, tangible benefits that equate to stability are felt. There is empirical credence to these statements;⁶⁷ however, there is also empirical evidence of successes of the inverse.⁶⁸

C. Justice Alito’s Dissent⁶⁹

Generally, Justice Alito’s dissent contended that the Court, by making this decision on unsupported constitutional grounds, invaded upon the states’ rights to regulate and define marriage.⁷⁰ First, Justice

Alito characterized the majority as a charitable effort to same-sex individuals who may now enjoy benefits of marriage. He wrote, “Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry.”⁷¹

Justice Alito then condemned the Court for even deciding the issue at all. He, consistent with his previous decisions,⁷² said that this is a matter for the Legislature. Concluding, Justice Alito stated, “All Americans, whatever their thinking on that issue, should worry about what the majority’s claim of power portends,”⁷³ because, in his opinion, the majority overreached.

Despite his disagreement with the majority, though, Justice Alito furthers the overarching theme of emphasizing marital stability. Adding his own take on the benefits of marriage, Justice Alito stated, “[m]arriage provides emotional fulfillment and the promise of support in times of need.

And by benefitting persons who choose to wed, marriage indirectly benefits society *because persons who live in stable, fulfilling, and supportive relationships make better citizens.*⁷⁴ As will be elucidated below, Justice Alito's position on marital stability may be the most extreme for those on the receiving end. He assumes that formal recognition by the government is somehow required for inter-human commitment. He also assumes, or at least implies, that these products of marital stability cannot otherwise be produced. These assumptions are negated by committed couples, oftentimes heterosexual, who simply choose not to be married for one reason or another.⁷⁵ Courts have also recognized the opposite of these assumptions; the Supreme Court of California stated: "The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses."⁷⁶

III. THE OPINION'S CUSTODY IMPLICATIONS

Similar to the precedent underlying *Obergefell's* ruling, there is great intersectionality in the repercussions of this opinion. As the Court explains, marriage provides a wide array of rights, privileges, and benefits to its participants:

taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.⁷⁷

Thus, all of the corresponding areas of law—taxation, estate planning, property, family and divorce, etc.—in which marriage is interwoven in the policies, rules, and regulations, will see effects from this ruling.⁷⁸ However, the Court seems to ironically ignore these correlated parts of marriage in the effect of its reasoning.

Though the crux of the *Obergefell* opinion is about creating marital unions—or broadening access to marriage, it must also be analyzed in the context of such unions being broken, or divorce—the prevalence of which demands equal attention.⁷⁹ “[O]ne million children experience parental divorce each year.”⁸⁰ So, by expanding marital opportunity, the logical result is an expansion of divorce as well.

Therefore, an area of law that will be affected by *Obergefell* is child custody.⁸¹ The major underlying assumption of the majority and dissenting opinions is directly juxtaposed with the area of law they greatly affect. Custody cases do not arise until an “emotional fulfillment” and “promise of support” is broken.⁸² More plainly, the Court seems to avoid divorce altogether. If the Court fully grasped this “new generation[],” it would understand that divorce is just as much a real concern as same-sex marriage, as are the accompanying custody disputes.⁸³ Due to jurisdictional boundaries between state and federal courts, which are based in

the states’ rights to autonomously regulate issues related to family life,⁸⁴ it is rare for Federal courts, let alone the Supreme Court of the United States, to discuss issues even remotely associated with custody. Thus, the language of *Obergefell* creates an “ace card” for the custodial party it happens to favor that cannot be outweighed with equivalent authority. This Section canvases how *Obergefell*’s rhetoric—outlined in Part II above—will affect custody law.

A. An Unduly Weighted Best Interests Analysis

The best interests framework is the center of custody systems nationwide.⁸⁵ To determine the custody configuration that best suits a child’s needs,⁸⁶ courts weigh several statutory factors within the context of each parent’s individual circumstances. Depending on the resulting balance, the child will either split time evenly with both parents, known as equal time-sharing, or the parent with more favorable circumstances will be awarded primary time-sharing, or the majority of time and physical care for the

child with prescribed visitation to the other parent.

The child's interest in maintaining continuity and stability generally guides best interests analyses.⁸⁷ The *Obergefell* majority would like us to believe that by simply saying "I do," a parent unlocks a magic door to providing stability and security to his or her child, that by entering into marriage, a household is inherently the more beneficial atmosphere for raising a child. However, consider a scenario in which the original custody determination gave primary custody to a single mother, who devotes her free time to raising her child and will likely not get married and was never married before. Then, the child's father marries his spouse as a result of newly legalized same-sex marriage and files for custody modification arguing that he can provide more continuity and stability for the child than the mother because he is now married. Is a reviewing court obligated, under *Obergefell*, to assume that, by virtue of his marriage, the father has an upper hand in the continuity and stability

factor, despite the fact that the mother has been the primary caretaker for an extended period of time?⁸⁸ The presumption of marital stability from *Obergefell* creates, or otherwise furthers, competing concerns with continuity and stability for maintaining the same routine and caretaker.

Moreover, imagine a custody dispute in which a mother, in celebration of *Obergefell*, legally married her short-term girlfriend. The father, who is not remarried, was awarded primary custody of his elementary school son a few years prior, following a best interests analysis. Employing the precedent of *Obergefell*, the mother petitions the court to modify custody based on her heightened stability resulting from her new marriage. If a court interprets *Obergefell* how it is likely to be interpreted based on the statements highlighted in this paper and grants the mother's petition, the decision could likely be in grave contrast to some more important best interests factors that likely influenced the original best interests analysis.

The *Obergefell* presumption—specifically in Justice Thomas’ articulation⁸⁹—assumes that both adults are adequately capable of being parents. Not only is this contradicted by common scenarios, but is also empirically disputed by the volume of cases the custody system and child protective services process each year.⁹⁰ If all parents were capable, the system would not be so flooded with children needing protection from unfit parents, both single and married. What the *Obergefell* decision fails to consider in creating this presumption of stability within a marriage is that “[t]he stability and continuity of the child’s environment can be affected by many things.”⁹¹ One may interpret the statements discussed herein as addressing but one of those many factors rather than determining one exclusive factor; however, the *Obergefell* Court weighs too heavily the stability that accompanies marriage for this to be clear.

Returning to the first hypothetical—single never-been-married mother with newly-wed homosexual dad—what does the

Obergefell presumption imply about non-marital sex? For a seemingly progressive opinion, the opinion still implies problems for parents of children out of wedlock—an antiquated doctrine.⁹² Nevertheless, the presumption may urge custody courts to further condemn non-marital sex. At best, if the mother here ends up having another adult move into the home, it is a coin toss between whether the custody court will follow Kennedy’s assumption against non-marital stability and Thomas’s reasoning that any two-adult household is tangibly better than a one-adult household. Either way, this superficial, structural analysis seems to subjugate the meaning of parenting and the actual value that a good parent provides to his or her child—love, support, and guidance—regardless of monetary resources or marital status.

B. Presumption Contradictory to Custody Laws

When applied strictly, the presumption of stability within a married family unit, and accompanying preference

for placing children in those homes based upon the stability focus of the best interests analysis, is contradictory to other custody laws and principles. Also written into several states' laws is a negative best interests factor when a parent is encouraging a step-parent (when the parent is remarried) or other third party to play a parental role.⁹³ Thus, when a parent ("Parent 1") is remarried and encouraging the new spouse ("Step-Parent") to play a parenting role superior to that of the other parent ("Parent 2"/ex-spouse of Parent 1) and the courts apply the *Obergefell* presumption of stability to the new marriage, Parent 2's parental rights are undermined by Parent 1's remarriage and Step-Parent's interference. This directly contradicts the purpose of these statutes that instruct the court to consider a Step-Parent's role and ensure that the two *per se* original parents maintain their roles in the child's life. If the *Obergefell* presumption is incorporated in such situations, though, the best interests analysis may be skewed.

Further, this presumption towards a married family unit resembles the outdated presumption of legitimacy. The presumption of legitimacy aimed to protect children from being ridiculed by both society and policy,⁹⁴ such as intestate laws at the death of a parent.⁹⁵ These outdated laws automatically gave parental rights to the married husband of the biological mother, regardless of whether he was the biological parent of the child.⁹⁶ However, "the old model that children born out of wedlock had no legal rights unless legitimated no longer exists."⁹⁷ In fact, the patriarchal model is not so much the norm in modern society.⁹⁸ "[S]ocial norms concerning parenthood have shifted dramatically in recent years, 'although mixed reactions toward single parenthood persist.'"⁹⁹ Regardless of society's reaction, statistics affirm the shift in family structure:

- 24% of children in 2014 did not live with two adults.¹⁰⁰

- Another 4% lived with one parent who was cohabiting, meaning 28% of children in 2014 did not live with two parents.¹⁰¹

- 5.5% of children in 2014 lived

with one biological or adoptive parent and a stepparent.¹⁰²

- Only 63.8% of children in 2014 lived with two biological or adoptive parents.¹⁰³
- By race, children who lived with two married parents in 2014 were as follows:¹⁰⁴
 - 74% white-alone, non-Hispanic
 - 58% Hispanic
 - 34% Black-alone

Kennedy argues that societal changes justify a shift in precedent and jurisprudence. Thus, this presumption of stability within married families and preference towards a patriarchal structure should not predominate the custody best interests analysis. Punishing single parents, instead, “ends up punishing single parents’ children.”¹⁰⁵ Thus, children would be the victims of an overbearing integration of the *Obergefell* marital presumption in custody laws.¹⁰⁶

C. Unjustified Prejudice to Single Parents

Taking the implications of the Court’s opinions a step further, as demonstrated in Section III.B., the most affected opponents of the opinions’ overarching insinuation are

single parents. Although the presumption of legitimacy has been removed from parenting laws, a modern stigma remains against single parents.¹⁰⁷ Nevertheless, “[w]hile the overall population continues to increase in the United States, the proportion of the population that is married continues to drop.”¹⁰⁸ As indicated above, single parents are caring for approximately twenty-four percent of the nation’s children¹⁰⁹ “and are the most rapidly growing family form in America.”¹¹⁰ The *Obergefell* opinion revitalizes this stigma concern, though.

This *Obergefell* presumption further damages single parents’ legitimacy as adequate parents. Despite Kennedy’s and the dissents’ implied presumption, single parents—nevertheless disadvantaged—are not innately inadequate. In fact, they may offer unique advantages to childrearing that marital families do not. For example, “[s]ingle-parent families are far less hierarchical and far more cooperative and communal than most two-parent marital families.”¹¹¹ They “also generate a different

gender dynamic, one which is most supportive of egalitarian sex roles and undermines traditional gender roles,”¹¹² which, following *Obergefell* and in the midst of modern developments, is something of significant value in modern society. “Single-parent families also provide models of support networks, familial and nonfamilial.”¹¹³

Further expanding upon Justice Alito’s input on the effects of a marital relationship, we come to the conclusion that children with married parents will make better citizens than those of single parents.¹¹⁴ Yet, common sense and empirical examples of successful people being raised by single parents tell us that this is false.¹¹⁵ The success and efficiency of parenting is a product of multiple variables.¹¹⁶ A single parent—which would include a widow or widower who was once married¹¹⁷—is not inherently incapable of providing stability and continuity for his or her child and raising a healthy, successful, law-abiding citizen.¹¹⁸ Hence, the conclusions

intertwined in the *Obergefell* opinions are far too black-and-white to be applied to custody analyses.

All in all, “children’s needs should be addressed, and all single-parent families must be valued regardless of their forms,”¹¹⁹ especially when determining the best interests outcome. Notwithstanding their differences, reverting to the most fundamental analysis, “[e]ven by conventional, ‘bright-line,’ legal concepts of family—by ‘blood, marriage, and/or adoption’—single-parent families are entitled to belong.”¹²⁰ In other words, single-parent families are increasingly prevalent in today’s society and reap unique benefits on their members.

The legal validation of stigma within *Obergefell* furthers single parents’ struggles, in spite of their competency to parent. “[T]he presence and repetition of the justifications for stigma within a legal context cloak these justifications with the legitimacy and presumed objectivity of the law. The law as ideology reinforces and validates stigma.”¹²¹

The *Obergefell* opinions do just that by creating a presumption against single parents for adequacy and legitimacy as caregivers to this country's future generations.¹²² “[S]ingle-parent families should not be stigmatized, and support should be available to needy children irrespective of family form.”¹²³ Thus, the *Obergefell* presumption—if accepted by custody courts, or even one court—further the inappropriate stigma against single parents.

IV. MITIGATING THE *OBERGEFELL* IMPACT ON CUSTODY ANALYSES

Undisputedly, there is strong support for the proposition that marriage provides stability to family structure that, in turn, benefits children being raised by married couples. Empirical evidence shows employment and wealth benefits are associated with marriage relationships.¹²⁴ Though, this is not absolute. It is not guaranteed, just by the fact that two people are married that their relationship is healthy—or that the relationship is healthy for children to be raised within—or that the

married individuals are fit to be parents. Likewise, custody courts should not operate on an inherent bias against single parents as a result of the *Obergefell* opinion. Such bias would further the injustice that children subjected to the best interests analysis face when courts arbitrarily weigh factors based upon their external and personal preferences, rather than the facts specific to each case.¹²⁵

Further, a parent's choice to be remarried after a divorce is just that: a choice. This choice is a part of the very right that *Obergefell* aimed to safeguard—the right to make choices to define one's identity. The progression of marriage laws makes each individual equal within a partnership, both of “who[m] share work and family responsibilities equitably.”¹²⁶ “Therefore, both parties can restructure their post-divorce lives equally in private and public spheres.”¹²⁷ In order to effectuate such freedom, the system must not allow for parenting rights to be affected by parents' remarriage choices following divorce.

Courts can implement strategies to avoid detrimentally affecting the delicate custody system from the biased implications of this unmatched precedent from *Obergefell*. Such strategies will generally aid the custody system by enforcing open-mindedness to all factors of the best interests analysis. Primarily, it should be emphasized to the courts that the marital status of a parent is exactly how it appears in the best interests statute—but *one fact* within a list of several facts that, together, form the overall framework of a child’s environment. Texas, for example, has taken this a step further and statutorily declares that the marital status of a parent should not affect a best interest analysis:

“The court shall consider the qualifications of the parties *without regard to their marital status* or to the sex of the party or the child in determining:

- (1) which party to appoint as sole managing conservator;
- (2) whether to appoint a party as joint managing conservator; and

the terms and conditions of conservatorship and possession of an access to the child.”¹²⁸

When closely considered, the answer can cut

both ways. One specific marital status could, in theory, be both beneficial and unfavorable to the analysis depending on the circumstances. So, “[i]nstead of seeing the single-parent family as inherently dysfunctional, the law should recognize the prevalence and importance of single-parent families. . . . [In fact], single parenting is the most common pattern within marriage as well as after divorce.”¹²⁹ Single parenting should, therefore, be accepted within the custody best interests analysis and intertwined as part of the circumstances affecting the overall analysis.

Notwithstanding a press for less emphasis on marital status, when considered in the best interests analysis, *Obergefell* directs an equal view of any marriage. With the expansion of marriage rights to homosexual couples, as equal to heterosexual couples, courts must similarly be sensitive and proactive to apply any preference towards marriage equally. After *Obergefell*, courts must view homosexual and heterosexual marriages as equal.

But, is that application a legal fiction? Though policies are slowly progressing, the benches of this country—both state and federal—remain predominantly conservative.¹³⁰ As a result, regardless of policy suggesting or advising otherwise, judges—given their great discretion in making custody determinations—may still enforce personal stigmas against homosexual parents.¹³¹ This restrained approach and possibility for personal influence significantly increases the importance of statutes like the one from Texas above—codifying a rejection of prejudice to marital status or, now, sexuality within marriage. A statute effectuating this equality would look like this:

The court shall consider the marital status of either parent as one factor within the best interests analysis and *without regard to the parent's relationship's sexuality* or to the sex of the parent's spouse when determining:

- (1) how marital status will affect the best interests analysis;
- (2) how time-sharing with the child will be divided between the parties; and
- (3) how decision-making related to

the child will be divided between the parties.

The most valuable aspect to be protected here is the delicate best interests analysis. Systemically, the framework has enough flaws, so disallowing *Obergefell* from upsetting the status quo is imperative. The stability of a married couple cannot be the sole basis for a custody determination and should not be unduly weighed against other factors. Just as the best interests statutes provide several factors, the courts should weigh several factors in each analysis. Despite the strength of the *Obergefell* precedent, custody courts should not allow parties to use this precedent as a trump card to overstep all other factors.

V. CONCLUSION

The Supreme Court, in the majority's valiant effort to afford equal marriage rights to same-sex couples and the Dissents' vocalization of passionate concerns about the outcome, imparted antagonistic presumptions on children's best interests. It did so via its *dicta* regarding marital stability

within the *Obergefell* opinion.

Custody law, though often overlooked, is one of the most sensitive, and arguably most important, areas of law. The subjects of the fact-intensive analyses are some of the country's most innocent and helpless victims of the justice system, both when it gets the answer right and even more so when it gets it wrong. Thus, it is the responsibility of lawmakers and the judiciary to protect the children of this country with its laws and its decisions. Whether Justice Kennedy and the subsequent dissents in *Obergefell* intended to impact custody law is irrelevant to the importance of avoiding detrimental effects to the custody system.

The presumption of marital stability for child rearing imparted in the *Obergefell* opinions must be recognized and proactively mitigated through conscious awareness by the courts analyzing best interest factors. When marital status is considered, though, *Obergefell* instructs that homosexual and heterosexual marriages be regarded as equal. Marital status of a parent is but one factor in

a multi-factor framework, and the fundamental right to marry is one of choice within one's larger right to define one's own identity. Therefore, courts must not allow the recent Supreme Court decision and marital status to outweigh other important factors that indicate ideal parenting.

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

² See generally *id.*

³ See, e.g., *Jernigan v. Crane*, 796 F.3d 976, 979 (8th Cir. 2015) (holding that Arkansas's bans on same-sex marriage are unconstitutional following *Obergefell*); *Armstrong v. Brenner*, 135 S. Ct. 890, 890 (2014) (ending the stay on injunctions for issuing same-sex marriages in Florida); *Condon v. Haley*, 21 F.Supp.3d 572, 587 (D.S.C. 2014) (holding same-sex marriage bans unconstitutional).

⁴ *Obergefell*, 135 S. Ct. at 2606 (“[F]aced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether the same-sex couples may exercise the right to marry.”). Until the Sixth Circuit Court of Appeals ruled on the issue in *DeBoer v. Snyder*, all U.S. Circuit Courts of Appeals, which had previously reviewed state statutes banning same-sex marriage, agreed that the bans were unconstitutional. *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), *rev'd by Obergefell*, 135 S. Ct. at 2584. See also *Condon*, 21 F.Supp.3d at 583 (“[A] decision of a circuit court, not overruled by the United States Supreme Court, is controlling precedent for the district courts within the circuit.”).

⁵ 135 S. Ct. 2584 (2015). The reference to 103 pages of the opinion includes the Syllabus.

⁶ See *infra* note 19 and accompanying text.

⁷ See *Local Government Responses to Obergefell v. Hodges*, BALLOTPEDIA (July 1, 2015), http://ballotpedia.org/Local_government_responses_to_Obergefell_v._Hodges; see, e.g., Michael

Martinez, *Who is Kim Davis, Kentucky Clerk Jailed Over Same-Sex Marriage Licenses?*, CNN, <http://www.cnn.com/2015/09/04/us/kim-davis-things-to-know/> (last updated Sept. 8, 2015); Press Release, *Governor Bentley Releases Statement on Same-Sex Marriage Ruling By the U.S. Supreme Court*, OFF. ALA. GOVERNOR (June 26, 2015), <http://governor.alabama.gov/newsroom/2015/06/governor-bentleyreleases-statement-sex-marriage-ruling-u-s-supreme-court/> (“Regardless of today’s ruling by the Supreme Court, I still believe in a one man and one woman definition of marriage.”).

⁸ Cf., e.g., Stephen Wermiel, *SCOTUS for Law Students: The Supreme Court’s Contraceptive-Mandate Cases*, SCOTUSBLOG (Apr. 15, 2016, 10:42 AM), <http://www.scotusblog.com/2016/04/scotus-for-law-students-the-supreme-courts-contraceptive-mandate-cases/> (explaining cases on this topic currently pending before the Court).

⁹ Andrew Soergel, *9 Need-to-Know Quotes from the Obergefell v. Hodges Opinions*, U.S. NEWS (June 26, 2015, 11:22 AM), <http://www.usnews.com/news/articles/2015/06/26/9-need-to-know-quotes-from-the-obergefell-v-hodges-opinions> (“[T]he final ruling was hardly unanimous, with Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito all authoring individual dissents.”).

¹⁰ LAWRENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE* 7 (2015).

¹¹ See *Obergefell*, 135 S. Ct. at 2631-40 (Thomas, J., dissenting); *id.* at 2640-43 (Alito, J., dissenting).

¹² This excludes in depth discussion of Justices Roberts and Scalia’s dissents.

¹³ See David G. Savage, *Conservative Overreach May Explain Liberal Victories in Supreme Court*, L.A. TIMES (July 2, 2015, 4:00 AM), <http://www.latimes.com/nation/la-na-scotus-wrapup-20150702-story.html>.

¹⁴ TRIBE, *supra* note 10, at 11.

¹⁵ Justice Kennedy was also the Senior Justice in the majority and, therefore, would have been the one assigning who wrote the opinion, with the first option to do so.

¹⁶ E.g., *Obergefell*, 135 S. Ct. at 2598 (“The nature of injustice is that we may not always see it in our own times.”).

¹⁷ E.g., *id.* at 2594 (“Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two

persons.”).

¹⁸ See, e.g., David Corn, *The 19 Best Lines from the Supreme Court Decision that Just Legalized Gay Marriage*, MOTHER JONES (June 16, 2015, 11:01 AM),

<http://www.motherjones.com/politics/2015/06/supreme-court-gay-marriage-best-lines-kennedy-decision> (describing the majority opinion as “a love letter to marriage—and gay marriage,” “a paean to marriage,” and passionate, and recounting what the author believes to be some of the best passages from the opinion).

¹⁹ The majority was narrow with a 5-4 vote favoring the decision. *Obergefell v. Hodges*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/> (last visited Sept. 10, 2015) [hereinafter SCOTUSBLOG]. Justice Kennedy (conservative) was the vote that pushed the Court to a majority, i.e., the swing vote. E.g., Stephen Collinson & Ariane de Vogue, *Conservatives Help Liberals Win at Supreme Court*, CNN (June 30, 2015, 6:48 AM),

<http://www.cnn.com/2015/06/29/politics/supreme-court-2015-term-liberals-conservatives/>; Andrew Soergel, *Supreme Court Affirms Constitutionality of Gay Marriage*, U.S. NEWS (June 26, 2015, 10:05 AM),

<http://www.usnews.com/news/articles/2015/06/26/supreme-court-affirms-constitutionality-of-gay-marriage>; see JEFFERY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 225-31 (2007)

(suggesting C.J. Roberts prefers unanimity and entered Office with the goal of increasing the number of unanimous votes coming from the Court in an effort to increase and protect the Court’s credibility and legitimacy).

²⁰ Paul Smith, *Symposium: A Fair and Proper Application of the Fourteenth Amendment*, SCOTUSBLOG (June 27, 2015, 10:17 AM),

<http://www.scotusblog.com/2015/06/symposium-a-fair-and-proper-application-of-the-fourteenth-amendment/> (“Despite the vituperative criticism of the dissents (both substantive and stylistic), Justice Anthony Kennedy’s majority opinion is both rhetorically eloquent and legally persuasive. You can like or dislike his writing style, but the majority opinion simply applied the law as it stands.”).

²¹ This would have required establishing (1) a history of discrimination, (2) “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” and (3) political weakness. *Bowen v. Gilliard*, 483 U.S.

587 (1987) (citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976)); *accord* *United States v. Carolene Products*, 304 U.S. 144 n.4 (1938).

²² See U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Reed v. Reed*, 404 U.S. 71 (1971) (“The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”); *Ondo v. City of Cleveland*, 2015 U.S. App. LEXIS 13474, 25 (6th Cir. 2015) (citing *Bowen*, 483 U.S. at 602; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)) (“Nor can [it be] establish[ed] that homosexuals are a suspect or quasi-suspect class The Supreme Court has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so.”). *But cf.* Erwin Chemerinsky, *Symposium: A Landmark Victory for Civil Rights*, SCOTUSBLOG, <http://www.scotusblog.com/2015/06/symposium-a-landmark-victory-for-civil-rights/> (June 27, 2015, 8:56 AM) (suggesting the Court’s ruling had a protective effect over a class which has “been traditionally discriminated against and extending to them a right long regarded as fundamental”).

²³ SCOTUSBLOG, *supra* note 19 (“Holding: The Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.”); Smith, *supra* note 20; *see also* U.S. CONST. amend. XIV; *Ondo*, 2015 U.S. App. LEXIS at 25 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-05 (2015) (“[T]he [*Obergefell*] Court [did not hold] . . . that homosexuals enjoy special protections under [the] Equal Protection Clause.”)).

²⁴ *Obergefell*, 135 S. Ct. at 2604.

²⁵ *Cf.* U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the . . . Records . . . of every other State.”).

²⁶ *Obergefell*, 135 S. Ct. at 2595-96.

²⁷ *Id.* at 2597-601.

²⁸ *Id.* at 2598-99 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Zablocki v. Redhail*, 434 U.S.

374 (1978) (striking down a restriction that banned parents who were in arrears on child support payments from marrying); *Turner v. Safley*, 482 U.S. 78 (1987) (striking down a law which restricted inmates’ ability to marry); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *Obergefell*, 135 S. Ct. at 2602-05 (citing *Lawrence*, 539 U.S. 558; *Zablocki*, 434 U.S. 374; *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a ban on interracial marriage)).

²⁹ Generally, history does not have a place in Equal Protection reasoning. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (using history as support to ground the right to abortion in Due Process, rather than Equal Protection). This Author is currently writing an article on this effect as well as how *Obergefell* may have changed this.

³⁰ *Obergefell*, 135 S. Ct. at 2603 (citing *M.L.B.*, 519 U.S. 102); *see* Smith, *supra* note 20 (“A variation on the evolving liberty theme is Justice Kennedy’s explanation of how the Equal Protection Clause can be used in conjunction with recognized liberty interests to move doctrine forward.”). *But cf. Obergefell*, 135 S. Ct. at 2625-43 (dissenting opinions).

³¹ *Id.* at 2603.

³² Chemerinsky, *supra* note 22.

³³ *See supra* note 28 and accompanying text.

³⁴ Chemerinsky, *supra* note 22.

³⁵ *See generally* *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down, on Equal Protection grounds, Oklahoma’s Habitual Criminal Sterilization Act of 1935, which required sterilization of criminals for habitual crimes but not white-collar crimes).

³⁶ *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming the right to abortion but altering the framework for reviewing abortion restrictions); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a right to abortion, grounded in a liberty right to bodily autonomy), *aff’d in part and overturned in part by* *Casey*, 505 U.S. 833.

³⁷ *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁸ *TRIBE*, *supra* note 10, at 11.

³⁹ *Obergefell v. Hodges*, 135 S. Ct. at 2597-98 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965)).

⁴⁰ *See id.* at 2600; *see also* *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

⁴¹ *Obergefell*, 135 S. Ct. at 2600 (discussing the consequences of the *Lawrence* ruling and the gaps in rights it granted to same-sex couples); see also *id.* at 2596 (“A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.”).

⁴² Though, it could be argued that the right granted in *Obergefell* is relational, similar to that in *Griswold*, 381 U.S. 479.

⁴³ *Obergefell*, 135 S. Ct. at 2597-98 (citing *Griswold*, 381 U.S. at 484-486).

⁴⁴ *Id.* at 2597-98 (citing *Eisenstadt*, 405 U.S. at 452).

⁴⁵ See generally *Griswold*, 381 U.S. 479.

⁴⁶ See generally *Eisenstadt*, 405 U.S. 438.

⁴⁷ *Id.*

⁴⁸ *Obergefell*, 135 S. Ct. at 2599.

⁴⁹ *Id.* at 2600.

⁵⁰ *Id.* at 2601 (“An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court of the States have conditioned the right to marry on the capacity or commitment to procreate.”).

⁵¹ See discussion *infra* Part II.B.-II.C.

⁵² See *infra* notes 89-91 and accompanying text.

⁵³ *Obergefell*, 135 S. Ct. at 2600 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013)).

⁵⁴ See discussion *supra* Part II.A.

⁵⁵ *Obergefell*, 135 S. Ct. at 2600 (emphasis added).

⁵⁶ *Id.* at 2600-01 (emphasis added).

⁵⁷ It also furthers an outdated stigma, as discussed *infra* in Part II.C.

⁵⁸ Justice Scalia joined Justice Thomas’s dissenting opinion. SCOTUSBLOG, *supra* note 19.

⁵⁹ U.S. CONST. amend. XIV, § 1 (“No state . . . [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). See generally *Obergefell*, 135 S. Ct. at 2631-40 (Thomas, J., dissenting).

⁶⁰ See *Obergefell*, 135 S. Ct. at 2636 (Thomas, J., dissenting) (stating “[R]eceiving governmental recognition and benefits has nothing to do with any understanding of ‘liberty’ that the Framers would have recognized”); *id.* at 2637 (adding “As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits”).

⁶¹ *Id.* at 2635.

⁶² *Id.* at 2636 n.5 (quoting Brief for Scholars of History and Related Disciplines as *Amici Curiae* at 8).

⁶³ But see *supra* note 50 and accompanying text.

⁶⁴ There are other implications from this statement. Generally, this seems to be an excuse from the conservative perspective, accrediting same-sex relationships to downplay the role of governmental recognition.

⁶⁵ *Obergefell*, 135 S. Ct. at 2636 (Thomas, J., dissenting) (citing Brief for Petitioners in No. 14-556 at 33).

⁶⁶ See *supra* note 56 and accompanying text.

⁶⁷ See *infra* note 118 and accompanying text.

⁶⁸ See *infra* notes 116 and accompanying text.

⁶⁹ Justices Scalia and Thomas joined Justice Alito’s dissenting opinion. SCOTUSBLOG, *supra* note 19.

⁷⁰ See generally *Obergefell*, 135 S. Ct. at 2640-43 (Alito, J., dissenting).

⁷¹ *Id.* at 2641 (Alito, J., dissenting).

⁷² E.g., *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (J. Alito concurring) (“A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”).

⁷³ *Obergefell*, 135 S. Ct. at 2643 (Alito, J., dissenting).

⁷⁴ *Id.* at 2641.

⁷⁵ See Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 687 (1976) (discussing motivations to enter legal marriage).

⁷⁶ *Marvin v. Marvin*, 557 P.2d 106, 113 (Cal. 1976).

⁷⁷ *Obergefell*, 135 S. Ct. at 2601 (citing Brief for United States as *Amicus Curiae* 6-9; Brief for American Bar Association as *Amicus Curiae* 8-29).

⁷⁸ See discussion *supra* Part I.A.2; see also, for example, Sally Abrahamson, *Obergefell v. Hodges and Its Potential Impact on Employment Law*, EMP. L. BLOG (June 29, 2015),

<http://www.employmentlawblog.info/2015/06/obergefell-v-hodges-and-its-potential-impact-on-employment-law.shtml>; Ashlea Ebeling, *Tax, Estate Planning, Benefits Opportunities After Supreme Court’s Same-Sex Marriage Decision*, FORBES (June 26, 2015), <https://www.forbes.com/sites/ashleaebeling/2015/06/26/tax-estate-planning-benefits-opportunities-after-supreme-courts-obergefell-gay-rights-decision/#3cd3a4b032b8>.

⁷⁹ See Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U.L. REV. 279, 286 (2004-05) (stating “The divorce rate in the United States has stabilized at an extremely high level [I]t is estimated that nearly one-half of all American marriages now end in divorce”).

⁸⁰ *Id.* at 287.

⁸¹ See, e.g., FLA. STAT. § 742.11 (2015) (stating “any child born within wedlock who has been

conceived by the means of artificial or in vitro insemination is irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination”); FLA. STAT. § 742.091 (2015) (defining what constitutes the determination of parentage in Florida). However, this raises many issues on parental rights and rights of donors or surrogates that courts have not ultimately settled and this paper does not aim to address. Nevertheless, it is a pathway to same-sex couples being more often recognized as parents and therefore an increased rate of custody disputes. *Cf. Obergefell*, 135 S. Ct. at 2595 (discussing the struggles of April DeBoer and Jayne Rowse to be recognized as parents in Michigan).

⁸² *Obergefell*, 135 S. Ct. at 2643 (Alito, J., dissenting).

⁸³ *Id.* at 2587. *See generally* Melanie Kalmanson, *Giving the Pawns a Voice: A Call for Mandatory Representation of Children in High-Conflict Custody Battles*, 5 T.M. SCH. L.J. GENDER, RACE & JUSTICE 54 (2015).

⁸⁴ *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”). *See generally* *Obergefell*, 135 S. Ct. 2584 (discussing individual States’ regulation of marriage).

⁸⁵ LINDA HENRY ELROD, 3-32 FAMILY LAW AND PRACTICE § 32.06 [1] (footnote omitted) (“In all jurisdictions, the standard by which courts will determine which of the parents will be awarded custody is known as the ‘best interests of the child’ standard.”). For further discussion on the current best interest framework, *see* Kalmanson, *supra* note 83, at Part II.A.1. and accompanying text.

⁸⁶ *But see* Kalmanson, *supra* note 83, at Part III.B (arguing that the best interests framework is applied in the abstract and, thus, cannot adequately serve the child’s best interests without providing independent representation to children in high-conflict custody battles).

⁸⁷ *See* ELROD, *supra* note 85, at § 32.06 [5][c] (“[A] stable environment and continuity may be among the most important factors in determining the child’s best interest.”); Kalmanson, *supra* note 83, at 57; *see, e.g.*, LA. C.C. Art. 134 (4); N.D. CENT. CODE § 14-09-06.2 (1)(d) (2015).

⁸⁸ ELROD, *supra* note 85 (“Most courts give preference to the parent with whom the child has been living on a regular basis over a period of time.”).

⁸⁹ *See* discussion *supra* Part II.B.

⁹⁰ *See* Barbara A. Babb, *An Interdisciplinary*

Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective, reprinted in RESOLVING FAMILY CONFLICTS 19 (Jana Singer & Jane Murphy, eds. 2008) (“[F]amily law cases constitute about thirty-five percent of the total number of civil cases handled by the majority of our nation’s courts, a percentage which constitutes the *largest and fastest growing part of the state civil caseload*.” (emphasis added)). *See* U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001 (Oct. 2003), <http://www.census.gov/prod/2003pubs/p60-225.pdf> (13,383,000 custodial parents in 2002 living with their own minor children whose other parent is not living in the home).

⁹¹ ELROD, *supra* note 85, at § 32.06 [5][c].

⁹² *See* discussion *infra* Part III.B.

⁹³ *E.g.*, FLA. STAT. § 61.13 (3)(b) (2015) (“The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.”); *see also* FLA. STAT. § 61.13 (3)(a) (2015). *But cf.* 13 DEL. C. § 722 (a)(3) (establishing a child’s “interaction and interrelationship” with a stepparent as part of the best interest analysis); N.D. CENT. CODE § 14-09-06.2 (1)(k) (“The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child’s best interests.”).

⁹⁴ *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 23 (1902-03) (“the disrepute of bastardy”).

⁹⁵ *See id.* at 22 (“The principal legal difference between a legitimate and an illegitimate child is that, in general, only the former is capable of inheriting either from an intestate father or through a father deceased. . . . If, therefore, [a] father leaves legacies to each of his children merely describing them as such, and does not specifically describe the bastard, the latter would not receive [inheritance] under the designation ‘child,’ even though the parentage was well known and acknowledged by the father.”).

⁹⁶ *See id.* at 24 (“It follows that marriage was much more than a means of ascertaining paternity; there was something attaching to the notion of marriage which was regarded as the basis of this very notion, — legitimacy.”).

⁹⁷ Haeryon Kim, *Book Note: In Defense of Single-Parent Families*, 2 J.L. & FAM. STUD. 229, 235 (2000).

⁹⁸ *Cf.* Wardle, *supra* note 79, at 287 (citations omitted) (“By 2000, one-third of all children

born in the United States were born out of wedlock. That figure represents a thirteen-fold increase in the number of nonmarital births in just over fifty years.”).

⁹⁹ Kim, *supra* note 97, at 232 (quoting NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 41 (1997)).

¹⁰⁰ *Family Structure and Children’s Living Arrangements*, CHILDSTATS.GOV, <http://www.childstats.gov/americaschildren/tables/fam1b.asp?popup=true> (last visited Sept. 10, 2015) [hereinafter FAM1.B]; *see also* Michele Weldon, *Single Mothers, Stand Proud*, CNN, <http://www.cnn.com/2012/05/13/opinion/weldon-single-mothers/> (May 14, 2012, 7:28 AM) (showing that in 2012, there were over 19 million children without two parents).

¹⁰¹ *Family Structure and Children’s Living Arrangements*, CHILDSTATS.GOV, <http://www.childstats.gov/americaschildren/family1.asp> (last visited Sept. 10, 2015).

¹⁰² FAM1.B, *supra* note 100 (adding 5% of married biological/adoptive parent and stepparents to 0.5% of cohabiting biological/adoptive parent and stepparent).

¹⁰³ *Id.* (adding 59.5% of two biological/adoptive parents who were married and 3.7% of two biological/adoptive parents cohabiting). This has decreased significantly from 77% of children living with two married parents in 1980. *Family Structure and Children’s Living Arrangements*, *supra* note 101.

¹⁰⁴ *Family Structure and Children’s Living Arrangements*, *supra* note 101.

¹⁰⁵ Kim, *supra* note 97, at 232.

¹⁰⁶ *See id.* at 233 (stating “[T]he laws support the nuclear, patriarchal family, even though the results may be detrimental to children”).

¹⁰⁷ Nancy Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN’S L.J. 20 (1995) (“Both socially and legally, we relentlessly stigmatize parents as bad parents who have broken, incomplete, dysfunctional families which result in predictably disastrous consequences for their children.”); Kim, *supra* note 97, at 229 (“[D]espite their ubiquity, single-parent families are, by and large, stigmatized both ideologically and economically.”). Dowd explains four justifications for the stigma: “poverty, child development, morality, and implicit race and gender bias.” Kim, *supra* note 97, at 230.

¹⁰⁸ Wardle, *supra* note 79, at 286; *see supra* notes 80-81 and accompanying text. Further, approximately 31.2% of custodial mothers in 2001 had never been married. U.S. CENSUS

BUREAU, *supra* note 90. Of the remaining 69.8% of custodial mothers who had ever been married, 43.7% were divorced or separated. *Id.* Only 24.5% of custodial fathers in 2001 were currently married or widowed; and, 56.2% were divorced or separated. *Id.*

¹⁰⁹ *See supra* notes 64-65 and accompanying text. *Cf.* Dowd, *supra* note 107, at 21 (stating “Single-parent families now constitute twenty-six percent of all families with minor children”).

¹¹⁰ Dowd, *supra* note 107, at 21-22.

¹¹¹ Kim, *supra* note 97, at 237 (quoting DOWD, *supra* note 99, at 109).

¹¹² *Id.* (quoting DOWD, *supra* note 99, at 110).

¹¹³ *Id.* (quoting DOWD, *supra* note 99, at 113).

¹¹⁴ *See supra* notes 75-77 and accompanying text.

¹¹⁵ *See, e.g.,* Sharon Jayson, *Single Moms’ Sons Can Succeed, New Research Shows*, USA TODAY, http://usatoday30.usatoday.com/news/nation/2008-08-27-single-moms-succeed_N.htm (listing Barack Obama, Michael Phelps, and Lance Armstrong among “some of the accomplished men who grew up in single-parent households for most or all of their youth.”) (last updated Aug. 28, 2008, 6:24 PM); Weldon, *supra* note 100 (“The 19.7 million children in this country with delinquent or absent fathers are not all headed for lives of crime, drugs, poverty and prison. To begin: Single moms have given us Olympian Michael Phelps, comedian Bill Cosby, Presidents Barack Obama and Bill Clinton.”). These examples could be slightly counteracted with some of their recent personal issues; however, it is no doubt that these individuals grew up to contribute to society and lead our country. Even more so though are the everyday anecdotes of successful, healthy individuals who were raised by single parents. *See id.* (“I can name many more, from my own life, and I’ll bet you can from yours.”).

¹¹⁶ *Cf.* Wardle, *supra* note 79, at 288-90 (discussing the several factors that affect the conclusion that single-parent families are less optimal than intact marriages for raising children; nevertheless, concluding that economic resources could not be isolated as the driving variable supporting this conclusion).

¹¹⁷ *See* Kim, *supra* note 97, at 237.

¹¹⁸ It is undisputed that studies indicate an empirical difference in the employment and wealth of single parents versus family units with an intact marriage. *E.g.,* Kim, *supra* note 97, at 231. Though, this is likely a result of societal factors and stigmas affecting such opportunities. *See id.* at 230-31, 234-35. Further, the stark conclusions of the

advantages of a heterosexual, marital parenting unit in Windle's article are explicitly outdated by the *Obergefell* opinion. See Wardle, *supra* note 79, at 292-95 (discussing lack of evidence for success of "lesbigay" parenting and suggesting its unsuccessfulness by questioning its "long-term impacts on children"). But cf. *Obergefell*, 135 S. Ct. 2584 (equating the marital unit of a homosexual couple with that of a heterosexual couple for purposes of providing stability for parenting a child).

¹¹⁹ *Id.* (citing DOWD, *supra* note 99, at 120).

¹²⁰ *Id.* at 238 (citing DOWD, *supra* note 99, at 153).

¹²¹ See Dowd, *supra* note 107, at 51.

¹²² Cf. *id.* at 52 ("This role of law is clearest where the law expressly stigmatized single parents or their children as a matter of status.').

¹²³ See Kim, *supra* note 97, at 239.

¹²⁴ See *supra* note 118.

¹²⁵ See Kalmanson, *supra* note 83, at Part III.

¹²⁶ Kim, *supra* note 97, at 234 (quoting DOWD, *supra* note 99, at 61).

¹²⁷ *Id.*

¹²⁸ TEX. FAM. CODE § 153.003 (2015); accord *id.* § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.').

¹²⁹ Dowd, *supra* note 107, at 67.

¹³⁰ Herman Schwartz, *Filling Judicial Vacancies to Protect the Progressive Legacy*, Reuters (Jan. 13, 2014), <http://blogs.reuters.com/great-debate/2014/01/13/filling-judicial-vacancies-to-protect-the-progressive-legacy/> ("By January 2009, 59.5 percent of all federal judges were Republican appointees, and they had solid majorities on 10 of the 13 courts of appeals.'). *Id.* ("For more than 30 years the Democratic Senate caucus feebly stood by as Republicans seized control of the federal courts.'). See generally, e.g., Adam Liptak, *Why Judges Tilt to the Right*, N.Y. TIMES (Jan. 31, 2015), http://www.nytimes.com/2015/02/01/sunday-review/why-judges-tilt-to-the-right.html?_r=0.

¹³¹ See LINDA HENRY ELROD, 3-32 FAMILY LAW AND PRACTICE § 32.06 [5][f][iii] (citing Swisher & Cook, *Bottoms v. Bottoms: In Whose Best Interest? Analysis of a Lesbian Mother Child Custody Dispute*, 34 U. LOUISVILLE J. FAM. L. 843 (1995-96). Further, the underlying principles of the judiciary are conservative in nature insofar as the nation views the judiciary as a reactionary branch of government to the actions of the other branches rather than of its own volition. But cf. Mark A. Graber, *Does It*

Really Matter – Conservative Courts in a Conservative Era Symposium: A New Constitutional Order: Panel 4, 75 FORDHAM L. REV. 675, 684 (2006) ("The leading . . . proponents of limited judicial power . . . have little influence on conservative judicial practice.'). This is why we see such a controversy on judicial activism. Obviously, there are conflicting theories, primarily legal realism, which contend that judicial decisions are driven by much more than a strict interpretation of the laws governing the other branches.