

She’s Got to Be Somebody’s Baby: Using Federal Voluntary Acknowledgments to Protect the Legal Relationship of Married Same-Sex Mothers and Their Children Conceived Through Artificial Insemination

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ABSTRACT: This Note argues for the federal government to institute a plan to provide voluntary acknowledgments of parentage to married same-sex female couples, just as they are provided to unwed fathers under 45 C.F.R. § 303.5. This process would protect a non-birthing mother’s right to legal parenthood and exert control over the care and custody of any child born to her spouse during their marriage as an intended parent. Currently, same-sex non-birthing married females are only listed on a child’s birth certificate, which does not establish legal parenthood for same-sex couples reproducing through artificial insemination. The current state of parentage for non-birthing same-sex mothers is too uncertain, as some states refuse to recognize legal parentage for the non-birthing mother. This is true even in situations where the marital presumption—the presumption one’s spouse is the parent of a child born into the marriage—is at play. This Note examines the history of same-sex marriage and parentage, the importance of changing the current state of parentage for married same-sex mothers, and how the federal government may be the answer to the problem of state denial of legal parentage to married same-sex mothers.

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I. INTRODUCTION

In the 2010 census of the United States, there were 56,510,377 opposite-sex married couples,¹ while only 131,729 same-sex married couples,² due in part to pre-*Obergefell* marriage laws.³ Since *Obergefell v. Hodges* legalized same-sex marriage, however, the number of same-sex marriages has increased.⁴ As a result of this increase, the number of children born or adopted by same-sex couples has increased, too.⁵ In the United States, around 70 percent of children currently live in a two parent household.⁶ A proportion of those households consist of female same-sex married couples, 26.5 percent of whom have children together.⁷

For these same-sex married females with children, the road to marriage and equality has not been easy, though little has been as difficult as the journey to parenthood. In the early 1700s, the common law presumed that a child born to a woman was the child of the woman's husband, and this presumption was nearly impossible for either the mother or her husband to rebut.⁸ While somewhat easier to rebut today than during the 1700s, this marital presumption of parentage extends to the female spouse of a gestational mother in all states, either through the law or in practice.⁹ Several

1. *Husband-Wife and Unmarried-Partner Households by Sex of Partner by Presence of Related and Own Children Under 18 Years*, U.S. CENSUS BUREAU (2010), <https://data.census.gov/cedsci/table?q=same%2osex%2ochildren&tid=DECENNIALSF12010.PCT15&hidePreview=true> [<https://perma.cc/NEK6-gKMH>].

2. *Census Bureau Releases Estimates of Same-Sex Married Couples*, U.S. CENSUS BUREAU (Sept. 27, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html#:~:text=Census%20Bureau%20Releases%20Estimates%20of%20Same-Sex%20Married%20Couples.,same-sex%2ounmarried%2opartner%20households%20in%20the%20United%20States [<https://perma.cc/M6FH-NGN9>].

3. Marina Koren, *Gay Marriage in the U.S., After Obergefell v. Hodges*, ATLANTIC (June 22, 2016), <https://www.theatlantic.com/news/archive/2016/06/gay-marriage-obergefell-hodges/488258> [<https://perma.cc/27C5-9G4P>]. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015) (legalizing same-sex marriage in every state, as many still did not allow same-sex marriage in 2015).

4. Koren, *supra* note 3; Julie Moreau, *Gay Marriage Generated \$3.8B Over 5 Years, Study Finds*, NBC NEWS (June 1, 2020, 1:06 PM), <https://www.nbcnews.com/feature/nbc-out/gay-marriage-generated-3-8b-over-5-years-study-finds-n1221211> [<https://perma.cc/5K86-2AFY>].

5. *U.S. Census Bureau Releases CPS Estimates of Same-Sex Households*, U.S. CENSUS BUREAU (Nov. 19, 2019), <https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html> [<https://perma.cc/STT5-G8B7>].

6. U.S. CENSUS BUREAU, FIGURE CH-1: LIVING ARRANGEMENTS OF CHILDREN: 1960 TO PRESENT 1 (2020), <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ch-1.pdf> [<https://perma.cc/4SNX-JB5W>].

7. Brian Glassman, *Census Bureau Implements Improved Measurement of Same-Sex Couples*, U.S. CENSUS BUREAU (Sept. 17, 2020), <https://www.census.gov/library/stories/2020/09/same-sex-married-couples-have-higher-income-than-opposite-sex-married-couples.html> [<https://perma.cc/98Q8-8835>].

8. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562-3 (2000).

9. See *infra* Part III. But see Governor Raimondo Signs Rhode Island Uniform Parentage Act, GLAD (July 21, 2020), <https://www.glad.org/post/governor-raimondo-signs-rhode-island-uniform>

states refuse to extend *legal parenthood* to these couples, however, causing many issues, such as cost and lack of parental rights, for both the non-birthing female spouse and potentially for the child,¹⁰ which will be discussed in Part III. Without legal parenthood, a parent has no right to see their child, nor to make decisions of custody and care of the child, during their marriage or after it ends in death or divorce.¹¹ A legal parent is a person who is “a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds.”¹² Legal parentage can be established through the marital presumption, an acknowledgment of parentage, or other means.¹³

The issues of a lack of legal parenthood are apparent when discussing same-sex mothers. After the nationwide legalization of same-sex marriage in the U.S., many women chose not only to marry but also to have children together. Since two women cannot create a child by way of sexual relations, these women could either adopt or find some means of surrogacy or artificial insemination. Artificial insemination, or the intentional introduction of semen into a woman’s uterus in an attempt to produce a pregnancy through nonsexual means,¹⁴ was a common choice for many. For some of the women that conceived through artificial insemination, their happiness was tainted because some states, such as Texas, do not recognize the non-birthing wife as the child’s legal parent, even when her name is on the birth certificate.¹⁵ Thus, she would have to go through an expensive and lengthy process of a second-parent adoption—an adoption of the child her wife (the legal, first-parent) just birthed—if she wanted any legal rights to the child.¹⁶ To protect both same-sex parents and children from these issues, the Uniform Law Commission added new and revised clauses to the 2017 Uniform Parentage

parentage-act [<https://perma.cc/B7BX-7CRQ>] (discussing the implementation of new laws in Rhode Island to ensure same-sex parents receive both the marital presumption and legal parenthood); *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (holding the female spouse of a gestational mother must be put on the birth certificate of their child by extending the presumption of parentage statute to lesbian couples).

10. See generally Associated Press, *For Same-Sex Couples, a New Path to Legal Parenthood*, NBC NEWS (Nov. 26, 2018, 10:56 AM), <https://www.nbcnews.com/feature/nbc-out/same-sex-couples-new-path-legal-parenthood-n940081> [<https://perma.cc/CK6W-2M7H>] [hereinafter *For Same-Sex Couples, a New Path to Legal Parenthood*] (discussing the costs of having to adopt a child conceived through artificial insemination, lack of parental rights, and lack of insurance for the child(ren) during the adoption process, among other harms). See *infra* Section III.B.

11. See *infra* Section III.B.

12. W. VA. CODE § 48-1-232 (2021).

13. *Id.*

14. *Artificial Insemination*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/artificial%20insemination> [<https://perma.cc/GVK7-R25B>].

15. See *infra* Section III.A.

16. See *infra* Section III.B.

Act (“UPA”).¹⁷ The UPA is a uniform act designed to protect both children and parents by providing guidelines to determine parentage.¹⁸ The UPA was updated in 2017 to address modern reproductive and parentage issues, including children born through artificial insemination and the concept of same-sex parents.¹⁹ While some states have adopted the UPA²⁰ to provide some consistency in parental rights for same-sex parents, very few have adopted substantial portions of the Act, contributing partially to differences in respective state laws.²¹ States that have enacted the UPA create an easier path to parentage for same-sex couples, without forcing non-birthing mothers to adopt their own children and ignoring whether the couple is married or biologically related to the child.²² However, because adoption of the UPA is not obligatory for states, it cannot solve the problem of a lack of legal parentage in states that refuse to recognize the non-birthing mother who would simply not adopt any sections related to same-sex parentage.

This Note argues legal parentage must be extended to the birth mother’s wife in every state by reworking federally enforced child support laws, specifically 45 C.F.R. § 303.5, to influence states to provide voluntary acknowledgments of parentage to the non-birthing wife. Part II examines the historical background of parentage, reproductive rights, and same-sex marriage.²³ Part III examines the importance of ensuring same-sex wives receive legal parentage of children born to their spouses, while Part IV discusses why states that will not extend legal parentage to these mothers violate the Fourteenth Amendment to the U.S. Constitution.²⁴ Finally, Part V discusses a solution to this problem utilizing federally required voluntary acknowledgments.²⁵

17. Melissa Heinig, *What Is the Legal Definition of a Parent Under the Uniform Parentage Act?*, LAWYERS.COM (Feb. 1, 2019), <https://www.lawyers.com/legal-info/family-law/paternity/legal-definition-parent-under-uniform-parentage-act.html> [<https://perma.cc/BA95-27D3>].

18. *Id.*

19. *Id.*

20. *See generally* UNIF. PARENTAGE ACT (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2017) (discussing proposed uniform laws which states can adopt surrounding parenthood, children, and uniform legal guarantees within states who choose to adopt the UPA or portions of it).

21. Julie Moreau, *Changes to State Parenting Laws Help Fill Gaps for Same-Sex Couples*, NBC NEWS (Aug. 1, 2020, 3:30 AM), <https://www.nbcnews.com/feature/nbc-out/changes-state-parenting-laws-help-fill-gaps-same-sex-couples-n1235517> [<https://perma.cc/8CM2-95L8>].

22. *Id.*

23. *See infra* Part II.

24. *See infra* Parts III, IV.

25. *See infra* Part V.

II. MEET THE PARENTS: AN EXAMINATION OF THE HISTORY OF MARITAL PARENTAGE PRESUMPTIONS AND RIGHTS THROUGH THE PRESENT DAY

For a long period of history, parentage determined not only who you were genetically, legally, and your resulting legal rights as an individual, but also what rights your parents—particularly your father—had to parent you.²⁶ Starting with *Stanley v. Illinois*, the law began to inch away from protecting only married, heterosexual parents and their offspring and began to guard unmarried parents and children born into non-traditional relationships.²⁷

Skinner v. Oklahoma ex rel. Williamson began a line of precedent stating that the right to reproduce is a fundamental right, which one has the option to exercise, or not exercise, freely.²⁸ This right to reproduce soon changed not only attitudes about having babies, but also altered who was contributing to reproduction in the United States, especially after the late 1970s.²⁹

Additionally, with the nationwide legalization of same-sex marriage in *Obergefell*, the same rights and privileges of heterosexual married couples were seemingly extended to same-sex couples under the Constitutional rights of due process and equal protection.³⁰ While great progress was made with *Obergefell*, new challenges emerged in the area of parentage because of the major increase in the once infinitesimal number of children born to same-sex married couples.³¹ This growth created frightening challenges for non-birthing female spouses who wished to be legal parents of their spouse's newborns, as not every right available to heterosexual married parents was, in practice, extended to same-sex married parents,³² as is discussed in Parts III and IV.

26. See *infra* Section II.A.

27. See generally 405 U.S. 645 (1972) (involving parental rights for an unmarried father whose partner and mother of his children died).

28. See generally 316 U.S. 535 (1942) (holding that compulsory sterilization violated the Equal Protection Clause by its violation of the right to reproduce because forced sterilization was applied unequally to different crimes); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman's right to privacy under the Due Process Clause protects her liberty to choose whether to have an abortion or exercise her reproductive rights).

29. Dana Rudolph, *A Very Brief History of LGBTQ Parenting*, FAM. EQUAL. (Oct. 20, 2017), <https://www.familyequality.org/2017/10/20/a-very-brief-history-of-lgbtq-parenting> [<http://perma.cc/CF8F-W858>].

30. *Obergefell v. Hodges*, 576 U.S. 644, 665–74 (2015).

31. Rudolph, *supra* note 29.

32. For *Same-Sex Couples, a New Path to Legal Parenthood*, *supra* note 10. But see Jesse Lamp, *Circuit Court Rules Indiana Must List Both Parents' Names on Birth Certificates in Same-Sex Female Relationships*, JURIST (Jan. 18, 2020, 12:23 PM), <https://www.jurist.org/news/2020/01/circuit-court-rules-indiana-must-list-both-parents-names-on-birth-certificates-in-same-sex-female-relationships> [<http://perma.cc/34AH-6SYU>] (describing a recent Seventh Circuit case holding Indiana must include a female's same-sex, non-birthing spouse on the birth certificate of a child born to the marriage).

A. THE HISTORY OF PARENTHOOD AND THE PARENTAGE PRESUMPTION

The historical application and development of the parentage presumption can help highlight the important, detrimental impact of confining legal parentage within the presumption of marital parentage to lesbian married couples. Throughout history, one's parentage has been one of the most important personal features and could determine not only one's place in the world but also one's treatment by society.

From almost the beginning of recorded time, there has been a stigma surrounding children born out of wedlock.³³ For example, even in Biblical stories, illegitimate children were treated with animosity, as shown in the story of Ishmael, whose father cast him out after the birth of his legitimate son, Isaac.³⁴ Over time, these attitudes led to the creation of the legal presumption that any child born during a marriage was the child of the mother's husband, and thus, the child was legitimate.³⁵ This presumption, created in 1777 by Lord Mansfield,³⁶ was originally an evidence rule limiting testimony given by either spouse, if the testimony would illegitimize a child born during the marriage.³⁷ The importance of having a legitimate child, both legally and socially, was so substantial that the presumption was extended to children born after their parents divorced, if conceived during the marriage.³⁸

Historically, a child born to unmarried parents suffered many consequences, despite having no choice in their own conception. The issue of illegitimate births negatively impacted inheritance, as illegitimate children could not inherit from *either* parent³⁹ in most states,⁴⁰ even during the 1900s.⁴¹ This problem led to the creation of new laws,⁴² made to acknowledge that children whose parents married *after* their births were legitimate, thereby removing their inability to inherit from their mother or father.⁴³ Eventually,

33. *Genesis* 21:10–14.

34. *Id.*

35. LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 1:3 (2021).

36. See generally *Goodright v. Moss* (1777) 98 Eng. Rep. 1257 (K.B.) (discussing the marital presumption of parentage, though at the time, the marital presumption was of paternity only).

37. *Taylor v. Whittier*, 138 N.E. 6, 6–7 (Mass. 1922).

38. ELROD, *supra* note 35, at §1:3.

39. R.D. Hursh, Annotation, *Inheritance from Illegitimate*, 48 A.L.R.2d 759 § 3(a) (1956).

40. A.S.M., Annotation, *Inheritance By, From, or Through Illegitimate*, 24 A.L.R. 570 §1(b)(1) (1923). Illegitimate children could inherit from the mother in a limited number of states and from the father in some states, if the father would acknowledge the child as his own. *Id.* §§ (1)(b)(1), (2)(b)(1).

41. Hursh, *supra* note 39, at § 3(a). However, the Supreme Court ruled in *Trimble v. Gordon* that illegitimacy could not be a classification used to disqualify a child from inheriting from his or her mother or father. *Trimble v. Gordon*, 430 U.S. 762, 770–71 (1977).

42. 41 AM. JUR. 2D *Illegitimate Children* § 98 (2021).

43. *Putative Father Registries*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT'YS (2018), <https://adoptionart.org/adoption/birth-expectant-parents/putative-father-registries> [https://perma.cc/7RZT-NC2Y].

around the 1970s,⁴⁴ with caselaw challenging paternity, particularly in cases of extramarital affairs or premarital sex producing children, came the popularity of the term “putative father” within the legal community.⁴⁵ A putative father is generally defined as “a man whose legal relationship to a child has not been established, but claims to be the father or who is alleged to be the father of a child who is born to a woman to whom he is not married at the time of the child’s birth.”⁴⁶

Additionally, significant progress was made in the 1972 case *Stanley v. Illinois* when the Supreme Court held that unmarried fathers could not automatically be presumed to be unfit or neglectful parents.⁴⁷ In this case, the father of three children, upon the death of their mother and his off-and-on partner, was not given the opportunity to obtain custody of his children who were taken by the state.⁴⁸ The state determined that an unmarried father, Stanley, was unfit to raise his children by the very nature of being an unmarried father.⁴⁹ Unmarried mothers and divorced or wed fathers in the same situation could only have their children taken away if and only if there was a hearing and a showing of neglect.⁵⁰ Thus, the fathers were given less protection simply for being unmarried fathers.⁵¹ On appeal, the Supreme Court held the Illinois law assuming an unmarried father’s parental inability and lack of fitness without allowing him a hearing to show whether he was a fit parent violated the Equal Protection Clause.⁵² The Court reasoned that extending the right to a fitness hearing to some classes of parents while denying the right to unmarried fathers denied these fathers equal protection of the law.⁵³ Further, the Court held that due process guaranteed Stanley the right to a hearing before the state could take his children from him.⁵⁴ Due process required that Illinois provide individualized proof that a father could not care for his children before the state could remove them from his care.⁵⁵ The court noted that a father in this situation could ordinarily file to adopt his own children.⁵⁶ Significantly, this argument foreshadows the same

44. Dale Joseph Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R.6th 349 § 2 (2007).

45. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972) (involving parental rights for an unmarried father whose partner and mother of his children died).

46. *Putative Father Registries*, *supra* note 43.

47. See *Stanley*, 405 U.S. at 657-58.

48. *Id.* at 646-47.

49. *Id.* at 647.

50. *Id.*

51. *Id.*

52. *Id.* at 658.

53. *Id.* at 657-58.

54. *Id.* at 647-49.

55. *Id.* at 649-58.

56. *Id.* at 648-50. However, the Court also states this route would not have worked for Stanley because of Illinois’ unfit presumption. *Id.* at 648.

argument being made today for same-sex, married women to adopt their own children.

Stanley set the stage for the development of more rights for fathers, even those who were not married to their child's mother or who needed to bring a challenge over the mother's husband. However, these challenges were not always successful, even when DNA testing was on the side of the biological father. For example, in the 1989 case *Michael H. v. Gerald D.*, the Court recognized the importance of the marital relationship over the biological relationship.⁵⁷ In this case, the mother was married to and living with her husband when she gave birth to a daughter.⁵⁸ However, the mother was having relations, and eventually cohabitating sporadically, with both her husband and another man, Michael H., when she conceived her daughter.⁵⁹ Even after it was determined that Michael was the biological father,⁶⁰ the Court declined to grant him—the putative father—parental rights in place of the marital father (husband).⁶¹ The Court refused to ruin the husband's established family, given that he had stepped up to raise and treat the child as his own.⁶² Further, it did not violate Michael's right to due process when he was not allowed to prove paternity because paternity was irrelevant under the California law⁶³ and because the law historically has protected the marital family unit over the rights of putative fathers.⁶⁴ While no Supreme Court case has directly overruled *Michael H.*, many decisions from lower courts have either distinguished the case or called the holding into question,⁶⁵ indicating that a similar case today may turn out differently. However, its dicta discussing the husband's involvement in the daughter's life and desire to be her parent were considered important pieces of the husband and daughter's familial relationship.⁶⁶ Unironically, this argument mirrors arguments made *now* to extend the legal parentage presumption to female same-sex spouses, including those arguments discussing the sanctity and necessity of protecting the parentage presumption for the marital parent.⁶⁷

57. *Michael H. v. Gerald D.*, 491 U.S. 110, 119–30 (1989).

58. *Id.* at 113–14.

59. *Id.*

60. *Id.* at 114.

61. *Id.* at 122–32.

62. *Id.* at 131.

63. *Id.* at 127.

64. *Id.* at 124, 128–31.

65. See generally *Jones v. Trojak*, 586 A.2d 397 (Pa. Super. Ct. 1990) (discussing overcoming the marital presumption of paternity).

66. *Michael H.*, 491 U.S. at 130–31.

67. *Id.*; see *infra* Part III.

B. REPRODUCTIVE RIGHTS OVER TIME

Similar to parentage rights, understanding how reproductive rights have developed throughout the twentieth and twenty-first centuries helps explain the underlying laws and rights relevant to same-sex parentage. Reproductive rights only began to develop in the last 100 years, and prior to that development, an individual's reproductive choices were largely decided for them by the government. The right to reproduce was not recognized for a considerable portion of U.S. history.⁶⁸ Forced sterilization was deemed acceptable and necessary to prevent the eventual starvation, execution, or creation of more “degenerate offspring” born to the mentally handicapped in the 1927 case *Buck v. Bell*.⁶⁹ Further, expectations that women should (and possibly must) reproduce were the accepted norm for over 100 years.⁷⁰ These views on reproductive rights heavily influenced the law surrounding procreation, until a series of cases challenged these norms, beginning in the 1940s.⁷¹

Starting with the 1942 case, *Skinner v. Oklahoma*, the Court began to expand the right to reproduce.⁷² At that time, Oklahoma law provided that felons who had committed two or more felonies involving moral turpitude and then committed a third crime could be found a “habitual criminal” by the jury or court.⁷³ Any felon determined to be a habitual criminal, with the exception of those guilty of a few specific felonies, could be sterilized upon entry of a court order to do so.⁷⁴ The law, Oklahoma's Habitual Criminal Sterilization Act, allowed the forced vasectomy (male sterilization procedure) or salpingectomy (female sterilization procedure) upon a finding by a jury that sterilizing the felon would not harm the person's health.⁷⁵ Jack T. Skinner, who had stolen chickens and committed two separate robberies between 1926 and 1934, was in an Oklahoma prison when the Oklahoma sterilization law was passed, and the state filed proceedings for his sterilization.⁷⁶ After a jury found

68. See generally *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (discussing the right to reproduce); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing marital privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion nationwide).

69. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

70. See Mary Ziegler, *A Brief History of US Abortion Law, Before and After Roe v Wade*, HISTORYEXTRA (June 21, 2019, 10:36 AM), <https://www.historyextra.com/period/20th-century/history-abortion-law-america-us-debate-what-roe-v-wade> [<https://perma.cc/3UG2-UXYG>] (discussing the campaign to criminalize abortion in the 1850s, a nationwide-ban by the 1880s, and the history of abortion leading up to the 1973 decision in *Roe v. Wade*).

71. See generally *Skinner*, 316 U.S. 535 (discussing the right to reproduce); *Griswold*, 381 U.S. 479 (discussing marital privacy); *Roe*, 410 U.S. 113 (legalizing abortion).

72. See *Skinner*, 316 U.S. at 541 (stating that “[m]arriage and procreation” constitute “basic civil rights”).

73. *Id.* at 536–37.

74. *Id.* at 537.

75. *Id.* at 536–37.

76. *Id.* at 537.

for Skinner to be sterilized, the case went to the U.S. Supreme Court, which held that the law violated the Equal Protection Clause because of its unequal treatment of felons, as some severe felonies did not fall under the statute allowing sterilization for one's crimes but various minor felonies did.⁷⁷ Further, because thieves who had different relationships to the stolen property were punished differently, one could be subjected to sterilization where another would not, for what was essentially the same crime.⁷⁸ The Court concluded this discrimination violated the Equal Protection Clause, asserting that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."⁷⁹ *Skinner* would eventually expand to establish the right *not* to reproduce. More than 20 years later, in *Griswold v. Connecticut*, a physician and a director of a Planned Parenthood branch were arrested for giving contraceptive advice to married couples.⁸⁰ The Court held that criminalizing contraceptive use violated the right of a married couple to have marital privacy.⁸¹ While the Court briefly mentioned the Fourteenth Amendment, it chose not to rule on due process or equal protection grounds.⁸² Instead, the Court discussed "zones of privacy" emanating from various Amendments in the Bill of Rights, stating that the criminalization, rather than the regulation, of contraceptive use by married couples was destructive to their private relationship, with which the government had no right to interfere.⁸³ Finally, in *Roe v. Wade*, a woman who was seeking an abortion challenged a state law criminalizing abortions.⁸⁴ This ban included all abortions—even in instances of rape, where a mother was in the age of minority, or in instances that would be detrimental to the woman's mental or emotional health.⁸⁵ The Court discussed the fundamental right one has to make basic decisions without government intrusion, including whether to procreate or use contraception.⁸⁶ Further, it discussed the fact that, to not violate a woman's due process, there needed to be a "compelling state interest" for a law, and the law needed to "be narrowly drawn to" effectuate

77. *Id.* 537–40.

78. *Id.* at 539. Stealing chicken three times, which amounts to three felonies, could have allowed a jury to find that a person should be sterilized. *Id.* Whereas, if a bailee of the chicken were to take the chicken and do something he has no authority to do with them for his benefit, he is considered an embezzler. *Id.* Embezzlement did not fall under the sterilization statute. *Id.*

79. *Id.* at 541.

80. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

81. *Id.* at 485–86.

82. *Id.* at 481–82.

83. *Id.* at 484–86.

84. *Roe v. Wade*, 410 U.S. 113, 119–21 (1973).

85. *Id.* at 119; TEX. PENAL CODE ANN. §531–36 (1857).

86. *Roe*, 410 U.S. 113 at 152, 155–57.

the legitimate purpose.⁸⁷ However, while the state had a compelling, legitimate purpose in protecting the health of a pregnant woman and potential human life,⁸⁸ the law was too broad because it criminalized abortions during a stage of pregnancy where the health risks caused by an abortion were low and the fetus had not yet reached viability outside the woman's womb.⁸⁹ Thus, the Court held a law criminalizing abortion without regard to the mother's interests or her stage of pregnancy, which only allowed an exception if the abortion would save the mother's life, violated the Due Process Clause because it interfered with the woman's right to privacy in choosing whether to abort her pregnancy.⁹⁰ In total, *Skinner*, *Griswold*, and *Roe* developed caselaw that allowed an individual the freedom to have children or to choose not to exercise that right, whether married, a criminal, and of either sex.⁹¹

C. SAME-SEX MARRIAGE CHANGES

Additionally, to understand the legal parentage problem faced by same-sex couples, it is necessary to understand the development of marriage-equality and what the U.S. Supreme Court has held, relevant to the right to marry. The road to same-sex marriage was difficult for the LGBTQ+ community, who for decades fought for marriage-equality to no avail.⁹² Starting in the early 2000s, however, some states began legalizing same-sex marriage, lighting the way for an eventual nationwide legalization.⁹³

In 2003, Massachusetts became the first state to legalize same-sex marriage in a landmark holding in *Goodridge v. Dep't of Pub. Health*.⁹⁴ There, the court held that Massachusetts could not deny same-sex couples the benefits of marriage simply because they did not want to marry someone of the opposite-sex, and difference in treatment on this basis violated the Equal Protection Clause and the Due Process Clause.⁹⁵ A statute that is challenged on Due Process grounds requires "a real and substantial relation to" some feature of the public welfare to withstand the rational basis test.⁹⁶ To survive the rational basis test on equal protection grounds, the statute must be

87. *Id.* at 155–56.

88. *Id.* at 162–64.

89. *Id.* at 163–65.

90. *Id.* at 152–54, 164–67.

91. "Sex" here is being used in reference to male or female in the sense of reproductive organs present at birth and is not intended to address any gender or sexuality spectrum.

92. See Susan Linney, *Gay Marriage States: History of Same Sex Marriage in US*, KNOT (July 30, 2019), <https://www.theknot.com/content/gay-marriage-states-history> [<https://perma.cc/J85L-QTD6>] (discussing the history of same-sex marriage bans and, conversely, legalization, such as bans imposed in Alaska in 1998 and Arizona in 2008).

93. *Id.*

94. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

95. *Id.* at 961.

96. *Id.* at 960 (quoting *Coffee-Rich, Inc. v. Comm'r of Pub. Health*, 204 N.E.2d 281, 287 (Mass. 1965)).

rationally related to “a legitimate public purpose.”⁹⁷ The state claimed the purpose of the law was to preserve the purpose of marriage, which Massachusetts argued is to procreate, protect the economy, and to provide the “optimal” family for a child.⁹⁸ The court reasoned that the law could not survive rational-basis analysis because the stated purposes were not only not evidenced but were also incorrect.⁹⁹ The court also discussed why the arguments against marriage-equality were incorrect, evaluating the arguments quite similarly to how the Supreme Court of the United States would do so in *Obergefell v. Hodges* 12 years later.¹⁰⁰ The court discussed the fact that the purpose of marriage was not procreation, which is a fundamental right but not a requirement of marriage.¹⁰¹ Further, the state’s economic argument that same-sex couples were not economically reliant on each other disregarded the fact many same-sex couples already had children and were thus financially dependent on one another in raising their family.¹⁰² Finally, the court dismissed the argument that having home stability provided by opposite-sex parents was a legitimate reason for discrimination.¹⁰³ The court pointed out that many same-sex families already existed, but reasoned that the parents in those families not being married was harmful for several reasons.¹⁰⁴ Some of these harms included the lack “of predictable rules of child custody, visitation, [and] support” in the event of a split, lack of economic security through marital financial privileges, and the presence of stigma toward children of unmarried parents.¹⁰⁵ Central to its holding, the court announced “[m]arriage is a vital social institution . . . [that] nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.”¹⁰⁶ This important principle would endure throughout later marriage equality cases.

After *Goodridge*, several states began to legalize same-sex marriage. By the time *Obergefell* was decided, 36 additional states had legalized same-sex marriage.¹⁰⁷ While many viewed same-sex marriage legalization as a positive

97. *Id.* (quoting *English v. New England Med. Ctr.*, 541 N.E.2d 329, 333 (Mass. 1989)).

98. *Id.* at 961–66.

99. *Id.* at 961–68.

100. *See generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015) (legalizing same-sex marriage in every state).

101. *Goodridge*, 798 N.E.2d at 961–68.

102. *Id.* at 961, 964–68. As a result, the court concluded same-sex couples were entitled the same financial benefits as heterosexual couples. *Id.* at 968.

103. *Id.* at 961, 963–69.

104. *Id.*

105. *Id.* at 956–57.

106. *Id.* at 948.

107. Julia Zorthian, *These are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME (June 26, 2015, 12:20 PM), <https://time.com/3937662/gay-marriage-supreme-court-states-legal> [<https://perma.cc/7KWQ-BAAV>].

development, some citizens viewed marriage-equality in their state as a setback, showing their disapproval at the polls.¹⁰⁸ Thirteen states, at the time of the *Obergefell* decision, intended to deny marriage-equality for the foreseeable future. *Obergefell v. Hodges*, decided by the Supreme Court in 2015, thwarted that attempt by holding same-sex couples have a fundamental right to marry in every state under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁰⁹ *Obergefell* involved same-sex couples from four different states who brought suit in their respective home states to challenge laws defining marriage as between a man and a woman only.¹¹⁰ The couples brought suit because their own states would not recognize their out of state, legal same-sex marriages.¹¹¹ In that case, the Court stated the fundamental right to exercise one's liberty through personal choice without government interference was guaranteed in the Due Process Clause, which included the choice to marry and to whom.¹¹² The Court stated that the fundamental liberties protected under the Due Process Clause authorized marriage and protected it as a fundamental right.¹¹³ Further, the right to personal choice was a part of individual autonomy, meaning a choice like whether to marry and to whom was a fundamental right for all people, just as was held when the Court struck down anti-miscegenation laws decades before.¹¹⁴ Marriage, was an "enduring bond" where two people could experience things like intimacy, spirituality, and expression together, regardless of their sexual identity, and the personal choice for two people to marry was a dignified decision that showed a unique commitment.¹¹⁵ Further, the Court stated the right to marry drew upon related rights of procreating and raising children because of its purpose to safeguard families.¹¹⁶ The Court stressed the importance for children of same-sex couples to have the stability and permanency of having married parents, the preservation of integrity and bonds that come with having their parents' marriage legally recognized, in addition to material protections for these children.¹¹⁷ The Court announced that children suffer from having parents who cannot marry because they are identified in society as lesser,¹¹⁸ and laws preventing same-sex marriage "harm

108. See *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009); *Three Iowa Justices Ousted From the Bench*, BRADY PRESTON GRONLUND PC (Nov. 4, 2010), <https://www.bpglegal.com/news/three-iowa-justices-ousted-bench> [<https://perma.cc/4ASS-S667>].

109. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

110. *Id.* at 653–54.

111. *Id.* at 655.

112. *Id.* at 663–66.

113. *Id.* at 664.

114. *Id.* at 665–66.

115. *Id.* at 665–67.

116. *Id.* at 667.

117. *Id.* at 667–68.

118. *Id.* at 668.

and humiliate the children of same-sex couples.”¹¹⁹ Finally, the Court stated that while marriage was no less meaningful or wonderful for those who did not have children, stability for children was a central premise of marriage because of the predictability and removal of stigma for any children.¹²⁰ Thus, excluding same-sex couples from access to the right to marry directly conflicted with that central premise.¹²¹ However, the Court did not express its due process analysis in high constitutional detail beyond its announcement of what rights under liberty and autonomy would be stripped from LGBTQ+ people without access to marriage.

Additionally, the Equal Protection Clause guaranteed equal protection of the laws, but the only reason for the laws banning same-sex marriage was to harm and disrespect same-sex couples.¹²² The Court held the Equal Protection Clause “prohibit[ed] [the] unjustified infringement of the fundamental right to marry.”¹²³ Comparing the denial of marriage to same-sex couples with laws banning interracial marriage, the Court appeared to promulgate that preventing consenting adults from marrying simply because of sexual orientation, like race, while allowing similarly situated heterosexual couples to marry violated equal protection.¹²⁴ While the Court’s equal protection analysis was brief and not highly detailed, it stated that equal protection and liberty under due process are intimately interwoven and ensure many rights together.¹²⁵ Sometimes, the Court held, because of this interweaving, the analysis of due process may indicate the exact violation of equal protection and vice versa.¹²⁶ Finally, the Court held that “in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”¹²⁷ After a long legal battle, marriage equality became official in the United States.

*D. THE MERGING OF PARENTAGE PRESUMPTIONS AND SAME-SEX
MARRIAGE*

With the newly found right to marry, many same-sex couples—those with and without children—had the opportunity to have children born into the stability of a marriage through adoption or artificial insemination, or so they thought. After *Obergefell*, a large majority of states would not (and some still

119. *Id.*

120. *Id.* at 668–69.

121. *Id.*

122. *Id.* at 672–76.

123. *Id.* at 675.

124. *See id.* at 672–75.

125. *Id.* at 673.

126. *Id.* at 672.

127. *Id.* at 673.

do not) extend legal parentage to the female, non-birthing spouse, though the child was conceived in the marriage through artificial insemination.¹²⁸ However, heterosexual spouses in the same situation are given the legal and parentage presumptions.¹²⁹ The many substantial harms of this problem will be discussed in Part III.¹³⁰ Further, the negative impact of the lack of legal parentage for same-sex wives¹³¹ was discussed in the monumental case, *Pavan v. Smith*.¹³² In *Pavan*, two couples challenged an Arkansas statute preventing married female mothers who had conceived through artificial insemination from putting their female spouses' names on their respective babies' birth certificates.¹³³ The same statute mandated that a male in the exact same situation with his wife had to be put on her child's birth certificate as the father.¹³⁴ The statute treated non-related males as fathers, *despite* no biological connection but rejected female spouses *because of* no biological connection, proving that the law was about more than genetics.¹³⁵ In analyzing the case, the Supreme Court stated that in *Obergefell*, its mention that same-sex couples must be given the same rights as heterosexual couples in marriage, including birth certificates, was not an accident.¹³⁶ Further, the Court rejected the state's contention that birth certificates were not a benefit of marriage but rather a record used for births.¹³⁷ The Court held that the law extending the marital presumption of parentage to a non-biological father married to the mother of a baby conceived through artificial insemination but not to a female spouse of a mother in the same instance violated the guarantee to equal protection of the laws.¹³⁸ *Pavan* shows that *Obergefell* was meant to extend the same features of marriage to same-sex couples. Moving forward, *Pavan* greatly influenced parentage laws and will affect any similar, subsequent state law challenges before the Supreme Court. However, because *Pavan* only changed the law in Arkansas, the question still remains in a few states whether the presumption of parentage includes *legal* parentage for non-birthing, same-sex wives.

128. Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 101 (2018); *For Same-Sex Couples, a New Path to Legal Parenthood*, *supra* note 10.

129. *For Same-Sex Couples, a New Path to Legal Parenthood*, *supra* note 10 (discussing voluntary acknowledgments for fathers who are not married to their child's mother); Paula A. Monopoli, *Inheritance Law and the Marital Presumption After Obergefell*, 8 EST. PLAN. & CMTY. PROP. L.J. 437, 456–57 (2016).

130. *See infra* Part III.

131. Moreau, *supra* note 21.

132. *Pavan v. Smith*, 137 S. Ct. 2075, 2076–78 (2017) (per curiam).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 2078.

137. *Id.* at 2078–79.

138. *Id.* at 2078.

III. ARE YOU MY MOMMY?: THE SEVERE DETRIMENT TO CHILDREN AND FEMALE, MARRIED SAME-SEX PARENTS WHEN A CHILD'S PARENTAGE IS NOT PRESUMED UNDER THE LAW

Parentage within the United States has changed immensely over the years, particularly since the Supreme Court decided *Obergefell*¹³⁹ and later *Pavan*.¹⁴⁰ These cases guaranteed not only that same-sex couples must be given the same rights to marriage as opposite-sex couples¹⁴¹ but also the same rights of parenthood and the marital presumption within those unions.¹⁴²

While some states have fought to prevent the extension of the marital presumption of parentage to same-sex couples,¹⁴³ several, including Colorado and Connecticut, are currently pushing for changes in legislation to extend the presumption.¹⁴⁴ Nevertheless, even where both wives may have their names on their child's birth certificate, some states will only recognize the non-birthing wife as a parent, not a *legal* parent.¹⁴⁵ A “[l]egal parent’ [is] . . . a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds.”¹⁴⁶ Legal parentage can be established through the marital presumption, a birth certificate (which is only *evidence* used in determining legal parenthood in some states and is not conclusive), an acknowledgment of parentage, adoption, or other means.¹⁴⁷ This means some mothers are left having to adopt their own children¹⁴⁸—even if their child was conceived through reciprocal

139. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015) (legalizing same-sex marriage in every state).

140. See generally *Pavan*, 137 S. Ct. 2075 (reaffirming statements in *Obergefell* that birth certificates and parental rights are included in the benefits and protections within a marriage for both opposite and same-sex couples).

141. *Obergefell*, 576 U.S. at 665.

142. See *id.* at 667–69 explaining the benefits conferred to the children of LGBTQ+ couples when their parents are allowed to marry); *Pavan*, 137 S. Ct. at 2078 (giving a non-carrying mother in a two-mom family the right to have her name on the child's birth certificate if she is married to the birthing mother).

143. See generally *Pavan*, 137 S. Ct. 2075 (invalidating part of an Arkansas statute treating similarly situated same-sex parents differently than opposite-sex parents as unconstitutional); *Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020) (invalidating a section of law extending the marital presumption to a mother's husband but not her wife on equal protection grounds, though only extending the presumption to *female* same-sex couples).

144. See H.B. 1102, 2016 Leg., 42d Reg. Sess. (La. 2016) (enacted); H.B. 20-1292, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); H.B. 5178, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020).

145. Paige Lyons, Comment, *Are You My Mother?: Equality for Same-Sex Parents in Texas Following Obergefell*, 51 TEX. TECH L. REV. 241, 255 (2019); *Same-Sex Parenting – Birth Certificate FAQs*, ACLU PA. (2021), <https://www.aclupa.org/en/know-your-rights/same-sex-parenting-birth-certificate-faqs> [https://perma.cc/9FYP-72S6].

146. W. VA. CODE ANN. § 48-1-232 (2021).

147. *Id.*

148. See Moreau, *supra* note 21.

IVF¹⁴⁹—where non-biological married fathers do not have to resort to adoption and are instead given legal parenthood.¹⁵⁰ Even where the child is biologically related to the non-birthing parent, through reciprocal IVF, she would still need to adopt the child to become a legal parent.¹⁵¹ However, the birthing mother, while sharing none of the child’s genes, would become a legal parent at birth.¹⁵² The lack of guaranteed legal parentage for same-sex wives causes harm not only to the stability of their family unit and stigma toward their children¹⁵³ but also carries extra costs,¹⁵⁴ uncertainty about who may make medical decisions for their child,¹⁵⁵ and parental limbo in the case of the birthing spouses’ death, among many other problems.¹⁵⁶

A. *KEEP PUSHING!: HOW ANTIQUATED LAWS AND INTERPRETATIONS WITHIN STATES HAVE MADE LEGAL MOTHERHOOD MORE DIFFICULT FOR THE WIFE OF A BIRTH MOTHER*

In the United States, not every state extends legal parentage to the non-birthing, same-sex wife, despite the child being born into the couple’s marriage. For example, the Iowa Supreme Court only recently extended the marital presumption and legal parentage to female spouses in the 2013 decision in *Gartner v. Iowa Department of Public Health*.¹⁵⁷ The Arizona Supreme Court did not do so until the 2017 decision in *McLaughlin v. Jones*.¹⁵⁸

The gravity of the harm caused by states not extending legal parentage becomes apparent when one considers states, such as Virginia and Louisiana, which have made little to no movement in extending the legal parentage presumption¹⁵⁹ or have introduced measures to make attaining legal

149. Reciprocal IVF is the process where a female couple has an egg removed from partner A, which is then fertilized and placed into partner B to carry to term. Jodi Argentino, *Legal Implications and Limitations in Co-Maternity Situations*, 315 N.J. LAW. 43, 44 (2018). This means the mother birthing the child is presumed to be the mother, but the biological mother—the non-birthing partner—might not be extended legal parentage, even if allowed on the birth certificate in some states. *Id.*

150. See Moreau, *supra* note 21.

151. *Id.*

152. Argentino, *supra* note 149, at 44.

153. See Douglas Nejaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 264–68 (2020).

154. *IVF Cost: Analyzing the True Cost of In Vitro Fertilization*, CNYFERTILITY (Oct. 12, 2020), <https://www.cnyfertility.com/ivf-cost> [<https://perma.cc/6PHD-8DR2>] (discussing costs of IVF treatments throughout the U.S.); *How Much Does Adoption Cost?*, HUM. RTS. CAMPAIGN <https://www.hrc.org/resources/how-much-does-adoption-cost> [<https://perma.cc/Y27U-72BJ>] (discussing the cost of second parent adoption).

155. See GLAD, *supra* note 9.

156. See Moreau, *supra* note 21; Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1541 (2018).

157. See 830 N.W.2d 335, 340–41 (Iowa 2013).

158. *McLaughlin v. Jones* 401 P.3d 492, 494 (Ariz. 2017).

159. *Hawkins v. Grese*, 809 S.E.2d 441, 446–49 (Va. Ct. App. 2018); VA. CODE ANN. § 20-158 (West 2019).

parenthood more difficult for same-sex spouses.¹⁶⁰ While a few states—Colorado,¹⁶¹ Connecticut,¹⁶² and Massachusetts¹⁶³—have proposed legislation to extend the presumption of legal parentage to same-sex couples, any votes on the enactment of the bills have been delayed due to the 2020 Coronavirus Pandemic.¹⁶⁴ The delays caused by the Pandemic have highlighted two large concerns involving the death of a birth mother before the establishment of her wife's legal parentage and medical decisions for a baby born to a female same-sex couple, which will be discussed in Section III.B.¹⁶⁵ As discussed in Part II,¹⁶⁶ Arkansas did not, until quite recently, extend the marital presumption to same-sex spouses. It was not until 2017 when the Supreme Court of the United States held that an Arkansas state statute denying same-sex couples the legal presumption of parentage provided to opposite-sex married couples violated the Equal Protection Clause.¹⁶⁷ This holding evidenced the U.S. Supreme Court would likely find any statute that failed to extend the marital presumption of parentage to same-sex couples, despite doing so for similarly situated opposite-sex couples, to be unconstitutional through the Equal Protection Clause.¹⁶⁸ However, the U.S. Supreme Court issued this holding based on an individual state statute's violation of the Federal Constitution.¹⁶⁹ Because parentage is *mostly* governed by state law,¹⁷⁰ couples in every state that refuses to extend *legal* parentage will only see a country-wide change in the legal parentage presumption through Congress's enacting of substantial legislative changes.¹⁷¹

Further, the reason inconsistency among the states on this issue is inimical to families is because upon moving, a woman made a legal parent through the marital presumption in State A may not be considered the legal

160. H.B. 1102, 2016 Leg., 42d Reg. Sess. (La. 2016) (enacted) (requiring couples seeking to use a surrogate—the intended parents—to contribute genetic material to use a gestational surrogate, effectively excluding same-sex married couples who biologically cannot both provide a sample for one child).

161. H.B. 20-1292, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

162. H.B. 5178, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020).

163. S.B. 1013, 191st Gen. Ct. (Mass. 2020).

164. Moreau, *supra* note 21.

165. *See infra* Section III.B.

166. *See* discussion *supra* Section II.D.

167. *Pavan v. Smith*, 137 S. Ct. 2075, 2077–78 (2017) (per curiam).

168. *See id.* at 2076–79; *Obergefell v. Hodges*, 576 U.S. 644, 672–76 (2015).

169. *Pavan*, 137 S. Ct. at 2077–78.

170. *See* Moreau, *supra* note 21. *See generally* UNIF. PARENTAGE ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017) (discussing proposed uniform laws which states can adopt surrounding parenthood, children, and uniform legal guarantees within states who choose to adopt the UPA); Feinberg, *supra* note 128 (discussing proposed changes to state-governed parentage laws and federal acknowledgments of parentage).

171. ROBYN PAINTER & KATE MAYER, WHICH COURT IS BINDING?: BINDING VS. PERSUASIVE CASES 5 (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf> [<https://perma.cc/8YLS-CLEG>].

parent in State B because parentage depends on *state* law.¹⁷² While one would assume the Full Faith and Credit Clause would force State B to recognize State A's recognition of legal parentage, it does not. A birth certificate listing the wife as a non-birthing mother is not considered a "public act[], record[], [or] judicial [determination],"¹⁷³ like an adoption or a voluntary acknowledgment of parentage would be.¹⁷⁴ Were a married same-sex couple whose children were born during the marriage through artificial insemination to move to another state, some states would potentially not recognize the non-birth mother because they do not extend the legal parentage presumption to non-birthing, same-sex wives without the process of costly adoptions.¹⁷⁵ In the last year, the state of Indiana provided an example of a state refusing to recognize the non-birth mother, even if she were a legal mother in another state. A 2020 Seventh Circuit Court of Appeals decision invalidated a portion of an Indiana law extending the legal and marital parentage presumptions to non-biological, marital fathers of children born to birth mothers of children conceived through artificial insemination but not to same-sex married women.¹⁷⁶ Though denied six months later,¹⁷⁷ Indiana filed a writ of certiorari before the Supreme Court, indicating at least some states will continue their attempts to prevent same-sex legal parenthood.¹⁷⁸ Moreover, the results for same-sex families moving into some states are unpredictable because many states currently do not have any laws or regulations regarding legal parenthood for non-birthing, same sex mothers.¹⁷⁹ For example, Texas allows a same-sex female couple to list both wives' names on the birth certificate of a child born into their marriage through artificial insemination, but that

172. Moreau, *supra* note 21.

173. U.S. CONST. art. IV, § 1.

174. Alexander Newman, Note, *Same-Sex Parenting Among A Patchwork of Laws: An Analysis of New York Same-Sex Parent's Options for Gaining Legal Parent Status*, 2016 CARDOZO L. REV. DE NOVO 77, 92 (2016); see 45 C.F.R. § 302.70 (a) (11) (2010).

175. Newman, *supra* note 174, at 92; Joshua S. Myers, *Legally Married Mothers and the Presumption of Parentage*, OUTSMART MAG. (Jan. 1, 2016), <http://www.outsmartmagazine.com/2016/01/legally-married-mothers-and-the-presumption-of-parentage> [<https://perma.cc/J7G2-99DA>].

176. *Henderson v. Box*, 947 F.3d 482, 485–88 (7th Cir. 2020).

177. *Box v. Henderson*, No. 19-1385, 2020 WL 7327836, at *1 (2020).

178. *Henderson*, 947 F.3d at 485–88. Additionally, while outside the scope of this Note, this decision did not extend marital or legal parentage to same-sex husbands living in Indiana, which reinforces the idea that current parentage laws are unpredictable and inconsistent, as applied to same-sex parents and must be fixed.

179. SARAHJANE GUIDRY & DENISE BROGAN-KATOR, LOUISIANA LGBTQ FAMILY LAW: A RESOURCE GUIDE FOR LGBTQ-HEADED FAMILIES LIVING IN LOUISIANA 8–9, 25 (2017), <https://www.familyequality.org/wp-content/uploads/2018/06/Louisiana-LGBTQ-Family-Law-Guide-WEB.pdf> [<https://perma.cc/CG9P-U5FZ>]; see *Same-Sex Parenting – Birth Certificate FAQs*, *supra* note 145; see also Myers, *supra* note 175 (distinguishing between being listed as a parent on a birth certificate and *legal* parenthood, which is not established for the wife of a birth mother under Texas law by being named on a child's birth certificate); Moreau, *supra* note 21 (describing three states who do not currently but are seeking to change their parentage presumption to extend legal parenthood to same-sex married couples).

process does not establish *legal parenthood* for the non-gestational spouse under Texas law.¹⁸⁰ Some states only consider a birth certificate issued for the child of same-sex mothers in this situation to be *evidence* of a legal relationship, but that evidence does not itself “create the legal relationship” between the non-birthing parent and child.¹⁸¹ It is unpredictable whether a state that does not extend legal parentage to same-sex couples within its marital presumption will deny recognition of a preexisting legal relationship between a parent and child, particularly in a situation where the couple divorces and faces a custody dispute in State B.¹⁸² The lack of extension of legal parentage in some states also means same-sex couples should still go through with the expense and frustration of having the non-birthing wife adopt the child—her own child—if the couple moves to a state that may not recognize her legal parentage.¹⁸³ This added step, which opposite-sex couples do not face, seems entirely at odds with the assurances allegedly provided through *Obergefell*.¹⁸⁴

B. CONGRATULATIONS, IT'S A LEGAL FEE!: HOW DIFFERENCES IN TREATMENT
CAUSE MOTHERS AND CHILDREN BORN INTO SAME-SEX MARRIAGES
TO SUFFER UNNECESSARY HARMS AND COSTS

Same-sex female couples face several considerable obstacles when having a child through artificial insemination in states that do not guarantee legal parenthood to the non-birthing mother,¹⁸⁵ such as Virginia¹⁸⁶ and Texas.¹⁸⁷ Among these many obstacles are issues of adoption costs and adoption waiting periods.¹⁸⁸ Unfortunately, expense is not the only issue when it comes to adopting one's own child, nor is adoption the only harm to these families. These waiting periods introduce their own sub-issues, such as what would happen if the birth mother died or if issues of medical decisions for the child arose.

180. Myers, *supra* note 175.

181. Lyons, *supra* note 145, at 255.

182. See Moreau, *supra* note 21.

183. See GUIDRY & BROGAN-KATOR, *supra* note 179, at 8–9.

184. See *Obergefell v. Hodges*, 576 U.S. 644, 665–670 (2015) (discussing the benefits of marriage, including stability and legal protections for children born into a marriage, such as a birth certificate).

185. See NeJaime, *supra* note 153, at 268.

186. While the Virginia laws concerning artificial insemination provide for parentage of the non-birthing spouse, they do not guarantee that right, and in application the right is questionable. See *Hawkins v. Grese*, 809 S.E.2d 441, 446–49 (Va. Ct. App. 2018); VA. CODE ANN. § 20-158(A)(2) (West 2019).

187. See generally Lyons, *supra* note 145 (discussing equality for same-sex parents in Texas following *Obergefell*); Myers, *supra* note 175 (discussing the evidentiary value of birth certificates for proving parentage in Texas).

188. *Supra* note 184 and accompanying text.

In some states, second-parent adoption is the only means of ensuring the non-birthing female spouse is a legal parent,¹⁸⁹ even when she is on the birth certificate.¹⁹⁰ Second-parent adoption is the adoption of a child to establish legal parenthood for a “second” parent who may or may not be married to the child’s “first” legal parent (who may be the natural *or* adoptive parent of the child) without disturbing the legal parenthood of the “first” parent.¹⁹¹ This process, though less expensive than an adoption of a child *neither* spouse birthed,¹⁹² still costs a substantial amount of money for couples.¹⁹³ For instance, the cost of a second-parent adoption in the United States, on average, is between \$2,000 and \$3,000,¹⁹⁴ though it can cost tens-of-thousands of dollars.¹⁹⁵ Further, this large sum of money is an expense a family must pay *every time* they wish to expand their family. Opposite-sex couples pursuing artificial insemination do not have to do the same because of the extension of legal parenthood to the mother’s husband within the marital presumption. Nevertheless, many states and organizations implore same-sex couples to seek a second-parent adoption¹⁹⁶ in the case the couple decides to move to a state with unclear or no relevant same-sex parentage laws¹⁹⁷ and because of ongoing political debate regarding the future of same-sex rights.¹⁹⁸

189. Kathy Brodsky, *What’s a Second Parent Adoption?*, FAM. EQUAL. (May 2, 2019), <https://www.familyequality.org/2019/05/02/whats-a-second-parent-adoption> [<https://perma.cc/Y8M6-LCV8>].

190. GUIDRY & BROGAN-KATOR, *supra* note 179, at 9.

191. *Second Parent Adoption*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/second-parent-adoption> [<https://perma.cc/6HXJ-QLU2>].

192. See Rebecca Lake, *Average Cost of Adoption in the U.S.*, BALANCE (May 7, 2021), <https://www.thebalance.com/average-cost-of-adoption-in-the-u-s-4582452> [<https://perma.cc/NUJ4-LVST>].

193. See *How Much Does Adoption Cost?*, *supra* note 154 (discussing the cost of second parent adoption).

194. *Id.*

195. Susannah Snider, *What Adoption Costs—and Strategies to Pay for It*, U.S. NEWS & WORLD REP. (June 11, 2020, 11:36 AM), <https://money.usnews.com/money/personal-finance/family-finance/articles/what-adoption-costs-and-strategies-to-pay-for-it>.

196. Moreau, *supra* note 21; *Same-Sex Parenting – Birth Certificate FAQs*, *supra* note 146 (discussing antiquated laws that currently do not protect same-sex legal parentage and recommending adopting, even when on the birth certificate); GUIDRY & BROGAN-KATOR, *supra* note 179, at 9 (recommending couples adopt their children, even when married and both are on the birth certificate, as “[a]n adoption decree is the single best irrefutable and undeniable proof of parentage” in this instance).

197. *Non-Biological, Same-Sex Parents Should Consider Adoption – Even If Your Name is on the Birth Certificate*, ROZIN GOLINDER L., LLC (Mar. 10, 2020), <https://www.rgfamilylaw.com/blog/2020/march/non-biological-same-sex-parents-should-consider> [<https://perma.cc/R6EE-44RU>]; GUIDRY & BROGAN-KATOR, *supra* note 179, at 9, 25; see *supra* notes 178–79 and accompanying text.

198. Oscar Lopez, *Five Years on, LGBT+ Couples Fear for Future of Gay Marriage*, REUTERS (June 24, 2020, 12:03 PM), <https://www.reuters.com/article/us-usa-lgbt-marriage-trfn-idUSKBN23V2NF> [<https://perma.cc/gNWD-2FWH>]; Tim Holbrook, *Same-Sex Marriage at Risk as Supreme Court Gets More Conservative*, CNN (Oct. 6, 2020, 6:15 AM), <https://www.cnn.com/2020/10/06/opinions/thomas-alito-obergefell-marriage-equality-at-risk-holbrook/index.html> [<https://perma.cc/76P3-7VKE>].

Additionally, these couples typically will already have paid a large sum of money for artificial insemination.¹⁹⁹ On average, couples spend \$40,000 to \$50,000 on assisted reproduction because it typically takes two cycles of IVF for a couple to achieve a viable pregnancy and bring a baby home, though some report the average cost is around \$10,000 more than this estimated range.²⁰⁰ However, even assuming a couple could get pregnant after one cycle, the cost of one cycle ranges from \$8,000 to \$30,000, with a national average of \$20,000.²⁰¹ These couples are spending astronomical amounts to even have a child²⁰² and then are told the non-birthing spouse must pay additional sums to adopt the child she and her wife already paid to conceive just to be the child's legal parent.²⁰³ The consequences of not doing so could be the risk of having no legal say in the child's life.²⁰⁴ Even if the couple goes through with the adoption to ensure both parents are legal parents, there can be several harms that can and do occur while going through the adoption process, some of which are especially worrisome because of the Coronavirus Pandemic.²⁰⁵ Many states require a waiting period to adopt a child.²⁰⁶ This period can take around six months.²⁰⁷ This waiting period only begins after letters of recommendation²⁰⁸ and the completion of successful home studies with social workers.²⁰⁹ During that time and up until the official adoption, if a state does not recognize the non-birthing spouse as a legal parent, she cannot make medical decisions,²¹⁰ put the child on her insurance in some cases,²¹¹ or pick

199. See generally CNY FERTILITY, *supra* note 154 (discussing costs of IVF treatments throughout the United States).

200. *Id.* (discussing average costs and breakdowns of IVF cycles in the United States).

201. *Id.* (assuming a couple would get pregnant after one cycle without considering various variables like age and fertile health).

202. *Id.*

203. *How Much Does Adoption Cost?*, *supra* note 154.

204. See *Same-Sex Parenting – Birth Certificate FAQs*, *supra* note 145; GUIDRY & BROGAN-KATOR, *supra* note 179, at 8–9, 25; *Same-Sex Couples: Do We Still Need a Second Parent Adoption?*, JENNIFER FAIRFAX LLC (Oct. 24, 2018, 2:47 PM), <https://info.jenniferfairfax.com/family-formation-blog/second-parent-adoption-for-same-sex-couples> [<https://perma.cc/5VSM-R9T4>].

205. See Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/GX2U-L79J>].

206. Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 216 (2012); Lyons, *supra* note 145, at 257.

207. Lyons, *supra* note 145, at 257; Moreau, *supra* note 21.

208. Moreau, *supra* note 21.

209. Lyons, *supra* note 145, at 257; Maia Labrie, Comment, *Two Legal Mothers: Cementing Parental Rights for Lesbian Parents in Colorado*, 91 U. COLO. L. REV. 1247, 1262–63 (2020).

210. Douglas S. Diekema, *Parental Decision Making*, UW MED. DEP'T OF BIOETHICS & HUMANS. (2018), <https://depts.washington.edu/bhdept/ethics-medicine/bioethics-topics/detail/72> [<https://perma.cc/7KCK-QR89>] (discussing medical treatment of children absent a legal guardian).

211. Moreau, *supra* note 21.

the child up from any school or care facilities.²¹² There is also no way to know what would happen if the spouse died during childbirth or during the adoption proceedings in a state where the marital presumption does not extend legal parenthood to the non-birthing wife. Further, a lack of legal parentage raises many concerns regarding the medical care of a child. One must consider the possibility of the child being ill or needing shots and vaccines. In the absence of the birthing mother, and without a marital presumption of legal parentage, the non-birthing spouse will not be able to make these medical decisions.²¹³ For instance, it is unclear whether the non-birthing mother, lacking legal parentage, must rely on the doctors' decisions of her child's best interests.²¹⁴ One cannot know whether the non-birthing mother can demand a second opinion or continuation of some treatment, since she has not established legal parentage. Additionally, insurance for the child becomes complicated, especially in a single-income household. It is not uncommon for one spouse to stay at home with their children while the other works.²¹⁵ Therefore, the child might only have insurance coverage through the spouse that works outside of the home.²¹⁶ In this instance, it is unclear whether the non-birthing mother would be able to put the child on her insurance to cover any aforementioned medical costs without a legal parentage determination.²¹⁷ Non-legal parents also face the complication of not being able to pick up their children from school or daycare. In many

212. See CHILD CARE L. CTR., KNOW THE LAW ABOUT WHO MAY PICK UP A CHILD FROM CHILD CARE 8 (2014), <http://childcarelaw.org/wp-content/uploads/2014/06/Know-the-Law-About-Who-May-Pick-a-Child-Up-From-Child-Care-in-California.pdf> [<https://perma.cc/8VgE-KV7R>] (acknowledging that legal guardians and legal parents are the only people who may pick up their children unless there is written consent in California); Shannon McNulty, *Who is Authorized to Pick Up Your Child in an Emergency?*, SAVVYPARENT (2020), <http://www.thesavvyparent.us/authorization-to-pick-child-up-from-school> [<https://perma.cc/ARV7-CWBE>] (discussing who may pick up a child and when in the event the legal parent or legal guardian cannot, if the organization allows or has a procedure in place).

213. See Moreau, *supra* note 21; Diekema, *supra* note 210.

214. Lee Black, *Limiting Parents' Rights in Medical Decision Making*, AMA J. ETHICS (Oct. 2006), <https://journalofethics.ama-assn.org/article/limiting-parents-rights-medical-decision-making/2006-10> [<https://perma.cc/5FDU-N9BY>].

215. As of 2018, approximately one in every five parents in the U.S. stays at home with their children. Gretchen Livingston, *Stay-At-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RSCH. CTR. (Sept. 24, 2018), <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents> [<https://perma.cc/3U2A-55ZQ>].

216. While unclear just how many families are covered by the insurance of one spouse, 49 percent of families receive health insurance through their respective employers. Vaughn Himer, *How Many Americans Get Health Insurance from Their Employer?*, EHEALTH (Jan. 11, 2021), <https://www.ehealthinsurance.com/resources/small-business/how-many-americans-get-health-insurance-from-their-employer> [<https://perma.cc/L7CP-7WC6>].

217. See Moreau, *supra* note 21; Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 216, 259 (2009).

states, only a legal parent can pick a child up from school or daycare.²¹⁸ While some facilities allow parents to list an authorized person to pick the child up in the event of an emergency, someone besides the legal parent can only pick the child up if the legal parent has given a prior written authorization including a photograph of that person.²¹⁹ Though this is a good policy to protect children, it makes it difficult for the non-birthing spouse in the adoption waiting period to pick the child up and creates another waiting period of getting her authorized.²²⁰ In the meantime, unless someone else is already authorized, the birthing spouse will have to be free every day at pickup time, regardless of whether she is the sole source of income and needs to work during that time.²²¹ Finally, one can only speculate as to what would happen in the event of a divorce, as it is unclear whether the non-birthing mother could assert any rights in a state that does not follow the UPA or has no extension of legal parentage for same-sex, non-birthing wives.²²² While these are questions and harms all adopting couples could potentially face, it seems entirely against public policy to force them onto a couple when the child is born into their marriage. In similar cases involving opposite-sex spouses, both parents have legal rights to the child as legal parents. However, same-sex wives do not receive this right under identical circumstances, resulting in invidious discrimination and implicating serious constitutional violations.

IV. THE CONSTITUTIONAL ISSUES OF UNEQUAL TREATMENT OF MARRIED SAME-SEX MOTHERS

The unequal treatment of married same-sex parents and married opposite-sex parents related to the marital presumption of parentage and legal parenthood goes beyond emotional and financial harm; it violates the Equal Protection and Due Process Clauses of the Constitution.²²³ Yet, states

218. See CHILD CARE L. CTR., *supra* note 212, at 8 (acknowledging that only legal guardians and legal parents are the only people who may pick up their children unless there is written consent in California); McNulty, *supra* note 212.

219. CHILD CARE L. CTR., *supra* note 212, at 1–2.

220. See *id.*

221. See *id.*

222. See generally *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014) (holding an estranged female spouse was the presumed parent of the child who was born to her spouse through artificial insemination during the marriage); *Kelly S. v. Farah M.*, 28 N.Y.S.3d 714 (N.Y. App. Div. 2016) (holding an estranged same-sex spouse of birth mother had standing to seek visitation of the children born through artificial insemination during the marriage); Moreau, *supra* note 21.

223. See *Obergefell v. Hodges*, 576 U.S. 644, 663–68, 672–73, 675 (2015) (stating the unequal treatment of similarly situated couples on the basis of sexual orientation was invidious and served no purpose but to humiliate the couples and their children, while also violating their right to due process through liberty of choice to marry and have children); *Pavan v. Smith*, 137 S. Ct. 2075, 2077–78 (2017) (per curiam) (stating laws preventing the marital presumption by denying same-sex parents the right to have both their names on their child's birth certificate conflicted with *Obergefell* and violated equal protection).

still ignore both *Obergefell* and *Pavan*, each of which indicated that *any* statute in *any* state infringing on the marital presumption or legal parenthood violated the Constitution, as evident by the fact that couples are still fighting for legal parenthood²²⁴ and, in some states, to *keep* their right to the marital presumption.²²⁵

Further, while the Supreme Court has yet to state an official level of scrutiny to apply to sexual-orientation discrimination specifically, “[u]nder both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny.”²²⁶ For a law to survive strict scrutiny, the law must be narrowly tailored to fulfil only a stated compelling government interest.²²⁷

A. EQUAL PROTECTION FOR SOME

The Equal Protection Clause is violated by laws treating same-sex married mothers differently from similarly situated opposite-sex married parents. The Equal Protection Clause provides that states may not “deny to any person within its jurisdiction the equal protection of the laws.”²²⁸ This means, as applied to this issue, that states who extend legal parentage to opposite-sex married parents but deny legal parentage to same-sex couples (seemingly for no genuine reason other than to humiliate and stigmatize same-sex couples and their children) are in violation of the federal Constitution because they do not provide any satisfactory purpose to outweigh the harm of preventing legal parentage.²²⁹ Courts begin their Equal Protection Clause analysis by first deciding whether there is both a discriminatory intent and disparate impact created by the challenged law.²³⁰ Then, if there is both a discriminatory intent and disparate impact, courts examine which class of persons is affected by the law.²³¹ If the affected class has not been assigned a level of scrutiny prior to

224. See e.g., VA. CODE ANN. §20-158 (West 2019); Moreau, *supra* note 21; Hawkins v. Grese, 809 S.E.2d 441, 446–49 (Va. Ct. App. 2018); Lyons, *supra* note 145, at 242–43; Myers, *supra* note 175.

225. A writ was certiorari was recently filed for a Seventh Circuit case invalidating an Indiana parentage law. However, certiorari was denied. Henderson v. Box, 947 F.3d 482, 484, 487 (7th Cir. 2020) (invalidating a portion of an Indiana law extending the marital presumption to a mother’s husband but not her wife on equal protection grounds, though only extending the presumption to *female* same-sex couples explicitly).

226. Bostic v. Schaefer, 760 F.3d 352, 375 (4th Cir. 2014).

227. *Id.* at 377.

228. U.S. CONST. amend. XIV, § 1.

229. See Henderson v. Box, 947 F.3d at 484, 486–87 (invalidating a law preventing the marital presumption for same-sex females on equal protection grounds); Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (per curiam) (invalidating a law preventing the marital presumption through birth certificates for violating equal protection of the laws for same-sex parents); Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335, 340–41 (Iowa 2013) (holding the female spouse of a gestational mother must be put on the birth certificate of their child, extending the presumption of parentage to married lesbians).

230. Washington v. Davis, 426 U.S. 229, 239 (1976).

231. Varnum v. Brien, 763 N.W.2d 862, 887 (Iowa 2009).

the challenge in question, courts will ask whether the group is a discrete and insular minority and assign that class a level of scrutiny, based on their answer to that inquiry.²³² After deciding the level of scrutiny from among the three (strict scrutiny being the most difficult for a law to survive,²³³ rational basis the least difficult to survive,²³⁴ and intermediate falling somewhere in between the two previous),²³⁵ courts apply a two prong test examining the purpose of the law and how related the law is to fulfillment of that purpose.²³⁶ The level of scrutiny applied to sexual orientation, however, is unsettled.²³⁷ Some courts have applied strict scrutiny to laws involving same-sex marriage, which implicates sexual orientation.²³⁸ However, other courts have applied intermediate scrutiny, which only requires an important or substantial purpose that is closely tailored to the challenged law.²³⁹

While the Court did not detail a strict scrutiny application, the constitutional violation within parentage laws is shown through the Equal Protection Clause analysis in *Pavan*. The *Pavan* Court stated that *Obergefell* recognized states could not deny same-sex couples the benefits of marriage given to opposite-sex couples and that some of the plaintiffs in *Obergefell* were parents whose respective states would not recognize their spouse on their child's birth certificate.²⁴⁰ Further, the *Pavan* Court stated the lack of parental recognition on birth certificates was why it deliberately listed birth and death certificates as benefits within marriage that could not be denied to same-sex couples.²⁴¹ The state in *Pavan* claimed to not allow non-birthing mothers on the birth certificate only because they were not biologically related to the child, all while allowing non-related husbands to be on the birth certificate.²⁴² Thus, the Court held, the unequal application of the law between similarly situated men and women violated the Equal Protection Clause, as the law clearly was not about biology.²⁴³

Further, were one to apply strict scrutiny, in *Pavan* for example, it would resemble the following analysis, which would result in the law being struck down as an equal protection violation. The stated government purpose in *Pavan* was to ensure birth certificates only detailed genetic parentage.²⁴⁴ It is

232. *Id.* at 880.

233. *Id.*

234. *Id.* at 879–80.

235. *Id.* at 880.

236. *Id.*

237. *See, e.g., id.* at 889–95.

238. *Bostic v. Schaefer*, 760 F.3d 352, 377–84 (4th Cir. 2014).

239. *Varnum*, 763 N.W.2d at 896.

240. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam).

241. *Id.*

242. *Id.* at 2078–79.

243. *Id.* at 2077–79.

244. *Id.* at 2078.

debatable whether this is a compelling purpose because many men are listed on birth certificates already, despite no genetic tie, only to ensure the child has financial support. One could argue the purpose is not compelling because it is illegitimate. This is a somewhat gray area. However, because, in application, birth certificates listed non-biological fathers because of the marital presumption, while denying this listing to non-biological mothers despite the marital presumption, the interest was not narrowly tailored.²⁴⁵ The law was not narrowly tailored to only accomplish the state interest because, by allowing non-biological fathers to be listed, it *did not* accomplish the interest or even attempt to.²⁴⁶ This analysis could be applied to any other parentage law that currently does not extend legal parentage, and the result would be similar. However, it is important to apply intermediate scrutiny, simply because courts are split on the applicable level of scrutiny for this class of persons.

Applying intermediate scrutiny, the result would likely be the same; the law could not withstand intermediate scrutiny. Intermediate scrutiny requires an important or substantial purpose for having a law, and the law must be closely tailored to fulfilling that purpose.²⁴⁷ Applied to the facts of *Pavan*, it is debatable whether ensuring birth certificates only detail genetic parentage is an important or substantial purpose because many men are listed on birth certificates already, despite no genetic tie, only to ensure the child has financial support. The purpose is arguably illegitimate, and not important or substantial. The law likely would also not be closely tailored to the aforesaid purpose because by allowing non-biological fathers to be listed on the birth certificate, the law did not, in actual application, attempt to limit birth certificates to only those who are genetically connected to the child. Thus, it seems likely this law would also fail under intermediate scrutiny analysis.

Additionally, it is surprising that state laws that do not extend the legal parentage presumption are not only still on the books but also still being applied discriminately, particularly because there is precedent that shows the laws violate the Constitution.²⁴⁸ Yet, these laws are still being applied to invidiously discriminate against same-sex parents in many states.²⁴⁹ For example, in Texas, a woman's husband, but not a woman's wife, though not biologically-related to the child in either case, is considered the legal parent

245. *Id.* at 2077–78.

246. *See id.*

247. *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

248. *Pavan*, 137 S. Ct. at 2077–79 (striking down statute barring same-sex non-birthing mothers from being on the child's birth certificate); *Henderson v. Box*, 947 F.3d 482, 486–87 (7th Cir. 2020) (striking down law barring non-birthing, same-sex, female married mothers from being placed on child's birth certificate).

249. Lyons, *supra* note 145, at 255; Myers, *supra* note 175; see *supra* notes 160, 186–87 and accompanying text.

of their child conceived through artificial insemination if the non-birthing spouse is on the birth certificate.²⁵⁰

B. A LACK OF DUE PROCESS

Further, states may also be in violation of the Due Process Clause by denying married same-sex parents the right to parent their children.²⁵¹ The Due Process Clause states that no state “shall . . . deprive any person of life, liberty, or property, without due process of law.”²⁵² In the context of same-sex marriage and due process, liberty has come to mean the freedom to choose whether and to whom one will marry.²⁵³ This liberty is considered a vital element within the pursuit of happiness²⁵⁴ and central to autonomy and dignity, which guide individual personal choices which “define personal identity and beliefs.”²⁵⁵ Within these liberties, the *Obergefell* Court mentioned not only the right to government documents, such as birth certificates and death certificates,²⁵⁶ for married couples, but also the liberty to have and raise children within a marriage.²⁵⁷ The Court stated specifically that access to marriage is necessary because, “it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”²⁵⁸ The Court’s discussion on this matter indicates that having and raising children is a liberty to be protected and should receive protection under the Due Process Clause.²⁵⁹ The Court also announced “[m]arriage also affords the permanency and stability important to children’s best interests.”²⁶⁰ This indicates that *legal* parenthood must be protected under the *Due Process Clause* because the only way to establish permanency and, thus, stability is by having a parent who has the liberty to make decisions for a child and have custody and things only a legal parent can do.²⁶¹ In fact, while we have great indication due process would apply in the Court’s analysis of these points, we know for certain these principles apply under equal protection of the laws, as

250. See Lyons, *supra* note 145, at 255; Myers, *supra* note 175.

251. Cf. Henderson, 947 F.3d at 487 (discussing Indiana law as violating the Equal Protection Clause but not discussing the Due Process Clause, which the lower courts said applied to the facts).

252. U.S. CONST. amend. XIV, § 1.

253. Loving v. Virginia, 388 U.S. 1, 12 (1967).

254. *Id.*

255. Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

256. *Id.* at 670.

257. *Id.* at 667–68.

258. *Id.* at 667.

259. See *id.* (discussing the important purpose of marriage in protecting and upholding the family unit, particularly as an example of love and to nurture children for their future).

260. *Id.* at 668.

261. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (per curiam) (discussing parentage and birth certificates as benefits within marriage, as Arkansas’ birth certificates were not being issued simply to claim biological parenthood but to instead establish legal parentage regardless of biology).

evidenced by *Pavan*.²⁶² The state in *Pavan* provided a rebuttal to any potential argument that would address a due process liberty interest in parental recognition, despite there being no assertion by plaintiffs that there was a due process interest.²⁶³ By providing this rebuttal, the state indicated a need to defend against what it believed to be a somewhat viable argument for a significant liberty interest in the parent-child relationship for same-sex couples who become parents through artificial insemination.²⁶⁴ However, many couples have avoided raising such an issue²⁶⁵ or have redirected due-process arguments into their already established marital-liberty interest.²⁶⁶

However, by analyzing due process in *Pavan* using strict scrutiny (which is analogous to the analysis used when a substantive due process right such as child-bearing and rearing is involved), one can see where parentage law depriving non-birthing mothers from legal parentage would likely fall. For a law to survive strict scrutiny, the law must be narrowly tailored to fulfil only a stated compelling government interest.²⁶⁷ In *Pavan*, the stated interest was to limit birth certificates only to biological parents.²⁶⁸ However, the Arkansas law allowed non-biological, married fathers to be listed because of their marital status but would not allow non-biological, married mothers to be listed despite their marital status.²⁶⁹ While one could argue the law might be compelling, as stated in Section IV.A.,²⁷⁰ it seems like a gray area. The law would, however, fail because the Court has held that marriage—and all the benefits attendant to it—is a fundamental right that one has the liberty to exercise freely.²⁷¹ If one cannot be deprived of a fundamental right without due process of the law, one cannot be deprived of the benefits of that fundamental right without suffering a substantial harm. As stated in *Obergefell*, the right for married couples to provide their children security and stability is crucial.²⁷² The Court also held due process often works together with equal process,²⁷³ implying that because this law involved a fundamental right that was given to one class but not another on the basis of sexual orientation, the stripping of that established right violated due process. That is the case here. Thus, such a law cannot stand substantive due process analysis.

262. *Id.* at 2080 (Gorsuch, J., dissenting) (discussing the right for same-sex married couples to have children and be guaranteed equal protection of the law to utilize birth certificates in acknowledging legal parentage in Arkansas, just as opposite-sex couples could do under the law).

263. NeJaime, *supra* note 153, at 318.

264. *Id.* at 264–65, 318, 357.

265. *Id.*

266. *Id.* at 318–19.

267. *Id.* at 377.

268. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam).

269. *Id.* at 2077–79.

270. *See supra* Section IV.A.

271. *Pavan*, 137 S. Ct. at 2076; *Obergefell v. Hodges*, 576 U.S. 644, 663, 667 (2015).

272. *Obergefell*, 576 U.S. at 668–69.

273. *Id.* at 673.

V. AN EXTENSION OF LEGAL PARENTAGE FOR FEMALE SPOUSES OF GESTATIONAL MOTHERS THROUGH FEDERAL LAW AND THE VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE FOR INTENDED PARENTS

The UPA, an act created to simplify and clarify child custody and parentage,²⁷⁴ currently proposes several changes in parentage laws that would fill any gaps in same-sex parentage to ensure parents are not only given the marital presumption but also that states will recognize *legal* parentage for the presumed parent.²⁷⁵ However, the UPA is simply suggested legislation created by many experts, and there is nothing compelling a state, particularly one that does not wish to recognize same-sex parents, to adopt the UPA or the particular sections that would impact same-sex parentage.²⁷⁶

Since the UPA is optional and allows states to adopt whichever portions they choose, it cannot solve the problem of no legal parentage for married same-sex couples. However, a UPA-influenced, federally-regulated scheme of access to voluntary acknowledgments of parentage would solve that problem and at very little cost, if any. A voluntary acknowledgment of parentage is a document signed by a mother and the other parent, typically a male,²⁷⁷ to establish legal parenthood of a child.²⁷⁸ The utilization of voluntary acknowledgments under a federal scheme would provide a remedy for same-sex parents and eliminate the need for a major rewrite of federal law, as a scheme already exists to provide voluntary acknowledgments to alleged fathers. Section V.A of this Note proposes a federally enforced plan of access to voluntary acknowledgments of parentage for intended, non-birthing parents.²⁷⁹ Section V.B addresses many concerns with this proposal, such as federal involvement in law substantially governed by individual states and the availability of voluntary acknowledgments of parentage for a non-birthing wife.²⁸⁰

274. Heinig, *supra* note 17.

275. See generally UNIF. PARENTAGE ACT (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2017) (discussing proposed uniform laws that states can adopt to acknowledge legal parenthood, such as an extension to female parents of holding a child out as one's own and consent to artificial insemination).

276. Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589, 590–92 (2018).

277. Ken LaMance, *Voluntary Acknowledgement of Paternity*, LEGAL MATCH (Dec. 4, 2019), <https://www.legalmatch.com/law-library/article/voluntary-acknowledgement-of-paternity.html> [<https://perma.cc/5CFK-ECLK>].

278. *Acknowledgment of Parentage*, WASH. STATE DEP'T HEALTH, <https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/Parentage/AcknowledgementofParentage> [<https://perma.cc/8SGB-VQ45>].

279. See *infra* Section V.A.

280. See *infra* Section V.B.

A. A VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE: WHEN IT COMES
TO THIS CHILD, YOU ARE THE MOTHER!

The federal government should create a system by which states must allow same-sex, non-birthing married mothers to sign a voluntary acknowledgment of parentage, as an intended parent, or face federal funding reductions. By making simple amendments to 45 C.F.R. Section 303.5, voluntary acknowledgments would be provided to same-sex wives through Section 303.5, which is part of a statutory scheme already used to provide voluntary acknowledgments to putative fathers.²⁸¹ Doing so would properly acknowledge the holdings and discussion in *Obergefell* and *Pavan* surrounding same-sex marital and parental equality through the Due Process²⁸² and Equal Protection Clauses.²⁸³ Further, because judicial decisions have already promulgated that states cannot withhold legal parentage from same-sex couples, which some states continue to ignore, it is evident a judicial solution might not be the best solution. This is especially true when one considers how lengthy the legal process can be and the fact that every statute in each state not extending legal parentage would have to be successfully challenged by judicial process. Therefore, creating a solution through the legislative branch by utilizing a system that already exists may be the easiest, cleanest, and quickest answer to protect all affected parents and children.

A voluntary acknowledgment of parentage is a document signed by a mother and the other parent, typically a male,²⁸⁴ to establish legal parenthood of a child,²⁸⁵ usually to enforce child support obligations. The second parent is then added to the birth certificate, if not already on it.²⁸⁶ An acknowledgment ensures that the second parent will be recognized as a legal parent²⁸⁷ because a “voluntary acknowledgment” is equivalent to a judicial determination of legal parentage,²⁸⁸ which other states must recognize.²⁸⁹ An

281. See 45 C.F.R. § 303.5 (2018).

282. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015) (discussing the liberty interest in choosing who to marry and to be free to raise children in the secure stability of a marriage, just as opposite-sex couples).

283. See generally *id.* (discussing the invidious discrimination evident in the illegitimate purposes of the laws preventing same-sex marriage for treating same-sex couples on different footing than opposite-sex couples); *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam) (discussing unequal treatment of same-sex couples and opposite-sex couples on the basis of sexual orientation in not allowing non-biological marital mothers onto the child’s birth certificate but allowing non-biological married fathers on the child’s birth certificate, indicating no legitimate purpose in preventing the legal recognition of parentage).

284. LaMance, *supra* note 277.

285. WASH. STATE DEP’T HEALTH, *supra* note 278.

286. *Id.*

287. See *supra* note 251 and accompanying text.

288. 42 U.S.C. § 666 (a)(5)(D)(ii) (2018).

289. 750 ILL. COMP. STAT. 46/302(5) (2015); *Certificate of Parentage (COP)*, N.J. CHILD SUPPORT INST. (Aug. 22, 2016), https://njcsi.org/cspm/Chapter_09_Intergovernmental/09_

acknowledgment is far better security for the non-birthing parent than to only have her name on a birth certificate.²⁹⁰ Further, this plan would remove many, if not all, of the harms same-sex couples face in having children through artificial insemination. It would save couples thousands of dollars in adoption costs, as a voluntary acknowledgment is free in some states if filed at birth and under \$50 if filed after that time.²⁹¹ This process would additionally ensure parents have legal rights to their children upon or soon after birth. If something happened to the birthing spouse, if the couple decided to divorce, or the baby were ill and needed insurance from the non-birthing spouse, the non-birthing spouse would have the rights as the child's legal parent to address custody, medical care, or whatever other situation may arise, just as married opposite-sex couples in this position may do already upon birth.²⁹² By creating access to a document that establishes legal parenthood during the child's birth, the non-birthing spouse who signed the document can make these decisions immediately, unlike non-birthing mothers in states where they must adopt the child.

However, the plan would have to be well-structured to do minimal disruption to other areas of society. One can look to current federal government involvement in voluntary acknowledgments, as they are typically sought out for child support enforcement purposes and regulated by the federal government with financial conditions attached already.²⁹³ Currently, the federal government requires states and any entities participating in the state's voluntary paternity program to provide the forms needed for parents to acknowledge paternity to the alleged father of an out-of-wedlock child.²⁹⁴ The penalty for not providing these forms as required under 45 C.F.R. § 303.5²⁹⁵ or noncompliance with other portions of the Child Support Enforcement Program is that states lose federal welfare funding.²⁹⁶ States abide fairly meticulously by this program outline because they are very

Paternity_and_Support_Order_Establishment/Certificate_of_Parentage_(COP).htm#:~:text=Federal%20regulations%20that%20by%20signing%20a%20voluntary,party%22%20%2842%20U.S.C.%20%20666%20%28a%29%20%285%29%20%28C%29%29 [https://perma.cc/9QCX-M3TY]. The Full Faith and Credit Clause, which makes it unconstitutional for State B to ignore State A's "public Acts, Records, and judicial Proceedings," would ensure the recognition of a non-birthing wife's legal parentage through judicial enforcement. U.S. CONST. art. IV, § 1.

290. See *supra* note 186 and accompanying text (discussing the difference between presumptive parenthood and legal parenthood, the former of which is the only guarantee to a married non-birthing mother on a child's birth certificate).

291. *How Much Does a Paternity Test Cost in Colorado?*, TOLISON & WILLIAMS: FAM. & DIVORCE L. BLOG (June 1, 2018), <https://www.denverfamilylawmatters.com/blog/paternity-test-cost-colorado> [https://perma.cc/KF5P-DCMB]; WASH. STATE DEP'T HEALTH, *supra* note 278.

292. See *supra* Section III.B.

293. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER, SOC. POL'Y, & L. 467, 475-79 (2012).

294. 45 C.F.R. § 303.5(g) (2018).

295. *Id.*

296. See Harris, *supra* note 293, at 475.

dependent on this money to fund their child welfare programs and cannot afford to fund them alone.²⁹⁷

Thus, if the federal government simply changed 45 C.F.R. § 303.5 in every place that says “alleged father”²⁹⁸ to “alleged or intended parent,” it would not be a major overhaul or disruption in any state programs or negatively affect the states or citizens. For example, under Section 303.5(a)(1), the state must “[p]rovide an alleged father the opportunity to voluntarily acknowledge paternity.”²⁹⁹ By changing “alleged father” to “alleged or intended parent,” the section would be applicable to alleged fathers and to a non-birthing mother who decided to have a child with her wife. Since “alleged father” appears only six times in Section 303.5,³⁰⁰ it would not be a burdensome change.

Further, Section 303.5(g)(1)(i)³⁰¹ would be amended so that “out-of-wedlock” read “out-of-wedlock or to same-sex spouses.” This change would make the sentence applicable to alleged fathers and same-sex parents, giving same-sex parents access to voluntary acknowledgments upon the child’s birth.³⁰²

Finally, “paternity” should be amended to “parentage” throughout Section 303.5, as this would provide same-sex wives with the option of signing a voluntary acknowledgment immediately after birth of the child.³⁰³ For example, Section 303.5(a)(1) provides that certain agencies must give “an alleged father the opportunity to voluntarily acknowledge paternity,”³⁰⁴ which would be amended to give an alleged or intended parent “the opportunity to voluntarily acknowledge parentage.”³⁰⁵ By allowing a determination of parentage, rather than of paternity, each clause would continue to apply to unwed fathers, while also addressing non-birthing mothers. While this would be the most complicated feature of amending this section of the Code of Federal Regulations, given that Section 303.5 is less than three pages long and contains the term “paternity” 41 times, it would not be difficult to amend.³⁰⁶ Further, these changes are easy to implement, and would only slightly expand the class of persons the voluntary acknowledgments would be made available to. None of the procedure or reasoning behind the

297. *Id.*

298. 45 C.F.R. § 303.5.

299. *Id.* § 303.5(a)(1).

300. *Id.* § 303.5(a)(1), (c), (e)(3), (g)(2)(i)–(ii), (g)(3).

301. This section reads, “[t]he hospital-based portion of the voluntary paternity establishment services program must be operational in all private and public birthing hospitals statewide and must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born out-of-wedlock.” *Id.* § 303.5(g)(1)(i).

302. *See id.*

303. *See id.*

304. *Id.* at § 303.5.

305. *Id.* § 303.5(a)(1).

306. *See id.* § 303.5.

acknowledgments would change, and there would be no negative impact on the rest of society by implementing these changes.

B. ARGUMENTS AGAINST A PARENTAGE SYSTEM INVOLVING THE
FEDERAL GOVERNMENT

The proposal of a federally-regulated system to ensure states provide voluntary acknowledgment access to same-sex mothers is not without opposition. Involving the federal government in an area governed by individual states is controversial, particularly given the concept of dual sovereignty. Also, at first glance, it could seem problematic to provide a voluntary acknowledgment to an unrelated person, though in reality, it is not remotely problematic. Further, rather than jeopardizing a state's welfare programs, an increase in legal parentage will provide more money for those programs. However, the nature of this issue and the continued action by states in contravention of the Constitution warrant this solution. There may be some sentiment that the federal government should not be involved in parentage laws, as involvement would interfere with an area of law substantially governed by individual states.³⁰⁷ But the federal government has already crossed this boundary by requiring voluntary acknowledgments in the case of child support and by threatening to take away states' welfare funding for noncompliance.³⁰⁸ Just before the establishment of the Child Support Enforcement Program, citizens demanded reduced welfare spending.³⁰⁹ The federal government found that the need for welfare was directly related to a lack of child support for many children.³¹⁰ By creating a program to enforce child support payments and help parents establish support, the federal government helped states reduce taxes related to the cost of welfare programs because less families became dependent on welfare.³¹¹ This proposal is simply an extension of that plan to another group of people (same-sex married mothers), which ensures minimal changes or harms to the government, taxpayers, or other entities by utilizing this plan. Further, because more same-sex parents would be legal parents, it would be easier to enforce child support and avoid increased welfare spending, just as the original plan intended.

However, federal involvement itself is not the only possible source of tension. Some argue same-sex wives should not be allowed to sign the acknowledgment because it typically is used to acknowledge *biological* parentage and thus legal parentage.³¹² The problem with this argument is that

307. See *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam).

308. Harris, *supra* note 293, at 480–81.

309. See MICHAEL R. HENRY & VICTORIA S. SCHWARTZ, U.S. DEP'T HEALTH & HUM. SERVS., A GUIDE FOR JUDGES IN CHILD SUPPORT ENFORCEMENT 3–4 (Mark R. Reynolds ed., 2d ed. 1987), <https://www.ncjrs.gov/pdffiles1/Digitization/102378NCJRS.pdf> [<https://perma.cc/8RKE-PLCT>].

310. See *id.*

311. *Id.* at 5.

312. Harris, *supra* note 293, at 479–82.

biology is already irrelevant to whom the government allows to sign a voluntary acknowledgment. States allow men to sign voluntary acknowledgments of parentage *without* being the biological father of the child he is acknowledging as his legal child.³¹³ In fact, under 45 C.F.R. § 302.70(a)(5)(vii), states are not allowed to make biological testing a precondition before allowing a parent to sign a voluntary acknowledgment.³¹⁴ Thus, states use voluntary acknowledgments to show *intention* and who is *willing* to be accountable and show up for a child's life. The ensured presence of a parent who loves and cares for a child while providing familial and financial stability is important, and allowing such an acknowledgment might also protect the government by having fewer children in poverty or using benefits in the case of death or divorce where the second parent is not legally accountable for the child's care.³¹⁵ So, it is not any different that a lesbian parent who contributed no biological sample to the creation of the child but actively sought out and intended to create such a child should be given the same right to legal parentage as a man doing the same. Further, the proposed federal scheme would promote societal good and economic growth. If people do not have to fear having no legal right to their own child, they will feel safer having children in the first place. With less fear and fewer costs from not having to proceed with a second-parent adoption, more same-sex couples might consider having children. Additionally, couples who already have children might have more, given the reduced financial and emotional burdens of having children as a same-sex couple. An increase in procreation would mean more money for the federal government to provide to less fortunate families through various welfare programs, as the existence of more children who cost money to raise creates more spending within the economy.

VI. CONCLUSION

The federal government must enact a new voluntary acknowledgment scheme that includes application to married same-sex females to protect mothers and children from discriminatory practices and to remove the harms currently faced by same-sex couples not faced by similarly situated opposite-sex couples. The scheme would amend 45 C.F.R. § 303.5, so that each clause stating "alleged father" would instead state "alleged or intended parent,"³¹⁶

313. *Id.*

314. 45 C.F.R. § 302.70(a)(5)(vii) (2010).

315. See generally Robert J. Samuelson, *Single Parenthood and Poverty, The Undeniable Connection*, INVS. BUS. DAILY (Mar. 18, 2018, 8:00 PM), <https://www.investors.com/politics/columnists/single-parenthood-and-poverty-the-undeniable-connection> [<https://perma.cc/PE7L-FRUC>] (discussing government benefits for impoverished people and the stereotype that single mothers are impoverished *because* they are single); Ian Rowe, THOMAS B. FORDHAM INST., *The Power of the Two-Parent Home is Not a Myth*, AM. ENTER. INST. (Jan. 8, 2020), <https://www.aei.org/articles/the-power-of-the-two-parent-home-is-not-a-myth> [<https://perma.cc/FP5H-C42J>] (discussing the importance of two-parent households in relation to poverty).

316. 45 C.F.R. § 303.5.

“out-of-wedlock” in Section 303.5 (g) (1) (i)³¹⁷ would become “out-of-wedlock or to same-sex spouses,” and “paternity” in throughout Section 303.5 would become “parentage.”³¹⁸ This scheme would reinforce the Supreme Court holdings in *Obergefell* and *Pavan*, while reducing risks of harm and encouraging same-sex participation in reproduction in couples that might otherwise be fearful of having kids. While a state could theoretically ignore the changes under Section 303.5, they will not, as the threatened total loss of welfare funding would be too burdensome on any state’s budget.³¹⁹ Thus, this is the most definite and least harmful plan to convince states to recognize non-birthing mothers as legal parents. Further, this plan would promote societal good and economic growth, as more people procreating would mean more children who cost money to raise and more money being spent in the economy. This means more money for the federal government to provide for less fortunate families through various welfare programs. Thus, the acknowledgment extension would not only benefit society and further the concept of equality, but it would also protect something all people hold most dear: family.

317. *Id.* § 303.5(g)(1)(i).

318. 45 C.F.R. § 303.5.

319. *See generally* Harris, *supra* note 293 (discussing TANF and other welfare programs that are funded mainly by the federal government so long as states follow specific guidelines).