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## Non-Marital Families and (or After?) Marriage Equality

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# NON-MARITAL FAMILIES AND (OR AFTER?) MARRIAGE EQUALITY

DEBORAH A. WIDISS\*

## ABSTRACT

*If, as is widely expected, the Supreme Court soon holds that bans on same-sex marriage are unconstitutional, it is almost certain that the decision will rely heavily on the Court's reasoning in United States v. Windsor. I strongly support marriage equality. However, a decision that amplifies Windsor's conception of the harm caused by exclusionary marriage rules could set back efforts to secure legal recognition of, and respect for, non-marital families. That is, Windsor rectified a deep inequality in the law—that same-sex marriages were categorically denied federal recognition—but in so doing it embraced a traditional understanding of marriage as superior to all other family forms. Its rationale and its rhetorical flavor stand in tension with foundational cases from the 1960s and 1970s that dismantled the legal systems under which non-marital children were systematically denied benefits and that protected the decision-making autonomy of couples who engaged in sexual intimacy outside of marriage.*

*The expansion of marriage rights for same-sex couples, including any future victory at the Supreme Court, comes at a time when marriage rates more generally are at an all-time low and non-marital childbearing is at an all-time high. The lesbian, gay, and bisexual (LGB) community is part of these larger trends. Demographers believe that the majority of children currently being raised by same-sex couples were conceived in prior heterosexual relationships that included a member of the couple. Same-sex couples with relatively low levels of educational attainment are more likely to be raising children than couples with advanced degrees; same-sex couples that include racial minorities are also more likely to be raising children than white couples. If marriage and divorce by same-sex couples follow more general trends, the members of the LGB community who are statistically most likely to be raising children are also statistically least likely to marry and remain married. Accordingly, even if same-sex couples enjoy universal marriage rights, it is essential to continue to advocate support of non-marital families and other blended family forms that depart from the “traditional” nuclear family.*

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\* Associate Professor of Law, Maurer School of Law. I am very grateful to Courtney Cahill for organizing the “After Marriage” symposium and inviting me to be part of it. It was a day of thought-provoking and inspiring discussion. The symposium was held in January 2014, and this Essay was published in March 2015. Accordingly, this Essay has had a relatively long gestation during a period of extraordinarily rapid developments regarding same-sex marriage. My thanks to all who offered comments to me at the symposium and to those who helped me further consider and revise my thoughts as the underlying legal landscape changed, including: Will Baude, Alexander Boni-Saenz, Mary Bonauto, Courtney Cahill, June Carbone, Mary Anne Case, Max Eichner, Martha Ertman, Bill Eskridge, Haley Gorenberg, Clare Huntington, Courtney Joslin, Andy Koppelman, William Kuby, Serena Mayeri, Melissa Murray, Doug NeJaime, Marc Poirier, Laura Rosenbury, Lior Strahilevitz, and participants in the Workshop on Regulating Family, Sex, and Gender at the University of Chicago Law School; the Emerging Family Law conference; the Law and Society Association conference; and the AALS Workshop on Sexual Orientation and Gender Issues. Thanks too to the editors of the *Florida State University Law Review* for their extremely conscientious work (and for their patience with multiple revisions of this Essay as the law changed). I am grateful to Dean Austen Parrish and the Maurer School of Law Summer Research Stipend Program for supporting this project. The electronic version of this Essay was modified slightly after print publication to reflect that the consolidated Supreme Court case (pending when this Essay was published) which struck down all remaining bans on same-sex marriage is known as *Obergefell* rather than *DeBoer*.

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## I. INTRODUCTION

A few months after this Essay is published, the Supreme Court will likely decide whether states must permit same-sex couples to marry.<sup>1</sup> Many expect that the Court will hold that bans on same-sex marriage are unconstitutional—and if it does, the decision will almost certainly rely heavily on *United States v. Windsor*,<sup>2</sup> the 2013 case that held that the federal government’s categorical refusal to recognize same-sex marriages was unconstitutional. Indeed, *Windsor* has already dramatically advanced marriage equality. In addition to providing same-sex married couples access to the myriad rights and benefits that flow from marriage under federal law,<sup>3</sup> *Windsor* includes stirring language that proclaims gay and lesbian relationships to be worthy of respect and acknowledges that the Defense of Marriage Act (DOMA) unfairly denigrated same-sex marriages as “second-tier” marriages.<sup>4</sup> These affirmations by the Supreme Court are important—and they were overdue. While support for same-sex marriage was already growing quickly prior to *Windsor*, the rate of change since *Windsor* has been staggering.<sup>5</sup> This is a heady time for the marriage equality movement. I have long argued that it is unconstitutional to deny same-sex couples the right to marry,<sup>6</sup> and I celebrate these developments.

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1. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), cert. granted 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (Nos. 14-556, 14-562, 14-571).

2. 133 S. Ct. 2675 (2013).

3. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004) (identifying more than one thousand rights and benefits in federal law premised on marriage).

4. *Windsor*, 133 S. Ct. at 2694.

5. When *Windsor* was decided, twelve states permitted same-sex couples to marry. Greg Stohr, *High Court Allows California Gay Marriage, Voids U.S. Law*, BLOOMBERG (June 26, 2013, 3:59 PM), <http://www.bloomberg.com/news/2013-06-26/supreme-court-ruling-may-allow-gay-marriage-in-california.html>. Now, just twenty-one months later, thirty-seven states permit marriage. See *Where State Laws Stand*, FREEDOM TO MARRY (last updated Feb. 9, 2015), <http://www.freedomtomarry.org/pages/where-state-laws-stand>. There are several additional states where pro-marriage decisions are currently stayed. *Marriage Rulings in the Courts*, FREEDOM TO MARRY (last updated Jan. 27, 2015) [hereinafter FREEDOM TO MARRY, *Marriage Rulings*], <http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts>. The Freedom to Marry website tracks developments and provides frequent updates. *Id.*

6. See generally Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (discussing arguments under the fundamental rights

In this Essay, however, I look at *Windsor* through the lens of efforts to recognize non-marital families. From this perspective, *Windsor* may be considered a step back. *Windsor* characterizes state-conferred marital recognition as a necessary precursor for couples to “live with pride in themselves and their union,”<sup>7</sup> and the denial of federal recognition, the Court fears, “humiliates tens of thousands of children” by making it “even more difficult for the children to understand the integrity and closeness” of their families.<sup>8</sup> *Windsor* thus implicitly resurrects and reinforces claims that non-marital childrearing—and sexual relationships outside of marriage, more generally—are inherently less worthy of respect than marital relationships. This emphasis on the “unique” dignity of state-conferred marital recognition sits in considerable tension with Supreme Court decisions from the 1960s and 1970s that dismantled the legal systems under which non-marital children were systemically denied benefits and protected the decision-making autonomy of couples who engaged in sexual intimacy outside of marriage.<sup>9</sup> At this earlier point in time, the Court responded to allegations that benefits or rights were unfairly limited to marital families by holding that marriage was insufficiently related to legitimate government interests to satisfy equal protection guarantees. By contrast, *Windsor*’s approach to broadening access to the federal benefits of marriage further builds up the pedestal on which marriage sits.

In the years leading up to *Windsor*, advocates representing same-sex couples built on these earlier cases to challenge the exclusive reliance on state marriage as providing access to important governmental benefits, rights, and privileges.<sup>10</sup> The dramatic advances in marriage equality litigation since the decision in *Windsor* have largely ended this other trajectory of litigation. Indeed, the initial complaint in *DeBoer v. Snyder*, one of the pending Supreme Court cases, did not allege that Michigan’s ban on same-sex marriage was unconstitutional; rather, the couple challenged a Michigan law that precluded them from adopting each other’s children because they were not married.<sup>11</sup> In other words, the couple sought legal recognition of the functional reality that they were already a family, a family formed not

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branch of equal protection law); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007) (discussing sex discrimination arguments).

7. *Windsor*, 133 S. Ct. at 2689.

8. *Id.* at 2694.

9. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

10. See *infra* text accompanying notes 87-90.

11. See, e.g., *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev’d by DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted* 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (Nos. 14-556, 14-562, 14-571).

through marriage but through their personal commitments to each other and to the children they were raising together.

April DeBoer and Jayne Rowse should be able to marry—and I very much hope that they will win their case in the Supreme Court. But a victory on that front should not end questions regarding the appropriateness of premising so many governmental rights and benefits exclusively on marriage, or assumptions that marriage is inherently superior to all other family forms. In this respect, I join other commentators who have long warned that the marriage equality movement's valorization of marriage could be detrimental to respect for alternative family structures.<sup>12</sup>

*Windsor's* rhetoric proclaiming the "unique" dignity of marriage reverberates within a larger context: the sweeping demographic changes in the nature of marriage within this country. It is now quite common for different-sex, as well as same-sex, couples to live together without marrying.<sup>13</sup> More than forty percent of babies born in the United States are born to unmarried parents.<sup>14</sup> Roughly half of all marriages end in divorce.<sup>15</sup> Accordingly, children are routinely raised by single parents, cohabiting parents, divorced parents, and in blended families of various configurations. Moreover, although marriage rates were once relatively uniform across different social classes and races, that is no longer the case. Statistically speaking, lifelong marriage is now common only among a relatively affluent, highly educated, and disproportionately white sliver of the population.<sup>16</sup>

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12. See, e.g., NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 98-109 (2008); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Zachary A. Kramer, *The Straight and Narrow*, 2012 CARDOZO L. REV. DE NOVO 147; Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 302-03 (2013); Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ: J. LESBIAN & GAY STUDIES 119 (1999). The question of whether same-sex marriage should be prioritized in LGBT advocacy efforts goes back several decades. See generally Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379 (2009).

13. See PAULA Y. GOODWIN ET AL., NAT'L CTR. FOR HEALTH STAT., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 1-2 (2010) (finding that nine percent of women and nine percent of men aged fifteen through forty-four, respectively, were in cohabitating relationships, and that twenty-eight percent of women and men cohabited before their first marriage).

14. See, e.g., *id.* at 1 (estimating that forty percent of all children will live at least a portion of their childhoods in a cohabiting household); *Fast Stats: Unmarried Childbearing*, CDC (last updated Jan. 22, 2015), available at <http://www.cdc.gov/nchs/faststats/unmarry.htm> (stating that in 2013, 40.6% of all U.S. births were to unmarried women).

15. See, e.g., Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE FAM. 403, 405 (2010) (gathering studies showing that the lifetime probability of disruption of marriage is between forty and fifty percent).

16. See *infra* text accompanying notes 106-14.

The LGB community is part of these larger trends. Demographers believe that the majority of children currently being raised by same-sex couples were conceived in prior heterosexual relationships that included one of the members of the couple.<sup>17</sup> Such children often retain legal and emotional ties with both of their birth parents, even if they also form ties with a parent's new same-sex partner. Additionally, even if legally able to marry, some same-sex couples, including some couples raising children together, may not do so. Same-sex couples with relatively low levels of educational attainment are more likely to be raising children than couples with college or graduate level degrees; same-sex couples that include racial minorities are also more likely to be raising children than white couples.<sup>18</sup> If marriage and divorce by same-sex couples follows more general trends, the members of the LGB community who are statistically *most* likely to raise children are also statistically *least* likely to marry and remain married. In other words, even if a future decision by the Supreme Court strikes down all state bans on same-sex marriage, many children being raised by same-sex couples—like many children, more generally—will live in families that depart from the married-parents-with-children paradigm.

Decisions like *Windsor*, which will almost certainly become part of the family law canon, both express and actualize cultural constructs of the family. The Court presumes that same-sex couples need state recognition to “live with pride in themselves and their union,” and that federal denial of such recognition causes non-marital children to feel “humiliati[on].”<sup>19</sup> Similar themes have been sounded in post-*Windsor* marriage equality litigation.<sup>20</sup> Certainly, DOMA's refusal to recognize same-sex marriages was insulting and hurtful, and it is true that many individuals continue to venerate marriage. But there is also growing acceptance for the kaleidoscope of family structures. That said, it may well be harmful and humiliating to children with unmarried parents (gay or straight) that the Supreme Court of the United States contends they cannot understand “the integrity and closeness of their own family” if their parents lack a stamp of approval from the government.<sup>21</sup> The way in which advocates, and ultimately the Supreme Court, frame legal questions has importance, distinct from the practical outcome of cases. I hope that the next step

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17. See ABBIE E. GOLDBERG ET AL., WILLIAMS INST., RESEARCH REPORT ON LGB-PARENT FAMILIES 1, 9 (2014), available at <http://williamsinstitute.law.ucla.edu/research/parenting/lgb-parent-families-jul-2014/>.

18. See *infra* text accompanying notes 122-25.

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

20. See *infra* text accompanying notes 38-41.

21. *Windsor*, 133 S. Ct. at 2694.

forward for marriage equality will not be a step backward for the recognition of diverse family forms, more generally.

## II. *WINDSOR*: RECTIFYING STIGMA AND REIFYING STIGMA

*Windsor* rectifies a deep inequality in the law—that lawful same-sex marriages were denied federal recognition—but in so doing, it suggests that marriage is clearly superior to other family forms. Thus, in addressing one form of stigma, it reaffirms another. Even as *Windsor* dramatically expands access to key marriage rights, it reaffirms the primacy of marriage in ways that are both substantively and symbolically harmful.

DOMA created “second-tier marriage[s].”<sup>22</sup> By denying participants the benefits and obligations of marriage, as expressed in more than 1,000 federal laws, DOMA inflicted both symbolic and tangible harms. The majority opinion in *Windsor*, authored by Justice Anthony Kennedy, focuses on the dignitary aspect of the injury.<sup>23</sup> Again and again, the opinion characterizes the harm as the denial of “equal dignity” with different-sex marriages.<sup>24</sup> The more tangible effects of the law, such as the \$363,000 estate tax that Edie Windsor was forced to pay because her marriage was not recognized, are comparatively little mentioned. Indeed, even when discussing the practical effects of DOMA, the opinion emphasizes their connection to dignity, observing: “Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive [same-sex] couples . . . of both rights and responsibilities.”<sup>25</sup>

Justice Kennedy is certainly correct that DOMA unfairly—and hurtfully—denigrated same-sex couples by singling out same-sex marriages as ineligible for federal recognition. DOMA “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”<sup>26</sup> As Justice Kennedy observed, the debate over the bill left no question that it was animated, at least for many, by disapproval of homosexuality and homosexual relationships.<sup>27</sup> A bare desire to harm an unpopular group cannot be the le-

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22. *Id.*

23. *Id.* at 2692-96.

24. *Id.* at 2693 (“The history of DOMA’s enactment and its own text demonstrate that interference with the *equal dignity* of same-sex marriages . . . was its essence.” (emphasis added)); see also *id.* (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages . . .”); *id.* at 2694 (“The principal purpose is to impose inequality, not for other reasons like government efficiency.”).

25. *Id.* at 2694.

26. *Id.*

27. See *id.* at 2693 (discussing the legislative history of the law and quoting the U.S. House report that characterized DOMA as expressing “both moral disapproval of homo-

gitimate basis of denial of federal benefits.<sup>28</sup> The recognition of this harm was long overdue, and I heartily applaud it.

But the particular way in which the *Windsor* opinion expresses DOMA's effect implicitly casts aspersions on sexual and parental relationships formed outside of marriage. In "raising up" same-sex marriages to comparable status with different-sex marriages, the opinion adopts rhetoric that denigrates non-marital relationships and childrearing. Thus, we are told, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might *aspire* to occupy the same *status and dignity* as that of a man and woman in lawful marriage."<sup>29</sup> But New York, like other states, decided that same-sex couples "should have the right to marry and *so live with pride in themselves and their union*," a decision that "conferred upon them a *dignity and status of immense import*," and "enhanced the *recognition, dignity, and protection of the class in their own community*."<sup>30</sup> Going beyond the proposition recognized in *Lawrence v. Texas* that consensual sexual intimacy between persons of the same sex merits constitutional protection, New York "acted to give their lawful conduct a *lawful status*."<sup>31</sup> The Court described this status as a "far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State *worthy of dignity in the community* equal with all other marriages."<sup>32</sup> The refusal of the federal government to recognize such marriages, the Court fears, "humiliates tens of thousands of children" by making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."<sup>33</sup>

In recognizing the injury that DOMA wrought by treating same-sex marriages as second-tier marriages, the *Windsor* opinion embraces a traditional understanding of marriage as superior to all other family forms. There are other—less normatively loaded—ways in which the harms caused by DOMA could have been characterized. For example, the opinion could have emphasized that same-sex couples and their families were harmed by the denial of important tangible rights and benefits under the federal code. Or the injury could have been framed more explicitly as a combination of liberty and equality claims: That same-sex couples, like different-sex couples,

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sexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality' " (quoting H.R. REP. NO. 104-664, at 16 (1996)).

28. See *USDA v. Moreno*, 413 U.S. 528, 534-35 (1973).

29. *Windsor*, 133 S. Ct. at 2689 (emphasis added).

30. *Id.* at 2689, 2692 (emphasis added).

31. *Id.* at 2692 (emphasis added).

32. *Id.* (emphasis added).

33. *Id.* at 2694.



should have the right to choose to marry if they desire to do so, and that they should receive the full panoply of state and federal benefits and obligations that come with marriage. Both of these harms are also real and significant. They reflect the current reality that marriage works as a gateway to significant federal rights and benefits, but they are far less judgmental in tone. The rhetorical framing of the injury in *Windsor* goes further. Repeatedly characterizing marriage as an exalted state to which same-sex couples aspire implicitly suggests that same-sex (or different-sex) individuals who choose to engage in non-marital sexual relations or non-marital parenting will—and more troubling, perhaps, should—feel less “pride” in their own relationships and stand with less “dignity” before their children, their families, and their communities.

To be sure, there is a deep tradition of valorization of marriage in Supreme Court jurisprudence. “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”<sup>34</sup> “[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>35</sup> “Marriage . . . [is] fundamental to the very existence and survival of the race.”<sup>36</sup> These are familiar quotations, and they are sprinkled liberally throughout the briefs (on both sides) of marriage equality cases. Opponents of marriage equality use them to argue about the importance of the institution they seek to “protect.” Advocates of marriage equality use them to argue the fundamental nature of the injury that exclusion from marriage causes, as well as specifically to argue that alternative legal statuses, such as civil unions or domestic partnerships that provide the rights and benefits of marriage, are an inadequate substitute. And, particularly in recent years, advocates of marriage equality have contended that marriage is necessary to protect children of same-sex couples from the “stigma” of illegitimacy.<sup>37</sup>

There are undoubtedly some good tactical reasons why marriage equality proponents have celebrated the specialness of marriage, and *Windsor*, along with the string of recent successes at the ballot box and in lower-court litigation, suggest their power. These themes were particularly prevalent in the post-*Windsor* decision by the Seventh Circuit holding that bans on same-sex marriage were unconstitutional, where the court asserted that “marriage confers respectability on sexual relationship,” and thus to exclude a couple from marriage is to

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34. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

35. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

36. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

37. See, e.g., Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012) (tracing and critiquing the rise of these arguments in cases challenging the denial of same-sex marriage).

deny it a “coveted status.”<sup>38</sup> The court also quoted *Windsor*’s language on the “humiliation” experienced by children living in states with marriage bans,<sup>39</sup> and expanded on the theme by positing that adopted children of same-sex couples would want their parents to be married so that they could be “in step with their peers.”<sup>40</sup> Notably absent from the court’s analysis was any recognition that in any given classroom, there would likely be many children who have *unmarried, different-sex* parents.<sup>41</sup> As this example illustrates, and as others have previously noted, arguments regarding the special “dignity” of marriage come with some real costs as well.<sup>42</sup> The language put forward by advocates, and ultimately adopted by the Court in *Windsor*, regarding non-marital families is deeply in tension with efforts made a generation ago to lessen the importance—both symbolic and substantive—of whether a child was born to a legal marriage.

### III. NON-MARITAL RECOGNITION BEFORE *WINDSOR*

Contrast *Windsor*’s concern regarding the “humiliation” suffered by children whose parents’ marriages are not recognized by the federal government with the Supreme Court’s assertions in *Levy v. Louisiana*, a 1968 decision which held unconstitutional the denial of wrongful death benefits to non-marital children.<sup>43</sup> In *Levy*, the Court proclaimed that it started from the premise that “illegitimate children are not ‘nonpersons.’ They are humans, live, and have their being.”<sup>44</sup> In so declaring, the Court did not simply establish the doctrinal point that non-marital children had rights enforceable under the Equal Protection Clause.<sup>45</sup> Rather, the striking language was part of a larger recognition that the children’s relationship with their mother existed whatever the legal label attached, that is, that “she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; [and] in her death they suffered wrong in the sense that any dependent would.”<sup>46</sup> In *Glonn v. American Guarantee & Liability Insurance Co.*, the companion case which addressed the corollary issue of whether such benefits could be denied to the mother of an illegitimate child, the Court stated flatly: “To say that the test of equal protection should be the ‘legal’ rather than the bio-

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38. *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014).

39. *Id.* at 659.

40. *Id.* at 663-64.

41. See *infra* text accompanying notes 106-14.

42. See sources cited *supra* note 12.

43. 391 U.S. 68 (1968).

44. *Id.* at 70 (citing Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962)).

45. See *id.*

46. *Id.* at 72.

logical relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."<sup>47</sup>

Four years later, in *Weber v. Aetna Casualty & Surety Co.*, the Court extended the *Levy* rule to hold that dependent illegitimate children were to be "on an equal footing" with dependent legitimate children in claims for workers' compensation benefits after the death of a father, rather than a mother.<sup>48</sup> The Court again emphasized that the legal label did not reflect the reality of the family situation: "[T]he dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children."<sup>49</sup> The reasoning in these cases was then extended to recognize that non-marital children had an enforceable right to child support from their natural parents,<sup>50</sup> states could not limit welfare benefits to marital families,<sup>51</sup> non-marital children could not be categorically denied the right to inherit intestate from either their fathers or their mothers,<sup>52</sup> and, at least in certain circumstances, non-marital fathers had parental rights that merited due process protection.<sup>53</sup>

These early illegitimacy decisions recognize—and reject—a precursor to the "responsible procreation" argument used in the same-sex marriage cases today: that is, that state-funded or state-mandated benefits were properly limited to marital families as an incentive for couples to marry rather than raise children outside of marriage. (As described by other commentators, in the same-sex marriage context, the argument has morphed from claims premised on punishing non-marital families to the modern, rather strained, argument that because same-sex couples cannot have children by accident, they do not need these incentives whereas different-sex couples do.)<sup>54</sup> For example, in *Glona*, the defendants asserted that the denial of benefits was an appropriate punishment for the "sin" of hav-

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47. 391 U.S. 73, 75-76 (1968).

48. 406 U.S. 164, 165 (1972).

49. *Id.* at 169.

50. *See Gomez v. Perez*, 409 U.S. 535 (1973).

51. *See N.J. Welfare Rights v. Cahill*, 411 U.S. 619 (1973).

52. *See Trimble v. Gordon*, 430 U.S. 762 (1977). *But see Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding a statute that included specific proof requirements for non-marital children seeking to inherit from their fathers).

53. *See Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972).

54. For detailed discussions of the responsible procreation argument and its weaknesses, see, for example, Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 *YALE J.L. & HUMAN.* 1 (2009), Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 *LOY. L.A. L. REV.* 781 (2012), and Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 *CHI.-KENT L. REV.* 403 (2009).

ing engaged in non-marital sex.<sup>55</sup> The Court rejected the argument, asserting it would be “farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.”<sup>56</sup> Similarly, in *Weber*, the defendant argued that it was justified in limiting wrongful death benefits to marital children to promote the state’s interest in “protecting ‘legitimate family relationships.’”<sup>57</sup> While acknowledging the importance of the interest alleged, the Court concluded that the statute could not be said to “promote” marriage, because “it [cannot] be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen’s compensation.”<sup>58</sup>

In these illegitimacy cases, the Court also considered—and again rejected—claims that reliance on the marital status of the parents was appropriate because it was an effective proxy for the dependency of children. Although the Court acknowledged that abandoning the bright-line rule of marriage would lead to more difficult assessments of the substance of the relationship between the deceased parent and the child, the Court consistently (and rather cursorily) suggested that courts or agencies could adequately handle these questions. Thus, for example, the Court in *Glon*a stated that its holding “may conceivably be a temptation to some to assert motherhood fraudulently,” but asserted that such a question was merely one of “proof,” and “where the claimant was clearly the mother,” benefits could not be denied.<sup>59</sup>

States could require claimants to establish a *functional* relationship—i.e., dependency—where the benefits in question were designed to compensate family members for the loss of a provider.<sup>60</sup> The key move that the Court made was holding that the absence of a marital relationship between the adults could not be presumed to establish the absence of a functional relationship between the parent and his or her child.<sup>61</sup> The Court assumed that claimants would be limited to

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55. *Glon*a v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968).

56. *Id.*

57. *Weber* v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972) (quoting the earlier decision by the Louisiana Supreme Court in the case, *Stokes v. Aetna Cas. & Sur. Co.*, 424 So. 2d 567, 570 (La. 1970)).

58. *Id.*

59. *Glon*a, 391 U.S. at 76; cf. *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (“We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.”).

60. See, e.g., *Weber*, 406 U.S. at 174-75 (“By limiting recovery to dependents of the deceased, Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood. . . . Our ruling requires equality of treatment between two classes of persons the genuineness of whose claims the State might in any event be required to determine.”).

61. See *id.* at 173 (“It may perhaps be said that statutory distinctions between the legitimate and illegitimate reflect closer family relationships in that the illegitimate is more often

biological offspring, but at the time biological testing was far less precise than it is today, and many of the cases arose after the putative parent had died.<sup>62</sup> Evidence that an adult had *acted like* a parent by supporting the child, living with the child, or formally acknowledging the child was often deemed sufficient. In other words, a functional connection was grounds to infer a biological connection.

Melissa Murray has persuasively argued that these decisions were less transformative than typically assumed because in each of these early cases, the Court compares the parent-child relationship—and, more surprisingly, the relationship between the parents—to a marital norm.<sup>63</sup> Thus, she concludes, these and other cases from around the same time period that recognized parental rights of unmarried fathers “eliminate[d] some of the burdens of illegitimacy while maintaining a pro-marriage, pro-marital family impulse.”<sup>64</sup> This is an important insight, but it perhaps understates the symbolic and substantive importance of the Court’s recognition of these non-marital families. Even if the Glonas and the Levys “looked like” marital families, the rule established by their wins reaches non-marital children whose families may depart from the marital norm more dramatically, so long as they establish dependency.<sup>65</sup> As a policy matter, a program that seeks to provide income to a dependent child in the event of the death of a parent *should* consider whether such dependency exists. The more important point, perhaps, is that we should not presume such dependency even when applied to marital children or marital couples.<sup>66</sup>

To be sure, these early illegitimacy cases did not challenge the assumption that marriage could be used as a proxy for dependency between *adults*.<sup>67</sup> Indeed, in *Califano v. Boles*, a 1979 decision, the Supreme Court upheld a provision in the Social Security Act that made benefits available to the surviving *spouse* of a deceased wage-earner

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not under care in the home of the father nor even supported by him . . . . Whatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone’s recovery.”)

62. See generally, e.g., *Paternity Tests: Blood Tests and DNA*, FINDLAW (last visited Feb. 17, 2015), [http://files.findlaw.com/pdf/family/family.findlaw.com\\_paternity\\_paternity-tests-blood-tests-and-dna.pdf](http://files.findlaw.com/pdf/family/family.findlaw.com_paternity_paternity-tests-blood-tests-and-dna.pdf).

63. Murray, *supra* note 37, at 393-99.

64. *Id.* at 399; see also *id.* at 399-411 (making a similar critique of the reasoning in the cases concerning parental rights of unmarried fathers).

65. Here it may be important to distinguish between requiring a showing of dependency of a child on the deceased parent, which does seem legitimately related to the objective of these benefits plans, and requiring a showing of “marital”-like relationships between the non-married parents, which does not seem related to the objective of the benefits.

66. In fact, the Court in *Weber* emphasizes this point, noting that where a married couple had separated, the state likewise required a showing of dependency. 406 U.S. at 174 n.12 (citing *Sandidge v. Aetna Cas. & Sur. Co.*, 29 So. 2d 522 (La. Ct. App. 1947)).

67. My thanks to Serena Mayeri for making this point to me.

who was raising the wage-earner's dependent child but denied benefits to a surviving *parent* who was raising a wage-earner's dependent child if she had not been married to the wage-earner.<sup>68</sup> Although the dissenters relied on *Levy*, *Weber*, and other cases concerning non-marital children to argue that heightened scrutiny applied and that the denial was unconstitutional, the five-justice majority applied rational basis review and concluded that the distinction was "reasonable" because it was less likely that the unmarried surviving parent had been dependent on the wage-earner.<sup>69</sup>

During the same time period, the Court also recognized the importance of extended family bonds. In *Moore v. City of East Cleveland*, a 1977 decision, the Court struck down a zoning ordinance that adopted such a narrow definition of who could live in a single-family home that it precluded a grandson from living with his grandmother, uncle, and cousin.<sup>70</sup> Again, the Court's rhetoric was soaring, not only protecting Ms. Moore's personal choice to live with both of her grandsons but also celebrating the values of kinship networks: "Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family."<sup>71</sup> *Moore* did not rely explicitly on the cases recognizing constitutional rights for non-marital children; rather, it drew on substantive due process decisions concerning choice in reproduction and childrearing decisions. But they were intimately connected. As Justice Brennan's concurrence pointed out, extended family networks were particularly prevalent within the African American community;<sup>72</sup> this, in turn, was partially because black women were (and remain) disproportionately likely to have children outside of marriage and to rely on kin for support.<sup>73</sup> In this respect, *Moore* gestures towards racial dynamics that likewise simmered under the surface in *Levy*, *Glonn*, and *Weber*.<sup>74</sup>

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68. 443 U.S. 282, 289 (1979).

69. *Id.*

70. 431 U.S. 494, 496 n.2, 500 (1977).

71. *Id.* at 505.

72. *Id.* at 509 (Brennan, J., concurring).

73. At the time that East Cleveland put the ordinance in place, it had a growing black middle class population; the ordinance was intended to reduce white flight and to distinguish the suburb from the "ghetto," typified by single, black women and their children, on the other side of the city line. See generally Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in *FAMILY LAW STORIES* (Carol Sanger ed., 2008).

74. Serena Mayeri shows that attorneys who litigated the non-marital recognition cases often highlighted the disparate racial impact of the policies; the Court, however, has not framed its analysis in racial terms. See Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 104 CALIF. L. REV. (forthcoming 2015) (on file with author).

*Levy, Glona, Weber*, and their progeny, together with *Moore*, were important milestones in broadening constitutional understandings of the family beyond the “traditional” nuclear family of married parents living with children.<sup>75</sup> Both doctrinally and rhetorically, they affirmed that parent-child relationships formed outside of marriage, as well as extended kinship networks, can be “real” family relationships. As family forms have further diversified in recent years, courts and legislators have been increasingly open to recognizing “de facto” parental relationships, formed in the absence of either a biological connection or a legal parental relationship, as giving rise to enforceable rights and responsibilities.<sup>76</sup> Courts have also been increasingly willing to recognize that intimacy between adults can give rise to dependency and reliance, enforceable through express or implied contract law, even in the absence of marriage.<sup>77</sup> These developments offer a strong basis for building a broader conception of the family that merits constitutional protection and respect and reconsidering government policies that use marriage as the primary or sole marker of intimate adult relationships.

A somewhat similar trajectory can be seen if one looks at the Supreme Court’s decisions concerning sexual intimacy outside of marriage. In *Griswold v. Connecticut*, the Court protected the right of couples to make choices regarding contraception within the “sacred” space of marriage.<sup>78</sup> But by the time the Court decided *Eisenstadt v. Baird* in 1972, it expressed the privacy right at issue as the right of an “individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>79</sup> And then in *Lawrence v. Texas*, the Court relied on *Eisenstadt* to protect adults’ rights to make decisions regarding sexual intimacy in the privacy of their

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75. That said, the Supreme Court continues to sometimes privilege parental claims stemming from marital relationships over biological or functional relationships, as evidenced most strongly in the splintered opinions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). For a discussion of legal disadvantages for non-marital children that persists today, see generally Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

76. See Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L. Q. 495 (2014) (discussing the expansion of parenting rights in these contexts but warning that expansion of marriage equality could erode some of this progress); cf. Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 53-65 (2012) (arguing that through legal regulation of de facto parentage and domestic partnerships, courts and legislatures express idealized normative expectations of what parenting and marriage “should” look like, even though constitutional privacy protections prohibit the state from regulating these relationships more directly).

77. See generally, e.g., CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010).

78. 381 U.S. 479, 486 (1965).

79. 405 U.S. 438, 453 (1972).

homes, even though the same-sex couple involved was incapable of procreating and (at that time) legally prohibited from marrying.<sup>80</sup> Notably, *Lawrence* does not just grudgingly tolerate non-marital sexual conduct. The decision celebrated the “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>81</sup> Accordingly, the road from *Griswold* to *Eisenstadt* to *Lawrence* seems to describe a move from sanctioning and regulating sexual conduct as permissible only within marriage, to acknowledging and respecting personal choices to engage in sexual conduct outside of marriage.<sup>82</sup>

That said, even before *Windsor*, some commentators argued that the liberty established by *Lawrence* was, as Katherine Franke expressed it, a “domesticated liberty.”<sup>83</sup> *Lawrence* protected sexual decision-making, but emphasized that it occurred within the privacy of the home.<sup>84</sup> Moreover, the decision’s rhetoric suggested that its animating concern was protecting the sexual intimacy of well-established couples with a “personal bond that is more enduring” than the sexual contact itself.<sup>85</sup> The lawyers for John Geddes Lawrence and Tyron Garner at least tacitly encouraged the Court to assume that their clients were such a couple, although we now know that they were casual acquaintances who denied having had sexual relations at all.<sup>86</sup>

*Windsor* suggests that these concerns regarding *Lawrence*’s scope and foundation were well grounded. Now that same-sex couples *may* marry in many states, Justice Kennedy, again writing for the Court, clearly suggests that they *should* marry. Sexual intimacy, the Court (again) suggests, is best and most properly expressed within the heavily regulated institution of marriage. *Windsor* threatens to undermine the hard-fought protections for non-marital children and for sexual autonomy outside of marriage.

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80. 539 U.S. 558, 566 (2003).

81. *Id.* at 562.

82. In fact, although *Eisenstadt* explicitly preserved the right of the state to criminalize non-marital sex through fornication statutes, *see Eisenstadt*, 405 U.S. at 449-50, courts and commentators have interpreted *Lawrence* as signaling that such criminal statutes are probably unconstitutional. *See, e.g.,* Martin v. Zihlerl, 607 S.E.2d 367 (Va. 2005). A federal district court in Utah recently relied on *Lawrence* to hold that criminalizing polygamous relationships is also unconstitutional. *See Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

83. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); *see also* Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004); David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453.

84. *Lawrence*, 539 U.S. at 567.

85. *Id.*

86. *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012).



IV. NON-MARITAL RECOGNITION AFTER *WINDSOR*

In the years leading up to *Windsor*, gay and lesbian couples built on the foundational Supreme Court decisions discussed in Part III to challenge the denial of state or private benefits. Some of these cases predated the possibility of marriage at all, relying on guarantees of equal employment or more general equality principles to challenge the categorical denial of benefits to same-sex couples that were routinely provided to different-sex couples.<sup>87</sup> More recently, cases were brought when marriage rights were available in some jurisdictions but not in those where the plaintiffs lived,<sup>88</sup> or to challenge state counterparts to DOMA that stripped away the right to domestic partner benefits that plaintiff couples had previously enjoyed.<sup>89</sup> These claims, like the illegitimacy claims described above, argued that marriage was an insufficiently precise proxy for achieving legitimate governmental objectives—like recognizing long-term, committed relationships—and accordingly, that categories needed to be broadened to recognize same-sex couples. Courts often agreed.<sup>90</sup>

The symposium at which I first presented this Essay was held in January 2014. At that time, I posited that a similar strategy could be used to challenge the federal marriage discrimination that persists even after DOMA's categorical ban on federal recognition was struck down. As I discuss in an essay published at about the same time as the symposium was held, same-sex couples are currently sorted into three tiers, with married couples who live in states that recognize their marriages receiving full federal marriage benefits; same-sex married couples who live in states that refuse to recognize their marriages receiving most, but not all, federal benefits; and same-sex couples who are unmarried, even those in civil unions or domestic part-

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87. See, e.g., *Rutgers Council of AAUP Chapters v. Rutgers State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992); see also *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (challenging a university policy of making certain housing available only to "married" students).

88. See, e.g., *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781 (Alaska 2005) (challenging state and city policies limiting availability of health insurance and other employment benefits to spouses of employees); *Donaldson v. Montana*, 292 P.3d 364, 364 (Mont. 2012) (broad claim seeking an injunction to order the legislature to enact a statutory scheme that would provide the equivalent of marital benefits to same-sex couples who were in committed relationships but were precluded from marrying); *Bedford v. N.H. Cmty. Technical Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at \*6 (N.H. May 3, 2006).

89. See *Bassett v. Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013) (challenging state law eliminating ability of public employers to provide medical and fringe benefits to unmarried co-habitants of public employees); *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010), *aff'd sub nom Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

90. See, e.g., *Bassett*, 951 F. Supp. 2d at 973 (providing employment benefits to same-sex partners); *Alaska Civil Liberties Union*, 122 P.3d at 793-94 (similar); *Bedford*, 2006 WL 1217283, at \*9 (similar); *Tanner*, 971 P.2d at 448 (similar); see also *Levin*, 754 N.E.2d at 1111 (providing same-sex couples access to married student housing).

nerships that are functional equivalents to marriage under state law, receiving almost no federal recognition.<sup>91</sup> The government has mitigated the problem considerably by adopting place-of-celebration rules to determine which marriages are lawful in virtually all instances, except where clearly barred by statutory language or regulatory language.<sup>92</sup> But some key benefits—most notably Social Security recognition and certain veterans benefits—remain, as of March 2015 at least, unavailable to married couples who live in non-recognition states.<sup>93</sup>

This denial could be challenged on constitutional grounds.<sup>94</sup> That is, federal laws typically use marriage as an administratively convenient mechanism for identifying couples who are likely to have made a long-term commitment to each other, and/or likely to have intertwined finances.<sup>95</sup> Same-sex married couples living in non-recognition states have made the same level of legal commitment to each other as other spouses have; they are lawfully married. Their marriages are also administered and recorded by *a* state, simply not the state in which they happen to live. Since the federal government routinely recognizes the validity of marriages from all fifty states, it should be inapposite *which* state marries a given couple, so long as *some* state does.<sup>96</sup> In other words, it is hard to see how a policy that denies recognition to valid out-of-state marriages is sufficiently tailored to

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91. See Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 51-53 (2014). More recent developments in federal recognition are discussed in Deborah A. Widiss & Andrew Koppelman, *A Marriage by Any Other Name: Why Civil Unions Should Receive Federal Recognition*, IND. J. L. & SOC. EQUALITY (forthcoming 2015) (on file with author).

92. See *id.*

93. See *id.* For a long time after *Windsor* was decided, married couples who lived in non-recognition states were also not recognized as spouses under the Family and Medical Leave Act (FMLA), but in February 2015, the Department of Labor changed the regulations to replace the domicile approach with a place-of-celebration approach, effective March 27, 2015. See Definition of Spouse Under the Family and Medical Leave Act, 80 Fed. Reg. 9989 (Mar. 27, 2015) (to be codified at 29 C.F.R. pt. 825).

94. Indeed, there have reportedly been several law suits filed challenging the Social Security Administration's refusal to recognize out-of-state marriages of applicants. See Paula Span, *Spouses Denied Social Security Survivors' Benefits*, N.Y. TIMES: THE NEW OLD AGE (Nov. 11, 2014, 11:49 AM), [http://newoldage.blogs.nytimes.com/2014/11/11/spouses-denied-social-security-survivors-benefits/?\\_r=0](http://newoldage.blogs.nytimes.com/2014/11/11/spouses-denied-social-security-survivors-benefits/?_r=0).

95. See Widiss, *supra* note 91, at 46-48, and sources cited therein.

96. One could imagine an argument that the federal government has a federalism-based interest in respecting a couple's domicile state's policy choice to refuse to recognize a marriage. That argument, however, would be hard to square with the aggressive approach the federal government has taken in adopting place-of-celebration rules wherever possible. The current policy means that federal policies intended to work together may not do so, because couples are considered married for some purposes (e.g., tax) but not married for others (e.g., Social Security). Moreover, prior to the current debate over same-sex marriage, domicile rules in these statutes typically had little significance, since one state almost always recognized valid marriages from other states, even if their substantive rules regarding marriage eligibility varied. See Widiss, *supra* note 91, at 52.

achieve legitimate government objectives to pass even rational basis review, let alone any kind of heightened scrutiny that might apply.<sup>97</sup>

The federal government's refusal to recognize civil unions and domestic partnerships that offer full spousal benefits and obligations under state law is also open to challenge. Federal agencies have offered little explanation for this exclusion other than the fact that relevant statutes reference "marriage" or "spouse."<sup>98</sup> As I argue elsewhere, this is an unduly literalist approach to statutory interpretation.<sup>99</sup> Federal law generally looks to state law to identify valid marriages, and under state law, these alternative statuses are generally included *within* state definitions of marriage or spouse.<sup>100</sup> And again, there probably is insufficient justification for refusing to recognize such statuses to pass constitutional scrutiny. Couples who have

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97. Most recent decisions assessing the constitutionality of discrete denials of "marital" benefits to same-sex couples have treated the classification as being based on sexual orientation, since gay and lesbian couples are prohibited from marrying. *See, e.g., Bassett*, 951 F. Supp. 2d at 963 ("[The act] explicitly incorporates statutes that draw classifications based on sexual orientation and renders access to benefits legally impossible only for gay and lesbian couples."); *Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (because the act "makes benefits available on terms that are a legal impossibility for gay and lesbian couples," it "unquestionably imposes different treatment on the basis of sexual orientation"), *aff'd sub nom Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011). A growing number of federal courts have held that classifications on the basis of sexual orientation trigger heightened scrutiny. *See, e.g., Smithkline Beecham Corp. v. Abbott Labs.*, 704 F.3d 471 (9th Cir. 2014); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013), available at <http://yalelawjournal.org/2013/9/15/eyer.html> (collecting and discussing numerous lower court decisions that have applied heightened scrutiny to classifications on the basis of sexual orientation).

98. *See, e.g., Federal Employees Health Benefits Program*, 78 Fed. Reg. 64,873 (proposed Oct. 30, 2013) (to be codified at 5 C.F.R. pts. 890, 892, 894) (citing 5 U.S.C. § 8901(5) (2012) (Office of Personnel Management regulations stating benefits could not be provided to domestic partners because the relevant statute "defines 'member of [employee's] family' to mean the employee's 'spouse' and certain children.)); Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (IRS opinion letter categorically denying recognition to civil unions or domestic partnerships without offering a rationale). There are a few agencies that recognize civil unions and domestic partnerships for some purposes, most prominently of which, the Social Security Agency, applies a statute that incorporates consideration of state intestacy law. *See* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, GN 00210.001 WINDSOR SAME-SEX MARRIAGE CLAIMS—INTRODUCTION (2014), available at <https://policy.ssa.gov/poms.nsf/lnx/0200210001>.

99. *See generally* Widiss & Koppelman, *supra* note 91.

100. *See, e.g.,* COLO. REV. STAT. § 14-15-107(1) (2013) (containing almost identical language); NEV. REV. STATS. § 122A.200(1)(a) (2009) ("Domestic partners have the *same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law*, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, *as are granted to and imposed upon spouses.*" (emphasis added)); N.J. STAT. ANN. § 37:1-33 (West 2007) ("Whenever in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to 'marriage,' 'husband,' 'wife,' 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' 'widow,' 'widower,' 'widowed' or another word which in a specific context *denotes a marital or spousal relationship, the same shall include a civil union . . .*" (emphasis added)); *see also* Widiss & Koppelman, *supra* note 91 (referencing additional statutes).

formed these relationships have made precisely the same legal commitment to each other as spouses have. Since the statuses are—like marriage—recorded, administered, and dissolved by states, recognition would be unlikely to impose significant additional, administrative burdens on the federal government. A pre-*Windsor* challenge to the IRS's refusal to recognize California domestic partnerships and marriages continued even after *Windsor* as a more narrow challenge to the ongoing refusal to recognize domestic partnerships.<sup>101</sup> The plaintiffs contended that even though California now permits same-sex couples to marry, some of the couples who formed domestic partnerships no longer had the capacity to marry, and that their earlier legal unions should be recognized by the federal government as eligible for “marital” rights and benefits.<sup>102</sup> The district court, however, dismissed the claim on the ground that such individualized barriers could not be addressed in a class action.<sup>103</sup>

My hope when I first developed these ideas was that constitutional litigation or policy advocacy could benefit not only same-sex couples in formal legal statuses who were—and still are—denied federal recognition, but also that it could be instrumental in rethinking the out-size importance of marriage in federal policies more generally.<sup>104</sup> Since the time that I began to develop these ideas, however, the focus has shifted strongly to challenging the underlying discrimination implicit in state bans on same-sex marriage rather than the refusal to broaden access to federal “marital” rights. Same-sex couples have been remarkably successful in these cases. According to the advocacy group, Freedom to Marry, which tracks marriage litigation, as of January 2015, the win-loss record since *Windsor* was decided is sixty-one to five.<sup>105</sup> In light of the tidal wave of victories, I certainly do not question or regret advocates' focus on securing marriage equality in all states. I celebrate these wins.

I write this Essay, however, with an eye towards the non-marital recognition questions that will persist even if—and after—the Supreme Court strikes down all state bans on same-sex marriage. That is, the plaintiffs in the marriage equality cases obviously seek to be married. They should be able to do so. But same-sex couples more generally, like different-sex couples, must determine whether

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101. See Responsive Brief of Plaintiff Class Re Subsequent Legal Developments at 1, *Dragovich v. U.S. Dep't of Treasury*, No. CV-4:10-01564-CW (N.D. Cal. Mar. 6, 2014).

102. *Id.*

103. *Dragovich v. U.S. Dep't of Treasury*, No. CV-4:10-01564-CW (N.D. Cal. Dec. 4, 2014).

104. See Widiss, *supra* note 91, at 62-65 (discussing some federal policies that should permit broader eligibility and others that could be tailored more narrowly).

105. FREEDOM TO MARRY, *Marriage Rulings*, *supra* note 5.

and when to marry. In other words, even after marriage equality, there will be same-sex couples, including couples raising children, who are not married.

## V. NON-MARITAL RECOGNITION AFTER *OBERGEFELL*?

The expansion of marriage rights for same-sex couples, including a potential victory in *Obergefell*, comes as marriage rates in this country generally are at an all-time low, and non-marital childbearing is at an all-time high. Barely half of all adults are currently married, as compared to seventy-two percent of adults in 1960.<sup>106</sup> Approximately half of all marriages end in divorce.<sup>107</sup> More than forty percent of children born in America today are born to unmarried parents.<sup>108</sup> And although approximately half of those unmarried parents are living together when their children are born, very few remain together five years later; many of these individuals go on to have children with multiple partners.<sup>109</sup> It is also quite common to live with extended family networks and for grandparents, in particular, to play a major role in caring for children.<sup>110</sup> Moreover, all of these trends vary highly according to social class, educational achievement, and race. Women with more education and higher levels affluence marry later than women with less; ultimately, however, they are more likely to marry and *far* less likely to divorce.<sup>111</sup> Whites and Asians are much more likely to marry than Blacks and Latinos.<sup>112</sup> Conversely, rates of unmarried child-bearing are higher for Blacks and Latinos than for Whites, although they are also quite high among relatively poor and/or uneducated white women.<sup>113</sup> The cumulative upshot of these various trends is that it is extremely common for American

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106. D'VERA COHN ET AL., PEW RESEARCH CTR., BARELY HALF OF U.S. ADULTS ARE MARRIED — A RECORD LOW (2011), available at <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf>.

107. See, e.g., Cherlin, *supra* note 15, at 404-05.

108. See sources cited *supra* note 14.

109. See, e.g., Cherlin, *supra* note 15, at 406-07.

110. See, e.g., *id.* at 413-14.

111. See, e.g., *id.* at 404-05.

112. U.S. BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW, MARRIAGE AND DIVORCE: PATTERNS BY GENDER, RACE, AND EDUCATIONAL ATTAINMENT 6-7 (2013); JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012 (2013).

113. See, e.g., CHILD TRENDS DATA BANK, BIRTHS TO UNMARRIED WOMEN (2014), available at <http://www.childtrends.org/?indicators=births-to-unmarried-women> (gathering statistics from multiple reports); see also KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 226 (2005) (sociological study of non-marital parenting by poor women in Philadelphia).

children—particularly, but definitely not exclusively, poor or working class children—to live in family configurations other than the traditional nuclear family.<sup>114</sup>

The LGB community, like the heterosexual community, of course varies by class, educational attainment levels, race, and ethnicity,<sup>115</sup> although some studies suggest LGB individuals are disproportionately likely to be poor.<sup>116</sup> Looking specifically at same-sex couples raising children together, demographers identify some trends that could be significant for thinking about non-marital children and the reach of *Windsor*, as well as *Obergefell* or any other future Supreme Court decisions advancing marriage equality. Data gathered in 2013 (some pre-dating *Windsor* and some post-dating *Windsor*) suggests that there are approximately 690,000 same-sex couples living together.<sup>117</sup> Approximately nineteen percent of these couples are raising children together, with rates of childrearing much higher for lesbian couples than for gay male couples.<sup>118</sup> At that time, the vast majority of same-sex couples raising children together were unmarried.<sup>119</sup> Undoubtedly

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114. For a thoughtful exploration of what these demographic trends mean, or should mean, for family law, see Clare Huntington, *Post-Marital Family Law*, 67 STAN. L. REV. (forthcoming 2015).

115. See, e.g., GARY J. GATES, WILLIAMS INST., LGBT DEMOGRAPHICS: COMPARISONS AMONG POPULATION-BASED SURVEYS (2014), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf> (finding LGBT populations generally share the racial and ethnic characteristics of non-LGBT individuals).

116. See, e.g., M.V. LEE BADGETT ET AL., WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>; GARY J. GATES, WILLIAMS INST., SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY: 2005-2011 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf>.

117. GARY J. GATES, WILLIAMS INST., LGBT FAMILIES AND RELATIONSHIPS: ANALYSES OF THE 2013 NATIONAL HEALTH INTERVIEW SURVEY (2014) [hereinafter LGBT FAMILIES AND RELATIONSHIPS], available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-families-nhis-sep-2014.pdf>. 2010 census data suggested that there were 650,000 same-sex couples. See GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES (2013) [hereinafter LGBT PARENTING], available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

118. GARY J. GATES, NAT'L COUNCIL ON FAMILY RELATIONS, FAMILY FORMATION AND RAISING CHILDREN AMONG SAME-SEX COUPLES (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf>.

119. Gary Gates, analyzing data from the 2013 National Health Survey, estimates that of the 200,000 children likely being raised by same-sex couples, only 30,000 had married parents while 170,000 had unmarried parents. See GATES, LGBT FAMILIES AND RELATIONSHIPS, *supra* note 117, at 5. This data suggested little variation in the percentage of married and unmarried couples raising children, *see id.* (eighteen percent and nineteen percent, respectively), while some earlier work suggested that a higher percentage of couples who considered themselves married than those who considered themselves unmarried were raising children together. See GATES, LGBT PARENTING, *supra* note 117 (thirty-one percent and fourteen percent, respectively). But even if this earlier study is more accurate in terms of relative *rates* of child-raising, the majority of children would still be being raised by unmarried parents because there are so many more unmarried than married same-sex cou-

marriage rates have risen since 2013, but, even if marriage rights become universal, it is highly unlikely that all same-sex couples raising children together will marry.<sup>120</sup>

This is particularly true because LGB parenting is not evenly distributed across race, class, or education levels. About forty-five percent of different-sex couples are raising children together; this rate is relatively consistent across all educational achievement levels, although as noted above, the marital status rates vary.<sup>121</sup> Among same-sex couples, by contrast, child-raising rates vary sharply according to educational level, as a much higher rate of couples with relatively little education are raising children than those with more education.<sup>122</sup> Specifically, forty-three percent of same-sex couples with less than a high school education are raising children together, whereas just ten percent of same-sex couples with college degrees are raising children together.<sup>123</sup> Not surprisingly, since educational attainment correlates with income, same-sex couples raising children have substantially lower incomes on average than same-sex couples in general.<sup>124</sup> Rates also vary by race; same-sex couples that include Blacks or Latinos are far more likely than white same-sex couples to be raising children.<sup>125</sup> In other words, if trends regarding marriage and divorce by same-sex couples follow more general trends, the members of the LGB community who are statistically *most* likely to be raising children are also statistically *least* likely to marry and remain married. Moreover, surveys suggest that there are nearly 600,000

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ples. Additionally, some of the couples identified in this earlier study as “considering themselves married” may not have legal marriages. See GARY J. GATES, WILLIAMS INST., SAME-SEX COUPLES IN US CENSUS BUREAU DATA: WHO GETS COUNTED AND WHY (2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Who-Gets-Counted-Aug-2010.pdf> (explaining discrepancies between marital status reported to the Census Bureau and legal status).

120. There are currently no states where more than sixty percent of all same-sex households are married spouses, even though marriage has been legal in some states for several years. See U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME-SEX HOUSEHOLDS (2013), available at <http://www.census.gov/hhes/samesex/> (reporting percentage of total same-sex households that are married households as 59% in Massachusetts, 53.4% in Connecticut, and 52.7% in Iowa).

121. GATES, *supra* note 118, at F3.

122. *Id.*

123. *Id.* The decline is generally linear across educational levels. It goes from forty-three percent of couples with less than a high school degree, to thirty-two percent of those with a high school degree; to twenty percent of those with some college, to ten percent of those who have completed college; but there is a small uptick to fifteen percent of couples with graduate degrees. *Id.*; see also Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 DEMOGRAPHY 755, 765 (2010).

124. Rosenfeld, *supra* note 123, at 765.

125. GATES, *supra* note 118, at F3; GATES, LGBT PARENTING, *supra* note 117, at 4; Rosenfeld, *supra* note 123, at 765.

adults who identify as LGB who are raising children as single parents because they are not currently in a (same-sex or different-sex) relationship.<sup>126</sup>

Consideration of family formation patterns for same-sex couples helps to explain these patterns, which might seem surprising.<sup>127</sup> Public discourse on same-sex couples with children typically foregrounds couples who jointly planned parenthood through the private adoption of a newborn or young baby, artificial insemination through a clinic, or surrogacy. These paths to parenthood are becoming more common, particularly for younger same-sex couples who are coming of age in a time when homosexuality is more generally accepted.<sup>128</sup> But they can also be quite expensive and are therefore most likely to be used by relatively affluent same-sex couples.<sup>129</sup> Adoption of older children out of foster care, and artificial insemination by a known donor outside the clinic process, are more affordable alternatives, and these methods are also frequently used.<sup>130</sup> But demographers believe that such jointly-planned children account for less than half of the children being raised by same-sex couples. The most common path to parenthood for men and women who are part of same-sex relationships, or identify as LGB, is conceiving children in prior heterosexual encounters.<sup>131</sup> This is particularly true among working class or poor couples, as well as couples who include racial or ethnic minorities.<sup>132</sup> In other words, a significant portion of the children being raised by

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126. GATES, LGB FAMILIES AND RELATIONSHIPS, *supra* note 117, at 5.

127. For discussions of recent research on family formation by same-sex partner households, see generally GOLDBERG ET AL., *supra* note 17; Mignon R. Moore & Michael Stambolis-Ruhstorfer, *LGBT Sexuality and Families at the Start of the Twenty-First Century*, 39 ANN. REV. SOC. 491 (2013). For a historical overview of parenting by same-sex couples, see Douglas NeJaime, *Before and After Marriage: Toward a Family-Law Account of Marriage Equality* (unpublished manuscript) (on file with author).

128. See Moore & Stambolis-Ruhstorfer, *supra* note 127, at 495.

129. See *id.* at 497 (observing that adoption rates are higher for high-income individuals); see also GATES, *supra* note 118, at F3 (demonstrating that adoption rates are higher for (1) same-sex couples with high levels of educational attainment than for those with low levels of educational attainment, and (2) Whites than for racial minorities).

130. See GOLDBERG ET AL., *supra* note 17, at 10-11 (discussing artificial insemination with known donors); Cynthia Godsoe, *The Quiet Gay Revolution in Family Law* (unpublished manuscript) (on file with author) (discussing the history of adoptions from foster care by LGB individuals and couples).

131. See, e.g., GATES, *supra* note 118, at F3; GOLDBERG ET AL., *supra* note 17, at 6-7; Moore & Stambolis-Ruhstorfer, *supra* note 127, at 495.

132. See GATES, *supra* note 118, at F3. This may be inferred from the statistically high rate of racial and ethnic minorities raising children and the statistically high rate of couples with low levels of educational achievement raising children in general, as compared to the disproportionately high rate of white couples with high levels of educational achievement who adopt. *Id.*



same-sex couples are *also* children born in non-marital (heterosexual) relationships or children whose parents have dissolved prior (heterosexual) marriages.

It has been difficult for demographers to trace precisely how these various factors interrelate with same-sex marriage, because until very recently, the U.S. Census Bureau and other government entities that collect information on couples and households have not distinguished between married and unmarried same-sex couples. In the fall of 2013, however, the Census Bureau released a small tabulation with limited data,<sup>133</sup> and in fall 2014, the Bureau collected data on same-sex marriages within its main household statistics.<sup>134</sup> Although this is a promising step forward, the wording that the Bureau used may have caused confusion and misreporting.<sup>135</sup> Hopefully in the future the process will be improved, and researchers will be able to understand, in much greater detail, the demographic profile of same-sex couples who choose to marry and the extent to which they track or depart from the more general trends regarding marriage and divorce.<sup>136</sup> Larger demographic trends suggest, however, that if government policies continue to rely exclusively, or primarily, on marriage as the marker of family interdependence, the policies will leave out a significant portion of the poorest and most vulnerable same-sex couples and their children, just as the policies leave out a significant portion of the poorest and most vulnerable different-sex couples and their children.

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133. In the past, the Census Bureau did not distinguish between same-sex *married* and same-sex *unmarried* couples in its reports; it treated same-sex couples living together simply as cohabiting couples. U.S. CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS ABOUT SAME-SEX COUPLE HOUSEHOLDS: FERTILITY AND FAMILY STATISTICS BRANCH (2013), available at [http://www.census.gov/hhes/samesex/files/SScplfactsheet\\_final.pdf](http://www.census.gov/hhes/samesex/files/SScplfactsheet_final.pdf). In 2013, after *Windsor*, the Bureau released a special tabulation that, for the first time, distinguished between same-sex couples who reported as spouses and same-sex couples who reported as unmarried. See U.S. CENSUS BUREAU, *supra* note 120.

134. See D'vera Cohn, *For the First Time, Census Data on Married Couples Includes Same-Sex Spouses*, PEW RES. CTR. (Sept. 18, 2014), <http://www.pewresearch.org/fact-tank/2014/09/18/for-first-time-census-data-on-married-couples-includes-same-sex-spouses/>.

135. See *id.*; see also Ben Casselman, *The Census Still Doesn't Know How Many Same-Sex Couples There Are*, FIVETHIRTYEIGHTLIFE (Nov. 25, 2014, 6:00 AM), <http://fivethirtyeight.com/features/the-census-still-doesnt-know-how-many-same-sex-couples-there-are/>.

136. A study by researchers at the Williams Institute published in 2011 projected that marriage rates for same-sex couples would ultimately rise to the level of marriage rates of different-sex couples. See M.V. LEE BADGETT & JODY L. HERMAN, PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES (2011). This study found that female couples were more likely than male couples to marry and that the same-sex couples who married were, on average, older than different-sex couples who marry, most likely because many long-established couples did not have the opportunity to marry when they might have first had the desire to do so. The study does not report on income or race of couples marrying. *Id.*

## VI. CONCLUSION

*Windsor* was a landmark decision. In holding that DOMA's refusal to recognize same-sex marriages was unconstitutional, it rectified an important wrong and appropriately celebrated gay and lesbian marriages as worthy of respect. As marriage rights have expanded in the months since *Windsor* was decided, many same-sex couples have seized the opportunity to marry. If *Obergefell* or another subsequent Supreme Court decision holds that all state bans are unconstitutional, undoubtedly many more will do so. But not all same-sex couples will marry; and if same-sex marriage trends follow those of different-sex marriages, those who do not marry are disproportionately likely to be poor or working class persons of color—precisely the same demographic of same-sex couples who are disproportionately likely to be raising children.

Indeed, even families headed by married same-sex couples may not map neatly onto traditional legal categories. Same-sex couples who plan together to have children through adoption or assisted reproductive technology often choose to do so with a relatively high level of transparency, explicitly building connections to birth mothers, sperm donors, or surrogates that traditional parentage law—premised on two, and only two, legal parents—does not anticipate.<sup>137</sup> Children born in a prior heterosexual relationship of one of the same-sex spouses will generally continue to have a legal (and emotional) relationship with both biological parents, meaning that the non-biologically-related same-sex partner will be a step-parent.<sup>138</sup> This is also true for children with two legal same-sex parents who later separate, if either parent remarries. In other words, for many children being raised by same-sex couples, marriage rights are only one aspect of understanding the “integrity and closeness” of their families.

In this respect, children of same-sex couples are simply a subset of children within our society more generally. The rapid rise of non-marital childbirth, divorce, cohabitation, and remarriage means that children with gay, lesbian, bisexual, or straight parents often live in families that depart dramatically from the “traditional” married-parents-with-children paradigm. A generation ago, in a series of landmark decisions, the Supreme Court acknowledged and protected

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137. For a particularly colorful exploration of this subject, see Andrew Solomon, *Meet My Real Modern Family*, NEWSWEEK (Jan. 30, 2011, 9:02 PM), <http://www.newsweek.com/andrew-solomon-meet-my-real-modern-family-66661>. For discussion of research assessing choices regarding known versus unknown donors for artificial adoption and open versus closed adoption, see GOLDBERG ET AL., *supra* note 17, at 10-13.

138. For a discussion of the complexity of this step-parent role, see Fiona Tasker, *Lesbian and Gay Parenting Post-Heterosexual Divorce and Separation*, in *LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE* (Abbie E. Goldberg & Katherine R. Allen eds., 2013).

familial bonds formed outside the province of marriage. The rhetoric and rationale of *Windsor*, by contrast, implicitly denigrated non-marital families. I hope and believe that the Supreme Court will soon grant same-sex couples the right to marry in any state. But nationwide marriage equality will not end the need to reconsider the extent to which a large number of government policies and programs rely on marriage as the exclusive mechanism of recognizing family structures. It is not only time to advance marriage equality. It is also time to advance recognition of non-marital families.