Recent Developments
Decoupling Marriage & Procreation:
A Feminist Argument for Same-Sex Marriage
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ABSTRACT

The quickly arriving reality of same-sex marriage is a move forward for all couples who marry, including opposite-sex and transgender couples. This piece examines the way that same-sex marriage will improve these other marriages. In particular, I argue that the “essential aspects” of marriage remain sex and reproduction—domains associated with the wife in a traditional marriage in a way that serves to denigrate women. Although the long-existing link between procreation and marriage has begun to fade, it will not be until same-sex marriage is fully legalized that opposite-sex marriage can fundamentally change. Therefore, both feminists and advocates of same-sex marriage should work together to continue to make marriage relevant for the modern day.

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INTRODUCTION

If we think about marriage in the broader context, we will realize that our concerns about marriage flow primarily from the fact that it usually involves children. On this view, we have a social interest in marriage not for its own stake, but because marriage traditionally is the institution in which procreation has occurred.1

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It is not the courts that have engendered the diverse composition of today’s families. It is the advancement of reproductive technologies and society’s recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle.2

Sex and procreation have long been intertwined with the right of marriage. As early as 1942, the Supreme Court blended these fundamental rights in *Skinner v. Oklahoma*.3 In the Oklahoma penal system it was determined that Skinner, a small-time thief, should be sterilized.4 The decision was not that Skinner needed to be barred from marriage; rather, Skinner’s punishment was to lose his procreative ability through coerced sterilization. Despite the fact that only procreation, not marriage, was prohibited for the defendant, the Court declared that it was dealing “with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”5 The Court discussed procreation as though it could happen only within marriage.6 In the Court’s view, if Skinner had the right to procreate, he necessarily had the right to do it in the only legitimate forum: marriage.7 The Court’s decision posits procreation as an essential element of marriage.

Marriage and the family have changed in the seventy years following *Skinner*. Notably, recent research shows that by 2008, forty-one percent of children in the United States were born to single women, an eightfold increase in

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3. Skinner v. Oklahoma, 316 U.S. 535 (1942) (finding an equal protection violation because involuntary sterilization was only a punishment for certain types of crimes; in this instance Skinner was a convicted chicken stealer).
4. Id. at 537.
5. Id. at 541.
6. Id.
7. Id.
out-of-wedlock births from fifty years earlier. Despite social changes, the assumption of a link between marriage and procreation has been slow to transition. While the availability of birth control and the increased social acceptance of out-of-wedlock children have begun to drive a wedge between marriage and procreation, there is still a strong societal sense that any ‘normal’ marriage requires natural procreation. This piece argues that the advent of state-recognized same-sex marriage will further erode the connection between procreation and marriage, thereby freeing all couples—both same-sex and opposite-sex—from the problematic assumption that the only valid marriages are marriages that include natural procreation. This assumption is problematic because it reinscribes the traditional gender binary, thereby making women’s role in opposite-sex marriage less valuable than men’s.

Part I explores the societal harms that arise for women and transgender individuals from the continuing connection between procreation and marriage. Part II focuses on how courts have begun to move away from a belief that marriage is defined through procreation by examining annulments, assisted reproductive technology, adoption, and same-sex marriage litigation.

In Part III, this piece argues that the growing acceptance of same-sex marriage will have the most substantial impact on changing the centrality of natural procreation for all marriages because the courts are facing the marriage-procreation link directly. With the adoption of same-sex marriage, procreation can no longer be understood as the essential aspect of marriage.

I. IMPLICATIONS OF THE MARRIAGE-PROCREATION COUPLING

Seventy years after Skinner, there remain areas of law where marriage and procreation are intimately linked. This link can be clearly seen in annulment law, where there are procreation-specific grounds for voiding a marriage, as well as in

10. The word “transgender” as used in this article is intended to apply as an umbrella term to transgender and transsexual individuals. For a more in-depth discussion of the usage of transgender as an encompassing term, see Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, in TRANSGENDER RIGHTS 3 (Paisley Currah, Richard M. Juang & Shannon P. Minter eds., 2000).
11. “An action or proceeding for the annulment of a marriage is instituted to obtain a judicial declaration that because of some disability or defect which existed at the time of the marriage ceremony, no valid marriage ever took place or that no valid marriage relation ever existed.” 24 AM. JUR. 2D Divorce and Separation § 4 (2012).

"An annulment is distinguished from a divorce in that as a general rule an annulment proceeding is for causes for avoidance of the marriage existing at the time of the marriage, whereas a divorce ordinarily is for causes arising after the marriage. An annulment renders the marriage void ab initio while a dissolution is based upon a valid marriage which terminates as of the date of the judgment of dissolution."

Id. (citation omitted).
transgender marriage cases. Because these cases are reliant on strict gender categories and gender stereotyping, both women and transgender individuals are harmed by the marriage-procreation linkage.

Historically, women “have been disadvantaged by the family-market dichotomy because it reflects a hierarchy.”12 This traditional hierarchy is based on women bearing and raising children while men work in the paid economy.13 The basis for this distinction is that

[w]omen were marked by the institution of marriage as sexual beings in need of control, so that paternity can be definitively established. This function of marriage was seen as so crucial to social order historically that it justified intimate and physical control of women by their husbands.14

In their role as reproducers, women’s public roles were minimized; men controlled the public sphere and established it as the sphere of primary importance. Therefore, women’s work in the home was devalued while men’s work outside the home was privileged. By controlling the public sphere, men gained financial control and superior economic status.

Historically, the economic position of women has played a role in the position of spouses during and after marriage.15 For example, evidence shows that in the early 1920s “women suing for divorce were considerably more likely to be employed than married women generally.”16 However, for the most part employed women were not socially acceptable and “[c]hallenges to the perceived natural division of labor were viewed as threats to the underlying social and family structure.”17 As women began to enter the work force in greater numbers—even while continuing to perform the domestic work—they were blamed for divorces and the breakdown of social and sexual mores.18

Since the 1920s economics has continued to matter immensely in marriages and divorces. For several more decades the marriage contract generally embraced the notion that “the husband has a duty to support and to live with his wife and the wife must contribute her services and society to the husband . . . .”19 As a part of this marriage contract, married women generally lost the power to contract for themselves.20 This arrangement had harmful effects on women:

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12. REGAN, supra note 1, at 142.
13. Id.
16. Id. (reviewing evidence from California and New Jersey).
17. Id. at 22.
18. Id. at 20-22.
20. See, e.g., id.
These effects include[d] the economic disadvantages that are both a direct result of women’s marital status and a consequence of social and economic factors related to inegalitarian marriage, such as job stratification and lower pay. Inequality creates barriers for women’s access both to economic and political life, and to full inclusion in the polity, since their “dependent” status contradicts the qualities of independent judgment required of citizens. Thus, the denial of political rights to women was accompanied by, and reinforced through, a system of legal regulation that had its nexus in the marriage contract.  

Unfortunately, until recently it has been this patriarchal, heteronormative marriage that has been recognized as a fundamental right guaranteed by the United States of America’s Constitution. It is thus within this framework that courts have interpreted the meaning of marriage.

While the paradigmatic marriage is a man in the workforce and a woman at home, this no longer reflects the reality in many households. As of 2010, for opposite-sex married-couple households, one in fifteen fathers stayed at home full-time with children while one if four mothers stayed at home. These numbers neither account for the primary caretakers who work part-time nor for non-married couples, either opposite-sex or same-sex, who may have a primary caretaker at home. While more men are intimately involved with child-rearing than in prior generations, it is still more likely that women will be the primary caretakers, and absent a surrogacy arrangement or adoption, women are still the people bearing and nurturing a child. In general, women are largely tasked with procreation. This is evidenced both by patterns of labor divisions in opposite-sex households and by the fact that birthing and breast-feeding are specific to the mother. For some feminists, the marriage model is the basis for other discrimination against women, and equality within marriage must come before equality in other areas—such as employment—can be achieved.

As long as sex and natural procreation remain fundamental aspects of marriage, not only women but also transgender individuals will be harmed. Science has not yet enabled transgender individuals to become naturally procreative in their identified gender, but hormone therapy and reassignment

22. Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down Virginia’s anti-miscegenation law and holding that marriage is a fundamental right).
24. Id.
25. Id.
26. Id.
surgery can remove reproductive capacity from the person’s birth-sex. Therefore, the question in most cases evaluating the validity of transgender marriages is, generally, not whether there is a chance of natural procreation, but whether the marital sex was sufficient to sustain the marriage. M.T. v. J.T. was the first United States transgender marriage case. In 1976, the New Jersey Superior Court was faced with the issue of determining what a woman’s biological sex was for marital purposes. The wife, a “post-operative transsexual,” sought support from her husband in a divorce proceeding; the husband contended that there was never a valid marriage because of his wife’s status as transgender. The court determined that the couple had engaged in vaginal intercourse and went into substantial detail about the wife’s vagina, concluding that it, “though at a somewhat different angle, was not really different from a natural vagina . . . .” In making a final determination of whether the wife was female enough for marriage, the court declared that “it is the sexual capacity of the individual which must be scrutinized.” However, the court was clear in pointing out that the wife could no longer “function as a male sexually either for purposes of recreation or procreation.” Therefore, relying on procreation as an important component of marriage, the court concluded that the wife was a “wife” for purposes of the marriage requirement because she no longer had the reproductive capabilities of a man.

Twenty-five years later, In the Matter of the Estate of Marshall G. Gardiner was decided by the Kansas Supreme Court. The court in Gardiner relied primarily on reproductive capacity and the plain meaning of sex to determine whether a transgender woman was able to inherit as the deceased husband’s lawful wife. The court remanded for the trial court to decide on the sex of the wife at the time of the marriage, but said that the “plain, ordinary meaning of ‘persons of opposite sex,’ contemplates a biological man and a biological woman and not [transsexuals].” The court, however, assured the lower court that there would not have been fraud if the marriage was

28. This is not unrelated to the many intersex conditions that create natural infertility. Though some members of this group may have natural procreative abilities, many do not.
29. Certainly some transgender couples can naturally procreate, such as an opposite-sex couple composed of two transgender people. However, this is the exception.
31. Id. at 205.
32. Id.
33. Id. at 206.
34. Id. at 209.
35. Id. at 206.
36. Id. at 208; see also, Corbett v. Corbett, 2 W.L.R. 1306, 2 All E.R. 33 (Probate, Divorce, and Admiralty Div. 1970) (quoted as being the only reported decision prior to M.T. v. J.T. where a court determined the validity of a marriage between a postoperative transsexual and a male person and found the marriage invalid because it had not been, and could not have been, consummated).
37. 42 P.3d 120 (Kan. 2002).
38. Id.
39. Id. at 135.
consummated; again, sexual intercourse ensures that the marriage was valid even when gender identity is questioned. An absence of procreative ability is not always the critical factor in transgender marriage cases. In In re Elaine Frances Ladrach and Littleton v. Prange, the courts decided the cases based on chromosomal make-up rather than procreative ability or secondary sex characteristics. However, because chromosomes can oftentimes be a proxy for reproductive capacity in a certain gender, the courts were more concerned about there being the ability to procreate inside the marriage rather than having the ability to engage in vaginal intercourse.

The courts’ requirement of procreative ability (specifically, procreative ability that corresponds to an individual’s gender presentation) in marriage cases disproportionally harms transgender individuals because it all-too-frequently leads to a ruling that a “valid” marriage never existed if one or both individuals in a union was/is transgender. As long as courts dismiss transgender marriage in this manner, transgender individuals will continue to be left out of an important civic institution merely because their gender identity offends the courts’ conception of acceptable reproductive behavior and correspondingly the value of marriage.

Because women and transgender individuals of both genders are disadvantaged by laws relying on a fundamental connection between procreation and marriage, the question is how to remedy the problem. As Part II demonstrates, courts have begun moving away from a conception of marriage that relies on procreation as fundamental, which is a step towards a remedy.

II. THE SLOWLY SHIFTING VIEWS OF PROCREATION AND MARRIAGE IN FAMILY LAW

There are many ways that courts comment on what marriage is—and what marriage is not. This section will draw on several areas of law to demonstrate that although the law continues to see natural procreation as essential to marriage, there has been a gradual shift away from this association. The first area of law is annulment, which strongly demonstrates the marriage-procreation link.

40. Id. at 123.
41. In re Ladrach, 32 Ohio Misc. 2d 6 (Ohio Probate Ct. 1987). The court also seemed concerned with the bride’s prior two marriages to women as a reason to deny her marriage to a biological man. Id. at 7-8.
43. Id.; In re Ladrach, 32 Ohio Misc. 2d at 6.
44. Also vital in court decisions is whether a state recognizes sex changes. For example, in Louisiana, once a court grants a sex change, the individual is allowed to marry as a member of his or her gender. Thus, transgender individuals in Louisiana can marry someone of the opposite sex and there is no basis to annul the marriage due to fraud even if the spouse did not know that his or her partner was transgender. Emily Latham, Comment, Recognizing Error and Fraud in the Contract of Marriage in Louisiana, 66 LA. L. REV. 563, 569-70 (2006).
Next are assisted reproductive technology and adoption, both of which demonstrate a move away from the marriage-procreation coupling, yet cling to the coupling in important ways. Finally, same-sex marriage is an area where opponents of marriage rely on the marriage-procreation link, but courts have shown an inclination to reject the coupling.

A. Annulment

In gauging judicially constructed meanings of marriage, annulment is an informative starting point. Annulments are used in two circumstances: when marriages are void ab initio and when marriages are voidable.\(^{45}\) In both circumstances, marriages are annulled because there is something fundamentally wrong with the marriage.\(^{46}\) Marriages that are void ab initio include incestuous and bigamous marriages; these marriages are held to never have existed.\(^{47}\) Marriages that are voidable lead to an annulment if fraud or duress caused the marriage and were present at the time marriage occurred.\(^{48}\) Fraud-based annulments are only granted if the problems in a marriage go right to its core. In other words, the fraud must go to the essential aspects of a marriage.\(^{49}\) Thus, because a large part of the legal analysis in annulment cases is whether something counts as an essential aspect of marriage, courts engage in conversations of what they think is so fundamental to a marriage that if it is missing (or was the basis of fraud), an annulment is justified.

Courts continue to enforce the law that annulments based on fraud are only allowed for fraud that goes to the essential aspect of marriage; however, courts continue to define these essential aspects of marriage as sexual and reproductive capacity. Unfortunately, this definition of an “essential aspect” of marriage leaves women in a uniquely disadvantaged position because historically it is the wife who is in charge of reproduction while the husband is in charge of economic production.\(^{50}\) The courts have thus established that only the traditional woman’s role in marriage goes to the essence of marriage while the man’s does not. While at first glance it may appear positive to highly value women’s reproductive contribution, this is not a beneficial view. Instead, married women

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46. Id.
47. Id.
48. Id. at 290-91.
49. See supra Part I.
50. For example, a Florida court found that under the common law, “the husband was legally, and exclusively, responsible for providing the necessaries for the entire family unit.” Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So.2d 644, 645 (Fla. 1986). For a historical explanation, see DiFONZO, supra note 15, at 13-36.
are faced with an additional burden to reproduce—a burden that if not met may lead to annulment and possibly to non-equitable property distribution.\footnote{Regan, supra note 1, at 195.}

The annulments discussed in this piece are based on fraud, meaning that procreation is only a ground for annulment if a partner has held himself or herself out as able to procreate while knowing that he or she cannot.\footnote{Id.} For example, a court may find that a woman who has held herself out as fertile but cannot have children has committed fraud against her husband; therefore, he is entitled to an annulment.\footnote{Twila L. Perry, The “Essentials of Marriage”: Reconsidering the Duty of Support and Services, 15 YALE J.L. & FEMINISM 1, 30 (2003).} However, a man who promised to have a job, but instead stayed at home drunk and contributed little to the marriage would not be considered to have defrauded his wife; therefore, she would not be entitled to an annulment.\footnote{This example stems from the case Johnston v. Johnston, 18 Cal. App. 4th 499, 501 (1993), where the court exhibited no sympathy for a wife seeking an annulment who had married her husband in part because of his economic promise.} The point of this piece is not to condemn or condone either action, regardless of which gender is perpetrating the “fraud.” Rather, it is merely to point out that if there is fraud of procreation, the fraudulent spouse will potentially leave the marriage without the hope of support or a share of the marital property, as annulments mean there is no obligation of support.\footnote{Id.} At the same time, someone who lied about economic abilities may be able to garner marital support, such as alimony, through a divorce proceeding, which is unavailable from an annulment.\footnote{Id.}

There are many behaviors that are insufficient to annul marriages. Like many areas of family law, the grounds for annulment vary by state. After World War II, New York led the nation in the available grounds for annulment and the number of annulments granted.\footnote{DiFonzo, supra note 15, at 90.} During this time period, New York granted annulments on over 150 grounds. Although New York granted annulments liberally, and “[m]arriages could be annulled for misrepresentations about virtually any aspect of the conjugal relationship, including age, profession, character, disease, education, loyalty, mental incapacity, and property,” other states were much more limited in the grounds for annulment.\footnote{Id.}

In California, when a shoe salesman falsely represented to his fiancée that he owned his own shoe store, the court determined that it was not sufficient
fraud to annul the marriage. A court found that another man who represented to his fiancée that he was a “man of means” while he was really “impecunious” did not commit sufficient fraud to entitle the wife to an annulment. More recently, in 2004, a man fraudulently represented his financial assets and yet his wife was denied an annulment. In another annulment case the husband “turned from a prince into a frog” after the marriage, meaning that the wife found that the man who had promised to support her was instead an alcoholic, would not work, was bad at sex, and was dirty. The court stated that “[i]n California, fraud must go to the very essence of the marital relationship before it is sufficient for an annulment.” The court held that this marriage could not be voided based on the husband’s fraud because it was not sufficiently essential to the marital relationship.

While earning potential and personality are often not sufficient for an annulment, sex and reproduction are different matters. One issue has been men seeking to annul a marriage where the wife falsely reported a pregnancy in order to induce the marriage. The majority rule is that a falsely reported pregnancy is not a ground for annulment. Courts following the majority rule reason that the false representation of pregnancy does not prevent the future performance of the marital obligation to bear only the children of the spouse. Thus, even courts that do not allow annulments on the grounds of a falsely represented pregnancy rely on the importance of procreation within that marriage. These courts decide that in the future a child can be born within that marriage, thereby upholding the reason for marrying in the first place.

Premarital sex is also an issue when one future spouse engages in coitus with a third party. Several annulment cases have been brought when an extramarital child has been borne from infidelity. An example where fraud related to sexual intercourse was not enough to annul the marriage was a case in 1915, involving a husband who indicated he was chaste prior to marriage. In that particular case, after the marriage was consummated and another woman came forward pregnant with the husband’s child, it became clear that the husband had committed fraud to induce his new wife to marry him by promising chastity.

63. Id. at 502.
64. Id.
67. Id.
68. Compare this to the minority rule where a woman who falsely reports a premarital pregnancy in order to induce a marriage is determined to have committed fraud; therefore, the court will allow the husband to annul the marriage. Masters v. Masters, 108 N.W.2d 674 (Wis. 1961).
70. Id.
The Illinois court, however, found that this fraud was insufficient to annul the marriage.\footnote{Id.}

Women also have premarital sex, which sometimes leads to pregnancy. States are more likely to grant an annulment when it is the wife who engaged in premarital sex with a third party. The majority of states hold that if a woman is pregnant before marriage and falsely represents to her fiancé that he is the father, then the fraud goes to the essence of the marriage and the marriage can be annulled.\footnote{See, e.g., Miller v. Miller, 1998 OK 24, 956 P.2d 887.} A Delaware court, which follows this majority rule, explains:

The essence of the marriage contract is wanting when a woman, at the time of its consummation, is bearing in her womb, the fruit of her illicit intercourse with a stranger. Such condition prevents the wife from performing the normal marital duty of bearing only the children of her spouse.\footnote{Husband, 262 A.2d at 657-658 (citations omitted).}

Again, marital procreation is at the center of what the court requires for a valid marriage.\footnote{Id. For additional analysis, see generally Laurence Drew Borten, Note, \textit{Sex, Procreation, and the State Interest in Marriage}, 102 COLUM. L. REV. 1089, 1116-17 (2002).}

A minority of states deny relief to the unsuspecting husband who had sex with his fiancée but is not the biological father of the child. These courts reason that he assumed the risk of pregnancy and is at fault for having engaged in premarital intercourse; therefore, he must now deal with the consequences of a child being born, regardless of whether it is his biological child.\footnote{Mobley v. Mobley, 16 So. 2d 5, 7 (Ala. 1943) (relying on theories of pari delicto to determine that the husband cannot get an annulment).}

Annulments are instructive in a second sense as well: when a marriage is annulled, legally there was never a marriage and thus, there was also no marital property. Although courts may distribute property in an equitable fashion between the two parties to an annulment, the property distribution is different than in a divorce and generally will not include alimony.\footnote{See, e.g., Short v. Short, 102 N.E.2d 719, 720 (Ohio Ct. App. 1951) (reasoning that "[i]n this state, divorce and alimony are prescribed only by statute, and alimony is a legal right which attaches only to a valid marriage. So, when a marriage has been declared void from its very inception by way of an annulment, neither party to the action has a right to an award of alimony.").}

For many individuals, the decision to seek an annulment is based on fear of losing a portion of marital property. Laws on property distribution at the end of marriage have “been shaped by shifting understandings of the nature of the commitment that marriage involves, the appropriate division of labor within it, and the propriety of making moral judgments about marital conduct.”\footnote{REGAN, \textit{supra} note 1, at 200.} Inasmuch as property distribution is shaped by the understanding of marriage, the granting of annulments, a situation where property will not be divided under marital property laws, evidences a
devaluation of the claim of the lesser-earning spouse, often the wife. 78

Historically, and today, courts couple procreation and marriage in annulment law. Although not all jurisdictions agree on what constitutes the essence of marriage, it is clear that economic fraud is not sufficient fraud to constitute grounds for an annulment. 79 On the other hand, courts are more likely to grant annulments when the fraud is about procreative ability. 80

B. Assisted Reproductive Technology

In recent years, technology has developed to allow individuals and couples to reproduce when they were not otherwise able to do so naturally. 81 Users of assisted reproductive technology include infertile opposite-sex couples, same-sex couples, and singles. This technology shows a way in which procreation has been separated from marriage. However, the technology is also a means by which non-naturally procreative couples are achieving a “traditional” marriage. Many see the technology as enhancing, or even legitimizing, a marriage that would otherwise have been childless. 82 Clinics and providers of reproductive assistance often discriminate based on marital status, and there are certainly overtones of the importance of marriage in many policies and court decisions on the topic. 83 Therefore, while assisted reproductive technology has opened

78. The fact that property distribution may be different after an annulment rather than a divorce may lead some spouses to seek an annulment for the goal of winning a more favorable distribution of property. While normally the higher-earning spouse might find annulment economically beneficial, at least for Kris Humphries there seemed to be a possibility that an annulment would allow him to sell the story of his short-lived marriage to Kim Kardashian. Naughty But Nice Rob, Kris Humphries Annulment: Could Kim Kardashian’s Ex Make Money Off Divorce?, THE HUFFINGTON POST (Dec. 5, 2011, 2:40 PM), http://www.huffingtonpost.com/2011/12/04/kris-humphries-kim-kardashian-divorce-pre-nup-annulment_n_1128655.html.

79. See, e.g., Mayer v. Mayer, 279 P. 783, 783 (Cal. 1929).

80. MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 95 (1972). Although this piece explores only limited reasons for annulments, courts have also considered annulments for venereal disease, impotence, intention to not engage in sexual intercourse, and sterility. See Borten, supra note 74.

81. In this piece, I use the term “natural procreation” to refer to intravaginal intercourse that results in pregnancy without outside assistance.

82. Included in the class of couples who benefit from the ability to use assisted reproductive technologies are the growing numbers of same-sex couples who are marrying young and having children. See, e.g., Benoit Denizet-Lewis, Young Gay Rites, N.Y. TIMES MAG. (Apr. 27, 2008), http://www.nytimes.com/2008/04/27/magazine/27young-t.html?_r=1 &oref=slogin (profiling young gay couples who have opted to marry at a young age and intend to have children at a future date). It is notable that despite growing numbers of same-sex couples adopting, by 2009 only nineteen percent of same-sex couples who were raising children reported having an adopted child in the home. Sabrina Tavernise, Adoptions by Gay Couples Rise, Despite Barriers, N.Y. TIMES, Jun. 14, 2011, at A11.

83. Susan B. Apel, Access Denied: Assisted Reproductive Technology Services and the Resurrection of Hill-Burton, 35 WM. MITCHELL L. REV. 412, 413-14 (2009). “Some providers of ART services have established policies that prohibit their use by single persons or same-sex couples. Other providers may be less specific and less direct, opting to judge individuals seeking their help on a case by case basis. In some cases, ‘the welfare of the child’ may be a dispositive factor in the decision to
parenthood to individuals without a sexual partner and same-sex or sterile couples, the model of reproductive assistance is in large part based on the goal of having children within a marriage.

One way in which this technology demonstrates that natural procreation and marriage are not always linked is through the use of reproductive technologies by married couples. While many opposite-sex couples use their own genetic material with reproductive technologies, others buy sperm or eggs from third-parties. Many states have passed specific legislation establishing paternity in the consenting husband of a woman who is inseminated by donated sperm. By writing these paternity laws, legislatures have extended the marital presumption of paternity to children who were knowingly conceived through technology with non-marital genetic material. By providing a place for couples to have children of the marriage without capabilities of natural procreation, the legislatures are moving away from the traditional definition of family that assumed that all marriages were naturally procreative. However, at the same time, legislatures are reinscribing the marriage-procreation coupling by providing an avenue whereby married couples can establish parental rights even if the child is not the product of natural procreation.

Despite some decoupling of marriage and procreation, assisted reproductive technology, as used by opposite-sex couples, often reinscribes the coupling. One way that assisted reproductive technology can help to promote the marriage-procreation link is by allowing couples to keep secret that outside biological material or any other reproductive assistance was used to conceive a

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84. See, e.g., 750 ILL. COMP. STAT. 40/3(a).

"If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of a child thereby conceived. The husband’s consent must be in writing executed and acknowledged by both the husband and the wife. The physician who is to perform the technique shall certify their signatures and the date of the insemination, and file the husband’s consent in the medical record where it shall be kept confidential and held by the patient’s physician. However, the physician’s failure to do so shall not affect the legal relationship between father and child. All papers and records pertaining to the insemination, whether part of the permanent medical record held by the physician or not, are subject to inspection only upon an order of the court for good cause shown."

Id. (citation omitted).

85. This was also, in a way, true with the marital presumption of paternity stemming from the common law. Under the common law, if a man was sterile but his wife got pregnant by another man, the husband would be considered the father. This rule is still valid today, albeit with growing exceptions. For a recent use of the marital presumption, see for example H.S. v. Superior Court of Riverside County, 108 Cal. Rptr. 3d 723 (Ct. App. 2010). The difference is that now couples are actively seeking outside sperm, or egg donation, whereas before the marital presumption worked mainly in circumstances where the wife had had an affair or been raped outside of marriage. See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (discussing how “our traditions have protected the marital family” even when a third-party fathered a child with the wife).
child. Early in the history of reproductive technology use, “[p]arents rarely told their children that they were conceived with donated sperm; many psychologists counseled parents to protect themselves and their child from the possibility that the child might feel resentment if she learned that she was ‘different’ from other children.” Certainly, not all parents hide the genetic identity of their children, and as more children become aware of their genetic history, more internet identification and connection sites have opened. Donor Sibling Registry is an example, where donor children can explore their genetic background and family. Despite a move toward openness by many people, in some families there remains a veil of secrecy relating to the use of third-party genetic material to conceive a child of the marriage. It is harder to maintain this secrecy in lesbian or single-parent households; however, in opposite-sex households the amount of information revealed is typically at the discretion of the parents because couples generally select genetic material that is going to produce a child with similar outward appearance.

A second reason that technology does not necessarily decouple marriage and procreation is that technologies are being used by women so that they can have a naturally procreative marriage later in life. Many single women decide to use their eggs to have their own children without a spouse; this decision can be based on either a desire to be a single parent or simply because they have not found suitable spouses. Other women freeze eggs in the hope that they will later be able to marry and have their own genetic children within a traditional family. For example, one woman who froze her eggs at thirty-six is “still intent on marrying and having babies the traditional way, but sees egg freezing as maximizing her opportunities for motherhood.” Therefore, rather than always subverting the link between marriage and procreation, sometimes assisted reproductive technology merely allows natural marital procreation where it may not have otherwise been available.

A third way in which assisted reproductive technology has perpetuated the

87. Id.
89. Shanley, supra note 86, at 262.
90. Id. There is a substantial market for genetic material and potential parents are able to pick the genetic material of their choosing. Id. In general, this genetic material is chosen to create a child that looks like his or her parent or parents. Id.
93. Id.
link between marriage and procreation is through policies that rely on marriage to define parental relationships or define procreative rights based on marital status. For example, President George W. Bush gave a large grant to RESOLVE: The National Infertility Association, in order to educate the public on embryo donation, also known as “snowflake adoptions.”94 “Snowflake adoptions” was the language adopted by the pro-life movement to refer to embryo donations by couples with extra embryos to couples with none.95 The Snowflakes program helps mainly Christian, white, middle-class, and well-educated couples without a criminal record find embryos they can “adopt”—“single mothers, lesbians and unmarried couples need not apply.”96 The Snowflakes adoption agency requires prospective parents to put together a scrapbook so that donors can get to know the potential parents of their genetic offspring.97 However, “[t]he subtext of most of these scrapbooks is that only a child will keep the happy marriage together.”98 Again, reproductive technologies are being used to ensure that marriage and procreation always coexist. The narrative is clear: the opportunity to procreate is


President Bush’s view of embryos must be contrasted with President Obama’s. On March 9, 2009, President Obama lifted President Bush’s moratorium on research of new lines of stem cells. Exec. Order No. 13505, 3 C.F.R. 229 (2009). While the Snowflakes program and President Bush see the destruction of embryos as immoral because they are unique human beings, President Obama has not buckled to the social pressure and instead justified his lifting of the ban in part because, as he says, “As a person of faith, I believe we are called to care for each other and work to ease human suffering. I believe we have been given the capacity and will to pursue this research and the humanity and conscience to do so responsibly.” Remarks on Signing an Executive Order Removing Barriers to Responsible Scientific Research Involving Human Stem Cells and a Memorandum on Scientific Integrity, 1 PUB. PAPERS 199 (Mar. 9, 2009).

95. Stefanie Marsh, Pre-Born in the USA, TIMES OF LONDON, Feb. 16, 2006, at 4. This language was adopted purely as a political move because labeling embryo donation as adoption “elevates embryos to the status of a child in many people’s minds.” Suzanne Smalley, A New Baby Debate, NEWSWEEK, Mar. 24, 2003, at 53 (quoting Susan Crocking, a Boston-based attorney specializing in reproductive law).

96. Of course, there is no legal adoption when these embryos are transferred because there is not yet a child. However, the individuals involved have decided to label the transfer of embryos as “adoptions.”

97. Marsh, supra note 95 at 4.

98. Id.

99. Id.
being used to save a troubled marriage; specifically, a marriage troubled by lack of a natural child can be saved through the birth of an abandoned, and subsequently “adopted,” embryo.

Same-sex couples are also consumers of assisted reproductive technologies. Unfortunately, same-sex couples often face discrimination in accessing assisted reproductive technology and therefore lack the same access to procreate as sterile opposite-sex couples. Lesbian couples have been denied services by certain physicians and clinics because of moral and religious disapproval of lesbian relationships.100 Particularly because there is no federal legislation, clinics are able to, and do, refuse treatment if they find that the parent or parents would not be adequate, and for many clinics and physicians, same-sex couples are included in this group.101 For many states there is no protection for same-sex couples seeking assistance in bearing a child because sexual orientation is often not covered by discrimination statutes.102 In addition, physicians can refuse treatment based on a couple being unmarried, even if the underlying concern is that the couple is same-sex, because marital status is not generally a protected status under state laws, and even if it were, marriage is not an option for most same-sex couples.103

Gay men are also in a uniquely disadvantaged position because there is, for most couples, no uterus available to gestate the fetus. If there is not a family member or close friend who volunteers to carry the child, the couple—or single man—will have to contract out and hire a surrogate.104 This can be prohibitively expensive for many couples as the typical surrogacy agreement involves payments of around $25,000 to the surrogate mother.105 This is in addition to the costs of buying an egg, which can range from $5,000 to $50,000, and paying for


101. Id.
102. Id. Some states, such as California, prohibit discrimination based on sexual orientation. Id.
103. Id. A related area of law is legislation that allows pharmacists to refuse to provide Plan B to women if providing it is against their religion. For a comprehensive examination of current state laws on the topic see State Policies in Brief: Emergency Contraception, GUTTMACHER INST. (Feb. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf. The obvious difference is that pharmacists who refuse to provide Plan B will refuse for all women—not just lesbians or unmarried women—while physicians specializing in fertility are singling out certain categories of women—those in opposite-sex marriages—to whom they will provide services.

104. These same limitations apply to single straight men also. Certainly straight men face different types of discrimination than gay male couples, but there continues to be a stigma against single men who have a child alone. Surrogate Mothers Fulfilling Gay Men’s Parenthood Dreams, AFP (May 5, 2008), http://afp.google.com/article/ALegM5gGD7YSwO71b5E0W6lZ8Uwsi_gfEA.

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the medical costs associated with the pregnancy and birth. While costs will likely not decrease without a substantial change in insurance policies to cover assisted reproductive technologies, what might change for gay men is social acceptance of men being primary caretakers. Men, as primary caretakers, are often looked down on and there are reported stories of men not being able to handle infant child-care. Continuing changes in allowing two men to adopt children may be a harbinger of the growing acceptance of procreation and child-rearing within male-only households.

While assisted reproductive technology allows more couples and individuals to have children than was previously possible, the technology is oftentimes used to reinforce the coupling of marriage and procreation. Assisted reproductive technology allows married couples to appear to have procreated naturally. While single individuals and gay and lesbian couples benefit from assisted reproductive technology, law and society often limit their use of the services, decreasing the impact that the technology might otherwise have on the decoupling of marriage and procreation.

C. Adoption

Exploring adoption in order to explain the connection between natural procreation and marriage may sound counterintuitive. However, if adoption is taken as a proxy for the people who society believes should be able to naturally procreate, then adoption law can help explain the importance of natural procreation in marriage. When adoption laws were originally promulgated, they were written to ensure that adoption imitated nature in that adoptive parents were supposed to look as if they could have been the natural parents. Passing as a biological family required appropriate ages, races, and genders. The remains of the fiction of a biologically related family linger in how courts determine the best interests of the child in adoption proceedings. Because of remaining restrictions in adoption, it is clear that, even today, adoption demonstrates the linkage of marriage and procreation.

In order for an adoptive family to look biologically related, adoptive


107. See, e.g., Weil, supra note 100 (discussing how the story of a bachelor who hired a gestational surrogate and then killed the child just six weeks after birth because the child cried too much is used as a cautionary tale of men having children without women to act as primary caretakers).


109. The “best interests of the child standard” is the standard through which most judicial decisions relating to children are made. The court uses this capacious standard to take into account anything that might impact the child in custody, visitation, and adoption cases. Uniform Marriage & Divorce Act § 402 (1973). For examples of the application of a best interests of the child standard see In re Marriage of Carney, 24 Cal.3d 725, (1979); Hollon v. Hollon, 784 So.3d 943, (Miss. 2001).
parents must be of naturally procreative age. It is now clearly established that the age of the parents can only be one factor in the best interest analysis and is not automatically determinative. A leading case comes from California, where the appellate court determined that a full report must be done on adoptive parents, even when they were past child-bearing age, to determine if placement was in the child’s best interests. The court dismissed the state’s claim that the adoption should be disallowed on the grounds that children with older parents “may encounter peer group difficulties because of the advanced age of the adoptive parents”; rather, the court required a showing of some other reason the placement would not be in the best interest of the child before a placement could be refused based on the age of the adoptive parents.

The litigated cases are generally about older parents trying to adopt; however, California’s Family Code is also clear that for younger adoptive parents there must be a ten-year age gap between the child and the adoptive parent unless public policy dictates allowing the adoption. Although the law has settled at a place where adoptive parents must no longer be the proper ages to have borne the child, adoption is harder for parents who do not appear to be the appropriate age. The legal system continues to be invested in having parents that appear to be the proper age to have naturally conceived the child. Although age is no longer an automatic reason to deny the placement of a child, parents who are too young or too old to appear to be the biological parents face additional burdens in the adoption process.

Race in adoption has been a more contentious issue. Palmore v. Sidoti, although a custody case rather than an adoption case, set the precedent for treatment of race in the best interests of the child standard. The case involved a white couple who had a daughter and then divorced; after the divorce the mother started dating and subsequently married a black man. The father argued that the daughter would suffer school-yard stigma for having a black step-father and the trial court credited the stigma as a reason to move the girl to her father’s custody. However, the Supreme Court held that race cannot be dispositive in the placement of a child and the possible stigma associated with a trans-racial family is not a sufficient reason to move a child elsewhere.

111. Id.
112. Id.
114. Although not an actual adoption agency, the families donating genetic material through the Snowflake program will designate an upper age limit on who they view as appropriate in using their embryos. See Snowflakes Frozen Embryo Adoption Program, NIGHTLIGHT CHRISTIAN ADOPTIONS, available at http://web.archive.org/web/20101127024745/http://nightlight.org/adoption-services/snowflakes-embryo/multiethnic-embryos.aspx (page archived Nov. 27, 2010).
116. Id.
117. Id.
118. Id. at 433.
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effect of this holding carried over to adoption cases.

Trans-racial adoptions have, for a long time, been discussed as a matter of public policy. In 1972, the National Association of Black Social Workers equated “whites adopting black children to ‘cultural genocide.’” The group still recommends against trans-racial adoptions for black children, although they no longer use the genocide language in reference to the practice. There are major issues at play in trans-racial adoptions other than just the appearance of a naturally procreative family. For example, there is also the matter of racism in the United States and the concern that white parents may not be equipped to teach their children of color how to handle the racism that is still pervasive today. In addition, there also may be cultural concerns with trans-racial adoption because of a risk of losing certain minority cultures. Because race can still be a factor in the placement of adopted children, there may still be lingering ideas about how children of a marriage should appear. However, the move has been gradually toward allowing trans-racial adoptions that necessarily create families that do not appear to be biologically related.

Finally, the way that courts view gendered parental roles in adoption cases is illuminating. Implicated in these court decisions are both heterosexuals who do not fulfill their traditionally defined gender roles and all homosexual couples who are necessarily bending traditional maternal and paternal roles. Florida was a front-runner in the fight against same-sex couples adopting and famously prohibited gay adoptions following a hard-fought 1970s campaign led by singer Anita Bryant. Both state and federal challenges eventually followed the 1977 law but it was not until thirty years later that the Florida law ceased to ban adoptions for openly gay and lesbian individuals and couples.

In 2004, the Eleventh Circuit decided Lofton v. Department of Children and Family Services, a challenge by a foster father who would have been a

120. Id.
121. Id.
123. “In 2004, 26 percent of black children adopted from foster care, about 4,200, were adopted transracially, nearly all by whites. That is up from roughly 14 percent, or 2,200, in 1998.” Clemetson, supra note 119.
124. For example, courts have struggled with different-sex couples where a woman is the economic provider and the husband performs domestic tasks. For an interesting example, see Young v. Hector, wherein the court focused on the past division of labor within the family in determining custody and a support award. 740 So.2d 1153 (Fla. Dist. Ct. App. 1999). The dissent was vocal that “the result below [giving the working mother custody and support] was dictated by the gender of the competing parties.” Id. at 1173 (Schwartz, C.J., dissenting).
126. Almanzar, supra note 125; see also Lofton v. Dep’t of Children & Family Servs., 358 F.3d 804, 807-08 (11th Cir. 2004); In re Gill, 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).
model adoptive parent except that he was gay and was therefore banned from adopting under the Florida law. In upholding the Florida adoption ban, the court held that because Lawrence v. Texas did not create a fundamental right for same-sex relationships, Lawrence had no impact on the case and the court did not apply strict scrutiny. In addition, the Lofton court distinguished Lawrence, discussing how the case was not applicable when children were involved. Importantly, the court also noted that Lawrence did not give public recognition or legal status to same-sex conduct, and consequently should not give the same legal status to gay adults wanting to adopt as straight adults adopting received. The court did not give weight to the fact that the plaintiff was an ideal parent for his child and rehabilitated the child following the child’s HIV-positive birth. Rather than ever examining the best interests of the child, the court was primarily concerned with not granting formal recognition to a family that they did not see as natural. The adoption of this child would have undermined Florida’s stance that adoption and procreation were activities that should occur only within marriage.

Following Lofton, however, there was a successful challenge to the law in state court under the Florida constitution. The Florida appellate court held that the ban was unconstitutional as there was no rational basis for the ban on homosexual individuals and couples adopting children. The court focused on how Florida allows singles to adopt, meaning that many children are placed in homes that are already not modeled on a naturally procreative family, as there is

127. Lofton, 358 F.3d at 807-08.
129. Lofton, 358 F.3d at 816. Strict scrutiny refers to a Fourteenth Amendment analysis that makes it more difficult for the government to burden an individual’s rights. For an explanation of this complicated area of law, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (4th ed. 2011).
130. Lofton, 358 F.3d at 817 (holding that “[h]ere the involved actors are not only consenting adults, but minors as well. The relevant state action is not criminal prohibition, but grant of a statutory privilege. And the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition. Hence, we conclude that the Lawrence decision cannot be extrapolated to create a right to adopt for homosexual persons.”)
131. Id.
132. Id. at 807.
133. Rather than recognize the relationship as familiar, the court dismissively described the relationship as follows: “Under appellants’ theory, any collection of individuals living together and enjoying strong emotional bonds could claim a right to legal recognition of their family unit, and every removal of a child from a long-term foster care placement—or simply the state’s failure to give long-term foster parents the opportunity to adopt—would give rise to a constitutional claim.” Id. at 815.
135. Adoption of X.X.G., 45 So. 3d at 81. The Florida Department of Children and Families has decided not to appeal the decision to the Florida Supreme Court. As of today, the ban on adoption by gay individuals is not being enforced in Florida.
only one parent present in the household. In addition, the court rebuked the theory that children are uniquely harmed by growing up with homosexual parents. The decision provided little analysis regarding marriage as the court thought it largely irrelevant because the ban reached both single and coupled homosexuals. Despite little discussion of marriage, the case is clearly a step toward allowing procreation in the absence of marriage.

In the District of Columbia, there was no ban on gay people adopting; rather, the issue was whether a second parent could adopt. The D.C. Court of Appeals ultimately reasoned by analogy to a marital relationship, saying, “the stepparent exception easily applies here by analogy; [the two men] are living together in a committed personal relationship, as though married, and are jointly caring for Hillary as their child.” The court placed this gay couple into the matrix of marriage, basing their legal rights on how much they look like a traditional married couple. Of course, the obvious difference between a same-sex couple and an opposite-sex couple in the adoption arena is that that a same-sex couple will never appear to have naturally produced the child that they are adopting, while a different-sex couple oftentimes will.

The transition of adoption law to allow adoption by parents of ages, races, and genders that do not comport with our understandings of traditional families places yet another wedge between marriage and natural procreation. While many of the traditional adoption requirements have been relaxed, this change is far from complete. The trend toward recognizing these family forms will accelerate as same-sex marriage becomes more widely accepted.

D. Same-Sex Marriage

The same-sex marriage debate provides fodder for the contention that a large portion of America is still concerned with naturally procreative marriages,
while other portions of the country are ready to expand marriage beyond just natural procreation. This Subpart begins by looking in-depth at Lawrence. It then specifically examines California’s same-sex marriage history, paying particular attention to the language employed in the important court cases. Finally, it examines litigation from other jurisdictions, exploring language about procreation in the fight for same-sex marriage.

1. Starting with Sex: Lawrence as a Foundation

Lawrence v. Texas is foundational in almost every legal discussion about gay rights. However, Lawrence has also impacted the liberty that courts are willing to grant to sexual relationships outside of marriage. For example, because of Lawrence, anti-fornication laws have been struck down laws impacting the sexual relations of minors have been made sexual-orientation-neutral. But perhaps the biggest impact from Lawrence will be on the marital status of same-sex couples.

144. Certainly, California is not the only state to have made substantial changes in the marital status of same-sex couples. Notable court decisions include Baker v. State, where the Vermont Supreme Court held that not granting a status relationship to same-sex couples violated the state constitution; the state then created civil unions as an alternative to marriage for same-sex couples. 744 A.2d 864 (Vt. 1999). Also important is Goodridge v. Department of Public Health, where the Massachusetts Supreme Court held that not allowing marriage violated the equal protection and due process clauses of the state constitution and the only remedy was to expand marriage to same-sex couples. 798 N.E.2d 941 (Mass. 2003). For a discussion of Goodridge and the connection of marriage and procreation see Jamal Greene, Divorcing Marriage from Procreation, 114 YALE L. J. 1989 (2005). While other states have clearly dealt with marriage and procreation, California’s marriage laws are notable as there has been substantial back-and-forth between the judiciary and the public, with bountiful litigation.

145. For ease of communication, the term “gay rights” is used in this article to encompass the full range of civil rights claimed by gay, lesbian, bisexual, and transgender groups and individuals. However, in certain contexts it is clear that the “gay rights” movement has been fully controlled by privileged biological male couples and does not fully incorporate the rights of the rest of the community. For a discussion of greater inclusion in the gay rights movement, see Shannon P. Minter, Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion, in TRANSGERNDER RIGHTS, supra note 10, at 141.

146. Proponents of polygamy, another type of relationship that has not received government recognition, have unsuccessfully tried to use the Lawrence decision to overturn bans on multiple marriages. See, e.g., Bronson v. Swenson, No. 2:04CV21TS, 2005 WL 1310482 (D. Utah May 24, 2005) (noting that Lawrence does not apply to a polygamy case because polygamy laws do not “preclude private sexual conduct.”); Berg v. State, 2004 UT App 337, 100 P.3d 261 (discussing how the Utah Attorney General is afraid of having Lawrence overturn the polygamy ban and therefore, he will not be prosecuting polygamy. Consequently, the laws will stay on the books post-Lawrence but cannot be challenged).

147. Martin v. Zihrel, 607 S.E.2d 367 (Va. 2005) (holding that under Lawrence, a state law prohibiting pre-marital sex was unconstitutional, and therefore, that a woman could go forward with a tort suit against a former sexual partner who gave her herpes because engaging in pre-marital sex was no longer a crime).

148. See, e.g. State v. Limon, 122 P.3d 22, 24 (Kan. 2005) (holding that the Romeo and Juliet law must be applied equally to same-sex and opposite-sex partners after Lawrence because sexual conduct between two minor males is no more prohibited or illegal than that between minor opposite-sex partners).
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Justice Kennedy’s opinion in *Lawrence* decided the case on due process grounds and created a place for sexual liberty outside of the marital relationship. In its decision, the Court overturned *Bowers v. Hardwick* and announced that changing social mores had demonstrated the existence of a substantive due process right for same-sex couples to engage in sex without criminalization. The outcome and impact of the decision is unfortunately more complicated than it could have been because Justice Kennedy explicitly limited the holding to very specific scenarios, stating,

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Many of the characteristics that Kennedy identifies as not being impacted by the Court’s holding are characteristics that have nothing to do with the gay rights movement. But some of them, such as state recognition, do overlap with the goals of this movement. The Court clearly thought that it should not do too much too soon for the gay rights movement, and it remains to be seen whether *Lawrence* will be the foundation for decisions in which bans on same-sex marriage are held to be unconstitutional. However, as of now, *Lawrence* is the main precedent on gay rights coming from the Supreme Court and therefore must be taken seriously as the backdrop to any future litigation in gay rights.

2. California’s Same-Sex Marriage Cases

In 2000, California voters passed Proposition 22, which statutorily defined marriage as a relationship between a man and a woman. Proposition 22 was merely an amendment to the California Family Code and is not to be confused with Proposition 8, which followed in 2008 and banned same-sex marriage as an amendment to the California Constitution. See CAL. FAM. CODE § 308.5 (1994), invalidated by *In re Marriage Cases*, 43 Cal. 4th 757, rehearing denied, 2009 WL 2515727 (unpublished) (holding that Prop 22 was an unconstitutional violation of the equal protection clause); CAL. CONST. art. I, § 7.5, invalidated by Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), aff’d sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). Proposition 22 added “[o]nly a marriage between a man and a woman shall be valid or recognized” into the California Family Code.
Supreme Court in *In re Marriage Cases*. Groups of same-sex couples filed cases seeking declaratory judgment that the family code provisions were unconstitutional. These suits were opposed by the supporters of Proposition 22, who used arguments based on procreation to justify the law. The California Supreme Court dispatched with the anti-marriage arguments made by the proponents of Proposition 22 as follows:

Pointing out that past cases often have linked marriage and procreation, these parties argue that because only a man and a woman can produce children biologically with one another, the constitutional right to marry necessarily is limited to opposite-sex couples.

This proposition is fundamentally flawed for a number of reasons. To begin with, although the legal institution of civil marriage may well have originated in large part to promote a stable relationship for the procreation and raising of children and although the right to marry and to procreate often are treated as closely related aspects of the privacy and liberty interests protected by the state and federal Constitutions, the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children. Men and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry.

In this challenge to Proposition 22, the California Supreme Court concluded that same-sex couples were deserving of the label of marriage under the California Constitution. In part this was because California decisions discussing the nature of marriage and the right to marry have recognized repeatedly the linkage between marriage, establishing a home, and raising children in identifying civil marriage as the means available to an individual to establish, with a loved one of his or her choice, an officially recognized family relationship.

Likewise, having children with a partner “is without doubt a most valuable component of one’s liberty and personal autonomy.” In determining that there is a due process right for same-sex couples to marry, the court spent substantial time discussing how procreative ability is not the critical aspect of marriage; rather it is the choice of a life partner that is the critical aspect of marriage. However, the linkage of procreation and marriage was an important concern that the court felt was deserving of attention. The attention shown to this topic

154. *In re Marriage Cases*, 43 Cal. 4th at 757.
155. *Id.*
156. *Id.* at 825.
157. *Id.* at 829.
158. *Id.* at 813.
159. *Id.* at 817.
160. *Id.*
indicates its potential validity and persuasiveness for some jurists.

Though a victory for same-sex marriage proponents, the result of In re Marriage Cases was quickly overturned by voters. In 2008, Proposition 8, a constitutional amendment passed via voter initiative, took effect, defining marriage as a relationship between a man and a woman for purposes of the California Constitution. As a result, same-sex marriage was once again banned in California. The California Supreme Court upheld Proposition 8 as valid in Strauss v. Horton in the spring of 2009.

Soon after Strauss v. Horton, same-sex marriage proponents shifted their focus to federal court. Perry v. Schwarzenegger was filed in the Northern District of California and a decision was issued by Chief Judge Vaughn Walker on August 4, 2010. In his decision to strike down Proposition 8 as unconstitutional, Walker was also explicit in distinguishing procreation from marriage. He stated:

Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse. “[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” The Supreme Court recognizes that, wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship.

After this decision, proponents of Proposition 8 appealed to the Ninth Circuit. In his decision for the panel, Circuit Judge Stephen Reinhardt did not deal with whether there was a fundamental right to marry, but rather discussed

161. The ballot measure added Section 7.5 to the California constitution, declaring that “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.
162. However, same-sex marriages performed in California prior to Proposition 8’s effective date remained valid despite the change in law. Strauss v. Horton, 46 Cal. 4th 364, 470 (2009).
163. Id. at 474.
164. Perry v. Schwarzenegger was filed by lawyers operating outside of the mainstream same-sex marriage movement and was initially not approved of by the same-sex marriage establishment. Jesse McKinley, Bush v. Gore Foes Join to Fight Gay Marriage Ban, N.Y. TIMES, May 28, 2009, at A1.
165. This move is interesting based on the history of same-sex marriage litigation. Despite initial attempts at challenging the opposite-sex requirement in federal courts, marriage proponents have largely focused on state constitutions in the last thirty years. John W. Dean, The Olson/Boies Challenge to California’s Proposition 8: A High-Risk Effort, FINDLAW (May 29, 2009), http://writ.news.findlaw.com/dean/20090529.html. The focus on state constitutions came after the failure of Baker v. Nelson, where the United States Supreme Court dismissed an appeal from the Minnesota Supreme Court “for want of substantial federal question.” 409 U.S. 810, 810 (1972). Certainly the decision in Perry v. Schwarzenegger demonstrated that the federal judiciary has changed substantially in the last forty years.
167. Id.
the dignitary harms associated with limiting access to marriage.\textsuperscript{169} For Judge Reinhardt, Proposition 8 was \textit{Romer}\textsuperscript{170} all over again.\textsuperscript{171} As Justice Kennedy did in \textit{Romer}, Judge Reinhardt used the rational basis level of scrutiny to determine that the referendum was unconstitutional.\textsuperscript{172}

Judge Reinhardt considered four possible reasons that Proposition 8 had been approved by the California voters.\textsuperscript{173} One of these reasons, and the first mentioned, was “furthering California’s interest in childrearing and responsible procreation.”\textsuperscript{174} The court held that Proposition 8 was not rationally related to the “responsible procreation” reason.\textsuperscript{175} Framing this argument in light of the rescinding of marriage, the court said:

In order to explain how rescinding access to the designation of ‘marriage’ is rationally related to the State’s interest in responsible procreation, Proponents would have had to argue that opposite-sex couples were more likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of ‘marriage.’ We are aware of no basis on which this argument would be even conceivably plausible. There is no rational reason to think that taking away the designation of ‘marriage’ from same-sex couples would advance the goal of encouraging California’s opposite-sex couples to procreate more responsibly.\textsuperscript{176}

The decisions overturning California’s referenda are clear—no longer should procreation be considered the \textit{sine qua non} of marriage. Rather, marriages are to be founded on loving partnerships regardless of procreative ability.

The problem with courts’ conceptions of contemporary marriage is that in other family law contexts, courts continue to regard sex and procreation as fundamental to marriage in a way that they do not consider things like breadwinning and companionship to be.\textsuperscript{177} As same-sex marriage becomes more prevalent and courts continue to specifically exclude procreation as a necessary component of marriage, the view that procreation is not fundamental to marriage will enter into other areas of law and continue to move marriage away from being defined merely as natural procreative ability.

\begin{itemize}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Romer v. Evans}, 517 U.S. 620 (1996). \textit{Romer} was a challenge to a voter referendum in Colorado. The Court based its decision in part on the fact that “the amendment seems inexplicable by anything but animus toward the class it affects.” \textit{Id.} at 632.
\item \textsuperscript{171} \textit{Brown}, 671 F.3d at 1079.
\item \textsuperscript{172} \textit{Id.} at 1082.
\item \textsuperscript{173} \textit{Id.} at 1086.
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{Id.} at 1088 (emphasis in original).
\item \textsuperscript{177} \textit{See supra} Part II.A for an exploration and analysis of many of these cases.
\end{itemize}
3. Same-Sex Marriage Litigation from Other Jurisdictions

While California is an example of where litigation has been successful, other state courts have not been as willing to extend marriage to same-sex couples. The reasoning in these cases is varied, but again, offers insight into what courts think a marriage is as they justify denying marriage to same-sex couples. For many of these courts, the coupling of marriage and procreation was key to the decision.

*Jones v. Hallahan*, a 1973 case from Kentucky, determined that two women could not wed. The court turned to dictionary definitions of marriage to determine that a marriage can only be between a man and a woman. Importantly, one of the definitions cited by the court included that marriage was “for the purpose of founding and maintaining a family.” However, the court did not take this seriously and never further addressed whether procreation and children were fundamental to marriage. Instead, the court quickly determined that two women could not even ask to be married because what they were proposing was not a marriage under the dictionary definition of marriage, but something else entirely.

More recently, New York’s highest court upheld a ban on same-sex marriage in *Hernandez v. Robles*. The court provided two reasons that the government had a rational basis for instituting a ban on same-sex marriage; both reasons were reliant on the relationship between marriage and procreation or children. First was the “responsible procreation” argument: heterosexual sex leads to accidental pregnancy while homosexual sex does not, thus only heterosexual couples needed marriage to “create more stability and permanence in the relationship.” Same-sex couples do not need the same type of stability because “they do not become parents as a result of accident or impulse.” For the New York Court of Appeals, procreation is linked to marriage as marriage is necessary to control and stabilize procreation; because same-sex couples do not have naturally procreative sex, they do not need marriage to control that sex. The second rationale was that it is better for children to have both a mother and a

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179. *Id.* The court used a dictionary definition of marriage because the Kentucky code did not contain a definition.
180. *Id.*
181. *Id.*
182. *Id.* Also worth noting is that the court relied on *Baker v. Nelson* for the notion that disallowing marriage did not infringe on any constitutional rights, while arguing that in fact no constitutional issue was actually raised in the case.
185. *Id.*
186. *Id.*
187. *Id.*
father as they grow up.188 The “responsible procreation” argument relied on by New York was also made by opponents of same-sex marriage in other states, including in California during the Proposition 8 litigation.189 The answer advanced by Judge Walker in response to this argument is that marriage and procreation are not fundamentally linked and can independently exist.190 The fact that courts still accept the “responsible procreation” argument shows that procreation and marriage are still fundamentally linked for some jurists. However, as the trend toward allowing same-sex marriage and discounting arguments like “responsible procreation” continues, there will be less acceptance of this argument. As proponents of marriage equality become more successful and this argument fails at higher judicial levels, procreation and marriage will be substantially separated in the eyes of the law, benefiting all couples.

These four areas of family law highlight that courts are constantly commenting on what marriage is—and what marriage is not. In many ways the law continues to see natural procreation as essential to marriage. However, a promising change is developing in the same-sex marriage litigation in multiple states—most notably, in California. While annulment is the area of law most strongly rooted in the coupling of marriage and procreation, adoption and assisted reproductive technology both work to reinscribe the coupling even in non-naturally procreative marriages. These areas of family law demonstrate the current state of the law, but also speak to the opportunity provided by same-sex marriage to further decouple marriage from procreation, which will be a step forward for gender equality.

III. How Same-Sex Marriage Can Re-Define All Marriage

The growing acceptance of same-sex marriage will change the centrality of natural procreation for all marriages. The full examination in Part II of multiple areas of family law demonstrates that marriage and natural procreation are separating. However, a broad acceptance of same-sex marriage will further separate marriage and natural procreation. This Part makes two distinct arguments. First, it demonstrates how contemporary annulment law could be applied to same-sex couples and what impact that could have on all marriages. Second, it argues that allowing same-sex marriage, particularly in light of the language used in leading opinions, will fundamentally impact the way that natural procreation and marriage are connected.

188. Id. Although less directly relevant to the analysis in this article, this second rationale shows another way in which the New York court believed that marriage and procreation were connected.


190. Id.
A. Application of Annulment Law to Same-Sex Marriages

A search of the legal databases returns no cases where a formal same-sex relationship has been dissolved via annulment for fraud.\textsuperscript{191} This Subpart will explore how courts might apply the rules on fraud-based annulments to same-sex couples.

As previously indicated, annulment law remains one of the most influential legal structures in maintaining the linkage between procreation and marriage. While this piece argues that the legalization of same-sex marriage will ultimately force annulment law to change, it is also important to analyze how contemporary annulment law could be applied to same-sex couples.

To begin, the annulments in question are based on the natural procreative abilities of spouses. In order to get an annulment, one spouse must have represented a capacity of having children while knowing she or he was sterile.\textsuperscript{192} This rule makes less sense in a same-sex partnership where, in almost all cases, natural procreative sex between partners is not an option. Whereas opposite-sex couples have a general expectation of naturally procreative sex, that expectation does not exist for most same-sex couples.\textsuperscript{193} Instead, same-sex couples enter into a relationship with the expectation that outside resources, such as assisted reproductive technology, will be required in order to procreate.\textsuperscript{194} For many lesbian couples, all that is needed in order to have a child is a sperm donor, who can be a friend,\textsuperscript{195} family member,\textsuperscript{196} or a stranger contracted through a sperm bank. For gay men, the process is far more complicated because eggs are expensive and a surrogate must be found.

Procreation is not as natural or as inexpensive for the average gay or lesbian couple as it might be for a fertile opposite-sex couple. Without the assumption of easily obtained natural procreation upon entering the relationship, same-sex partners will have a more difficult time arguing that there was fraud.

\begin{itemize}
\item \textsuperscript{191} This is not to say that same-sex couples have not received annulments; however, it appears that courts have yet to apply the fraud rules to a same-sex marriage or other formal relationships. In fact, a fair number of same-sex marriages have been annulled—sometimes against the wishes of either partner. Most famously was \textit{Lockyer v. City and County of San Francisco}, where the California Supreme Court invalidated the marriages performed in San Francisco after Mayor Gavin Newsom instructed the court to ignore Proposition 22 and grant marriage licenses to same-sex couples. 95 P.3d 459 (Cal. 2004).
\item \textsuperscript{192} \textit{See supra} Part II.A.
\item \textsuperscript{193} I qualify this statement by noting there are same-sex couples including a transgendered individual who may be fertile in their biological sex and therefore able to procreate naturally with their same-gender partner.
\item \textsuperscript{194} \textit{See supra} Part II.B for a discussion of reproductive technologies.
\item \textsuperscript{195} For example, in \textit{In re Thomas S. v. Robin Y.}, a biological father was a known sperm donor who later sought paternity of the child raised by a lesbian couple, one of whom was the biological and gestational mother. 618 N.Y.S.2d 356 (App. Div. 1994). The court ruled that the biological father could get parental status despite the agreement that the couple would raise the child. \textit{Id.}
\item \textsuperscript{196} For example, the court in \textit{In re The Parentage of A.B.} held that both women were the legal parents of the child where the lesbian couple jointly decided to have a child with one woman’s egg and the sperm of the partner’s brother. 818 N.E.2d 126 (Ind. Ct. App. 2004)
\end{itemize}
based on natural procreation. However, an argument could be made by the spouse filing for annulment that the other partner held out an ability to provide the genetic material or be the gestational mother, while knowing that this was a physical impossibility.

Yet, it seems unlikely that the court would accept such an argument. First, courts are likely to resist requiring spouses to procreate using technology, which is essentially what would be required of a same-sex partner who promised to provide genetic material but who could not. Second, courts will likely reject the fraud argument in a same-sex marriage because if the issue in a same-sex couple is that one partner cannot provide genetic material or be the gestational mother, the other partner often may be able to do it. This would not be a beneficial line of reasoning for courts to take as it essentializes men and women to their procreative abilities and assumes there was no good reason that the couple originally negotiated who would provide the genetic material or be the gestational mother. Despite potential problems, it is possible that courts will take this route. Certainly, without cases on the books, it is unclear if courts would go so far.

Both of these legal interpretations show that as a consequence of biology, same-sex couples will marry without an expectation of natural procreation. Rather, they will enter a relationship that is reliant on outside resources and/or technology to bear children. Natural procreation can no longer be considered a fundamental part of marriage if an entire class of married couples is biologically excluded from carrying out the act. Even if courts were prone to see a distinction between naturally procreative heterosexual coupling and non-naturally procreative homosexual coupling, the Equal Protection Clause should support equal treatment of both classifications of couples regardless of the type of sex. Therefore, annulment law will have to change to align more easily with same-sex marriages, thereby redefining what is at the essence of a marriage. As discussed in Part I, changing annulment law and the linkage of marriage and procreation will help prevent the denigration of women and their familial roles.

197. A good example is the Tennessee case Davis v. Davis, where the state supreme court adjudicated a dispute between a divorced couple that had created and frozen embryos for future use. 842 S.W.2d 588 (Tenn. 1992). The wife wanted to donate the embryos to other couples while the husband adamantly opposed any such donation. The court made several important arguments, including (1) a distinction between a pre-embryo not yet in the woman’s body and an embryo in a woman’s body in saying that a woman’s bodily integrity was not implicated in the first instances, and (2) generally the right to not procreate will trump the right to procreate except in unnamed extreme circumstances. Clearly, assisted reproductive technology is not the same as natural conception.

198. The level of scrutiny for discrimination based on sexual orientation has yet to be established by the Supreme Court. However, several courts and the Obama administration now apply heightened scrutiny to sexual orientation discrimination claims. See, e.g., Letter from Eric H. Holder, Jr., Attorney General, to The Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder issued a letter on February 23, 2011 stating that “[President Obama] and I have concluded that classifications based on sexual orientation warrant heightened scrutiny.” Id.
B. Same-Sex Marriage Litigation and the Separation of Procreation from Marriage

As demonstrated in Part II, same-sex marriage litigation often discusses whether being able to naturally procreate is necessary to a ‘real’ marriage. The short answer from the above analysis is that as courts move to accept same-sex marriage, naturally procreative sex can no longer be as important to the definition of marriage.\(^{199}\) As same-sex marriage becomes more accepted across states and by the federal government, more marriages will function without the expectation of procreative sex. Consequently, there will be more judicial opinions and laws that declare natural procreative ability to no longer be the \textit{sine qua non} of marriage. Therefore, as time passes, non-procreative marriage will become more accepted in the law and in society, a transition which is good for society and in particular for women and transgender individuals.

Women have long been relegated to raising children and caring for the home. While women now have a choice of entering the workforce, society continues to think women are primarily responsible for childrearing and house management in different-sex marriages.\(^{200}\) Decoupling marriage from procreation is one way to empower women and promote an appreciation for the plurality of women’s identities, furthering the goals of the feminist movement. If marriage no longer comes with a requirement of procreation—and procreation no longer must be performed in a marriage—women will have more options in choosing whether or not to have children and in determining vocational options.

Transgender marriages have been easily dismissed as void or voidable by many courts. This position will become difficult to defend as marriage and reproduction are decoupled. The argument made by those seeking to void transgender marriages would be that the marriage is a same-sex marriage, and is therefore void \textit{ab initio} in jurisdictions where same-sex marriages are not allowed. However, once same-sex marriage is valid, transgender marriages should be valid regardless of how a court defines the person’s sex or gender. Although no longer requiring opposite-sex couplings in marriage will not entirely remove courts from determining the legal sex of an individual, removing marriage litigation cases will better allow transgender individuals to integrate into their identified gender without the legal system invalidating marriages.

CONCLUSION

The law is transitioning from a strict linkage of marriage and procreation to a system where neither is fundamental to the other. However, there are still

\(^{199}\) See supra Part II.D.
important areas of law and society where marriage and procreation are fundamentally linked, including annulment cases, usage of assisted reproductive technology, and adoption. These areas of law may be slowly moving toward a separation of procreation and marriage. However, it is same-sex marriage litigation that has forced the courts to reconceptualize marriage and procreation.

The benefit of same-sex marriage is more than just granting marriage to a historically disadvantaged group. Rather, it also includes transforming the definition of marriage to allow transgender individuals to freely marry and to allow women greater access to the economic sector and a place of equal footing with their male spouses.

Same-sex marriage creates an area of advocacy where a strong coalition of groups concerned with sexuality and gender can converge. Historically, feminist and gay rights groups have not always worked together. However, by working together on this issue, these advocacy groups can achieve equal marital rights for homosexual people while improving marriage for everyone by freeing women and transgender people from the problematic coupling of marriage and procreation.

201. For example, feminist groups were not involved in the campaign against Proposition 8 despite clear gender implications. Kathryn Abrams, Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality, 57 UCLA L. REV. 1135, 1136-37 (2010). In addition, gay rights groups were not involved in a recent San Francisco campaign involving sex work. Id. at 1140 (discussing Proposition K and the lack of queer perspectives on sex work throughout the campaign).