THE PATERNITY ESTABLISHMENT THEORY OF MARRIAGE AND ITS RAMIFICATIONS FOR SAME-SEX MARRIAGE CONSTITUTIONAL CLAIMS

NOTE

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ABSTRACT

Proponents of gay marriage have long argued that laws banning the practice violate the Due Process and Equal Protection Clauses of the United States Constitution and their counterparts in state constitutions. They contend that same-sex couples have the same fundamental right to marry as heterosexual couples, and that states have no rational basis for prohibiting marriages between members of the same sex. This Note puts forward a theory of marriage that undermines both arguments. It asserts that a central function of marriage is to establish paternity. The Note surveys the writings of philosophers, scholars, and jurists from Aristotle to Blackstone, together with the work of modern evolutionary biologists, to show how all characterize marriage as a means of identifying fathers and assigning them parental responsibilities. In the days before DNA testing, monogamy was the only reliable way of determining paternal identity. This fact profoundly shaped the institution of marriage from antiquity up to the present, giving rise to a modern marital presumption of paternity that only makes sense in the context of heterosexual marriage. The Note goes on to examine the paternity establishment theory in light of Perry v. Schwarzenegger, concluding that the theory provides better support for "Prop 8" than the arguments advanced by defense counsel in that case.

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I. INTRODUCTION

The most successful legal strategy supporters of same-sex marriage have employed in attacking laws limiting marriage to opposite-sex couples is to argue that such laws violate the due process and equal protection rights of same-sex couples. These claims assert that same-sex and opposite-sex marriages are functionally indistinguishable, and thus opposite-sex marriage laws violate same-sex couples' due process rights by denying them the fundamental right to marry, and also run afoul of equal protection by creating a classification without a justifiable reason for doing so. A number of courts have struck down opposite-sex marriage laws by concluding that such laws violate either the Fourteenth Amendment of the U.S. Constitution or the due process and equal protection clauses of state constitutions.[1]

[1] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that a state constitutional amendment violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment); Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (holding that a state law prohibiting the state from recognizing same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment), *rev'd*, 455 F.3d 859 (8th Cir. 2006); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (holding that a statute defining marriage only as a union between a man and a woman violated the state constitution's equal protection clause); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that a state statute limiting marriage to opposite-sex couples violated the state constitution's due process and equal protection clauses); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that a law limiting marriage to opposite-sex couples violated the state equal protection clause); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts legislature does not have a rational basis to deny same-sex couples marriage and thus violated the state constitution's due process and equal protection clauses); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that a state law depriving same-sex couples the

This Note will present a conception of marriage that could undermine due process and equal protection arguments in same-sex marriage litigation. It will assert that a central function of marriage is to establish paternity. This theory, by showing marriage to be an institution based on a reproductive strategy, serves to discredit the argument that same-sex marriages would fulfill the same purposes that traditional marriage historically has.

The "paternity establishment" theory proceeds as follows: Before the advent of modern technologies such as DNA testing and birth control, monogamy was the only reliable way to identify the father of a child. Human infants require a higher level of parental care than most species, making paternal involvement crucial for a mother and child's well-being. Evolutionary theory tells us, however, that males are not inclined to invest precious time and resources in children that may not be theirs biologically. Female monogamy is thus an adaptation to assure fathers of their paternity and encourage their involvement in raising the child. The paternity establishment theory holds that this reproductive strategy is the central function of marriage.

This may strike modern audiences as a radical understanding of marriage. However, the theory traces back to classical antiquity, has survived for centuries, and has been validated by modern science. From Aristotle to Thomas Aquinas to William Blackstone, some of the most prominent thinkers in the Western tradition have held that paternity establishment is a central function—if not *the* central function—of marriage.[2] More recently, evolutionary theorists have determined that there is a link between monogamy and paternal investment, finding that a key reason monogamous species limit themselves to one partner is because monogamy is the only natural way paternity can be established with any level of certainty.[3] Bolstering the theory, paternity establishment concerns have dictated which relationships the state has recognized as marriages throughout Anglo-American history.[4]

This conception of marriage could have major ramifications for same-sex marriage constitutional claims. In order to prevail on a due process challenge, advocates would have to show that same-sex marriage is substantially similar to opposite-sex marriage in terms of its functions in Anglo-American history, and thus falls within the fundamental right to marry. If paternity establishment were a central function of marriage, it would be harder to make that case.

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statutory benefits and protections afforded to opposite-sex couples who choose to marry violated the Common Benefits Clause).

[2] *See infra* notes 33–107 and accompanying text.

[3] *See infra* notes 149–166 and accompanying text.

[4] *See infra* notes 108–148 and accompanying text.

Likewise, in an equal protection challenge, same-sex marriage plaintiffs argue that there is no justifiable reason for the state to allow opposite-sex couples to marry but not same-sex couples. In many of the instances in which courts have struck down laws limiting marriage to opposite-sex couples, they did so by finding that such laws could not pass even rational basis review. The paternity establishment theory of marriage, however, would provide the state with at least a rational basis to limit marriage to opposite-sex couples.

Part II of this Note describes recent due process and equal protection analyses by the Supreme Court, which foreshadow the potential legal implications of the paternity establishment theory. Part III presents the history of the paternity establishment theory of marriage, from its origins in Aristotle's teachings all the way to modern evolutionary theory. It shows how paternity establishment concerns have shaped the institution of marriage for over 700 years of Anglo-American history. Part IV addresses the implications of the paternal establishment theory of marriage for due process and equal protection analyses in same-sex marriage litigation. Part V concludes by proposing that legal advocates of traditional marriage laws utilize the paternity establishment theory of marriage to defend such laws against constitutional challenges.

II. DUE PROCESS AND EQUAL PROTECTION REVIEW IN SAME-SEX MARRIAGE LITIGATION

In order to appreciate the ramifications that the paternity establishment theory could have for same-sex marriage litigation, it is first necessary to give a brief overview of the Supreme Court's due process and equal protection jurisprudence. This summary will provide the requisite context for an in-depth examination of the theory's application in same-sex cases in Part IV.

A. DUE PROCESS ANALYSIS

Under the concept of substantive due process, a state may not infringe upon certain "fundamental" rights unless the infringement is narrowly tailored to serve a compelling state interest.[5] To determine whether a right is fundamental under the Due Process Clause, a court examines whether the right is rooted in "our Nation's history, legal traditions, and practices."[6]

The Supreme Court has held that the right to marry is a fundamental right.[7] The question in same-sex marriage litigation, then, is whether

[5] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993).
[6] Washington v. Glucksberg, 521 U.S. 702, 710 (1997).
[7] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987) (noting that "the decision to marry is a fundamental right" (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)

same-sex couples can claim that right, or must establish a new and distinct right to wed.[8] This inquiry requires courts to delve into the historic nature and scope of traditional marriage to determine whether same-sex marriages fulfill the same functions and purposes.[9] If so, then same-sex couples could claim the same fundamental right to marry, and laws preventing their nuptials would be subject to strict scrutiny review.[10]

What types of evidence should a court examine when determining whether a right is "deeply rooted" enough to be considered fundamental? In two of the more recent cases containing in-depth analyses of fundamental rights claims, *Michael H. v. Gerald D.*[11] and *Washington v. Glucksberg*,[12] the Supreme Court looked to several remarkably similar historical sources in considering two very different claims. *Michael H.* addressed whether an "adulterous natural father" had a fundamental right to challenge the marital presumption of paternity,[13] while *Glucksberg* considered whether there was a fundamental right to assisted suicide.[14] In both of these cases, the Court surveyed "over 700 years" of Anglo-American common law tradition, starting with the thirteenth century scholar Henry de Bracton, "one of the first legal-treatise writers."[15] *Glucksberg* further noted that "other late-medieval treatise writers" echoed Bracton's writings on suicide.[16] In both cases, the Court relied on the writings of Sir William Blackstone,[17] noting in *Glucksberg* that his "Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers."[18] In both *Michael H.* and *Glucksberg*, the Court examined how early American courts treated the common law traditions concerning the marital presumption of paternity

("[The] freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.")))).

[8] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) ("The parties do not dispute that the right to marry is fundamental. The question presented here is whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right.").

[9] *See id.* ("[B]ecause the right to marry is fundamental, the court looks to the evidence presented at trial to determine: (1) the history, tradition and practice of marriage in the United States; and (2) whether [same-sex couples] seek to exercise their right to marry or seek to exercise some other right.").

[10] *Id*. at 994.

[11] 491 U.S. 110 (1989).

[12] 521 U.S. 702 (1997).

[13] *See generally Michael H.*, 491 U.S. 110.

[14] *See generally Glucksberg*, 521 U.S. 702.

[15] *Glucksberg*, 521 U.S. at 711; *Michael H.*, 491 U.S. at 124.

[16] *Glucksberg*, 521 U.S. at 711 n.10.

[17] *Id.* at 712; *Michael H.*, 491 U.S. at 124.

[18] *Glucksberg*, 521 U.S. at 712.

and suicide, respectively, by citing treatise-writers such as James Kent and Zephaniah Swift.[19] The Court then considered how the states had approached each asserted right in the previous century by examining model codes and American Law Reports.[20] Finally, in both cases, the Court noted that though technology had advanced, attitudes had softened, and circumstances had changed, state laws had largely remained unchanged, underscoring enduring and important policy reasons for observing the marital presumption of paternity and for prohibiting assisted suicide.[21]

The Supreme Court's heavy reliance on these types of sources in its due process review is not without its critics. In his dissent from *Michael H.*, Justice Brennen, joined by Justices Marshall and Blackmun, accused the majority opinion of "stop[ping] at . . . Bracton, or Blackstone, or Kent" in determining whether an interest was deeply rooted in the country's traditions,[22] and of "act[ing] as though English legal treatises and the American Law Reports always have provided the sole source for our constitutional principles."[23] Whatever the shortcomings of this method, however, the Court finds these materials persuasive in due process cases, and thus these are the types of historical sources that should be consulted when considering whether same-sex marriage comes within the fundamental right to marry.

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[19] *Id.* at 713; *Michael H.*, 491 U.S. at 125.

[20] *Glucksberg*, 521 U.S. at 715–16; *Michael H.*, 491 U.S. at 125–26.

[21] *Glucksberg*, 521 U.S. at 719 ("Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition."); *id.* at 728–35 (finding several continuing state interests in prohibiting assisted suicide); *Michael H.*, 491 U.S. at 125 ("in modern times . . . the rigid protection of the marital family has in other respects been relaxed"); *id.* at 140 (Brennen, J., dissenting) ("[T]he original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child."); *id.* at 130 ("Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa. If Michael has a 'freedom not to conform' (whatever that means), Gerald must equivalently have a 'freedom to conform.' One of them will pay a price for asserting that 'freedom'—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two 'freedoms,' but leaves that to the people of California.").

[22] *Michael H.*, 491 U.S. at 137 (Brennen, J., dissenting).

[23] *Id*. at 138.

B. EQUAL PROTECTION ANALYSIS

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[24] This guarantee of equal protection coexists with the reality that some legislation makes legitimate and necessary distinctions between groups of individuals.[25] If a law targets a group that has been defined as a "suspect class," courts will apply heightened scrutiny in their review of the law, finding it invalid unless the government can show that the law advances a compelling state interest.[26] When a law creates a classification that does not target a suspect class, however, it is presumptively valid, and courts will uphold it as long as it is rationally related to some legitimate government interest.[27]

The Supreme Court "has never ruled that sexual orientation is a suspect classification for equal protection purposes."[28] Further, the Court indicated in *Lawrence v. Texas* that it was unlikely to do so, stating that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[29] This conclusion seems to preclude the application of strict scrutiny review. In light of this fact, in cases where courts have struck down opposite-sex-only marriage laws as a violation of the Equal Protection Clause, they have done so by finding that the laws cannot withstand even rational basis review.[30] The remainder of this Note suggests that paternity establishment represents one legitimate purpose that may enable marriage laws to survive rational basis review.

III. THE PATERNITY ESTABLISHMENT THEORY OF MARRIAGE

The paternity establishment theory holds that marriage is a man's sexual monopoly over a woman—his wife—which allows him to identify the children she bears as his biological own. This theory of marriage has a long history in Western thought, finding its roots in the teachings of Aristotle, reappearing in the writing of Thomas Aquinas,

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[24] U.S. CONST. amend. XIV, § 1.
[25] *See* Romer v. Evans, 517 U.S. 620, 631 (1996).
[26] *See, e.g.*, Clements v. Fashing 457 U.S. 957, 963 (1982) (stating that the Court will depart from the usual rational basis review when a challenged statute places burdens upon "suspect classes" of persons or on a constitutional right that is deemed to be "fundamental").
[27] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319–20 (1993).
[28] Citizens for Equal Protection v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006).
[29] 539 U.S. 558, 559 (2003).
[30] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) ("[T]he Equal Protection Clause renders [a law limiting marriage to a man and a woman] unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review.").

Blackstone, and other influential thinkers, and showing up today in modern kin selection theory.[31] The theory is reinforced by the Western legal tradition, as the establishment of paternity has been a continuous and central legal function of marriage for centuries: from ancient Rome, to the Medieval Church, to Enlightenment-era England, and finally to modern day America.[32] The following historical analysis shows that paternity establishment has been a defining function of marriage in Western legal and intellectual traditions for over two thousand years, and continues to be so today.

A. CLASSICAL GREECE

The paternity establishment theory has its roots in classical antiquity, when Aristotle took issue with Socrates' teachings on marriage. In Plato's *Republic*, Socrates had proposed a radical new system of marriage. His proposal can best be described as *polisgamy*: marriage to a whole city. In Socrates' ideal society, every man would have sexual access to every woman in the city.[33] In such a situation, it would be impossible to discern who fathered which children.[34] Socrates argued that the consequence of this ambiguity would be that all men would assume fatherly responsibility for all children in the city since, if wives are communal, any given child might be any man's offspring. Social cohesion would be high, he believed, because familial links would be imputed between everyone in the society.[35] Because it would supposedly eliminate discrimination based on consanguinity and promote city-wide family "unity," Socrates asserted that "the community of wives and children among our citizens is clearly the source of the greatest good to the State."[36] When wives and children are held in common, he concluded, the citizenry "will be delivered from all those quarrels of which . . . children or relations are the occasion," and "their life will be blessed as the life of Olympic victors and yet more blessed."[37]

In *Politics*, Aristotle attacked Socrates' "communal wives" scheme. His rebuttal was based on a variation of the "tragedy of the commons" theme. Because "all men regard most what is their own, and care less for

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[31] *See infra* notes 33–107, 149–166 and accompanying text.
[32] *See infra* notes 45–56, 69–86, 106–48 and accompanying text.
[33] PLATO, THE REPUBLIC 147 (Benjamin Jowett trans., Colonial Press 1901) ("the wives . . . are to be common").
[34] *See id*. at 147 (stating that "no parent is to know his own child, nor any child his parent"); *id.* at 152 ("[H]ow will they know who are fathers and daughters, and so on? They will never know.").
[35] *Id*. at 154 ("[E]very one whom they meet will be regarded by them either as a brother or sister, or father or mother, or son or daughter, or as the child or parent of those who are thus connected with him.").
[36] *Id.* at 155.
[37] *Id.* at 157.

common property,"[38] Aristotle predicted that "each citizen in the state will have a thousand children but none of them will be as the children of any individual,"[39] as "it would be uncertain to whom each child belonged and who should preserve it when born."[40] As a consequence, fathers "will all alike neglect them."[41] In a society where paternity is divorced from biology and is fictionally extended to encompass all men and all children, Aristotle argued, paternal investment will be nonexistent:

> [W]hen no father can say, this is my son; or son, this is my father, for as a very little of what is sweet, being mixed with a great deal of water is imperceptible after the mixture, so must all family connections, and the names they go by, be necessarily disregarded in such a community, it being then by no means necessary that the father should have any regard for him he called a son.[42]

Aristotle's defense of monogamous marriage rested on the assertion that when men can say "this is his own son and his own wife,"[43] fathers, assured of their paternity, are more likely to care for their children. "There are two things which principally inspire mankind with care and love of their offspring," Aristotle wrote; "knowing it is their own, and what ought to be the object of their affection." It was on this basis that he rejected Socrates' communal wives proposal.[44] This rebuttal of polisgamy is perhaps the earliest articulation of the paternity establishment theory of marriage.

B. ANCIENT ROME

By the Roman era, Aristotle's understanding of marriage had become the mainstream view. "The Romans conventionally regarded marriage as an institution designed for the production of legitimate children."[45] This

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[38] ARISTOTLE, POLITICS 38 (H. G. Bohn trans., 1853).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] ARISTOTLE, POLITICS 32 (William Ellis trans., 1888).
[43] *Id.* at 30.
[44] *Id.* at 32. This passage from *Politics* was not the only time Aristotle drew a connection between paternal devotion and paternal certainty. In *The Nicomachean Ethics*, Aristotle stated that "mothers are more fond of their children than fathers are" because "they feel more convinced that [the children] are their own." ARISTOTLE, THE NICOMACHEAN ETHICS 248 (R.W. Browne trans., George Bell & Sons 1889).
[45] SUSAN TREGGIARI, ROMAN MARRIAGE: IUSTI CONIUGES FROM THE TIME OF CICERO TO THE TIME OF ULPIAN 8 (1993); *see also* ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 563 (1953) ("Procreation of legitimate children was the aim of a Roman marriage.").

concept of marriage was adopted from the Greeks and "was ingrained in Roman consciousness."[46]

The paternity establishment theory was also the cornerstone of the Roman legal understanding of marriage. The phrase *liberorum quaerendorum causa* ("for the reason of desiring children") was "a legal formula indicating that the purpose of marriage is to beget legal heirs."[47] "At the registration of citizens," one scholar explains, "the head of a family was asked whether he was living with a wife *liberorum quaerendorum causa*."[48] There were several types of quasi-marriage relationships in Ancient Rome, such as concubinage and relationships with slaves, but children born to women in these relationships did not have a legal father.[49] A "wife" was defined as "the woman whom a man takes for the breeding of legitimate children."[50] This explains why a man was asked if he was living with a woman *liberorum quaerendorum causa.*

"In Roman law," writes historian Susan Treggiari, marriage was "accompanied by precise legal results. Its purpose was clear and pragmatic: the production (and consequent rearing) of legitimate children."[51] Under the marital presumption of paternity, a Roman doctrine that was a later incorporated into English common law, a child born into a marriage was considered the husband's child.[52] Conversely, Roman law also held that a child born out of wedlock was *nullius filius*, and had no legal father.[53] Paternity was established only through marriage, as the Roman maxim *pater est quem nuptiae demonstrant*

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[46] *See* TREGGIARI, *supra* note 45, at 8 (noting that there was a "parallel Greek formula" for the Roman concept of *liberorum quaerendorum causa*); *id.* at 185 ("the Greek background is relevant to Roman ideas of the classical period on the nature of marriage. Greek ideas shaped the categories in which people automatically thought.").

[47] SUETONIUS, THE LIVES OF THE CAESARS 27 (Kessinger 2004).

[48] BERGER, *supra* note 45, at 563.

[49] TREGGIARI, *supra* note 45, at 8.

[50] *Id.*

[51] *Id.* at 13.

[52] *See* GDK v. Dept. of Family Servs., 92 P.3d 834, 836 (Wyo. 2004) ("The marital presumption was derived from Roman civil law and adopted as part of English common law." (citing Edward R. Armstrong, *Putative Fathers and the Presumption of Legitimacy-Adams and the Forbidden Fruit: Clashes Between the Presumption of Legitimacy and the Rights of Putative Fathers in Arkansas*, 25 U. ARK. LITTLE ROCK L.REV. 369, 373 (2003))).

[53] *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 553 (2000) ("From Ancient Roman law to the development of English common law, children born to unmarried parents were filius nullius, no one's son.").

indicates.[54] In addition, in Rome "a married woman committed adultery by having sexual relations with anyone other than her mate," while a husband "transgressed the law only if he carnally knew another man's wife."[55] Paternity establishment was considered a central function of marriage: to the Romans, "marriage made possible the link between father and child. The father could acknowledge the child as his own and undertake to rear it."[56]

C. MEDIEVAL SCHOLARSHIP

The paternity establishment theory was widely endorsed by medieval ecclesiastical philosophers, who adopted Aristotle's conception of marriage and expounded on it. During the Middle Ages, "all the commentators of Aristotle, from Thomas Aquinas to Albert of Saxony, from Oresme to Buridanus," along with Giles of Rome and Ptolemy of Lucca, "recognized that female fidelity was the only way to ensure the legitimacy of progeny and that a husband's control over his wife's body was the only means of ensuring paternity."[57] Their writings are an important link in the history of Anglo-American marriage because they help reveal the theoretical underpinnings of Church doctrine, which drew on Roman law and shaped marriage law in early medieval England.

Thomas Aquinas provided perhaps the most well-developed medieval articulation of the paternity establishment theory. "[I]n the case of animals among whom there is no concern on the part of the males for their offspring," he observed, "the male has promiscuous relations with several females and the female with plural males."[58] However, "in every species of animal in which the father has some concern for offspring, one male has only one female."[59] Because "the male in the human species has the greatest concern for offspring," a man "naturally desires to know his offspring."[60] A man's ability to identify his children "would be completely destroyed if there were several males for one female," and therefore, "that one female is for one male is a consequence of natural

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[54] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *446 ("'*Pater est quem nuptiae demonstrant*,' is the rule of the civil law."); Dominik Lasok, *Virginia Bastardy Laws: A Burdensome Heritage*, 9 WM. & MARY L. REV. 402, 405–6 (1967). The phrase has been translated, "the nuptials show who is the father." *Kowalski v. Wojtkowski*, 116 A.2d 6, 14 (N.J. 1955).

[55] Marvin M. Moore, *The Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1962).

[56] TREGGIARI, *supra* note 45, at 13.

[57] CHRISTIANE KLAPISCH-ZUBER ET AL., A HISTORY OF WOMEN IN THE WEST: SILENCES OF THE MIDDLE AGES 114 (1992).

[58] ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES Bk. III § 124.3 (Anton C. Pegis et al. trans., Hanover House 1957).

[59] *Id*.

[60] *Id*. at § 124.1.

instinct."[61] Aquinas reasoned that this natural instinct set the contours of the institution of marriage, stating that "[t]he reason why a wife is not allowed more than one husband at a time is because otherwise paternity would be uncertain."[62] He noted that, for this reason, "no law or human custom has permitted one woman to be a wife for several husbands,"[63] an observation that was confirmed centuries later by modern anthropologists.[64] Aquinas concluded that paternity establishment is central to the institution of marriage, going so far as to state that "certainty as to offspring is *the principal good* which is sought in matrimony."[65]

Similar concerns about paternity shaped Aquinas' contemporaries' views on marriage. One historian writes that Giles of Rome believed that a wife's most important duties to her husband were "modesty, chastity, and fidelity" because "nothing else could guarantee his legitimate paternity. All other feminine virtues were in some way related to this need for assurance."[66] Medieval scholars considered paternity establishment so crucial to marriage that Ptolemy of Lucca was skeptical that Socrates and Plato actually endorsed polisgamy. After noting that the care of offspring depends on parents' ability to identify their own children,[67] Ptolemy stated that the communal wives proposal was so absurd that "it does not seem credible that [Socrates and Plato] could advocate such a community as the one Aristotle seemingly imputes to them."[68]

D. ENGLISH LAW

The basis of English marital law was largely a continuum of the Greco-Roman-ecclesiastical concept of marriage. Church courts introduced into English law Roman legal doctrines concerning

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[61] *Id*.
[62] ST. THOMAS AQUINAS, *OF GOD AND HIS CREATURES* 288 (Joseph Rickaby trans., Carroll Press 1950).
[63] AQUINAS, *supra* note 58, at § 124.2.
[64] *See* Berghe & Barash, *infra* note 162, at 811 ("Polyandry . . . is extremely rare.").
[65] AQUINAS, *supra* note 58, at § 124.2.
[66] KLAPISCH-ZUBER ET AL., *supra* note 57, at 114.
[67] Ptolemy rejected Socrates' polisgamy idea by arguing that "[c]hildren . . . make [communal wives] impossible, since in the act of generation two seeds do not come together, but one alone, from the man." BARTHOLOMEW OF LUCCA ET AL., ON THE GOVERNMENT OF RULERS: DE REGIMINE PRINCIPUM 226–27 (James M. Blythe trans., U. of Penn. Press 1997). Pointing to monogamous species in nature such as birds, Ptolemy observed that "even animals know their own offspring for as long as is necessary to nourish their children, especially young birds before they can fly." *Id.*
[68] *Id*. at 226.

marriage.[69] Bracton, writing in the thirteenth century, stated that England recognized the marital presumption of paternity.[70] English common law also adopted the doctrine of *filius nullius*.[71] And like Rome, English common law defined adultery as "sexual relations between a married woman and a man not her husband, whether the man was married or single," a double-standard "explained by the fact that the common law was concerned with illicit intercourse only when it was calculated to adulterate the blood and expose a husband to the maintenance of another man's children and to the risk of their inheriting his property."[72]

This adaptation of Roman marital traditions would by itself show the importance of paternity establishment to the English concept of marriage. A centuries-long debate in England over informal marriages, however, throws the central role of paternity establishment concerns in English marriage law into even sharper relief.

The history of informal marriage in the Anglo tradition began with England's failure to adopt the Roman doctrine of *legitimatio per subsequens matrimonium*. Under Roman and canon law, if a child was born before his parents were married, the parents' subsequent marriage would legitimate the child.[73] The Church, whose marriage laws were heavily influenced by Roman tradition, managed to introduce many of its

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[69] Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 486–87 (1961) (stating that ecclesiastical courts "provided a direct channel for the infusion of . . . Roman concepts into English law and English institutions," and that they "possessed a vast jurisdiction over matrimonial matters," including marriage and legitimacy).

[70] 1 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 45 (Travers Twiss ed., 1878) ("[A] person is presumed to be a son from the very fact, that he is born of a wife, because marriage proves him to be a son, and this presumption will always hold good, until the contrary is proved."); *see also* KARL GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW: A CONTRIBUTION TO THE HISTORY OF THE ROMAN LAW IN THE MIDDLE AGES 130 (1866) ("The Roman presumption, *pater est quem nuptiæ demonstrant*, was valid in England, being thus expressed: 'legitimus filius est quem nuptiæ demonstrant,' or thus: 'nuptiæ probant filium esse.'").

[71] E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 10 (1992) ("Although Roman society recognized the right of existence of the out-of-wedlock child, Roman law nevertheless declared this child to be *filius nullius*—a child of no one—which precluded the child from asserting both support and succession rights. . . . The concept of *filius nullius* was carried over to the English common law." (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447)).

[72] Moore, *supra* note 55, at 219–20.

[73] GÜTERBOCK, *supra* note 70, at 127 (stating that the doctrine of *legitimatio per subsequens matrimonium* was sanctioned by the Church's own law and by Roman law); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 207 (1795).

marital principles into English law, such as the marital presumption of paternity and the doctrine of *filius nullius*.[74] It failed, however, in its attempt to establish the doctrine of *legitimatio per subsequens matrimonium*.[75] England's Special Bastardy Act of 1235 declared: "He is a Bastard that is born before the Marriage of his Parents,"[76] and made no provision for the legitimization of the child if his parents married after his birth.

The Special Bastardy Act posed a problem for the Church. Illegitimacy was a major concern for local parishes, as they did not wish illegitimate children to pose an economic burden. "A recurrent problem for most communities was to ensure a male provider for women and children."[77] Because ex-ante legitimacy was not recognized, the Church was left with few options when an illegitimate child was born.

To mitigate the consequences of the Special Bastardy Act and ensure that mothers and children had a male provider, the Church began recognizing "informal" marriages. In the late twelfth century, the English Church decided that a marriage promise—even one made privately—was sufficient to create a binding marriage.[78] This allowed local parishes, when confronted with pregnancies out of wedlock, to presume that the pregnant woman and the child's father had made a private marriage promise, and thus avoid labeling the child illegitimate.[79] Church courts and justices of the peace would uphold a pregnant woman's claim that she had been "'debauched under promise of marriage,' and if necessary compel the man in question to perform the presumed promise."[80] This enabled the Church to treat most sexual relationships resulting in pregnancies as "clandestine" marriages, which were still legally binding.[81] "[C]onsent to intercourse and consent to marriage were not separated analytically" by local Church courts, "and were perhaps deliberately blurred in some communities."[82] Though the Church's formally stated preference was for marriages solemnized in a church, it did not insist upon this because, if it refused to recognize "informal"

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[74] GÜTERBOCK, *supra* note 70, at 126 (stating that, "owing to the Church," Roman laws had an indirect effect on English inheritance laws, and that "the law concerning the legitimacy and the bastardy of children as bearing on their capacity to inherit, presents an example of the effects of Roman influence").
[75] *See id*. at 127; Lasok, *supra* note 54, at 406.
[76] 20 Hen. 3, c. 9 (1235).
[77] STEPHEN PARKER, INFORMAL MARRIAGE, COHABITATION AND THE LAW 9 (1990).
[78] *Id*. at 12.
[79] *Id*. at 19.
[80] Eve Tavor Bannet, *The Marriage Act of 1753: "A Most Cruel Law for the Fair Sex,"* 30 EIGHTEENTH-CENTURY S. 233, 234 (1997).
[81] *Id*.
[82] PARKER, *supra* note 77, at 19.

marriages, "sin would multiply at a stroke" and many children would be left without legal fathers.[83]

This informal system of marriage served the country well until the Industrial Revolution. Before that time, England was a "'face-to-face' society," consisting of many small, rural villages with relatively stable and immobile populations—the ideal environment for "informal" marriages to thrive.[84] In these small communities, the villagers would have a good idea of who the father of an unwed woman's baby was, and could pressure him to marry her. While not all pregnant women were eventually married to their lovers in traditional rural society, as with transient workers who impregnated young women and then moved on,[85] the retroactive attribution of informal marriage vows nevertheless mitigated the consequences of premarital sex and out-of-wedlock pregnancies.[86]

By the eighteenth century, however, the 500-year-old practice of informal marriage became more difficult to sustain with the increase in urbanization and geographical mobility brought on by the Industrial Revolution.[87] There were two potential consequences of out-of-wedlock

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[83] *Id.* at 12–13.

[84] *Id.* at 9.

[85] Belinda Meteyard, *Illegitimacy and Marriage in Eighteenth-Century England*, 10 J. INTERDISC. HIST. 479, 487 (1980).

[86] PARKER, *supra* note 77, at 19 (stating that practice of retroactively attributing a marriage promise when there was an unwed pregnancy meant that "[i]n effect for the peasant community there was very little premarital sex").

[87] Meteyard, *supra* note 85, at 488–89. One team of historians argues that informal marriages were not as successful in anonymous urban areas because the safeguards that facilitated informal marriage in rural communities did not exist in cities. Many young women came to cities for work and soon started looking for husbands, but without a family and close-knit village community to look after their interests, they were often impregnated and abandoned by their boyfriends. In the cities, "'seducers could pursue their ends more easily, because they did not fear an avenging father, often violent, ready to make them pay for the dishonor.'" Louise A. Tilly et al., *Women's Work and European Fertility Patterns*, 6 J. INTERDISC. HIST. 447, 466 (1976) [hereinafter *Women's Work II*]. Economic factors also played a role in the breakdown of marriage. As the English economy moved away from farming, many young men, especially those in "professions marked by unstable tenure, such as servants, traveling workers, or soldiers," were unable to provide the steady support that a fledgling family needed. *Id.* Even if a couple *did* intend for an informal relationship to be permanent, "sometimes the men moved on to search for work," or else "poverty created unbearable emotional stress," making relationships difficult to sustain. Louise A. Tilly et al., *Women's Work and European Fertility Patterns* 28 (Ctr. for Research on Soc. Org., Working Paper No. 95, 1974), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/50872/1/95.pdf [hereinafter *Women's Work I*]. Unable to support their "wives" and children, many men facing such obstacles simply gave up on the relationships and moved on. *Id.* at

pregnancies in this period. One consequence, which was more common in rural areas, was common law marriage.[88] The other involved the father's desertion of the pregnant woman, which in turn might lead to the woman becoming involved in a series of short-lived encounters in pursuit of another male provider, or even resorting to prostitution to support herself.[89] The latter outcome—abandonment and its negative side effects—appears to have increased in frequency in the eighteenth century.[90] A contemporary writer observed that single mothers were numerous, "bastardy rampant, and 'licentiousness' the rule rather than the exception."[91] Middle class observers were disturbed by the unstable side of informal relationships, and "especially by the increase in the numbers of abandoned pregnant women."[92]

The breakdown of informal marriage in England led to a robust eighteenth century debate about the ultimate objectives of marriage. During this period, the paternity establishment theory appeared in numerous works by several very influential authors, including John Locke,[93] Francis Hutcheson,[94] William Blackstone,[95] and the author of the influential tract *A Letter to the Public*.[96]

Locke's understanding of marriage might be of particular interest in a fundamental rights claim for same-sex marriage, considering that his writings provided the inspiration for the Due Process Clause.[97] Locke

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34. One historian writes that "[m]arriage failed to take place for many reasons," but "no major change in values or mentality was necessary to create these cases of illegitimacy." Tilly et al., *Women's Work II*, *supra*, at 466–67. In many cases, young people indulged in premarital sex with the expectation that the relationships would progress into marriage, but those expectations went unfulfilled in the new economic context. Tilly et al., *Women's Work I*, *supra*, at 34.

[88] Tilly et al., *Women's Work II*, *supra* note 87, at 465.

[89] *Id.*

[90] CHARLES MARSH, *A Letter to the Public: Containing the Substance of What Hath been Offered in the Late Debates upon the Subject of the Act of Parliament for the Better Preventing of Clandestine Marriages*, *in* THE MARRIAGE ACT OF 1753: FOUR TRACTS 25 (1984) (stating that failed relationships "have happened very frequently of late Years, to the Ruin of a Multitude").

[91] EVE TAVOR BANNET, THE DOMESTIC REVOLUTION: ENLIGHTENMENT FEMINISMS AND THE NOVEL 99 (2000).

[92] Tilly et al., *Women's Work II*, *supra* note 87, at 465.

[93] *See infra* notes 98–100 and accompanying text.

[94] *See infra* notes 102–104 and accompanying text.

[95] *See infra* notes 106–107 and accompanying text.

[96] *See infra* notes 113–122 and accompanying text.

[97] *See, e.g.*, Michael Hoggan, *Settled Expectations and the Takings Clause: Property and Law Are Born and Must Die Together*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 379 (1996) ("John Locke's theory of natural law clearly influenced the framers of the Constitution when they wrote that no

maintained that humans entered into long-term, monogamous relationships because human infants required more parental care than the mother alone could provide.[98] He supported this argument with a long discussion of pair-bonding in animal species, observing that long-term relationships were found only in those animal species whose infants were so vulnerable that they required support from the father as well as the mother, such as birds.[99] Locke concluded that marriage was necessary for men and women to raise children successfully, as it assured that "their interests [would be] better united, to make provision and lay up goods for their common issue." He added that "*uncertain mixture* . . . would mightily disturb" this end.[100]

Frances Hutcheson was the prominent figure in the Scottish Enlightenment and "was probably the most influential and respected

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person shall 'be deprived of life, liberty, or property, without Due Process of law.'"); Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990) ("Modern substantive due process analysis and the privacy rights it purportedly protects reflect a liberal tradition whose backbone is a natural rights philosophy most persuasively articulated by John Locke."); Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. BALT. INTELL. PROP. L.J. 75, 83 n.38 (2002) (stating that the Fourteenth Amendment "embodied John Locke's natural-law theory"); Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 146 n.240 (1999) ("The intellectual source of the constitutional Due Process doctrine is found in the philosophy of John Locke."); Eric E. Walker, *State Action and Punitive Damages: A New Twist on an Old Doctrine*, 38 CONN. L. REV. 833, 837 (2006) ("The guarantees embodied in the Fourteenth Amendment, and in the Constitution generally, find their foundation in the natural rights philosophy of John Locke.").

[98] JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 134 (Ian Shapiro ed., 2003) (1690) ("[H]erein I think lies the chief, if not the only reason, 'why the male and female in mankind are tied to a longer conjunction' than other creatures, viz. because the female is capable of conceiving, and de facto is commonly with child again, and brings forth a new birth, long before the former is out of a dependency for support on his parents' help, and able to shift for himself, and has all the assistance that is due to him from his parents: whereby the father, who is bound to take care for those he hath begot, is under an obligation to continue in conjugal society with the same woman . . . .").

[99] *Id.* at 133–4 ("In those viviparous animals which feed on grass, the conjunction between male and female lasts no longer than the very act of copulation; because the teat of the dam being sufficient to nourish the young, till it be able to feed on grass, the male only begets, but concerns not himself for the female or young, to whose sustenance he can contribute nothing. . . . [But in birds,] whose young needing food in the nest, the cock and hen continue mates, till the young are able to use their wing, and provide for themselves.").

[100] *Id.* at 134.

moral philosopher in eighteenth-century America."[101] Sometime before his death in 1746, Hutcheson turned his attention to marriage in *A System of Moral Philosophy*. In that treatise, he identified paternity identification as the most important function of marriage:

> The *first and most necessary article* is that the fathers should have their offspring ascertained, and therefore the woman who professes to bear children to any man must give the strongest assurances that she will not at the same time cohabit with other men. . . . In the marriage-contract therefore *this is the first article*.[102]

To prove this point, Hutcheson presented a picture of what the world would have looked like without marriage. "[U]nlimited indulgences in promiscuous fornication," he argued, "would have this effect, that the fathers would generally be uncertain about their own offspring, and have no other incitement to any cares about them than the general tye of humanity, which we know is not sufficient."[103] Hutcheson endorsed the idea that men would not care for children without the assurance of their biological paternity, which could only be achieved through *ex ante* marriage.

In the context of the debate about informal marriage, Hutcheson suggested that men could be prevented from abandoning their wives and children by ending the practice of informal marriage and forcing couples to acknowledge publicly that they were married. "[M]arriages should be publickly known," he argued, so "that no married persons may deny them."[104]

William Blackstone's *Commentaries on the Laws of England*, "arguably the single most influential work of jurisprudence in American history,"[105] also posited that paternity establishment was the primary purpose of marriage. In the chapter on parent-child relationships, Blackstone made this point twice. First, after noting that the Roman rule "*pater est quem nuptiae demonstrant* ['the nuptials show who is the father']" was the law in England, he cited Montesquieu to assert that

> the establishment of marriage in all civilized states

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[101] NORMAN FIERING, MORAL PHILOSOPHY AT SEVENTEENTH-CENTURY HARVARD 199 (Univ. of North Carolina Press 1981).
[102] 2 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY, IN THREE BOOKS 156 (Glasgow, R. & A. Foulis 1755) (emphasis added).
[103] *Id*. at 154.
[104] *Id.* at 169.
[105] William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J.L. & RELIGION 255, 255 (2007).

> is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way.[106]

A few paragraphs later, he noted that there was generally "very great uncertainty" in proving the paternity of a child, and so "[t]he main end and design of marriage [was] . . . to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong."[107]

While the scholars were delving into the ultimate purpose of marriage, Lord Hardwicke proposed the Marriage Act of 1753.[108] This legislation required that a relationship be formally and publicly declared a "marriage" in order to gain state recognition. The Act required couples either to have their impending nuptials announced by "banns" and celebrated formally in a church, or else to obtain a marriage license.[109] It declared that any marital contract that did not follow these provisions would be null and void.[110] The Act also included various provisions to ensure the accurate recognition and recording of marriages, such as a requirement that local parishes keep marriage records on "good and durable Paper" and that witnesses be present at the ceremony.[111]

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[106] 1 BLACKSTONE, *supra* note 54, at *447.

[107] *Id.* at *455. One contemporary author argues that "one might reject Blackstone's view that marriage was an institution designed primarily to protect children and instead argue that marriage was an institution designed primarily to facilitate the orderly distribution of property." Katharine K. Baker, *Bargaining Or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 24–25 (2004). She points out that "[i]t is far easier for a probate court to identify the children of an intestate's marriage than all the children whom the intestate may have begotten." *Id.* But whether marriage's purpose is to identify fathers in order to assure that they care for their offspring or to make the probate courts' task of distributing deceased men's property easier, Blackstone's ultimate premise—that the establishment of paternity is the state's central concern—remains the same.

[108] An Act for the Better Preventing of Clandestine Marriage, 1753, 26 Geo. 2, c. 33 (Eng.).

[109] *Id.* "Banns" are public announcements in a church of an intended marriage, designed to provide an opportunity for any objections to be raised based on known impediments to the union (thus preventing invalid marriages). OED ONLINE, http://www.oed.com/viewdictionaryentry/Entry/15296 (last visited Nov. 15, 2011).

[110] 26 Geo. 2, c. 33.

[111] *Id.*

One of the goals of the Marriage Act was to deter people from cohabitating by ending state recognition of informal marriage. Due to the collapse of the structures that made informal marriage workable, "[b]efore the Act came into force in 1754 the public had been left in a state of considerable and reasonable confusion about the state of the law concerning marriage."[112] From 1754 onward, however, "the law was absolutely clear" that only formally and publically celebrated, registered marriages would be considered valid.[113] Any relationship that did not conform to the requirements for recognition set out in the Act "made a woman a whore and her children bastards and meant that she was no longer entitled to any maintenance or financial support from the father of her children."[114] The hope was that, by putting women on notice that the law would not protect them unless they were married in the way defined by the statute, they would have a strong incentive to insist upon a formal, legally recognized marriage before engaging in sexual activity.

Another objective was to help the state keep track of husbands and fathers through the requirements that marriages be public affairs, and that the local parishes keep a marriage register. By forcing marriages out into the open, the Act would make it more difficult for men to avoid their responsibilities to their children. Historian Eve Tavor Bannet compares the Act's requirement of marriage recordkeeping to copyright law, which was implemented in England shortly before:

> as copyright ensured that texts could be attached and attributed to their authors, the marriage register ensured that women could be attached and attributed to a husband, and their children to a father, who was in the language of the time, "the Author" of a child's "Being.". . . [T]he register ensured that men could be held responsible for the support of their wives and for the maintenance and education of their children."[115]

The only surviving published tract presenting an argument for the Marriage Act is *A Letter to the Public: Containing the Substance of what hath been offered in the late Debates upon the Subject of the Act of Parliament For the better preventing of Clandestine Marriages*.[116] The tract's arguments in support of the law relied heavily on the paternal identification theory.

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[112] LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500–1800 37 (1977).
[113] *Id*.
[114] BANNET, *supra* note 91, at 96.
[115] *Id*.
[116] R.B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500–1850, at 101 (1995).

First, the *Letter* asserted that marriage's requirement of mutual fidelity was designed to assure a man of his paternity of children born to his wife: "[t]he Engagement of mutual Constancy . . . as to the Woman's Part . . . [is] meant to be a Security to the Man, that her Children are his Offspring, by which Means the Father becomes interested with the Mother in a joint Care of their Issue."[117] The *Letter* argued that marriage's conduciveness to the care of children "must be understood to be one of the great political Ends of public Wisdom in the Institution of Marriage."[118]

Furthermore, it asserted that the practice of informal marriage and its attendant instability created the sort of promiscuous environment that would undermine the institution of formal marriage. Clandestine marriages, it argued, facilitated casual sexual encounters.[119] Such a marriage contract "might be legally negotiated in a Tavern, or private House between the two Parties concerned, without the Presence of a Clergyman, or any other third Person," only to end in a one-night stand.[120] The author asked, "[w]hat can Marriages so contracted end in, according to the natural Course of Things, but Separation of the Parties, whereby the whole public Purpose that can be served by a Marriage-Contract is in their Case defeated?"[121] One consequence of these brief marriages was that many women fell into a pattern of subsequent "short-lived encounters."[122] *A Letter to the Public* identified this type of relationship volatility as a cause of paternal abandonment. "[T]he real father," asserted the author, "being uncertain whether he is so or not, and likewise unconcerned in the Fate of the Woman, will not be prompted by any natural Motive, either to assist towards her Support, or the Care of her Offspring."[123]

A Letter to the Public suggested that the Marriage Act would reduce instances of abandonment and illegitimacy by creating proof of marriages. It noted that with informal marriage, "Any Person who doth not regard the Honesty of observing a Contract, might readily enter into all the Marriage Covenants, without the least design of keeping any one of them, except that which relates to carnal Knowledge," and after a short affair, the man "might disclaim the Contract with little Risk of being disprov'd; and thus innocent Women would be daily deluded and abandoned to Infamy and Want, beyond a Possibility of Redress."[124] The *Letter* argued that "Fraud and Surprize ought to be guarded against, as

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[117] MARSH, *supra* note 90, at 21.
[118] *Id*.
[119] *Id*. at 23–24.
[120] *Id*. at 23.
[121] *Id*. at 25.
[122] Tilly et al., *Women's Work II*, *supra* note 87, at 465.
[123] MARSH, *supra* note 90, at 21.
[124] *Id*. at 23.

destructive to the political Ends proposed by this Institution: And therefore the Solemnization of Matrimony ought to be open, public, and subject to Notoriety."[125] It concluded that the Marriage Act's new publicity measures would accomplish this goal, because its requirements for the public celebration of marriages and the keeping of records would "together compose a very good System to make Marriages notorious."[126]

The paternity establishment theory remained current in England into the twentieth century. In his book *Marriage and Morals*, philosopher Bertrand Russell writes that "[c]onstancy or quasi-constancy in sex relations arises among animals, as well as among human beings, where, for the preservation of the species, the participation of the male is necessary for the rearing of the young."[127] Russell also states that paternity concerns have shaped the "monogamic patriarchal family" for millennia in the West: "[t]he primary motive of sexual ethics as they have existed in Western civilisation since pre-Christian times has been to secure that degree of female virtue without which the patriarchal family becomes impossible, since paternity is uncertain."[128] And as late as 1951, the Royal Anthropological Institute of Great Britain defined marriage as "a union between a man and a woman such that children born to the woman are the recognized legitimate offspring of both partners."[129]

E. AMERICAN LAW

Across the Atlantic, American common law incorporated the marital presumption of paternity[130] and the doctrine of *nullius filius*.[131] Some states adopted the English double-standard concerning adultery

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[125] *Id*.
[126] *Id*. at 26.
[127] BERTRAND RUSSELL, MARRIAGE AND MORALS 8–9 (W. W. Norton & Co. 1970).
[128] *Id.* at 7–8.
[129] ROYAL ANTHROPOLOGICAL INST. OF GREAT BRITAIN AND IRELAND, NOTES AND QUERIES ON ANTHROPOLOGY 110 (1951).
[130] *See* R.R.K. v. S.G.P., 507 N.E.2d 736, 739 (Mass. 1987) ("The presumption that a child born in wedlock is legitimate is one of great antiquity. Several courts have noted that it was a maxim of the Roman law which the common law copied." (citing Estate of Cornelious, 35 Cal.3d 461, 464 (1984), Hall v. Taylor, 466 U.S. 967 (1984), and Kennedy v. State, 173 S.W. 842 (Ark. 1915))).

[131] *See* JAMES KENT, COMMENTARIES ON AMERICAN LAW 212 (Little, Brown 1901) ("A bastard [is], in the eye of our law, *nullius filius*, or as the civil law, from the difficulty of ascertaining the father, equally concluded, *patrem habere non intelliguntur*."); Jaffe v. Deckard 261 S.W. 390 (Tex. Civ. App. 1924) (stating that the mother of an illegitimate child was held responsible for the child's care but the father was not, and that "[t]he reason for the rule that the putative father could not be made to support his bastard child was the uncertainty of its paternity. No such reason could exist as to its maternity.").

punishment.[132] Even the English debate over informal marriage carried over into American courts.

Just as in medieval England, the desire to provide every child with a legal father was the chief motivation for American courts' recognition of informal marriages. In 1912, the Ohio Supreme Court noted that "there is always a stratum of society that prefers to shun or disregard legal ceremonies and adopt a coarser and less conspicuous way of forming domestic ties," and justified the recognition of informal marriage by stating, "[i]t is the innocent offspring of such citizens that the law [of informal marriage] would mercifully protect," allowing courts to avoid labeling the children "bastards."[133]

One judge complained that courts' desire to legitimize children whenever possible led to arbitrary standards concerning informal marriage. He observed that "facts [were] tortured to allow a common-law marriage" when the legitimization of children was at stake.[134] "However sound the motivation," the judge continued, "a fact situation cannot be twisted to establish a common-law marriage where there are children of that marriage, but to condemn a relationship as meretricious when there is no offspring of that union."[135]

Also, just as the English critics of informal marriage did in the mid-18th century, American courts cited paternity establishment concerns in policy arguments against the practice. These courts feared that state recognition of uncelebrated marriages would open the door to "the imposition upon estates of suppositious heirs."[136] Because claims about the existence of informal marriages presented a "fruitful source" of paternity fraud by false heirs, courts "closely scrutinized" claims of common law marriage—even going so far as to view such claims "with hostility."[137]

In the late 1960s and early 1970s, the Supreme Court issued a series of decisions under the Equal Protection Clause that gave illegitimate children many of the same rights as children born to married parents,[138]

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[132] Moore, *supra* note 55, at 220 (citing State v. Lash, 16 N.J.L. 380, 387 (N.J. Sup. Ct. 1838) (explaining that the reason for "the heinousness [of adultery] consists in exposing an innocent husband to maintain another man's children, and to having them succeed to his inheritance")).

[133] Umbenhower v. Labus, 97 N.E. 832, 834 (Ohio 1912).

[134] *In re* Soeder's Estate, 209 N.E.2d 175, 177 (Ohio Prob. Ct. 1965).

[135] *Id*.

[136] Duncan v. Duncan, 10 Ohio St. 181, 188 (1859).

[137] Staudenmayer v. Staudenmayer, 552 Pa. 253, 261–62 (1998).

[138] *See* Trimble v. Gordon, 430 U.S. 762 (1977) (holding that a statutory disinheritance of illegitimate children whose fathers die intestate was unconstitutional); Gomez v. Perez, 409 U.S. 535 (1973) (holding that a state cannot not give legitimate children a judicially enforceable right to support from

effectively ending the doctrine of *filius nullius*.[139] In *Gomez v. Perez*, while stating that the "lurking problems with respect to proof of paternity" could not be "lightly brushed aside," the Court held that states could not give legitimate children a judicially enforceable right to support from their biological fathers but deny that right to illegitimate children.[140] Similarly, in *Trimble v. Gordon*, the Court held that laws barring illegitimate children from inheriting their father's estate violated the Equal Protection Clause. Again expressing "sensitivity" to the difficulty of proving paternity, the Court concluded that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[141] These decisions largely eliminated the paternity establishment concerns that had previously motivated courts to recognize informal marriages. Indeed, the rulings led the Commonwealth Court of Pennsylvania to conclude in 2003 that the circumstances creating a need for informal marriage are not present in today's society, as the right to obtain child support from a father is no longer dependent upon his marital status, and legitimacy status no longer determines the inheritance rights of children.[142]

Though informal marriage and the doctrine of *nullius filius* are obsolete, the marital presumption of paternity still stands. The Supreme Court has recognized it as "a fundamental principle of the common law,"[143] and it has even been codified in many states through their adoption of the Uniform Parentage Act.[144]

Even though, after *Gomez*, states can compel paternal support of children born out of wedlock, state governments continue to have an

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their biological fathers but deny that right to illegitimate children); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (holding that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent); Levy v. Louisiana, 391 U.S. 68 (1968) (holding that under the Equal Protection Clause of the Fourteenth Amendment a state may not create a right of action in favor of children for the wrongful death of a parent but deny illegitimate children such a right).

[139] Coincidentally or not, these decisions came down soon after President Johnson's Great Society initiatives vastly expanded government entitlement programs for poor mothers and children, giving the federal government a greater interest in securing paternal support for children born out of wedlock.

[140] *Gomez*, 409 U.S. at 538.

[141] *Trimble*, 430 U.S. at 772.

[142] PNC Bank Corp. v. Workers' Comp. Appeals Bd. (Stamos), 831 A.2d 1269, 1279 (Pa. Commw. Ct. 2003).

[143] Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

[144] *See Uniform Matrimonial and Family Laws Locator*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/uniform/vol9.html#paren (last visited Nov. 15, 2011).

interest in establishing paternity by default through marriage. In light of how difficult and expensive it can be to track down unwed fathers and establish their paternity through litigation, the marital presumption of paternity is very convenient for the state. Without it, state attorneys would generally have to file more lawsuits to establish paternity and obtain child support judgments. Presuming a woman's husband to be the father of her children saves states an enormous amount of hassle and expense, as "[p]rocedure by presumption is always cheaper and easier than individualized determination."[145]

Texas, for example, leads the nation in state-brought paternity suits, "test[ing] nearly 160,000 potential dads" from 2000 to 2008.[146] In 2004 alone, Texas established legal paternity for almost 60,000 children through litigation.[147] Although this effort already constitutes an enormous undertaking, the state's burden would be much heavier were it not for the marital presumption of paternity. In 2003, for example, of the 377,000 live births in Texas, approximately a quarter-million children were born to married women.[148] Paternity is efficiently established through the marital presumption for those children, making marriage a major benefit to the state.

F. MODERN EVOLUTIONARY THEORY

The latest support for the paternity establishment theory of marriage comes from modern science. Evolutionary theorists have developed a narrative explanation of monogamy that, in its overall conclusions, is remarkably consistent with the writings of Aristotle, Aquinas, Locke, Hutchison, Blackstone, and other historical proponents of the paternity establishment theory.

Some modern evolutionary theorists argue that the origins of monogamy are traceable back to the African savanna, when prehistoric humans took their first steps upright. When early humans began walking upright, their bodies, and especially their hips, became more slender to accommodate this new practice.[149] Unfortunately, the bipedal-suited

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[145] Munonyedi Ugbode, *Who's Your Daddy?: Why the Presumption of Legitimacy Should Be Abandoned in Vermont*, 34 VT. L. REV. 683 (2010).

[146] Sarah Viren, *Texas Tracks Down Dads*, Houston Chron., Jan. 15, 2008, *available at* http://www.chron.com/disp/story.mpl/metropolitan/5454588.html.

[147] Tex. Att'y Gen. Greg Abbott, *Building Strong Families to Build a Stronger Texas*, May 2005, *available at* https://www.oag.state.tx.us/agency/weeklyag/weekly_columns_view.php?id=169.

[148] *See* TEX. DEP'T OF STATE HEALTH SERVS., 2003 NATALITY, http://www.dshs.state.tx.us/chs/vstat/vs03/nnatal.shtm (last updated May 7, 2010) ("Overall, 65.6 percent of mothers reported being married." 377,374 live births multiplied by .656 equals 245,293 live births to married women.).

[149] *See, e.g.*, John L. Locke, *Language and Life History: A New Perspective on the Development and Evolution of Human Language*, 29 BEHAV. & BRAIN SCI.

skeletal structure was not optimal for pregnancy. This tension between the demands of bipedalism and childbearing is known as the "obstetrical dilemma."[150] "[T]he wider maternal pelvis that could enable more prenatal brain growth (and hence the birth of a bigger-brained baby) simply isn't feasible, because of the competing demands of bipedalism on a woman's skeleton."[151] As a result, "[t]o be born, rather than snagged in the birth canal, a big-brained hominin baby has to be born with a smaller head than expected."[152] This means that for humans, "a larger proportion of brain growth compared with, say, that of a chimpanzee baby must be postponed until after birth. The consequence is that human babies are born more helpless."[153] These vulnerable children "command more care, even require more care, than a mother alone can provide."[154]

Because of the unique needs of human newborns, "[w]e number among the small fraction of mammalian species in which males play important roles in raising offspring."[155] When it comes to paternal investment, in most species, males contribute little more than sperm. For human males, however, "[f]ollowing the generic male sexual strategy—roaming around, seducing and abandoning everything in sight—won't do a male's genes much good if the resulting offspring gets eaten."[156] Due to the unusually long time that humans take to mature and their consequent need for care and protection during infancy, a baby "seriously compromise[d] a mother's food gathering" in prehistoric times; this placed both the mother and her child in a very vulnerable position.[157] It thus became a better evolutionary strategy for the human male to stick around in order to help raise and protect his offspring, rather than mate

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259, 261 (2006) (stating that bipedalism "realigned the spine and narrowed the pelvis").

[150] *See id.* ("An important factor in the evolution of human infancy was bipedalism, which realigned the spine and narrowed the pelvis. This change created an unfavorable ratio between the smaller maternal birth canal and the large fetal head – the brain of modern human neonates is larger than the brains of other primates, even though it achieves a smaller percentage of its total growth at birth – and this produced what Washburn called an 'obstetrical dilemma.' This dilemma was eased when some amount of skull and brain growth – and motor development – were adaptively deferred into the postnatal period, increasing infant dependency and the need of postnatal care.").

[151] PETER B. GRAY & KERMYT G. ANDERSON, FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR 20 (2010).

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* at 30.

[156] *Id.*

[157] ROBERT WRIGHT, THE MORAL ANIMAL 57 (1994). Wright goes on to describe prehistoric children as basically helpless, fleshy mounds of "tiger bait." *Id.* at 58.

with as many women as possible and hope that at least a few of the resulting children would somehow survive to adulthood.

Natural selection, however, is strongly biased against males who invest precious time and resources in children that are not theirs. "Not long for this world," notes Wright, "are the genes of a man who spends his time rearing children who aren't his."[158] A mother, of course, knew beyond a doubt that the infant she gave birth to was her biological child, and thus had no reason to second-guess her investments in raising the child. By contrast, males lacked this built-in paternity verification, and therefore had less of a natural incentive to invest in someone else's offspring.

Some anthropologists have found that a male primate "will protect an infant, and be closely associated with it if, on average, the likelihood of paternity is high enough to outweigh the costs" of rearing the child.[159] "Hence, in order to gain this protection . . . a female needs to provide the male with a high enough probability of paternity to make it selectively advantageous for the male."[160] In a species with high male parental investment, such as with humans, "adaptations should evolve to help guarantee that the female's offspring are also [the investing male's] own."[161]

Female monogamy—which is arguably the defining characteristic of marriage across most cultures[162]—is such an adaptation. A woman limited herself to having sex exclusively with one man, thereby assuring his paternity; in return, the man shared the responsibilities of child rearing.[163] The father's investment improved the child's chances of survival, making female monogamy an evolutionarily-favored strategy.[164]

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[158] *Id.* at 66.

[159] CAREL P. VAN SCHAIK, INFANTICIDE BY MALES AND ITS IMPLICATIONS 362 (2000).

[160] *Id*.

[161] WRIGHT, *supra* note 157, at 65.

[162] *See, e.g.*, Pierre L. van den Berghe & David P. Barash, *Inclusive Fitness and Human Family Structure*, 79 AM. ANTHROPOLOGIST 809, 811 (1977) ("Polyandry . . . is extremely rare.").

[163] IAN TATTERSALL, BECOMING HUMAN 120 (1998).

[164] For further discussion of how monogamy is an evolutionarily-favored strategy based on kin selection, see HANS KUMMER, IN QUEST OF THE SACRED BABOON: A SCIENTIST'S JOURNEY 159–61 (1997) ("Kin selection really is not the selection of kin, but the selection of genes that program for supporting one's kin. A prerequisite for kin selection is that the helper be able to distinguish his relatives from other conspecifics. Mammals, having developed internal fertilization with all its consequences, have had only one way to evolve a system in which a male cares for his partner's young: he must prevent his partner from

Social scientists have pointed to paternal identification concerns as an explanation for why there are many examples of polygynous marriages (one husband and multiple wives) throughout history but few examples of polyandrous marriages (one wife and multiple husbands),[165] since the biological father can be easily identified in a polygynous marriage but not a polyandrous marriage. Consistent with the paternity establishment theory's premise that males only wish to invest in children who share their genes, anthropologists have also found that the most frequent form of human polyandry is *fraternal* polyandry, in which multiple brothers share one wife. They explain this startling finding by noting that "in the few cases of polyandrous mating in humans, kin selection theory would lead one to expect that if several men shared a wife and contributed to the fitness of her offspring, they would want to maximize the probability of the children sharing genes with them," and "that probability would be maximized in the case of fraternal polyandry."[166]

Taking together the work of evolutionary biologists, philosophers, jurists, and historians, it is plain that paternity establishment is a central function of marriage. Marriage has established paternity as a practical matter since prehistoric times, and as a matter of law for some two thousand years. The historical record leaves no question that paternity establishment has long been, and continues to be, a core function of marriage.

IV. PATERNITY ESTABLISHMENT THEORY AND SAME-SEX MARRIAGE CONSTITUTIONAL CLAIMS

This Part addresses the potential ramifications of the paternity establishment theory for due process and equal protection claims in same-sex marriage cases. The history of the relationship between paternity and marriage presented in Part III undermines the argument that same-sex marriage is a fundamental right and that states have no

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mating with another male. . . . Under these conditions, the child she bears must be his genetically, so that it is worthwhile for him to act as its father socially.").

[165] *See, e.g.*, Berghe & Barash, *supra* note 162, at 811 ("Some three-fourths of all human societies permit polygyny, and most of them prefer it. Monogamous societies often have been polygynous in a more or less recent past, and typically their monogamy is a legal fiction. . . . Polyandry, on the other hand, is extremely rare."). Consistent with the hypothesis that males are only interested in investing in children who share their genes, Berghe and Barash found that the most frequent form of human polyandry was *fraternal* polyandry, in which multiple brothers share one wife. *Id*. at 812 ("In the few cases of polyandrous mating in humans, kin selection theory would lead one to expect that if several men shared a wife and contributed to the fitness of her offspring, they would want to maximize the probability of the children sharing genes with them. This probability would be maximized in the case of fraternal polyandry.").

[166] *Id*. at 812.

rational justification for limiting marriage to a man and a woman. This point is made clearer by examining the opinion in the recent federal same-sex marriage case *Perry v. Schwarzenegger*, and considering how the paternity establishment theory could have affected the outcome.

Perry concerned a challenge under the Fourteenth Amendment to a California constitutional amendment—popularly known as "Prop 8"—limiting marriage to opposite-sex couples.[167] The Prop 8 defense counsel argued that "the right of a man and woman to marry grows out of and is inextricably tied to the traditional procreative purposes animating that institution."[168] The "traditional procreative purposes" that "animate" marriage rest in society's "interest in encouraging the opposite-sex couple, if and when they decide to have sexual relations, to marry and to commit themselves to take responsibility for raising any children produced by their union, whether intentionally or *unintentionally*, into responsible, productive citizens."[169] In other words, the Court claimed that marriage promotes responsible parenting by eliciting a pledge of long-term commitment from the parents; if an opposite-sex couple promised to stay together for the long-term through marriage, they argued, the relationship would be more stable and form a better environment for child-rearing.[170] The Prop 8 defense's description of marriage was similar to that utilized against other same-sex marriage claims, which has a track record of failure.[171] In this case, it failed to

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[167] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

[168] Defendant's Memorandum in Support of Summary Judgment at 23–24, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 172-1).

[169] *Id*. at 6.

[170] *See id.* at 61–62 (arguing that men and women who "communicate to each other and to the larger community their intent to strive for fidelity, loyalty, and permanence" will "take on the life-altering status of parents" more willingly than a couple who has not verbalized such intentions); *id.* at 66 (citing the New York Court of Appeals' characterization of "marriage and its attendant benefits" as an "inducement" that the government offers to opposite-sex couples who "make a solemn, long-term commitment to each other").

[171] *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 883–84 (Iowa 2009) (holding that, "for purposes of Iowa's marriage laws, which are designed to *bring a sense of order to the legal relationships of committed couples* and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation") (emphasis added); *In re* Marriage Cases, 183 P.3d 384, 430–32 (Cal. 2008) (defense argument that the "purpose underlying marriage [is] to channel procreation into a stable family relationship" failed to prevent the court from finding that opposite-sex marriage law violated due process and equal protection); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 478 (Conn. 2008) (noting that the claim that "prohibiting same sex couples from marrying promotes responsible heterosexual procreation" is a reason "often relied on by states in defending statutory provisions barring same sex marriage against claims that those provisions do not pass even rational basis review"); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (holding

persuade the court, which held that Prop 8 violated the Due Process and Equal Protection Clauses of the U.S. Constitution.

The paternity establishment theory provides a stronger argument than the one put forth by the Prop 8 defense. While it ultimately reaches the same general conclusions about the purpose of marriage, the paternity establishment theory provides a much deeper explanation of the dynamics that promote care by biological parents. It also offers better historical support and a more convincing justification for laws limiting marriage to opposite-sex couples. Each of these advantages is examined in turn below.

A. PATERNITY ESTABLISHMENT AS A RATIONAL BASIS FOR LIMITING MARRIAGE TO A MAN AND A WOMAN

The paternity establishment narrative provides the rational basis for opposite-sex marriage laws that has often proved elusive for traditional marriage advocates. In fact, it provides the state with a double justification for recognizing only opposite-sex marriages. First, by drawing a clear link between marriage and care by biological parents, it shows that the state has an interest in recognizing opposite-sex marriages that does not apply to same-sex marriages. Second, by demonstrating that same-sex marriage is incompatible with the marital presumption of paternity, it shows that the state has a valid reason for refusing to recognize same-sex marriage.

Many defenders of opposite-sex marriage laws, including the Prop 8 defense, have attempted to draw a connection between marriage and care by a child's biological parents, as biological parents must be of different sexes. They have argued that marriage facilitates the cooperation of biological parents in raising their children together in a way that would *not* also facilitate the cooperation of non-biological (including same-sex) parents. The Prop 8 defense, however, gave a weak explanation for exactly *how* marriage advances that objective. Their argument—that the promise of long-term commitment, through marriage, creates a stable environment for raising children—does not demonstrate that marriage is an inherently heterosexual institution. While it may indeed be better for children to be raised by parents who have pledged commitment to each other, the same can be said for children and their (potentially same-sex) adoptive, foster, or step-parents.[172] The Prop 8 defense tried to address

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that an opposite-sex marriage law was not justified by state's interest in providing favorable setting for procreation).

[172] The *Perry* court, for example, countered the argument by pointing out that "by increasing the number of married couples who might be interested in adoption and foster care, same-sex marriage might well lead to fewer children growing up in state institutions and more children growing up in loving adoptive and foster families." 704 F. Supp. 2d at 950.

this weakness by claiming that opposite-sex marriage seeks only to ensure that "unintentional" procreation, as opposed to adoption or planned procreation, occurs within a committed relationship.[173] This explanation failed to persuade the *Perry* court, which found it to be an unnecessarily restrictive makeweight argument.[174]

The paternity establishment theory, however, does tie the marriage promise to procreation. The "consideration" for a marriage contract is consideration that only natural parents can offer to each other. A woman's ability to assure a man of his *biological* parentage is what keeps the man invested in her children; as Aristotle said, "knowing it is their own" is what "principally inspire[s] mankind with care and love of their offspring."[175] In exchange for a man's promised long-term investment in her children, a woman promises her fidelity to the man to assure him of his paternity of the children. According to the paternity establishment theory, this is the essence of the marital bargain, and it is a bargain that only opposite-sex couples can make.

The government's treatment of marriage is grounded in its recognition of this reproductive strategy. The law presumes that a wife is faithful to her husband, and it holds her husband responsible for the support of children born into the marriage. The state has a reason for recognizing the existence of these opposite-sex relationships, which does not extend to same-sex relationships because they do not contain the same dynamics.

Paternity establishment theory not only highlights an area where same-sex and opposite-sex couples are not "similarly-situated" with regard to marriage, but also provides the state with a justification for *refusing* to recognize same-sex marriage. The Prop 8 defense had trouble coming up with a reason the state might have for excluding same-sex

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[173] Defendant's Memorandum, *supra* note 168, at 6 (No. 172-1) ("Opposite-sex couples pose a unique challenge to society in this respect [committed parentage], for they alone have the capacity to produce children *unintentionally*."); *id.* at 66 (citing Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) ("[Same-sex] couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.")).

[174] *Perry*, 704 F. Supp. 2d at 931 (characterizing the defense's argument that marriage promotes stability in relationships that may "unintentionally" produce children as a secular front argument, masking the defendants' ulterior belief in the "moral superiority of opposite-sex couples").

[175] ARISTOTLE, *supra* note 42, at 32.

couples from eligibility for marriage. When pressed by the court to "identify a difference between heterosexuals and homosexuals that the government might fairly need to take into account" when determining marriage eligibility, the Prop 8 defense noted that opposite-sex couples can procreate while same-sex couples cannot, but could not "advance any reason why the government may use sexual orientation as a proxy for fertility or why the government may need to take into account fertility when legislating."[176] When the defense asserted that "the state's interest in marriage is procreative," the court asked how permitting same-sex marriage "impairs or adversely affects that interest," and the defense counsel replied: "Your honor, my answer is: I don't know. I don't know."[177] Due to this lack of evidence, the *Perry* court found that "Proposition 8 has nothing to do with children," and "Proposition 8 does not affect who can or should become a parent under California law."[178] It concluded that there were no "real and undeniable differences" between same-sex and opposite-sex couples that the government might need to take into account in legislating marriage, and thus Prop 8 violated the Equal Protection Clause.[179]

The paternity establishment theory, however, shows that laws like Prop 8 do indeed "affect who can or should become a parent," and are necessary for the orderly administration of existing legal doctrines. For example, the assumption underlying the marital presumption of paternity would be turned completely on its head when applied to same-sex marriages.

The marital presumption of paternity is one of *biological* paternity.[180] The fact that the presumption has always been rebuttable with evidence that the husband is not the biological father[181] makes the connection between the presumption and biology clear. The marital presumption is built on the recognition that marriage's purpose is to facilitate paternal care by assuring a man that a child is *biologically* his.

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[176] *Perry*, 704 F. Supp. 2d at 9.
[177] *Id*. at 931.
[178] *Id*. at 1000.
[179] *Id*. at 997.
[180] *See, e.g.*, Shineovich & Kemp v. Shineovich, 214 P.3d 29 (2009) (stating that the marital presumption of paternity "creates a presumption as to who is the biological parent of a child. By the very terms of the statute, for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child.").
[181] *See, e.g.*, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 8 B.U. L. Rev. 227, 251 (2006) ("The conclusive presumption did not apply unless the husband and wife were cohabiting . . . . [T]he presumption never applied when the husband was sterile or impotent or when he was 'beyond the four seas' for more than nine months. Perhaps more significantly, a child whose race did not match the husband's was not covered by the presumption.").

The marital presumption, however, "would apply differently for same-sex partners inasmuch as both partners could not be the biological parents of the child," the New Jersey Supreme Court has noted.[182] "It appears that the presumption in such circumstances would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child."[183]

Consent is irrelevant in an opposite-sex marriage for the purposes of the presumption,[184] while biology is conclusive. As California's statutorily-enshrined marital presumption states, "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage" unless a blood test shows otherwise.[185] The California Court of Appeals, however, noted that "a gender neutral reading of [the marital presumption statute], which presumes a husband is capable of impregnating his wife, would be absurd as applied to a same-sex cohabiting couple."[186] In a same-sex marriage, the basis of the presumption would have to be completely reversed: biology would be irrelevant, and consent would be conclusive.

Because the marital presumption of paternity cannot rationally be applied to same-sex couples, an entirely new presumption, based on consent rather than biology, would have to be implemented if same-sex marriage were recognized. This would give states a rational basis under equal protection analysis for limiting marriage to a man and a woman. By pointing out that same-sex marriage is incompatible with the marital presumption of paternity, states can show that they have an interest in limiting marriage to a man and a woman.

B. HISTORICAL SUPPORT FOR DUE PROCESS PURPOSES

The paternity establishment theory provides a better historical narrative than the Prop 8 defense put forth. The historic sources the Prop 8 defense utilized in support of its due process argument consisted primarily of old dictionary definitions defining marriage as between a man and a woman[187] and Supreme Court cases that noted in passing that marriage is fundamental to our "existence and survival."[188] The defense did cite from sections of *Commentaries* and *Second Treatise* where

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[182] Lewis v. Harris, 908 A.2d 196, 216 n.18 (2006).
[183] *Id*.
[184] For example, if a wife stops taking birth control without her husband's knowledge and becomes pregnant with his child, her husband cannot disclaim parentage simply because he did not consent to his wife's conceiving the child.
[185] Cal. Fam. Code § 7540 (2011).
[186] *In re* M.C., 123 Cal. Rptr. 3d 856, 872 n.9 (Cal. Ct. App. 2011).
[187] Defendant's Memorandum in Support of Summary Judgment at 19–20, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 172-1).
[188] *Id*. at 24.

Blackstone and Locke discussed paternity establishment as a central function of marriage, yet inexplicably failed to expound on these critical passages.[189] The skimpy historical narrative put forth by the Prop 8 defense caused it to lose its due process claim.[190]

It is helpful to note the specific language the *Perry* court utilized in its due process analysis. The court found that "[m]arriage has retained certain characteristics throughout the history of the United States," but characteristics necessitating sex distinctions are not among them.[191] According to the court, "The right to marry has been historically and remains" solely "the right to choose a spouse and, with mutual consent, join together and form a household," neither of which are sex-specific functions.[192] It concluded that sex duality is not part of the "historical core" of marriage,[193] and that same-sex marriages "are consistent with the core of the history, tradition and practice of marriage in the United States."[194] Because it found that same-sex unions "encompass the historical purpose and form of marriage," the court held that same-sex couples "do not seek recognition of a new right,"[195] but only "ask [the government] to recognize their relationships for what they are: marriages."[196]

Utilizing the very terms that the *Perry* court employed to dismiss the Prop 8 defense's due process case, the paternity establishment theory can

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[189] *Id*. at 3.
[190] The *Perry* court rejected the defense's claim that "traditional procreative purposes" have historically "animated" the institution of marriage without much comment. For example, it noted that, "[h]istorically, legitimating children was a very important function of marriage, especially among propertied families," but dismissed this fact by simply stating "[t]oday, legitimation is less important." *Perry*, 704 F. Supp. 2d at 961. Without a presentation of a compelling historical narrative by the Prop 8 defense, the *Perry* court was able to define laws limiting marriage to a man and a woman simply as a reflection of America's cultural values in a less-enlightened era, when society-enforced gender norms dictated roles within a marriage. Marriage was "traditionally organized based on presumptions of a division of labor along gender lines," as "[w]omen were seen as suited to raise children and men were seen as suited to provide for the family." *Id*. at 958. Since these arbitrary presumptions about the roles of spouses have been done away with in today's progressive society, the court concluded, sex distinctions are not relevant to marriage today. *Id*. at 993 ("[T]he exclusion [of same-sex couples from marriage] exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.").
[191] *Id.* at 992.
[192] *Id.* at 993.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*

be used to argue that marriage historically has been a fundamentally heterosexual union. The theory provides rich support for the proposition that sex duality is indeed part of the "historical core" of marriage. Aristotle, Aquinas, Locke, Hutcheson, *A Letter to the Public*, Blackstone, modern evolutionary theorists, and other historical and contemporary sources provide very lucid explanations of the link between marriage, paternity establishment, and paternal care. Their writings define marriage as a trade between a woman and a man of paternity assurance for paternal support—a transaction that only opposite-sex couples can make. An argument can be made that "[t]he right to marry has been historically and remains the right" to make this bargain.[197] Moreover, the history of Western law makes very clear that marriage as a legal institution has "retained" the paternity establishment characteristic "throughout the history of the United States."[198] Marriage's legal function of establishing paternity can be traced from ancient Rome to modern America using sources favored by the Supreme Court, such as Henry de Bracton,[199] William Blackstone,[200] James Kent,[201] Zephaniah Swift,[202] model codes,[203] and American Law Reports.[204] With these historical sources providing support, a strong case can be made that paternity establishment—and thus sex duality—is part of the "historical core" of marriage, and that same-sex unions, in a very central function, do not "encompass the historical purpose and form of marriage."

V. CONCLUSION

The paternity establishment theory could give states a new defense against claims that laws limiting marriage to opposite-sex couples violate due process or equal protection principles. The theory draws a stronger link between marriage and procreation than traditional marriage advocates have managed to draw in the past. By showing that paternity establishment has been a core function of marriage historically, the

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[197] *Id.*
[198] *Id.*
[199] *See supra* notes 15–16, 70 and accompanying text.
[200] *See supra* notes 17–18, 106–107 and accompanying text.
[201] *See supra* notes 19, 70 and accompanying text.
[202] *See* cases cited *supra* note 19 and accompanying text; Swift, *supra* note 73, at 204 (stating that "[legitimate children] are those which are born within the pale of matrimony").
[203] *See* cases cited *supra* note 20 and accompanying text; Uniform Parentage Act, Art. 2, §204(a)(1) ("A man is presumed to be the father of a child if he and the mother of the child are married to each other and the child is born during the marriage.").
[204] *See* cases cited *supra* note 20 and accompanying text; 57 A.L.R.2d 729 §1[a] ("The common law copied from the Roman law the maxim that the presumption is that he is the father whom the marriage indicates, and there is no more firmly established principle of law than that every child born in wedlock is presumed to be legitimate.").

theory lends support to the argument that same-sex marriage would be inconsistent with the "history, tradition and practice of marriage in the United States," and therefore should not be considered a fundamental right for due process purposes. And by showing that the presumption of paternity cannot be applied to same-sex marriages in the same manner it is applied to opposite-sex marriages, the theory provides states with a rational basis for laws limiting marriage to heterosexual couples. These are promising arguments that legal defenders of opposite-sex marriage laws should utilize against future due process or equal protection challenges.