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IN *WINDSOR*'S WAKE: SECTION 2 OF DOMA'S DEFENSE OF MARRIAGE AT THE EXPENSE OF CHILDREN

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INTRODUCTION

The troubling trend of sidelining children's rights and interests in the same-sex marriage debate is evidenced by the exclusion of children from plaintiffs' classes in the vast majority of suits challenging marriage bans.[1] Despite the direct and adverse impact of these bans on children in same-sex families, the majority of claims asserted against these laws litigate the rights of adults as same-sex couples and identify infringement of adults' rights as the basis for their invalidation.[2] In the few cases that do advance children's claims, the courts' analyses and holdings are often framed exclusively in terms of adults' constitutional rights.[3] Notably, in *Windsor v. United States*, the U.S. Supreme

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1. *See, e.g.*, Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012); Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012); Della Corte v. Ramirez, 961 N.E.2d 601 (Mass. App. Ct. 2012).

2. *See* cases cited *supra* note 1 and *infra* note 9.

3. *See* Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *7-9 (W.D. Ky. Feb.

Court determined Section 3 of the Defense of Marriage Act (DOMA)[4] was an unconstitutional infringement of liberty interests held by legally married gay and lesbian couples,[5] and acknowledged and described the disabilities the law creates for children in same-sex families. Justice Kennedy explained:

> DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. *And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives . . . DOMA also brings financial harm to children of same-sex couples . . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.*[6]

Despite the absence of children in the family at issue in *Windsor*, the Court's holding rejected DOMA's defenders' characterization of Section 3 as a child-

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12, 2014). Despite the children of same-sex couples involved, six in total, being named as plaintiffs, the court's analysis focused on the injuries and interests of the couples specifically. *Id.* at *2, *8-9. Notably, the court limited its determination of the applicable standard of review to the impact of the ban on the couple, stating,"it is clear that Kentucky's laws treat gay and lesbian persons differently in a way that demeans them." *Id.* at *7.

4. Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

5. United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013). The Court held:

> DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Id.

6. *Id.* at 2694-96 (emphasis added).

welfare measure.[7] The opinion highlighted how the law deprives thousands of children in same-sex families of economic and legal entitlements and protections that serve their best interests, and demeans them and their families with government-issued badges of inferiority.

The invalidation of Section 3 represented a significant victory in the movement toward equal recognition and treatment of gay and lesbian couples and raised the profile of children's rights and interests as relevant to the debate.[8] The

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7. *Id.*; *see* the House of Representatives Report which justifies DOMA as a means to "encourag[e] responsible procreation and child-rearing," H.R. REP. NO. 104-664, pt. 5, at 2917 (1996). For an example of the child-welfare arguments provided by opponents, *see* Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 44-49, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), U.S. S. Ct. Briefs LEXIS 280 at *74-82 (noting the "intrinsic connection between marriage and children" and arguing that same-sex marriages do not produce unintended and unplanned offspring that the government has an interest in protecting and fail to support the societal goals of children being raised by biological parents employing "differing parental roles").

8. In previous articles and a co-authored Supreme Court amicus brief in *Windsor*, this Author has advanced children's rights based challenges in a number of other contexts. In the transracial adoption context, the Author has argued that the best interests of the child standard demands the consideration of race in placement decisions and she challenges the Multiethnic Placement Act's categorical prohibition of the consideration of race as a politicized departure from meaningful application of the best interests standard. Tanya Washington, *Loving Grutter: Recognizing Race in Transracial Adoptions*, 16 GEO. MASON U. CIV. RTS. L.J. 1 (2005). In the same-sex adoption context, the Author argues that the due process rights of waiting children, particularly children of color and other children classified as "special needs," are infringed by state adoption bans that categorically exclude gay and lesbian couples and individuals from the pool of adoptive parents. Tanya M. Washington, *Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans,* 6 HASTINGS RACE & POVERTY L.J. 1 (2008). She advances children's challenges to "orphan placement bans," and she articulates a negative liberty interest waiting children possess against state action that categorically forecloses the superior placement option, permanent placement, in favor of temporary or institutional care that compromises children's best interests. *Id.*; *see also* Tanya M. Washington, *Once Born Twice Orphaned: Children's Constitutional Case Against Same-Sex Adoption Bans*, 15 UTAH L. REV. 1003 (2014); Tanya Washington, *Suffer Not the Little Children: Prioritizing Children's Rights in Constitutional Challenges to "Same-Sex Adoption Bans,"* 39 CAP. U. L. REV. 231 (2011) [hereinafter Washington, *Suffer Not the Little Children*]. In the context of same-sex marriage bans, the Author proposes a claim by children in same-sex families against marriage bans as infringing a liberty interest in parentage incident to marriage, in violation of their substantive due process rights. Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1 (2012) [hereinafter Washington, *What About the Children?*]. The Author co-authored an amicus brief in *United States v. Windsor* highlighting the stigmatic, dignitary, and material harms Section 3 of DOMA causes children in same-sex families whose parents' marriages are denied recognition. The respondents' cited this amicus brief in their merits brief to the Court. Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondant Edith Windsor Addressing the Merits and Supporting

holding and reasoning in *Windsor* has inspired a proliferation of challenges to state marriage bans ("mini-DOMA's");[9] thereby confirming the prophetic nature of Justice Scalia's observation that the opinion, despite the inclusion of language that could cabin the applicability of the holding, would encourage challenges to state bans.[10] He predicted:

> the real rationale of today's opinion . . . is that DOMA is motivated by 'bare . . . desire to harm' couples in same sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples [sic] marital status.[11]

Despite an avalanche of claims filed against state marriage bans across the nation,[12] all too often, challenges have failed to include children as members of the plaintiff's class, even while they highlight how marriage bans harm children

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Affirmance, United States v. Windsor 133 S. Ct. 2675 (2013) (No. 12-307).

9. *See, e.g.*, Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB, 2014 WL 1568884 (S.D. Ind. April 18, 2014); Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) ; DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Lee v. Orr, No. 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); McGee v. Cole, No. 3:13-24068, 2014 WL 321122 (S.D. W. Va. Jan. 29, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); Garden State Equality v. Dow, 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012). *See generally* Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *2 (S.D. Ohio Apr. 14, 2014) (court highlighting that "ten out of ten federal rulings since the Supreme Court's holding in *United States v. Windsor*—all declaring unconstitutional and enjoining [marriage] bans in states across the country" (citations omitted)). *Id.* at *1.

10. *Windsor*, 133 S. Ct. at 2705, 2708-09 (Scalia, J., dissenting). Justice Scalia remarked in his dissent, "My guess is that the majority . . . needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term.) But I am only guessing." *Id.* at 2705; *see also Tanco*,2014 WL 997525, at *5. The Court in *Tanco* noted that other "courts have uniformly rejected a narrow reading of *Windsor*" and cited numerous cases where preliminary injunctions were issued to preclude enforcement of "anti-recognition laws." *Id.* at *5 n.8; *see, e.g.*, *De Leon*, 975 F. Supp. 2d at 632; *Lee*, 2014 WL 683680; *Bourke*, 2014 WL 556729; *Bostic*, 970 F. Supp. 2d at 456; *Bishop*, 962 F. Supp. 2d at 1252; *Obergefell*, 962 F. Supp. 2d at 968; *Kitchen*, 961 F. Supp. 2d at 1181.

11. *Windsor*, 13 3 S. Ct. at 2709 (Scalia, J., dissenting) (citation omitted).

12. As of October 12, 2014, lawsuits are pending in all states that do not currently allow same-sex couples to marry. Since the Supreme Court's decision in *Windsor* there have been forty-one court decisions striking down marriage bans and two decisions upholding marriage bans as constitutional. *See* PENDING MARRIAGE EQUALITY CASES, http://www.lambdalegal.org/pending-marriage-equality-cases (last visited Oct. 12, 2014).

in same-sex families.[13] In the absence of claims by children challenging laws adverse to their interests, the focus of litigation challenging marriage bans will remain on protecting adults' interests and maintaining the primacy of marriage.[14]

Despite Section 3's invalidation and the utility of the *Windsor* opinion and its rationale as a tool for dismantling laws that deny gay and lesbian couples the right to marry, Section 2 of the Act remains enforceable and poses a significant threat to children's legal relationship with their non-biological parent. This provision of DOMA, which permits states to disregard valid marriages created in states where same-sex marriage is allowed (recognition states),[15] by extension, authorizes the nullification of the filial relationship between children in same-sex families and their non-biological parents when the family relocates to a non-recognition state.[16]

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13. *See Bostic*, 970 F. Supp. 2d at 478. Although the child of the same-sex family at issue in this case was not named as a plaintiff, the court acknowledged the harm the Virginia marriage ban poses to her interests. It observed, that:

> [o]f course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. E.S.T., like the thousands of children being raised by same-sex couples, is needlessly deprived of the protection, the stability, the recognition and the legitimacy that marriage conveys.

Id. The Court presented protection and stability as derivative of marriage, rather than as inherent in parentage. *Id.* at 478-79. The Author of this piece, in accordance with the arguments of Professor Nancy Polikoff, believes this perspective entrenches the primacy of marriage and will focus instead on the primacy of parentage to avoid such entrenchment. *See generally* Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005) [hereinafter Polikoff, *For the Sake of All Children*]; *infra* Part III.C. For additional perspectives on same-sex marriage from the child's perspective, see Ruth Butterfield Isaacson, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 131-51 (2010); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well Being of Children*, 46 HARV. C.R.-C.L.L. REV. 81, 85-89 (2011).

14. *See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting); *but see DeBoer* , 973 F. Supp. 2d at 757; *Bourke*, 2014 WL 556729, at *2; Ellis v. Hous. Auth. of Baltimore City, 82, A.3d 161, 163 (2013); Garden State Equality v. Dow, 82 A.3d 336, (2013).

15. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996). The law specifically states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

16. In most cases, a child in a same-sex relationship will only be biologically related to one parent. The exception to this rule arises when the sperm donor and/or surrogate are related to both parents. *See infra* note 18.

At common law, parentage was determined two ways: by a child's birth to her mother and by the mother's marriage to her husband at the time of the child's birth.[17] Children in same-sex families can only be biologically related to one of their parents and consanguinity establishes and protects the filial relationship.[18] The relationship between the child and her non-biological parent, however, exists as ancillary to the marriage or is constructed by adoption, by contract, or by consent.[19] The legal status of that relationship is vulnerable to invalidation when the family relocates to a state that does not acknowledge the legal status of the parents' marital relationship and rights, relationships and claims arising therefrom.[20] This Article identifies the nullification of an existing filial relationship, authorized by Section 2 of DOMA, as a legal deprivation that unjustifiably infringes children's constitutional rights and provides a basis for an independent claim challenging Section 2 by children in same-sex families.

Arguably, Section 2 only operates to expressly authorize states to do what they could do anyway—withhold recognition of out-of-state, same-sex marriages by statute or constitutional amendment and void the parent-child relationships attendant to those unions.[21] So, one could argue, state bans are the more appropriate target for children's constitutional challenges, not Section 2 of DOMA.[22] However, Section 2 permits states to eschew their constitutional duty

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17. Michael H. v. Gerald D., 491 U.S. 110, 115 (1989).

18. If the couple is a gay couple, one of the fathers would have donated his sperm. If the couple is a lesbian couple, one of the mothers would have used her egg, though the other mother could be the gestational mother who carries and gives birth to the child. Despite a strong connection to the child for nine months, gestational mothers are not considered to be biologically related to the child. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 681 (2009).

19. *See infra* Part II.

20. *See, e.g.*, Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *3 (S.D. Ohio Apr. 14, 2014) (discussing that in defending Ohio's non-recognition law, Defendants take "the position that they are prohibited under Ohio law from recognizing [Plaintiffs'] Massachusetts marriage and the marital presumption of parentage that should apply to this family for purposes of naming both parents on the baby's birth certificate. . . . Without action by this Court, Defendants . . . will list only one of these Plaintiffs as a parent on the baby's birth certificate . . . .").

21. *See* Joshua Baker & William Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriages Measures*, 24 REGENT U. L. REV. 1, 8 (2012); William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1392 (2012); Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. GENDER RACE & JUSTICE 153, 158 (2009). *But see* Adar v. Smith, 639 F.3d 146, 160 (5th Cir. 2011); Pamela K. Terry, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out of State Adoptions*, 80 FORDHAM L. REV. 3093, 3134 (2012).

22. *See* Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5-6 (M.D. Tenn. Mar. 14, 2014); Bishop v. United States *ex rel*. Holder, 96 2 F. Supp. 2d 1 252, 1266 (N.D. Okla. 2014) (rejecting challenge to Section 2 and explaining, "The injury of non-recognition stems exclusively from state law . . . and not from the challenged federal law."); *see also* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, 32 FAM. ADVOC. 10, 13 (2010) ("Legal challenges to section [sic] 2 of DOMA have been few, and none have succeeded, at least in part

to respect existing legal parent-child relationships created in jurisdictions that permit gay marriage.[23] Naming children as plaintiffs in cases with their parents undermines the government's defense of Section 2 as a child protective measure with direct evidence to the contrary. Children's claims also challenge the government to establish that the non-recognition laws Section 2 authorizes serve, rather than harm, children's interests. A favorable holding in such suits would highlight the direct and harmful impact of marriage bans on children in same-sex families and would present children's rights and interests as grounding a viable constitutional claim,[24] rather than treating them as mere factors in the constitutional calculus, as the *Windsor* majority did.[25]

While the substance of constitutional claims against state bans would be almost identical to claims challenging Section 2, the latter would, like the decision in *Windsor*, have greater symbolic and precedential value. A holding invalidating Section 2 as unconstitutionally infringing children's constitutional rights could animate and provide jurisprudential support for challenges to state bans nationwide. By comparison, prevailing in suits challenging state bans would have persuasive, not precedential, effect outside of the state invalidating the ban.[26]

Though the *Windsor* Court referenced the stigmatic and dignitary harm children experience when their families are denied recognition, Section 3's

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because it is the state's non-recognition law that presents the impediment to recognition, not section [sic] 2 itself.").

23. There is a split of authority as to the existence of a public policy exception to the Full Faith and Credit Clause, which would mean Section 2 authorizes states to enact non-recognition laws in violation of principles of comity. *See* cases cited *infra* note 51.

24. Just as Justice Scalia noted the applicability of the rationale underwriting the Court's decision in *Windsor* to state challenges, the claims proposed in this Article can be used to frame and assert children's challenges to mini-DOMA's that proliferate in *Windsor*'s wake. United States v. Windsor, 133 S. Ct. 2675, 2705, 2708-09 (2013) (Scalia, J., dissenting); *see also* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of the Child* , 102 W. VA. L. REV. 411, 412 (1999) (discussing that the preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; "precious little" focus is given to the rights of a child who may be a product of a same-sex relationship.).

25. *Windsor*, 133 S. Ct. at 2694-96; *see also Tanco*, 2014 WL 997525 at *7. In the *Tanco* case, several of the same-sex families bringing suit included children and the plaintiffs advanced arguments relating to the direct and harmful impact of Tennessee's non-recognition statute and constitutional amendment on their children. Noting the "immanent risk of potential harm to their children during their developmental years from the stigmatization and denigration of their family relationship," the court acknowledged such potential harm by stating :

> [u]nder the existing state of the law in Tennessee, upon the birth of their child, Dr. Jesty will not be recognized as the child's parent, and many of the legal rights that would otherwise attach to the birth of a child . . . will not apply to Dr. Jesty or to the child.

Id. at *2. However, children are not named plaintiffs. *Id.* at *2-3.

26. *See Tanco*, 2014 WL 997525, at *5 n.8.

impact on children was framed principally in terms of the material deprivation children experience (e.g., social security benefits, health insurance coverage, etc.).[27] To be sure, these deprivations also emanate from enforcement of Section 2 by non-recognition states. Children in married same-sex families could assert that, though they are similarly situated to children in married opposite-sex families, state bans deprive them of certain material entitlements and protections because of their parents' sexual orientation, in violation of their equal protection rights.[28] This argument is supported by scholarship proposing and analyzing children's substantive equal protection claims in a variety of contexts, including same-sex marriage laws. [29]

In addition to advancing an equal protection claim, this Article focuses on how Section 2 deprives children in same-sex families of the security, consistency, and permanency that are defining features of the filial relationship, and makes the claim that these deprivations constitute substantive due process infringements.[30] Children's constitutional protections and entitlements encompass more than tangible benefits, expressed in monetary terms. This Article seeks to highlight intangible, substantive qualities inherent in the filial relationship that deserve constitutional protection. Beyond dignitary and stigmatic harms, courts should regard depriving children of the permanency, stability, and security inherent in the legal parent-child relationship as an infringement of the kind and quantum of care secured by the "best interests of the child" standard and as violating children's constitutional rights.[31] The focus on Section 2's detrimental impact

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27. *Windsor*, 133 S. Ct. at 2694-96 ("DOMA also brings financial harm to the children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.").

28. *See infra* Part IV.A.

29. Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondant Edith Windsor Addressing the Merits and Supporting Affirmance, United States v. Windsor 133 S. Ct. 2675 (2013) (No. 12-307) (noting "[t]he material and intangible deprivations caused by laws that [ ] prescribe same-sex marriage impair children's interests and arguably infringe children's rights"); *see also* Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307 (2010) [hereinafter Smith, *Challenging the Three Pillars*]; Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. R. 1589 (2013) [hereinafter Smith, *Equal Protection for Children*]; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994) [hereinafter Woodhouse, *" Out of Children's Needs, Children's Rights"*].

30. *See infra* Part IV.B; *see also* Washington, *What About the Children?*, *supra* note 8, at 1.

31. In addition to protecting certain substantive rights, the Due Process clause also provides procedural protection by requiring adherence to fair procedural processes when depriving persons of certain liberty interests. Whitney v. California, 274 U.S. 357, 373 (1927). There is a viable

on children's legal relationship with their non-biological parent also engages a broader query unanswered by the U.S. Supreme Court in *Michael H. v. Gerald*

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procedural due process challenge available to children in same-sex families against Section 2 of DOMA because it authorizes laws that enforce categorical, self-executing invalidation of their filial relationship with their biological parent, without due process before being deprived of their liberty interest in that relationship. In *Stanley v. Illinois,* 405 U.S. 645 (1972), the U.S. Supreme Court invalidated a law that deprived an unmarried father of his parentage rights without a hearing to determine his parental rights. The Court's reasoning for its determination provides ample support for a procedural due process claim by children in same-sex families whose filial relationships are invalidated by non-recognition laws. *Id.* It explained:

> Stanley is treated not as a parent, but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. . . . We observe that the State registers no gain toward its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family. . . . Procedure by presumption is always cheaper and easier than an individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand (citation omitted). . . . The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming, rather than proving, Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Id. at 648-58. The non-recognition laws Section 2 authorizes, like the law at issue in *Stanley* , automatically nullify the filial relationship between a child in a same-sex family and her non-biological parent based on the presumption that gay parenting is inherently harmful. *See* Bostic v. Rainey, 970 F. Supp. 2d 456, 479-80 (E.D. Va. 2014) (The Court, relying upon the U.S. Supreme Court's decision in *Stanley*, opined: "The 'for the children rationale' rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. Forty years ago a similarly unfortunate presumption was proffered to defend a law in Illinois. . . . The Supreme Court said that such a startling presumption 'cannot stand' (citation omitted). . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage."). In addition to dispensing with procedural due process guarantees, these laws dispense with the individualized, fact specific determinations of parental fitness required by the best interest of the child standard, which is controlling in the custody, visitation and adoptions contexts. *See infra* note 163. A children's procedural due process challenge also has the advantage of more easily clearing standing obstacles, particularly when advanced against a non-recognition law like Georgia's which excludes claims related to or arising out of out-of-state same-sex marriages from the jurisdictional authority of its state courts. *See infra* Part I.A, Part II. Despite the viability and advantages of children's procedural due process claim against Section 2, this Article limits its focus to children's equal protection and substantive due process entitlements because the Court's decision in *Windsor* focused on those constitutional guarantees.

D: whether children have a constitutionally protected right to a legal relationship with a parent.[32]

Part I of this Article introduces Georgia law, which prohibits gay marriage by statute and constitutional amendment, to illustrate how Section 2 of DOMA authorizes the abrogation of a filial relationship created in a recognition state between a child and her non-biological parent. This section also explains how non-biological, legal parentage, whether created as incident to a valid marriage, by contract, by law, or by intent, is vulnerable to invalidation in non-recognition states. Part II describes how children plaintiffs can satisfy standing requirements in jurisdictions like Georgia, which, in addition to banning gay marriage, forecloses all claims and rights relating to same-sex marriage, from litigation in its courts.

Part III analyzes the deprivation permitted by Section 2 within the context of the "best interests of the child" standard, which defines the nature and scope of care to which children are entitled and which recognizes the primacy of the filial relationship.[33] It acknowledges and responds to a critique that an expansive reading of children's rights would have the adverse and corresponding effect of limiting parental rights in a variety of contexts. This portion of the Article engages the scholarship of Professor Nancy Polikoff,[34] who warns against the entrenchment of marriage, and explains how the argument advanced here is preoccupied with the actual benefits attendant to the parent-child relationship, not the presumed benefits of the marital relationship. Part IV conducts the Equal Protection and Substantive Due Process analysis, considers the applicable level of constitutional scrutiny, and examines whether the laws Section 2 authorizes are justified by a state interest in negating existing filial relationships. This section highlights the advantage that children's claims may enjoy over adult claims against marriage bans, as the former arguably triggers a heightened level of constitutional scrutiny.[35] The Article concludes with a determination that Section 2's impact on children in same-sex families can be said to serve neither compelling nor legitimate governmental ends and is therefore unconstitutional.

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32. Michael H. v. Gerald D., 491 U.S. 110, 1 30-31 (1989). The facts in *Michael H.* raised the issue of whether a child resulting from an extramarital affair, but born into an existing, though admittedly dysfunctional marriage, could have a constitutionally protected relationship with her biological father and her mother's husband. This Article will address the Court's relevant holding and rationale. *Id.*; *see infra* text accompanying notes 193-205.

33. Gomez v. Perez, 409 US 535, 538 (1973) (referencing the "substantial benefits accorded [to] children generally"). *Id.*

34. *See infra* note 242.

35. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988); Plyler v. Doe, 457 U.S. 202, 219-20 (1982) (noting that "children who are plaintiffs in these cases are special members" of the legal class being analyzed); Trimble v. Gordon, 430 U.S. 762, 767 (1977); Weber v. Aetna, 406 U.S. 164, 168 (1972) ; Levy v. Louisiana, 391 U.S. 68, 71 (1968).

I. ARE YOU MY MOTHER? WHO'S YOUR DADDY?: LEGAL PARENTAGE IN SAME-SEX FAMILIES IN NON-RECOGNITION STATES

A. The Workings of DOMA and "Mini-DOMA's"

Even as the majority in *Windsor* invalidated Section 3 of DOMA, it acknowledged, "Section 2 . . . allows States to refuse to recognize same-sex marriages performed under the laws of other States."[36] The origins of Section 2 of DOMA can be traced to *Baehr v. Lewin,*[37] a 1993 decision by the Hawaiian Supreme Court, in which the state was required to provide a strong justification for its marriage ban.[38] On remand, the state failed to satisfy its burden,[39] however, the hope the decision inspired as movement toward marriage equality was extinguished by an amendment to the Hawaiian Constitution inviting legislators to prohibit same-sex marriage by statute.[40] Accepting the invitation, the Hawaiian legislature enacted a marriage ban foreclosing recognition of same-sex marriage in the state and muting the impact of *Baehr*'s holding.[41] Nevertheless, the case provoked alarm among opponents of same-sex marriage, who feared that *if* gay marriage were to become legal in Hawaii, which boasts a breathtaking backdrop for weddings and honeymooners, states throughout the nation would have been required to recognize the marital status of all same-sex couples married in Hawaii.[42] DOMA was enacted as a prophylactic measure to

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36. United States v. Windsor*,* 133 S. Ct. 2675, 2682-83 (2013).

37. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

38. *Id.* at 67 (holding sex to be a suspect class for the purposes of the equal protection analysis and requiring, on remand, that the state satisfy strict scrutiny).

39. Baehr v. Mike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

40. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). On November 13, 2013, Hawaii became the sixteenth jurisdiction in the United States to extend the freedom to marry to same-sex couples when Gov. Neil Abercrombie signed the freedom to marry into law.

41. HAW. REV. STAT. § 572-1 (1994).

42. Congress was concerned that "if Hawaii (or some other State) recognizes same-sex 'marriages,' other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions." H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913; *see also* Elizabeth Kristen, *The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 113 (1999) (noting that DOMA was enacted as part of the "backlash" against Hawaii's consideration of legalizing same-sex marriage); Rebecca S. Paige, *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage will Other States Have To?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165, 171 (1997) ("If the Hawaii Supreme Court ultimately determines that the marriage license statute is unconstitutional and recognizes same-sex marriages, proponents of same-sex marriage insist that other states must recognize such marriages under the Full Faith and Credit Clause, or alternatively that conflict of laws rules should be invoked to expand same-sex marriage beyond the boundaries of the sovereign State of Hawaii.").

ensure that same-sex marriages created in one state did not automatically enjoy recognition in other states, and effectively legalize same-sex marriage throughout the nation.

The text of Section 2 makes clear,

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[43]

Many claims about the constitutionality of Section 2 focus on fundamental precepts of federalism and adults' constitutional rights.[44] Some legal theorists posit that because Section 2 allows states to disregard the validity of a marriage legally created in another state, it violates the Full Faith and Credit Clause.[45] This argument is based upon the understanding that the Full Faith and Credit Clause imposes a constitutional duty on states to afford judgments by sister-states the same effect they would enjoy in their state of issuance.[46] Historically, states have routinely recognized marriages effectuated in other states, despite considerable variance among marital prerequisites.[47] Accordingly, they argue, Section 2's grant of authority to states to decline to recognize same-sex marriages sister-states represents a substantial departure from this practice.[48] Other

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43. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996) (emphasis added).

44. *See, e.g.*, Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006); Palladino v. Corbett, No. 13-5641, 2014 WL 830046 (E.D. Penn. Mar. 4, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

45. U.S. CONST. art. IV, § 1 (" Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); 28 U.S.C. § 1738C (allowing states specially to not "give effect to any public act, record, or judicial proceeding of" another state); *see also Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

46. Thompson v. Thompson, 484 U.S. 174, 174 (1988); Estin v. Estin, 334 U.S. 541, 545-46 (1948); Mills v. Duryee, 11 U.S. 481, 485 (1813).

47. United States v. Windsor, 133 S. Ct. 2675, 2691 (2013). Justice Kennedy observed in *Windsor* , "Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington—prohibit the practice)." *Id.* (citations omitted); *see also* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 442-46 (2005); U.S. MARRIAGE LAWS, http://www.usmarriagelaws.com (last visited Mar. 31, 2014).

48. Grossman, *supra* note 47, at 477-78; Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 385 (2005) ("[O]n its face, the DOMA interstate judgment recognition provision seems to contradict the full

scholars contend that the Full Faith and Credit Clause only requires states to respect *judgments* issued by other state courts[49] and because marriage is not a judgment, it is not entitled to comity.[50] In addition, some argue that the common law public policy exception to the Clause may justify disregarding same-sex marriages where recognition of such unions would violate a state's public policy, notwithstanding Section 2.[51] However, the existence of such an exception is the subject of some debate among courts and scholars.[52] Opponents of Section 2

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faith and credit Act and doctrine of mandatory interstate judgment recognition.").

49. Adar v. Smith, 639 F.3d 146, 160 (5th Cir. 2011) (noting that the U.S. Supreme Court "continues to maintain a stark distinction between recognition and enforcement of judgments under the full faith and credit clause"). The U.S. Supreme Court has noted a distinction between the application of full faith and credit to public acts, which may be subject to a public policy exception, and judicial proceedings, which do not fall within the scope of a public policy exemption. Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1988) (stating, "Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments."); *see also* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 437 (1943).

50. *See generally* Grossman, *supra* note 47.

51. Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1021 (D. Nev. 2012) (finding that the "protection of Nevada's public policy is a valid reason for the State's refusal to credit the judgment of another state, lest other states be able to dictate the public policy of Nevada"); Anders e n v. King County, 138 P.3d 963, 1005 (Wash. 2006) (Alexander, C.J., concurring) ("Where foreign law clearly violates our State's strong public policy, there is an important and well-established exception to the rule for recognizing foreign law. This exception probably requires that Washington courts would not recognize same-sex ' marriage' even in the absence of DOMA."); *In re* Marriage of J.B. and H.B., 326 S.W.3d 654, 670 (Tex. Ct. App. 2010). *But see Adar,* 639 F.3d at 179 (noting that there is "no roving public policy exception to the full faith and credit that is owed to out-of-state judgments."); *Baker*, 522 U.S. 222 at 233-34; *Estin*, 334 U.S. at 546 (finding that the Full Faith and Credit Clause "ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it").

52. *Compare* Borman v. Borman, No. 2014CV36, 2014 WL 4251133, at *4 (Tenn. Cir. Ct. Aug. 5, 2014) ("The laws of Iowa concerning same sex marriage is so diametrically opposed to Tennessee's laws, and Tennessee's own legitimate public policy concerning same-sex marriage, that Tennessee is not required by the U.S. Constitution to give full faith and credit to a valid marriage of a same-sex couple in Iowa."), *with* Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *17 n.24 (S.D. Ohio Apr. 14, 2014) (explaining, "The Supreme Court has thus rejected any notion that a state may disregard the full faith and credit obligation simply because the state finds the policy behind the out-of-state judgment contrary to [its] own public policy." (citing *Baker*, 522 U.S. at 233 (1988)); *see also* Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 753 (2003) ("Differences between the states on local public policy, significant in whether one state will recognize the statutes of another state, do not provide exceptions to the constitutional command to recognize a sister state's valid, final judgments."); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 78

theorize that it violates the equal protection and substantive due process rights of married same-sex couples by allowing non-recognition states to deny their marital status.[53]

Section 2 authorizes non-recognition states to invalidate both out-of-state, same-sex marriages and legal parentage between a child and her non-biological parent that exists as incident to the marriage, in violation of the child's equal protection and substantive due process rights. Giving support to a claim that Section 2 infringes a child's constitutional rights to a filial relationship, one New York Surrogate Court judge cautioned:

> Currently there are explicit prohibitions against same-sex marriages in forty-four states . . . Without a change in these laws, or an unlikely expansion of the Full Faith and Credit Clause jurisprudence, *these clear legislative statements of public policy would appear to permit courts of those states to deny recognition of same-sex marriages contracted elsewhere, and, arguably, also to legal rights flowing from those marriages, including presumptive parenthood*. Such a position is supported by DOMA, . . . [which] not only defines marriage as solely a relationship between a man and a woman, but also appears to allow the states to deny recognition of same-sex marriages validly contracted elsewhere.[54]

There are presently twenty states that prohibit same-sex marriage by statute and/or constitutional amendment.[55] Georgia has one of the most comprehensive set of laws prohibiting same-sex marriage and, therefore, provides the ideal context within which to assert children's constitutional challenges to Section 2.[56]

(2004) ("States are not free to refuse to enforce a judgment on public policy grounds.").

53. *See* Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006); Palladino v. Corbett, No. 13-5641, 2014 WL 830046 (E.D. Penn. Mar. 4, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014). Adults have also advanced claims that Section 2 infringed their right to travel by jeopardizing the legal status of the relationship between the child and her non-biological parent when the family traveled into a non-recognition state. *See, e.g.*, Finstuen v. Crutcher, 496 F.3d 1139, 1143 (10th Cir. 2007); Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *2 (M.D. Tenn. Mar. 14, 2014).

54. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 683-84 (2009) (emphasis added) (citations omitted).

55. It is important to note that the exact number of states that do and do not provide for marriage equality is changing, even as of the writing of this Article. As of October 12, 2014 almost one-half of states and the District of Columbia allow same-sex marriage. Erik Eckholm, *Gay Marriage Is Upheld in Idaho and Nevada*, N.Y. TIMES, Oct. 7, 2014, http://www.nytimes.com/2014/10/08/us/same-sex-marriage-bans-struck-down-in-idaho-and-nevada.html?_r=0("[T]he number of states authorizing same-sex marriage, which was 19 last week and 24 as of Monday, is likely to approach 35 in coming weeks, as the legal aftermath of the four appeals-court decisions issued to date plays out.").

56. Larry Copeland, *Seven Georgian Challenging State's Gay Marriage Ban*, USA TODAY (Apr. 22, 2014), http://www.usatoday.com/story/news/nation/2014/04/22/georgias-gay-marriage-

Several Georgia statutes and a constitutional amendment proscribe gay marriage, and, as an added guarantee of exclusion, Georgia courts are divested of jurisdiction over cases, claims and rights related to the prohibited unions. The jurisdictional obstacle precludes litigation of claims and rights that derive from the marriage such as legal parentage between a child and her non-biological parent, custodial rights, visitation rights, claims to material entitlements and protections, and claims relating to the security, permanency, and stability inherent in the filial relationship. Though, arguably, these deprivations result from non-recognition laws generally, Georgia law invokes Section 2 of DOMA to create the most severe consequences for children in same-sex families: the voiding of their legal relationship with their non-biological parent *and* denial of access to the courts to enforce the benefits, protections and parental responsibilities inherent in an existing filial relationship.

The Georgia Constitution provides in relevant part:

> This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. *The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.*[57]

The Georgia statute establishing the strongest prohibition against same-sex marriage provides:

> It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state. No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage

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ban-challenged/8007629/. On April 22 three gay couples and one individual filed suit challenging Georgia's constitutional amendment banning gay marriage as violating their equal protection rights. *Id.* Despite the presence of children in two of the families, children were not named plaintiffs in the suit. *Id.* The state of Georgia's defense of its exclusionary marriage laws centers on how they protect and serve the interests of children. Its motion to dismiss provides in pertinent part, "The challenged laws . . . rationally further Georgia's legitimate interest in ensuring legal frameworks for protection of children of relationships where unintentional reproduction is possible; ensuring adequate reproduction; [and] fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children . . . ." Defendant Deborah Aderhold's Brief in Support of Her Motion to Dismiss the Complaint at 33, Innis v. Aderhold, (2014) (No. 1:14-CV-01180-WSD), 2014 WL 3828018.

57. GA. CONST. art. I, § 4, para. 1 (emphasis added).

> entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. *Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.*[58]

Georgia's statutory and constitutional law, limiting jurisdiction to exclude claims and disputes arising from or relating to same-sex unions, echoes Section 2's exemption of "any . . . judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, or a right or claim arising from such relationship" from respect by non-recognition states.[59] This language implicates the legal status of parent-child relationships ancillary to a legal marriage considered void in a non-recognition state, and parent-child relationships constructed by law, by contract, by consent, and by estoppel that rely upon recognition of the marital relationship. Section 2 of DOMA and the laws it authorizes, like Georgia's, extinguish the filial relationship between a child and her non-biological parent, in violation of the child's constitutional rights.

B. Constructing Legal Parentage

The marital presumption of parentage affords the most secure guarantee of legal parentage, second only to biology-based parentage, in the opposite-sex marriage context.[60] In the "traditional" marriage context, the presumption of legal parentage with respect to children born within the marriage enjoys substantial constitutional protection, even where the child is not biologically related to the father and the child results from an adulterous affair.[61] The legal status of the relationship between the child and her non-biological father derives

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58. O.C.G.A. § 19-3-3.1 (2013) (emphasis added).

59. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996).

60. Michael H. v. Gerald D., 491 U.S. 110, 124-27 (1989); Wendy G-M v. Erin G-M, 2014 WL 1884485, at *9 (N.Y. Sup. Ct. May 7, 2014) (describing parentage incident to a valid marriage as "reflecti[ve] of the strong presumption, displayed across the boundaries of many states, connecting marriage to parenthood"); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L 505, 528-29 (1998) (noting that, in *Michael H.*, "Justice Scalia's plurality opinion is a ringing endorsement of both the vision of the traditional family as a 'good' which the law properly protects, and also, more implicitly, of the utility of the exclusiveness framework as a way to bolster and protect the traditional family").

61. *Michael H.*, 491 U.S. at 127. Pursuant to the adage, "mama's baby daddy's maybe," the marital presumption of parentage only applies to fathers who are married to the mother at the time of the child's birth but who are not biologically related the child. *Id.*

from the existing marriage, and the child's entitlement to the benefits and protections afforded by the filial relationship is not dependent upon the family's state of domicile.

In sharp contrast, the relationship between a child born to same-sex married parents who agree to and participate in her conception, birth, and co-parenting is vulnerable to invalidation in states that do not recognize the parents' marital relationship. Children with a filial relationship with their non-biological parent that derives from a marriage Section 2 authorizes states to void are vulnerable to the nullification of that relationship and deprived of the constitutional benefits and protections it secures for them. As a result, Section 2 authorizes states to invalidate the most secure guarantee of legal parentage for children and their non-biological parents.

When a same-sex family moves to a non-recognition state, like Georgia, the marriage and the attendant filial relationship between the child and the non-biological parent are categorically and automatically void and the non-biological parent is rendered a legal stranger to the child. The net effect of not recognizing an existing filial relationship is deprivation of the benefits and protections inherent in the legal parent-child relationship. In a non-recognition state the non-biological parent could be denied employer-provided health care benefits, be unable to make emergency medical and educational decisions, be unable to obtain her child's Social Security card, and be unable to travel internationally with her child.[62] Nullification of the legal status of her relationship with her child deprives the child of material entitlements and protections and compromises the security, permanence, and stability that a filial relationship provides.

A simple story illustrates the potential impact of Georgia's non-recognition laws, authorized by Section 2, on the legal status of existing parent-child relationships in same-sex families. Assume Jennifer was born in California one year after her mothers' marriage. Jennifer is biologically related to Carol, who carried and gave birth to her. Carol and Susan agreed to and participated in Jennifer's conception by in vitro fertilization and the couple agreed to co-parent their daughter. Susan, who serves in the U.S. military, is relocated to Fort Benning, one of many military bases in the state of Georgia. Shortly after the family moves to Georgia, Susan is deployed overseas, leaving Jennifer in the exclusive care of Carol.

One morning, as Jennifer is getting dressed, she complains of severe pain on the right side of her abdomen. Susan takes her to an urgent care clinic, and the

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62. *See* Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *see also* Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 17-18 (2006) (noting that both the marriage and parent-child relationships of same-sex couples may be terminated when they cross state borders and detailing the potential negative implications of this termination).

doctor recommends that Jennifer be admitted to the hospital to determine whether the pain is caused by a ruptured appendix. After a thorough examination at the hospital, the doctor concludes that Jennifer's appendix is inflamed. She explains that Jennifer's parents need to authorize emergency surgery so that it can be removed before it bursts. Susan is unable to reach Carol to authorize the surgery, and Susan is not Jennifer's legal parent because their filial relationship exists by virtue of a marriage Georgia considers void. In contravention of Jennifer's best interests, a hospital official can disregard Susan's legal parentage and deny her the right to make a life-or-death medical decision for her daughter.[63]

In California, Jennifer had two legal parents and she is entitled to all of the benefits and protections that legal parentage affords, which would include a relationship with both mothers sufficient to allow either of them to make emergency medical decisions on her behalf.[64] The invalidation of her filial relationship with Susan and the resulting harms, authorized by Section 2, can have catastrophic consequences. The nullification of a legal parent-child relationship compromises benefits and protections guaranteed to the child by the Equal Protection and Due Process Clauses.

Where the child has no genetic relationship to a parent, parentage attendant to marriage provides little protection against invalidation of their filial relationship by non-recognition laws authorized by Section 2 of DOMA.[65] In

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63. *See* Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *17 (S.D. Ohio Apr. 14, 2014) (describing the adverse impact of Ohio's non-recognition law on legal parentage thusly, "Same-sex couples' legal status as parents will be open to question, including in moments of crisis when time and energy cannot be spared to overcome the extra hurdles Ohio's discrimination erects.").

64. In the absence of the marriage ban Section 2 authorizes, children's filial relationship with their non-biological parent is not vulnerable to invalidation. *See* Wendy G-M v. Erin G-M, 2014 WL 1884485, at *11 (N.Y. Sup. Ct. May 7, 2014). In that case the court was tasked with determining whether a non-biological spouse married to the birth mother in a civil ceremony in Connecticut is a parent pursuant to New York's long standing presumption that both spouses are the legal parents of any child born within an extant marriage. *Id.* Determining both spouses to be the child's legal parents, the court held, "Because the Marriage Equality Act has sanctioned marriage in New York, this state no longer needs to afford comity to other jurisdictions on resolving issues relating to parenthood in same-sex marriages." *Id.*

65. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 682-83 (2009). The Court explained the lesbian mothers' desire, despite their marital status, to allow the biological mother to adopt their child by stating:

> [A]s the child of a married couple, Sebastian already has a recognized and protected child/parent relationship with both Ingrid and Mona, arguably making adoption unnecessary and impermissibly duplicative. Unfortunately, while this is the case in New York, the same recognition and protection of Mona's parental rights does not currently exist in the rest of this country, or in most other nations in the world. For this reason, the parties argue that only an order of adoption would ensure the portability of Sebastian's parentage, and further ensure that the federal government and other states would recognize Mona as Sebastian's legal parent.

light of this reality, same-sex couples employ a variety of legal devices to establish and buttress the filial relationship between a child and her non-biological parent. These efforts are designed to insure against invalidation of the legal parent-child relationship by non-recognition laws that void the couple's marriage. These forms of legal parentage fall loosely into two categories: parentage by adoption and parentage by judgment. The availability of these "alternative" forms of legal parentage does not eliminate the harm caused by Section 2, and their viability remains subject to non-recognition laws.

Section 2 permits states to disregard "judicial proceeding[s] of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship," including legal parentage.[66] Parentage created by judgment, particularly those that rely upon the existence of a marital relationship between same-sex partners, falls within the scope of the exclusion authorized by Section 2. Additionally, same-sex adoptions and second parent adoptions have fallen prey to invalidation by marriage and adoption bans in non-recognition states and can secure no guarantee of legal parentage in those jurisdictions.

Alternative methods of creating the filial relationship may provide an added measure of security, however, they cannot entirely insulate against the harm caused by Section 2's grant of authority to non-recognition states to disregard the legal status of those relationships.[67] As same-sex couples challenging Tennessee's non-recognition statute argue in *Tanco:*

> [a]lthough . . . they can take additional steps to reduce some of these uncertainties . . . these steps would be costly and time-consuming . . . [and] they would result in only minimal legal protections relative to the full panoply of rights that otherwise attach to state-sanctioned marriage.[68]

The existence of "alternative" forms of legal parentage does not negate the claim that the non-recognition laws Section 2 authorizes deprives children in same-sex families of the most protected form of parentage—parentage incident to an existing marriage.[69]

C. Second Parent and Joint Adoption

One popular method of constructing legal parentage between a child and a

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Id. (citations omitted).

66. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996).

67. *Himes*, 2014 WL 1418395, at *17.

68. Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *4 (M.D. Tenn. Mar. 14, 2014).

69. Anderson, *supra* note 62, at 3 (noting that non-recognition laws result in situations where "children of [same-sex] relationships are subject to fluctuating legal relationships based only on geographical location.").

non-biological parent is by adoption.[70] Joint adoption involves a same-sex couple adopting a child, with both parents enjoying constitutional rights and protections identical to those biological parents possess, with respect to the child.[71] Second-parent adoption is the process by which the non-biological parent in a same-sex family or the stepparent, in an opposite-sex family, adopts the child, thereby, establishing a filial relationship.[72] Some states require marriage as a prerequisite for allowing a second-parent adoption.[73] Some states allow an individual gay or lesbian person to adopt a child, but prohibit gay and lesbian couples from adopting.[74] However, several states and counties within states prohibit second parent adoption, making it challenging for non-biological parents in same-sex marriages to establish a filial relationship with their child.[75] Additionally, there are non-recognition adoption statutes and constitutional amendments that void same-sex adoptions created in other states.[76]

Professor Rhonda Wasserman identifies three explanations non-recognition states offer for refusing to recognize out-of-state adoptions by gays and lesbians.[77] First, states have the right to decline to recognize adoptions deemed

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70. Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1, 41 (2009). It is important to note that adoption is a complicated and involved process, and couples who pursue this option do so at considerable cost. *Id*. Adoption proceedings are generally lengthy and require an intrusive, and often expensive, professional " home study, "which investigates the intimate details of a couple's relationship, finances, family, and living environment. *Id.* The investigation may also entail fingerprinting and a mandatory check for a criminal record as well as any prior reported child abuse or neglect. *Id.* at 41-42.

71. MOVEMENT ADVANCEMENT PROJECT ET AL., SECURING LEGAL TIES FOR CHILDREN LIVING IN LGBT FAMILIES: A STATE STRATEGY AND POLICY GUIDE 11 (2013) [hereinafter SECURING LEGAL TIES], *available at* http://www.lgbtmap.org/file/securing-legal-ties.pdf.

72. Deborah H. Wald, *The Parentage Puzzle: The Interplay between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 397-408 (2007).

73. *See, e.g.*, MD. CODE ANN., FAM. LAW § 2-201 (2013); *but see* D.C. CODE §§ 16-302, 46-401 (2001) .

74. *See* OHIO REV. CODE ANN. § 3107.03 (West 2011); Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *10 (S.D. Ohio Apr. 14, 2014) (noting that under Ohio law "opposite-sex married couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. Ohio courts allow an individual gay or lesbian person to adopt a child, but not a same-sex couple."); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 980 (S.D. Ohio 2013). Even in the absence of explicit bans gay couples and individuals still suffer discrimination in the placement context. SECURING LEGAL TIES, *supra* note 71, at 11.

75. *See, e.g.*, Wheeler v. Wheeler, 642 S.E.2d 103, 104 (2007) (Carley. J., dissenting) ("There is not any appellate opinion addressing same-sex adoptions in Georgia, even though they have been permitted at the trial court level in certain counties . . . ."); *see also* SECURING LEGAL TIES, *supra* note 71, at 14-15.

76. Anderson, *supra* note 62, at 17-18.

77. Wasserman, *supra* note 70, at 5.

fundamentally inconsistent with their public policy.[78] Second, the non-adversarial nature of most adoption proceedings allows states to argue that adoptions are not judicial determinations; rather, they are created by private agreement between the adoptive and birth parents, and therefore they are not entitled to recognition under the Full Faith and Credit Clause.[79] Finally, she notes, a state may characterize recognition of parental status as a matter of enforcement and determine that its adoption and parentage laws, rather than those of the issuing state, are controlling.[80] A survey of recent case law highlights the limited utility of adoption as a method of insuring the filial relationship between a child and her non-biological parent against invalidation.

Adar v. Smith, a Fifth Circuit case, involved an unmarried gay couple who adopted a child born in Louisiana.[81] A New York court issued a joint adoption order and both men were designated the child's legal parents.[82] The parents applied to the Louisiana State Registrar requesting that the child's original birth certificate be amended to include both of their names.[83] Citing a Louisiana statute prohibiting adoption by unmarried couples, the registrar refused the parents' request.[84] In recognition of the adoption order, the registrar agreed to add one of the men's names to the birth certificate.[85] The parents and the child filed suit arguing that the adoption decree and the resulting filial relationships between the child and both parents were entitled to recognition by Louisiana under the Full Faith and Credit Clause.[86] They also claimed that the actions of the registrar violated their equal protection rights because they discriminated against the child based upon the marital status of the parents.[87]

The District Court granted the Plaintiffs' motion for summary judgment, without reaching their equal protection claim.[88] A three-judge panel of the Fifth Circuit Court of Appeals affirmed the lower court's decision; however, that ruling was set aside by a majority of the full 16-member court sitting en banc.[89] In an 11-5 decision the Fifth Circuit ruled that the Full Faith and Credit Clause did not apply to the registrar's decision and that Louisiana was not obliged to recognize the law of a sister-state repugnant to its public policy against adoption by unmarried couples.[90] The court also rejected the parties' equal protection claim, reasoning that the state's goal of ensuring that children are raised in stable,

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78. *Id.* at 23-24. *But see* cases cited *supra* note 52.
79. Wasserman, *supra* note 70, at 36-39.
80. *Id.* at 72; *see also* Adar v. Smith, 639 F.3d 146, 160 (5th Cir. 2011).
81. *Adar*, 639 F.3d at 149.
82. *Id.*
83. *Id.*
84. *Id.* at 149-50.
85. *Id.* at 150.
86. Adar v. Smith, 639 F.3d 146, 151 (5th Cir. 2011).
87. *Id.* at 161.
88. *Id.* at 150.
89. *Id.*
90. *Id.* at 161.

married homes justified its adoption law and that goal was rationally related to the registrar's refusal to amend the birth certificate.[91] While the Louisiana law at issue in *Adar* did not prohibit same-sex marriage, it had the same adverse effect that enforcement of state marriage bans authorized by Section 2, would have on children's rights and interests. It renders second-parent and joint adoptions vulnerable to invalidation in non-recognition states in violation of children's constitutional rights.[92]

The outcome in *Boseman v. Jarrell*[93] also underscores the vulnerability of filial relationships created by adoption. In that case, a lesbian couple living together in North Carolina as domestic partners made joint efforts to conceive a child with the expressed intent of co-parenting him.[94] The non-biological mother assumed an equal share of the parenting responsibilities after their son's birth.[95] To secure the legal status of her relationship with the child, both parties sought an adoption order designating the non-biological mother as a legal parent without terminating the legal parentage of the biological mother.[96] Though North Carolina law did not expressly authorize the kind of adoption sought by the parties, an adoption court granted the parties' request.[97] Upon dissolution of their relationship and on appeal to the North Carolina Supreme Court, the biological mother obtained a judgment invalidating the filial relationship between the child and her non-biological adoptive mother.[98] At issue in that case was enforcement of an existing adoption order within the state of its issuance, not enforcement of an out-of-state order.[99] Nevertheless, the court's decision invalidating the order

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91. *Id.* at 162.

92. NAT'L CTR. FOR LESBIAN RIGHTS: ADOPTION BY LBGT PARENTS 2 (2014), *available at* http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf. For example, gay adoption in Georgia is not prohibited by law and the status of second parent adoption in Georgia is unclear. Wheeler v. Wheeler, 642 S.E.2d 103, 104 (Ga. 2007) (Carley, J., dissenting) (cert. denied) ("There is not any appellate opinion addressing same-sex adoptions in Georgia, even though they have been permitted at the trial court level in certain counties . . . ."). The uncertainty that characterizes the treatment of second parent adoptions in Georgia raises questions about the state's willingness to recognize out-of-state, same-sex adoptions. Parents can protect their families by applying for legal guardianship, but guardianship "proceedings are burdensome and often lack finality . . . ." DeBoer v. Snyder, 973 F. Supp. 2d 757, 763 (E.D. Mich. 2014). In addition, legal guardianship does not provide the same rights as legal parentage. *Id.* at 771 (the court observed that under Michigan guardianship law: "in the event that a state court were to award guardianship of . . . surviving children to the non-legal parent, the guardianship would have to be renewed annually and would remain susceptible to the challenge of an interested party at any time . . . plac[ing] such children in a legally precarious situation").

93. Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010).

94. *Id.* at 497.

95. *Id.*

96. *Id.*

97. *Id.* at 497-98.

98. *Id.* at 502.

99. *See generally id.*

and extinguishing the non-biological mother's status as the child's legal parent illustrates the limited ability of an adoption order to create legal parentage that is not vulnerable to invalidation by non-recognition laws. [100]

The Tenth Circuit's decision in *Finstuen v. Crutcher*[101] reaches a different conclusion regarding the constitutionality of state laws precluding recognition of out-of-state, same-sex adoptions. The court held:

> [F]inal adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation. Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause.[102]

Similar holdings in *Russell v. Bridgens*[103] and *In re Adoption of Sebastian*[104] also inspire some optimism regarding the security of legal parent-child relationships created via adoption by a gay or lesbian parent or couple in non-recognition states.[105] However, as the more recent holding in *Adar* suggests, the protection adoption affords against invalidation of the filial relationship between a child and her non-biological parent is far from absolute.[106]

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100. *See id.* at 502 (noting that the court is obligated to "recognize the statutory limitations on the adoption decrees that may be entered" and, due to this, the adoption decree was void *ab initio* and the non-biological mother is not a parent of the child).

101. Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).

102. *Id.* at 1141.

103. Russell v. Bridgens, 647 N.W.2d 56, 59 (Neb. 2002) ("A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.").

104. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 692-93 (2009) (holding that: "although it is also true that an adoption should be unnecessary because Sebastian was born to parents whose marriage is legally recognized in this state, the best interests of this child require a judgment that will ensure recognition of both Ingrid and Mona as his legal parents throughout the entire United States").

105. *See also* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 962, 970 (Vt. 2006) (holding DOMA does not require adherence to judgment from a non-recognition state (Virginia) where biological mother took daughter to have former partner's parental and visitation rights extinguished reasoning that another state's judgment will not be given greater weight than a pre-existing order in the home state and the former partner is a parent of the child).

106. Notwithstanding a valid adoption order, the filial relationship between a child and a non-recognition parent may still have to be litigated to be acknowledged in a non-recognition state. *See, e.g.*, Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *13 (S.D. Ohio Apr. 14, 2014) (describing the discriminatory impact of Ohio's non-recognition law the court observed: "Under Ohio law, if the [Plaintiffs'] marriages were accorded respect, both spouses in the couple would be entitled to recognition as the parents of their expected children. As a matter of statute, Ohio respects the parental status of the non-biologically related parent whose spouse uses AI to conceive a child born to the married couple . . . . However, Defendants refuse to recognize these Plaintiffs' marriages and the parental presumptions that flow from them, and will refuse to issue birth

These cases were decided before *Windsor*, which was preoccupied with the constitutionality of Section 3 of DOMA and left the legality of Section 2 to be determined in the future.[107] Section 2 authorizes states to disregard any "right or claim arising from" a same-sex marriage which includes legal parentage of a non-biological parent in a same-sex marriage who obtains a second-parent adoption.[108] In some states second-parent adoption is permitted only when that parent is married to the biological parent.[109] If the marriage to the biological parent is void, the second-parent adoption, which may exist by virtue of the marriage, arguably, is also void.[110] Accordingly, a child could be deprived of the constitutional entitlements and protections inherent in a legal parent-child relationship with her non-biological parent, notwithstanding the second-parent adoption.

D. Parenting Judgments

Parenting judgments provide another method of creating a filial relationship based on an expanded definition of parentage beyond consanguinity, adoption, and as appurtenant to marriage.[111] These judgments are issued pursuant to state parentage laws and judicial determinations that recognize parentage based upon a variety of considerations including: intent to parent, consent to the conception of the child, conduct of the parent in relation to the child, and the child's best interests.[112] Several states recognize that a non-biological and non-adoptive parent can be a legal parent under specified circumstances.[113] Some states have enacted filiation laws that extend legal parentage to include a parent who has lived with a child and held herself out as the child's parent.[114] Parentage statutes in Delaware reflect an expanded definition of parentage and recognize a *de facto* parent as a legal parent if she functions as a parent in the child's life.[115]

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certificates identifying both women in these couples as parents of their expected children.").

107. United States v. Windsor, 133 S. Ct. 2675, 2682-83 (2013).

108. *See, e.g.*, MD. CODE ANN., FAM. LAW § 2-201 (2013); *but see* D.C. CODE §§ 16-302 (1963), 46-401 (2010).

109. *Id.*

110. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 683-84 (2009).

111. Meghan Anderson, *K.M. v E.G.: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 288-89 (2006); Nora Udell, *A Riddle for Dr. Seuss "Are You My (Adoptive, Biological, Gestational, Genetic, De Facto) Mother (Father, Second Parent, or Stepparent)?" and an Answer for our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage*, 21 TUL. J.L. & SEXUALITY 147, 149 (2012) ("Diverse . . . laws among states make allocating parental rights and obligations both overly complex and unjustly simple."); Wald, *supra* note 72, at 392-99.

112. Anderson, *supra* note 111, at 278-95.

113. *Id.* at 284-86.

114. SECURING LEGAL TIES, *supra* note 71, at 19-20.

115. DEL. CODE ANN. tit. 13, § 8-201 (2013); Smith v. Guest, 16 A.3d 920, 932 (Del. 2011); *see also* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain*

In other states, parentage may be established based on intent and expressions of consent to parent a child.[116] In those jurisdictions, a same-sex couple that plans to conceive, bear, and raise a child together using new reproductive technologies can petition the court to declare the non-biological parent to be a legal parent to the child.[117] Several state courts have held that a woman who consents to her female partner's insemination can be a legal parent,[118] and a few states have enacted statutes that explicitly recognize either a man or a woman who consents to another woman's insemination as a legal parent, without regard to the couple's marital status.[119] Some states have adopted the most flexible standard for establishing legal parentage and have determined a filial relationship to exist based on factors that include the following: acceptance of parenting responsibilities, living with the child, action by the legal parent that fosters a parent-child relationship between the child and her non-biological parent, and the existence of a bonded parent-child relationship between the child and her non-biological parent.[120]

Parentage judgments should be entitled to full faith and credit by all states; however, as the decision in *Adar* instructs, states may not be required to recognize out-of-state parentage where recognition contravenes that state's laws or is repugnant to its public policy.[121] This form of legal parentage is particularly vulnerable to invalidation in non-recognition states that define parentage more narrowly and without regard for parties' intent, consent, or conduct.[122]

Relationships With Parent-Like Individuals, 53 MD. L. REV. 358, 393-94 (1994) (providing a test for establishing a principled limitation on the expansive definition of parent).

116. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005). In this case, the California Supreme Court declared Elisa to be the presumed mother of the children her former same-sex partner conceived through artificial insemination. *Id.* The court reasoned that she actively participated in causing the conception of the children with the understanding that she and her partner would raise them together, "she received the children into her home and openly held them out as her natural children," she voluntarily accepted the rights and obligations of parenting the children after they were born, and there existed no competing claims to her being a second parent. *Id.*

117. Anderson, *supra* note 111, at 284-85, 289-91; NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LBGT FAMILIES 4 (2014), *available at* http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.

118. *See, e.g.*, *In re* T.P.S., 978 N.E.2d 1070, 1079 (Ill. App. Ct. 2012); Shineovich v. Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009); *In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005).

119. *See*, *e.g.*, N.M. STAT. ANN. § 40-11A-703 (2010).

120. *See, e.g.*, D.C. CODE § 16-831.01 (2009); IND. CODE § 31-9-2-35.5 (2007); KY. REV. STAT. ANN. § 403.270(1) (2004); S.C. CODE ANN. § 63-15-60 (2008).

121. *See supra* note 51.

122. *See, e.g.*, MISS. CODE ANN. § 43-21-105(e) (2014); *see also* Wendy G-M v. Erin G-M, 2014 WL 1884485, at *11 (N.Y. Sup. Ct. May 7, 2014) (explaining that "a determination [of parentage by equitable estoppel] by a trial court is fraught with complications, disputed facts which could easily lead to expensive and contentious hearings and appeals.").

Additionally, if the parentage judgment depends upon the marital status of the couple under the parentage laws of the state where it is created, the filial relationship is vulnerable to nullification because the prerequisite marital relationship is void in a non-recognition state.

The specific language of Georgia's non-recognition statute makes clear "the courts of this state shall have no jurisdiction whatsoever under any circumstances . . . to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage."[123] This jurisdictional exclusion, which is repeated in the state constitution, can be interpreted as expressly prohibiting litigation of parenting judgments in Georgia courts. If a hospital, school, or state official declined to recognize legal parentage pursuant to such a judgment the child is expressly prohibited from litigating that deprivation in Georgia courts.

State laws governing the construction, existence and enforcement of the filial relationship have evolved to allow persons unrelated to a child to establish legal parentage. This expansion of the law affords greater protection to the legal status of the relationship between parents and children in same-sex families in recognition states. However, these laws do not insure against invalidation of the filial relationship, authorized by Section 2 in non-recognition states. As a result, their legal parent-child relationship and the benefits and protections inherent in that relationship, are only secure in recognition states. When the family moves to a non-recognition state the parent and the child may be rendered legal strangers.

The availability of alternative forms of legal parentage does not eliminate, though it may mitigate, the harm caused by Section 2 because those filial relationships may not be accorded full faith and credit by other states. Section 2 authorizes the enactment of non-recognition laws depriving a child of the most secure guarantee of their filial relationship with their non-biological parent – presumptive parentage incident to marriage. It authorizes states, like Georgia, to categorically nullify the filial relationship between a child and her non-biological parent, to deprive the child of the benefits and protections of that relationship, and to deny her the right to bring claims to enforce that relationship. In this way, Section 2 infringes children's equal protection and substantive due process rights, and it should be invalidated.

II. STANDING: CHILDREN HAVE SKIN IN THE GAME

For children's claims against Section 2 of DOMA to be successful they must satisfy standing requirements. Plaintiffs are said to have constitutional standing to bring actions in federal court where they meet the following three criteria: claimants must suffer an injury-in-fact, there must be a causal connection between the alleged deprivation and the state action, and a favorable decision must provide plaintiffs with actual relief.[124] In light of the direct and adverse

123. GA. CODE ANN. § 19-3-3.1 (2013).

124. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-64 (1992); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Los Angeles v. Lyons, 461 U.S. 95, 101-105 (1983); Opala

impact of Section 2's grant of authority to states to create non-recognition laws, children should satisfy standing requirements.

Hollingsworth v. Perry[125] was the first case heard during the 2012-2013 U.S. Supreme Court term addressing same-sex marriage. The case centered on the constitutionality of California's marriage ban, Proposition 8.[126] Though the case was ultimately decided without reaching the issue of Proposition 8's legality,[127] oral arguments in the case produced commentary by Justice Kennedy that support an argument that Section 2 of DOMA inflicts an injury-in-fact on children in families with same-sex parents. At the *Hollingsworth* hearing, he described the impact of California's marriage ban on children in same-sex families as "an immediate legal injury or . . . what could be a legal injury," acknowledging the existence of "40,000 children in California . . . that live with same-sex parents, [who] want their parents to have full recognition and full status."[128]

Justice Kennedy's acknowledgment of a potential legal injury to children affected by marriage bans has no precedential value; however, it ascribes an actionable injury to children whose same-sex families are not accorded full, legal recognition. Notably, Justice Kennedy's remarks centered on the marital relationship and the derivative harm children suffer due to the stigmatizing denial of their same-sex parents' marriage. Arguably, Section 2's impact on children is more direct and adverse than the dignitary harm described by Justice Kennedy because it authorizes states to enact laws that nullify *existing* parent-child relationships. Justice Kennedy's characterization of the impact of same-sex marriage bans as an immediate, legal injury, however, provides significant support for the argument that children suffer an injury-in-fact by the non-recognition laws Section 2 authorizes.

Though *Finstuen* centers on a non-recognition adoption law, it is instructive with respect to the injury-in-fact requirement.[129] In that case, of the three same-sex families seeking to enjoin enforcement of Oklahoma's adoption law, only one family was determined to have suffered an injury-in-fact.[130] One plaintiff was a gay couple residing in Washington with their child.[131] The child was born in Oklahoma and was jointly adopted by the couple.[132] In an effort to honor their promise to the surrogate mother to bring the child to Oklahoma for occasional visits, they sought issuance of an Oklahoma birth certificate identifying both of

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v. Watt, 454 F.3d 1154, 1157 (10th Cir. 2006).

125. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

126. *Id.* at 2659; *see also* CAL. CONST., Art. I, § 7.5.

127. *Hollingsworth*, 133 S. Ct. at 2668 (holding the parties lacked standing to challenge this provision).

128. Transcript of Oral Argument at 21, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf.

129. Finstuen v. Crutcher, 496 F.3d 1139, 1143-45 (10th Cir. 2007).

130. *Id.* at 1144-45.

131. *Id.* at 1142.

132. *Id.*

them as parents.[133] The court upheld the trial court's dismissal of their claim for lack of standing and explained:

> Ordinary travel generally does not require a state to examine the legitimacy of an asserted parent-child relationship. Although a medical emergency might create a scenario in which parental consent is required, such a situation is merely hypothetical, as opposed to an actual or impending contact with Oklahoma authorities that could jeopardize the rights of any member of the Hampel-Swaya family . . . . [The] family's alleged injuries are simply too speculative to support Article III's injury-in-fact requirement for standing.[134]

The second same-sex family involved two children born to one of the mothers in New Jersey who now reside in Oklahoma.[135] The non-biological mother obtained a second-parent adoption in New Jersey, which issued new birth certificates for the children naming both women as their parents.[136] The circuit court overturned the district court's determination that standing was satisfied based on the non-biological mother's fear that her filial relationship would be invalidated by the Oklahoma adoption statute.[137] The court explained:

> Ms. Finstuen recites no encounter with any public or private official in which her authority as a parent was questioned. Most importantly, she has not established that the amendment creates an actual, imminent threat to her rights as a parent or the rights of her adopted children, because she is not presently seeking to enforce any particular right before Oklahoma authorities. The Finstuen-Magro plaintiffs, therefore, also fail to state a sufficient injury to confer standing under Article III for this suit.[138]

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133. *Id.* Their request was initially granted and fulfilled, but an Oklahoma statute, passed one month later, expressly refusing to recognize out-of-state, same-sex adoptions, invalidated the birth certificate. *Id.*; OKLA. STAT. tit. 10, § 7502-1.4(A) (effective 2004), (*declared unconstitutional by Finstuen*, 496 F.3d at 1156). The statute provided:

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.

Id.

134. *Finstuen*, 496 F.3d at 1144.

135. *Id.* at 1142.

136. *Id.*

137. *Id.* at 1144-45.

138. *Id.* at 1145.

The third same-sex family resided in Oklahoma with their adopted daughter who was born in Oklahoma.[139] One mother adopted the child in California, where the couple resided, and received a supplemental birth certificate listing her as the child's mother.[140] The other mother obtained a second-parent adoption six months later.[141] The couple's request that the child's birth certificate be amended to include the second mother's name was denied.[142] Contrasting their claimed injuries with those alleged by the other families, the court held they had standing and ruled:

> [T]he Doels have standing under Article III. OSDH has refused to revise E's birth certificate to add Jennifer Doel's name as a parent, and thus both Jennifer and E state an injury-in-fact. In addition, Jennifer and Lucy Doel recount an encounter with medical emergency staff in which they were told by both an ambulance crew and emergency room personnel that only "the mother" could accompany E and thus initially faced a barrier to being with their child in a medical emergency. This incident too constitutes a concrete, particularized injury. . . .
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> . . . .
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> Moreover, the Doels brought an equal protection claim claiming that Jennifer and Lucy Doel were injured when they were told that only 'the mother' could accompany child E in a medical emergency. In equal protection claims, 'the injury is the imposition of the barrier itself.'. . . It is clear that the adoption amendment is the codification of a general policy not to recognize the parent-child relationship of same-sex parents, and the Doels have stated that this policy caused their injury. Thus, the Doels have standing under Article III to claim that the Oklahoma adoption amendment is unconstitutional and to request a revised birth certificate for E naming Jennifer Doel as a parent.[143]

Finstuen makes clear that the injury-in-fact requirement demands more than prospective, speculative, or hypothetical harm; however, in *Tanco* the court explained:

> [t]he state has taken the position that the plaintiffs' fears, including those of Dr. Tanco and Dr. Jesty with respect to the upcoming birth of their baby and their rights in their home should one of them die, are "speculative," "conjectural," and "hypothetical." But the court need not wait, for instance, for Dr. Tanco to die in childbirth to conclude that she and her spouse are suffering or will suffer irreparable injury from enforcement of the Anti-Recognition Laws.[144]

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139. *Id.* at 1142.

140. Finstuen v. Crutcher, 496 F.3d 1139, 1142 (10th Cir. 2007).

141. *Id.*

142. *Id.*

143. *Id.* at 1145, 1147 (citation omitted).

144. Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *7 n.12 (M.D. Tenn. Mar.

If to satisfy standing, a child must establish that she or her parent has had an actual—as opposed to anticipated—encounter with a public official—who has denied the existence of their filial relationship, she should be able to do so easily when Section 2 authorizes the enactment of laws, like Georgia's, that empower officials to disregard an existing filial relationship and that foreclose the litigation of claims and rights based on that relationship in its courts.[145]

Returning to the example of Jennifer, Susan and Carol: If the doctor at the hospital in Georgia refuses to recognize Susan's authority, as Jennifer's mother, to make the decision about the proposed necessary, emergency surgery, Jennifer could assert a concrete, particularized harm.[146] The harm at issue would be the

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14, 2014). The court granted the Plaintiffs' request seeking a preliminary injunction preventing enforcement of Tennessee's non-recognition laws. The court explained:

> [T]he evidence shows that the plaintiffs are suffering dignitary and practical harms that cannot be resolved through monetary relief. The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization. . . .
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> . . . .
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> For Dr. Jesty and Dr. Tanco, and for Mr. Espejo and Mr. Mansell, there is also an imminent risk of potential harm to their children during their developing years from the stigmatization and denigration of their family relationship. The circumstances of Dr. Jesty and Dr. Tanco are particularly compelling: their baby is due any day, and any complications or medical emergencies associated with the baby's birth—particularly one incapacitating Dr. Tanco—might require Dr. Jesty to make medical decisions for Dr. Tanco or their child. Furthermore, if Dr. Jesty were to die, it appears that her child would not be entitled to Social Security benefits as a surviving child. Finally, Dr. Tanco reasonably fears that Dr. Jesty will not be permitted to see the baby in the hospital if Dr. Tanco is otherwise unable to give consent (citation omitted). For all of these reasons, the court finds that the plaintiffs have shown that they will suffer irreparable harm from enforcement of the Anti-Recognition Laws.

Id. at *7; *see also, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014). Plaintiff couple, married in Massachusetts, contended that Texas' non-recognition law negated the non-biological parent's filial relationship with their child and that she could not be considered a legal parent unless she undertook "the long administrative and expensive process of adoption." *Id.* at 646. The court determined those "monetary damages [to] constitute a concrete, injury in fact suffered by Plaintiffs due to Texas' ban on same-sex marriage." *Id.*

145. The plaintiffs in the federal lawsuit challenging Georgia's non-recognition laws and marriage ban are adults who claim the laws violate their equal protection and substantive due process rights. Though there is a child present in one of the families, he is not a named plaintiff. *See supra* note 56.

146. This raises the question whether the imposition of the barrier (i.e., the existence Georgia's non-recognition law) would suffice to establish an injury-in-fact or whether Jennifer must actually

imposition of a barrier to the validity of Jennifer's filial relationship and the deprivation of the rights and protections inherent in the filial relationship, specifically authorizing life-saving medical care. Additionally, dismissal of a claim seeking to litigate a parent-child relationship for lack of subject matter jurisdiction, as prescribed by Georgia's jurisdictional exclusion, should qualify as an injury-in-fact. Such a claim could arise in the context of a child custody or visitation dispute. Citing language from *Windsor* that references the demeaning and humiliating message DOMA Section 3 delivered to same-sex couples and children within same-sex families,[147] courts entertaining suits challenging state laws have also determined dignitary harm to be cognizable as an injury-in-fact.[148]

With respect to the second standing requirement, a causal connection between the alleged deprivation and the state action, children in same-sex families can argue that Section 2, like the non-recognition law at issue in *Finstuen*, is a "codification of a general policy not to recognize the parent-child relationship of same-sex parents."[149] Though the Oklahoma law addressed non-recognition of out-of-state *adoptions* and not out-of-state *marriages*, as Section 2 does, the effect of the law is the same. It authorizes the invalidation of the child's filial relationship with her non-biological parent, which the *Finstuen* court described as the imposition of a barrier in violation of equal protection entitlements.[150] The injury inflicted, nullification of an existing parent-child relationship, is a result of the authority Section 2 grants states to disregard out-of-state, same-sex marriages, and the legal parentage incident to marriage.[151]

To satisfy the third standing requirement, children need to establish that invalidation of Section 2 would provide them with actual relief.[152] To that end, they can argue that abrogation of Section 2 would require states to recognize out-of-state marriages and legal parentage incident to the marriage in a manner consistent with the comity other out-of-state marriages generally enjoy.[153]

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experience physical harm (i.e., death or critical injury) before she is considered to satisfy that standing criterion.

147. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

148. *See, e.g.*, Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB, 2014 WL 1568884, at *2 (S.D. Ind. Apr. 18, 2014) (finding, "the deprivation of the dignity of a state sanctioned marriage is a cognizable injury under Article III" based upon its determination "that Windsor recognized and remedied a dignitary injury.").

149. Finstuen v. Crutcher, 496 F.3d 1139, 1147 (10th Cir. 2007).

150. *Id.*

151. *See supra* note 15.

152. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-64 (1992).

153. Indeed, this argument is consistent with the purpose for which Section 2 was enacted—to permit states to disregard same-sex marriages and rights, claims, and relationships arising from those marriages. *See* Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252, 1263 (N.D. Okla. 2014) (describing the purpose of Section 2 of DOMA by observing, "According to the House Report preceding DOMA's passage, the primary purpose of Section 2 was to 'protect the right of the States to formulate their own public policy regarding legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the

Arguably, even if the Full Faith and Credit Clause required recognition of out-of-state, same-sex marriages, its public policy exception would allow a state to disregard sister-state laws that contravene its public policy against gay marriage.[154]

If the public policy exception exists, and there are conflicting circuit court decisions on this point,[155] states could enact and enforce non-recognition laws, notwithstanding Section 2.[156] In that case, Section 2 is essentially inert, and invalidating it would not provide children with relief, as standing requires.[157] However, given that there is meaningful support for the position that no public policy exception to the Full Faith and Credit Clause exists,[158] the invalidation of Section 2 could require non-recognition states to give full faith and credit to out-of-state, same-sex marriages and parentage incident thereto.[159] In that case, it would remove a barrier, and might serve to invalidate state marriage bans, which

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right for homosexual couples to acquire marriage licenses.'" (citing H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906).

154. *Id.* (referencing the House Judiciary Committee Report on Section 2, the court explained that the Committee "determined that states already possessed the ability to deny recognition of a same-sex marriage license from another state, so long as the marriage violated a strong public policy of the state having the most significant relationship to the spouses at the time of the marriage. However, the Committee also expressed its view that such conclusion 'was far from certain'").

155. *See supra* note 51.

156. *See* H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

157. Bishop, 962 F. Supp.2d at 1265-69. The *Bishop* court addressed the operation of Section 2 as relevant to the causation prong of standing requirements. It held,

> Section 2 is an entirely permissive federal law. It does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon non-recognizing states, and does not punish recognizing states . . . . Section 2 does not have any coercive or determinative effect on Oklahoma's non-recognition of the [ ] couple's California marriage. At a maximum, it removes a potential impediment to Oklahoma's ability to refuse recognition—namely, the Full Faith and Credit Clause.

Id. at 1266 (citations omitted).

158. *See* Adar v. Smith, 639 F.3d 146, 179 (2011) (noting that there is "no roving public policy exception to the full faith and credit that is owed to out-of-state judgments"); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971-76 (1997); *but see* Grossman, *supra* note 47, at 463-67; L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 43-44 (1998).

159. H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929 (referencing the potential necessity of Section 2, the report provides, "While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same-sex marriages celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate."); *see also* Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 378 (D. Mass. 2010); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1532 (2007).

would eliminate the injury suffered by children deprived of their filial relationships with their non-biological parent. Their filial relationships would no longer be vulnerable to nullification, and they would enjoy all of the benefits, protections, security, permanency, and stability that the legal parent-child relationship affords. Having addressed the issue of children's standing to challenge Section 2, this Article now turns to an examination of the best interests of the child standard, which informs the existence, scope, and substance of children's constitutional rights infringed by Section 2.

III. THE PRIMACY OF LEGAL PARENTAGE UNDER THE BEST INTERESTS OF THE CHILD STANDARD

The best interests of the child standard emerged as the polestar consideration for custodial determinations in late nineteenth and early twentieth century jurisprudence.[160] The rationale behind the application of the standard, which affords courts wide discretion to consider factors that inform a child's physical, psychological, social, and emotional well-being, is that the court, acting as *parens patriae,* will do what is best for the child.[161] This determination is fact-specific and should be done on a case-by-case basis with an eye toward ensuring the child's sustained growth, development and well-being, as well as security, continuity, and stability in her environment.[162] The best interests of the child standard is controlling in custody,[163] visitation,[164] and adoption determinations.[165]

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160. Chapsky v. Wood, 26 Kan. 650, 654 (Kan. 1881) ("Above all things, the paramount consideration is, what will promote the welfare of the child?"); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925).

161. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (noting "that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection"); Santosky v. Kramer, 455 U.S. 745, 766 (1982).

162. Watts v. Watts, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). The Court stated:

> The factors used to determine what is in the " best interests "of a child with regard to custody are: (1) age, health, and sex of the child; (2) determination of the parent that had the continuity of care prior to the separation; (3) which parent has best parenting skills and . . . other factors relevant to the parent-child relationship.

Id. (citations omitted).

163. Barney v. Barney, 301 A.D.2d 950, 951 (N.Y. 2003). The Court made clear that:

> The paramount consideration in determining custody is the best interests of the child. This crucial consideration is not tied to a routine analysis but, recognizing the uniqueness of each case, looks to the totality of the circumstances, including factors such as the child's age, the quality of each parent's home environment, the parents' relative fitness, the ability of each parent to provide for the intellectual and emotional development of the child, and the effect of the custody award on the child's relationship with the noncustodial parent.

Id. (citations omitted).

164. Fine v. Fine, 626 N.W.2d 526, 532 (Neb. 2001) (noting that the best interest of the child

In the custody context, the standard is used to assess the comparative competencies of parents competing for custody of a child.[166] In other contexts, such as adoption, the standard is applied to each parent seeking to adopt, and the court engages in a fact-specific inquiry into a child's needs and corresponding parental abilities.[167] In all contexts, the standard focuses on the relationship between the child and parent, or prospective parent, and it contemplates whether a child's emotional, intellectual, social, and physical well-being is served by that relationship.[168] The legal parent-child relationship is presumed to serve the child's best interests.[169]

The application of the best interests standard in the visitation context is particularly instructive in analyzing a child's right to a legal filial relationship.[170] The generalized assumption that a child benefits from a continued relationship with both divorcing parents is subject to a determination that the relationship with each parent serves the child's best interests, absent a determination that a parent is unfit.[171] While the noncustodial parent may be determined to be comparatively less competent to provide for a child's best interests, visitation is underwritten by an acknowledgment that a child's estrangement from the non-custodial parent is adverse to her well-being.[172] Not only is visitation with the non-custodial parent regarded as beneficial to a child, courts have recognized that children have an independent right to visitation with their non-custodial parent.[173] A child and her parent can only be deprived of this right where there is evidence that visitation is inimical to the child's physical or emotional needs.[174] Similarly

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standard serves as the "primary and paramount" consideration in decisions regarding visitation with a child).

165. Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. App. 3 Dist. 2010); Dupre v. Dupre, 857 A.2d 242, 251-52 (R.I. 2004).

166. *In re* Custody of Walters, 529 N.E.2d 308, 310-11 (Ill. App. 3d 1988).

167. *See* cases cited *supra* note 165.

168. *Dupre*, 857 A.2d at 251-52 ("Few principles are more firmly established in the law, however, than that in awarding custody, placement, and visitation rights, the 'paramount consideration' is the best interests of the child.") (citation omitted).

169. Parham v. J.R., 442 U.S. 584, 602-03 (1979) (emphasizing that "parents generally do act in the child's best interests"); *see also* Troxel v. Granville, 530 U.S. 57, 68-69 (2000).

170. *See In re* Marriage of Kiister, 777 P.2d 272 (Kan. 1989); Keen v. Keen, 629 N.E.2d 938 (Ind. Ct. App. 1994); DenHeeten v. DenHeeten, 413 N.W.2d 739 (Mich. Ct. App. 1989).

171. *See generally* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5 (2002); Rachel M. Colancecco, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 DREXEL L. REV. 573 (2009).

172. Negaard v. Negaard, 642 N.W.2d 916, 920-21 (N.D. 2002).

173. Camacho v. Camacho, 218 Cal. Rptr. 810, 220 (Ct. App. 1985) (noting that "visitation by the natural parent is as much a right of the child as it is of the parent"); Berg v. Berg, 642 N.W.2d 899, 903 (N.D. 2002); Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993) (noting that visitation is both presumed to be in the child's best interest and a right of the child).

174. *See* Woods v. Woods, 498 N.E.2d 906, 908 (Ill. App. Ct. 1986) (stating that visitation

children in same-sex families should not be deprived of their filial relationship with their non-biological parent when they move to a non-recognition state, unless the presumption that estrangement would be harmful to their interests is rebutted with credible evidence, or the determination is made subject to a fact-specific, individualized examination of the parent-child relationship. The categorical invalidation of legal parentage authorized by Section 2 dispenses with the required examination.[175]

The best interests of the child standard is a category of considerations relevant to a child's well-being, which should enjoy constitutional protection. In *Palmore v. Sidoti*, the U.S. Supreme Court described the best interests of the child as "indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[176] Many courts invalidating marriage bans have acknowledged the child's best interests as a compelling or legitimate state interest.[177] If children's interests rank as such, those same interests should enjoy constitutional protection against government infringement.

The substance of the best interests standard has evolved from being measured almost exclusively in terms of parental conduct,[178] to being focused on the benefits and protections a child derives from her legal relationship with her parent. As one judge observed, while questioning the constitutionality of depriving children of the opportunity to have *de facto* parents recognized as legal parents,

> [a law] that would deny children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of . . . the best interests of the child.[179]

Children's rights and interests are presumptively served and secured by the legal parent-child relationship.[180] Undergirding this presumption is an implicit acknowledgment of the filial relationship as quintessential to a child's protection

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may only be restricted where there is evidence that the child's physical, mental, moral, or emotional health would be endangered); Hendrickson v. Hendrickson, 603 N.W.2d 896, 902-03 (N.D. 2000) ("Denying a non-custodial parent visitation with a child is 'an onerous restriction,' such that ' physical or emotional harm resulting from the visitation must be demonstrated in detail' before it is imposed.") (citation omitted); Percle v. Noll, 634 So. 2d 498, 502 (La. Ct. App. 1994); Maxwell v. LeBlanc, 434 So. 2d 375, 379-80 (La. 1983).

175. *See supra* note 31.

176. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

177. *See infra* note 323.

178. *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925); Chapsky v. Wood, 26 Kan. 650, 654 (Kan. 1881) ("Above all things, the paramount consideration is, what will promote the welfare of the child?").

179. *In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (citation omitted) .

180. Parham v. J.R. 442 U.S. 584, 602 (1979) (noting that, "historically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children").

and care. In addition to the material benefits and protections children derive from the filial relationship,[181] there are also emotional, social, and mental benefits that derive from the permanency, constancy, and stability that the legal parent-child relationship provides.[182] Courts have consistently acknowledged these entitlements, which are inherent in the filial relationship, as serving children's best interests in a variety of contexts, including: custody disputes where courts reference the benefits of maintaining a relationship with both parents;[183] in federal permanency statutes and cases that acknowledge the primacy of permanent placement over extended foster or institutional care;[184] and in tort law.[185] By depriving children of the tangible and intangible benefits inherent in the filial relationship in contravention of their best interests, their equal protection and due process rights become casualties of the laws Section 2 authorizes.

A. Moving Children's Interests from Rhetoric to Rights

In *Planned Parenthood of Central Missouri v. Danforth*,[186] the U.S. Supreme Court expressly acknowledged the existence of children's constitutional rights, explaining, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[187] However, the scope and substance of those rights are not clearly defined, and are often obscured by parental rights. In his dissenting opinion in *Troxel v.*

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181. United States v. Windsor, 133 S. Ct. 2675, 2694-96 (2013).

182. Woodhouse, *"Out of Children's Needs, Children's Rights*," *supra* note 29, at 327-30.

183. *See, e.g.*, Mason v. Coleman, 850 N.E.2d 513, 515 (Mass. 2006) (finding no abuse of discretion in lower court's refusal to authorize mother's removal of the children to a different state reasoning that protection of the children's relationships with both parents is in the best interest of the child).

184. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 811 (11th Cir. 2004); *Encouraging Adoption: Hearing Before the Subcomm. on Human Res. of the Comm. on Ways and Means*, 105th Cong. 112 (1997) ("Permanency has a variety of connotations including the notion of stability with respect to the home where a child lives and his or her relationship to their caregivers. In the strictest sense, however, permanency refers to that place where the legal relationship between a child and the caregiver is most secure.").

185. For example, in wrongful death cases, bystander recovery cases, and loss of consortium claims, children may be allowed to recover based on the psychological and emotional harm experienced as a result of the loss of a parent and the loss of the benefits and protections derived from that relationship. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 101 (1983); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

186. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

187. *Id.* at 74; *see also* Bellotti v. Baird, 443 U.S. 622, 634-35 (1979) (citing several areas of law where the U.S. Supreme Court has recognized and protected the interests of children against unconstitutional government action).

Granville,[188] Justice Stevens referenced the indeterminate nature of children's constitutional rights in the familial context and observed:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, *it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation*. At a minimum, our prior cases recogniz[e] that children are, generally speaking, constitutionally protected actors . . . ."[189]

In *Troxel*, the Court decided an appeal from a state court's grant of visitation to a child's grandmother over the objection of the custodial parent.[190] The Court determined the statute authorizing the visitation order infringed fundamental parental rights and was not justified even if visitation would serve the child's best interests.[191] The majority opinion in *Troxel* does not acknowledge the child as a constitutional stakeholder or consider the best interests standard to create a set of enforceable and protected rights that the child can assert. As Justice Stevens notes in his dissent, "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at minimum a third individual, whose interests are implicated in every case . . . the child."[192]

Justice Stevens's suggestion that children's rights within the family and rights to relationships with family members exist and enjoy constitutional protection is raised, though not resolved, by the Court in *Michael H v. Gerald D*.[193] In this case, the Court expressly declined to determine whether a child has a substantive due process right to her relationship with her natural father.[194] Justice Scalia, writing for the majority, described the issue as one of first impression and explained, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . ."[195]

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188. Troxel v. Granville, 530 U.S. 57 (2000).

189. *Id.* at 88-89 (Stevens, J., dissenting) (citation omitted) (emphasis added). The claim advanced in this Article seizes upon a characterization of the best interest of the child standard as a vehicle for the expression of children's enforceable constitutional rights to the benefits inherent in the filial relationship.

190. *Id.* at 61-63.

191. *Id.* at 72-73.

192. *Id.* at 86 (Stevens, J., dissenting).

193. Michael H. v. Gerald D., 491 U.S. 110, 130-32 (1989).

194. *Id.* at 130. The Court framed the issue in terms of whether Victoria could have a relationship with both her natural father, with whom the evidence established she had a healthy relationship, and her stepfather. The Court's framing of the issue (i.e., whether a child can have two fathers) allowed it to more easily justify its decision.

195. *Id.* David Meyer makes an interesting observation about the seemingly contradictory

At the heart of *Michael H.* was Victoria, who was born into the marriage of Carole and Gerald, but was the result of an adulterous affair between Carole and Michael.[196] Michael acknowledged Victoria as his daughter, a blood test confirmed their biological relationship,[197] and during the first three years of Victoria's life she enjoyed a parent-child relationship with her biological father and with her mother's husband.[198] Michael filed a filial action in California state court to establish paternity and visitation rights.[199] On appeal from the lower court's decision denying him paternity, he argued that he had a constitutionally protected liberty interest in his parental relationship with Victoria, and that the termination of that relationship violated his substantive due process rights.[200] Victoria asserted a complementary constitutional claim to her filial relationship with Michael.[201] The Court framed the central issue in the case as whether tradition accords constitutional protection to the family unit and relationships that are formed within the "unitary family," rather than whether constitutional protection should encompass the individual rights of natural parents and natural children to a legal filial relationship with one another.[202] Scalia's skillful subversion of children's rights begins by conditioning the natural father's substantive, constitutional right to a continued relationship with his child upon his marital status vis-a-vis the child's mother.[203] He then framed Victoria's claim as asserting "a due process claim to maintain filial relationships with both Michael and Gerald," and rejected her claim reasoning, "whatever the merits of the guardian *ad litem's* belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[204] The Court upheld the termination of Michael's filial relationship with Victoria, because it would intrude upon the filial relationship between Victoria and her mother's husband.[205] The Court's holding in *Michael H.* reveals the preservation

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positions Justice Scalia takes in Troxel and Michael H observing, "In *Troxel v. Granville* . . . two Justices [Stevens and Scalia] suggested that future claims of parental prerogative over child visitation would need to be balanced against the competing privacy rights of children themselves." David Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1119 (2003).

196. *Michael H.*, 491 U.S. at 113.

197. *Id.* at 114 (noting that blood tests of Michael, Carol, and Victoria established a 98.07% probability that Victoria was Michael's child).

198. *Id.*

199. *Id.* at 115.

200. *Id,* at 115-16.

201. *Id.* at 116.

202. *Michael H.*, 491 U.S. at 124.

203. *Id.* at 130-31.

204. *Id*.

205. *Id.* at 130. Justice Scalia explains the tension inherent in the balance of protecting parental rights and preserving marriage:

In *Lehr v. Robinson* . . . we observed that "[t]he significance of the biological

of the marital ideal to be the thumb on the scale that prioritizes marriage, even one marked by infidelity, over an existing parent-child relationship. The Court has yet to clearly define the scope and substance of children's rights to legal parentage[206] that would animate the proposed challenge to Section 2 as authorizing states to nullify existing, filial relationships, in contravention of children's best interests. *Troxel* and *Michael H.* both involve the balancing of parental, third-party, children's and state interests and rights in the domestic context. In *Troxel*, the child's rights were not at issue and the Court's analysis, as Justice Stevens observed, centered on the conflict between parental rights and third-party rights to the child.[207] In *Michael H.*, even though the child was at the center of the controversy, the Court declined to determine her right to a relationship with her natural father, and the Court's holding was predicated upon the primacy of the marital relationship.[208] The Court fails to recognize the child as a constitutional stakeholder in both cases. However, neither decision encumbers the claim that the best interests of the child secures a child's right to an existing filial relationship. Negating that relationship and its benefits and preventing the child from raising claims and rights related to it infringes her constitutional rights.

B. Children's Rights vs. Parental Rights: A Zero Sum Game?

One argument against recognizing children's right to a filial relationship is

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> connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring," and we assumed that the Constitution might require some protection of that opportunity. Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. In *Lehr* we quoted approvingly from Justice Stewart's dissent in *Caban v. Mohammed*, to the effect that although "[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father," "the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist." . . . Here, to provide protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa.

Id. at 128-30 (citations omitted).

206. *See* Bellotti v. Baird, 443 U.S. 622 (1962). This case offers some guidance as to the privacy and liberty interests of children in the familial context. In *Bellotti*, the Court analyzed the constitutionality of a Massachusetts statute restricting the access of minors to abortion procedures by the imposition of parental notice and consent requirements. *Id.* at 625-26. The Court's analysis begins with an acknowledgement of children's constitutional rights and emphasizes the importance of the parent-child relationship as contributing to the child's well-being and as an integral aspect of an optimal familial environment. *Id.* at 633-39.

207. *See* Troxel v. Granville, 530 U.S. 57 (2000).

208. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

that it would diminish the scope and substance of parental rights. As children's rights scholar and law professor Martha Fineman has observed, "[s]ecured within the private family, the dependent child becomes the primary responsibility of the parent. This conceptualization renders most considerations of the child independent of the family (parent) inappropriate because they are potentially adversarial."[209] Many fear that the enlargement of children's rights will circumscribe parental authority over their children.[210] Observing the

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209. Martha Albertson Fineman, *Taking Children's Interests Seriously*, *in* WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 229 (Martha Alberston Fineman & Karen Worthington eds., 2009). On this point Professor Fineman observes further, "As with many . . . decisions affecting children and families, the rights and responsibilities of parents and the state must be components of any consideration of what is appropriate for children. . . . Perhaps it is evidence of our inability to rise above binary thinking . . . . The independent interests of the child, if recognized at all, are submerged as we slip into a consideration of the competing claims of authority over children made on behalf of parent and the state." *Id.*

210. This argument is also credited by some as a principal reason for the United States' reluctance to ratify the United Nations Convention on the Rights of the Child. *See* Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55, 56 (1998) (stating: "The argument that the Convention on the Rights of the Child will undermine or even negate parental rights and responsibilities is probably the most effective political weapon in the Convention opponents' arsenal. . . . These predictions cut to the core of our fierce, American-style independence, offend our sense of justice, individuality, and privacy, and seem to fly in the face of Supreme Court rulings holding parental rights to be protected by the Constitution."). The U.N. Convention on the Rights of the Child has been adopted by the U.N. General Assembly and has been ratified by every nation except Somalia and the United States. *Id.* at 57 n.8. On February 23, 1995, the United States became the 177th nation to sign the Convention, but it has not been considered by the Senate for ratification. *Id.* at 55-56. Historically it represents the most widely ratified human rights treaty. *Id*. at 57-59. It is also the first International document to comprehensively address children's civil, political, economic, social, and cultural rights. *Id*. It reflects the general principles espoused in two previously established non-binding declarations, the Geneva Declaration of the Rights of the Child (1924) and the United Nation Declaration of the Rights of the Child. *Id*. Critics of the Convention argue that in addition to interfering with state law, it would interfere with parental rights. Lainie Rutkow & Joshua T. Lozaman, *Suffer the Children?: A Call for the United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 165 (2006). State and local jurisdictions would be most impacted by the Convention because most of the Convention articles concern matters traditionally relegated to state rule. While some reservations to the terms of the Convention can be made, Article 51(2) limits the establishment of exceptions to those that do not contravene its central purpose. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, at art. 51 [hereinafter Convention]. It provides, "A reservation incompatible with the object and purpose of the present Convention shall not be permitted." *Id.* Proponents of the Convention contend that ratification would help define the best interest standard and increase enforcement of children's rights. Kilbourne, *supra* note 210, at 61. It could also result in the prioritization of children's rights over parental and governmental authority even when the latter two categories of power are

entrenchment of parental rights, one commentator explained:

> [T]he tradition of legal protection of parental rights has deep historical roots. Before the twentieth century, the combined status of biological parenthood and marriage signified a legal authority of almost limitless scope. . . . *Parental rights were understood to be grounded in natural law and were not dependent on behavior that promoted the child's interest*. . . . In the 1920s, the United States Supreme Court elevated parental rights to constitutional stature, restricting the extent to which the state can override parental authority.[211]

The right of the natural parent to raise her own child is considered fundamental and the right enjoys significant protection by the federal and many state constitutions.[212] The U.S. Supreme Court first recognized the constitutional character of parental rights in relation to their children in *Pierce v. Society of Sisters*[213] and *Meyer v. Nebraska*.[214] Although these early cases focused on parental rights, they implicitly raised questions about the existence, scope, and substance of rights held by the children over whom adults exercised authority.[215] Eventually, the Court expressly recognized children's rights as constitutional in *Prince v. Commonwealth of Massachusetts*,[216] although as in the cases that preceded it, parental rights enjoyed primacy.[217] These cases made it difficult for children to present their rights as independent from parental rights and as enforceable against infringement by parents and the State.

Ten years after *Prince*, children's rights finally began to emerge from the

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asserted on behalf of the child. *Id.* Article 3 of the Convention provides, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention, *supra* note 210, at art. 3. Article 7 provides, "The child . . . shall have . . . as far as possible, the right to know and be cared for by his or her parents." *Id.* at 7. For a thorough examination of the implications of U.S. ratification of the Convention, see generally JONATHAN TODRESS ET AL., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION (2006).

211. Elizabeth Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2407-08 (1995) (emphasis added).

212. Santosky v. Kramer, 455 U.S. 745, 769 (1982).

213. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

214. Meyer v. Nebraska, 262 U.S. 390 (1923).

215. *But see* Barbara Bennett Woodhouse, *"Who Owns the Child:" Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 998 (1992) ("*Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property.").

216. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 164 (1944). The Court explained the relationship between the parental and children's rights at issue stating, "[T]wo claimed liberties are at stake. One is the parent's to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these . . . ." *Id.*

217. *Id*.

preponderant shadow of parental interests and ground independent constitutional challenges in *Brown v. Board of Education*[218] and later in *In re Gault*.[219] In *Brown* the plaintiffs were children who, through their legal representatives, challenged the constitutionality of the doctrine of separate-but-equal based on impairment of their right to an equitable educational experience.[220] The challenge was not framed in terms of parental rights – the right of parents to provide an equal educational opportunity for their children or the right of parents to have their tax dollars used to provide equal educational opportunities for their children without regard to their race. Instead, the claim centered on the direct harm *de jure* discrimination in the education context caused Black children.[221] A unanimous Court trumpeted, "[S]egregation of children in public schools solely on the basis of race . . . *deprive[s] the children* of the minority group of equal educational opportunities"[222] in vindication of children's rights. The decision, heralded for its significance in the struggle for civil rights, also represents a high water mark for children's rights jurisprudence.[223]

The Court's unequivocal acknowledgment of children as possessing enforceable constitutional rights against harmful State action in *Brown*[224] was echoed in the Court's decision four years later in *Cooper v. Aaron*.[225] Responding to Arkansas' reticence to integrate its public schools, the Court stated, "[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."[226] The Court's acknowledgment of children's constitutional rights expanded beyond equal protection entitlements to encompass due process protections as well, in one of its most celebrated juvenile law decisions, *In re Gault*.[227] In that opinion the U.S. Supreme Court addressed whether juveniles accused of crimes in delinquency proceedings are entitled to procedural due process protections comparable to those enjoyed by adults.[228] The Court declared, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone"[229] and held that juveniles facing an adjudication of delinquency and incarceration are entitled to certain procedural safeguards under the Due Process Clause of the Fourteenth Amendment.[230]

While *Pierce* and *Meyer* reflected only implicit recognition of children's

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218. Brown v. Board of Educ., 347 U.S. 483 (1954).

219. *In re* Gault, 387 U.S. 1 (1967).

220. *Brown*, 347 U.S. at 487-88.

221. *Id.* at 493.

222. *Id.* (emphasis added).

223. *See generally* Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach*, 97 CORNELL L. REV. 549 (2012).

224. *Brown*, 347 U.S. at 493.

225. Cooper v. Aaron, 358 U.S. 1 (1958).

226. *Id.* at 16.

227. *In re* Gault, 387 U.S. 1 (1967).

228. *Id*. at 4.

229. *Id.* at 13.

230. *Id.* at 30-31.

rights, as co-extensive with or derivative of parental rights, the decisions in *Brown* and *In re Gault* identified children's rights as independent from parental rights and enforceable against government action. In both *Brown* and *In re Gault* children's rights were being advanced against State action and their claims did not implicate parental rights or support an argument that enlargement of children's rights could result in a corresponding diminishing of parents' rights.

The 1970s ushered in an era during which children's liberationists advocated for greater recognition of children's rights.[231] Perhaps in response to calls for legal reform, the U.S. Supreme Court recognized the existence of children's autonomous privacy interests;[232] however, the exact nature of those rights continues to provide fertile ground for debate.[233] One particularly formidable challenge to the project of defining children's constitutional rights is that they are neither fixed nor easily discernible and they continue to be measured in relation to parental rights, particularly in the familial context.[234] To ensure sufficient constitutional guarantees for children, the scope and character of their rights should be determined according to that which serves their best interests, and not in relation to parental rights.[235]

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231. Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 WM. MITCHELL L. REV. 807, 814 (2007); Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents*, 83 N.D. L. REV. 1227, 1246-47 (2007).

232. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Ingraham v. Wright, 430 U.S. 651 (1977); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Weber v. Aetna Cas. & Sur., 406 U.S. 164 (1972); *In re* Winship, 397 U.S. 358 (1970); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Levy v. Louisiana, 391 U.S. 68 (1968).

233. *See generally* Tom D. Campbell, *The Rights of the Minor: As Person, as Juvenile, as Future Adult*, 6 INT'L J.L. & FAM. 1, 2 (1992); Martha Minow, *What Ever Happened to Children's Rights?,* 80 MINN. L. REV. 267 (1995); Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights,* 40 WAYNE L. REV. 1227 (1994); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979); Woodhouse, *"Out of Children's Needs, Children's Rights*," *supra* note 29, at 322.

234. Fineman, *supra* note 209, at 229-30 ("In our system, the family (headed by the parent) is the social institution to which children with their dependency are referred . . . In most cases, the family is presumed to function appropriately, and the child, invisible within the private sphere, can conveniently be ignored . . . ."); *see also* Glenn Collins, *Debate Over Rights of Children Is Intensifying*, N.Y. TIMES, July 21, 1981, at A1, *available at* http://www.nytimes.com/1981/07/21/style/debate-over-rights-of-children-is-intensifying.html (quoting Robert Mnookin). Professor Robert Mnookin recognizes three major themes reflected in U.S. Supreme Court jurisprudence addressing children's rights: "First, that parents have primary responsibility to raise children. Second, that the state has special responsibilities to children, to intervene and protect them. And third, that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state." *Id.*

235. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Justice Stevens critiques the plurality's subversion of children's constitutional rights, contending:

> A parent's rights with respect to her child have [ ] never been regarded as absolute, but

While it is clear that children possess enforceable equal protection and due process rights, what has yet to be resolved is the relative weight to accord children's rights when balanced against competing parental interests. This is of particular concern in domestic contexts where parental rights and children's rights are often in conflict with one another.[236] *Bellotti v. Baird* identified "the importance of the parental role in child rearing" as a justification for according children's rights less constitutional protection than parental rights.[237] However vis-à-vis the state, the Court has questioned the legitimacy of distinguishing between children's rights and parental rights and has observed:

> The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult. . . . These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. . . . [T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'[238]

The proposed claims would not pit children's rights against parental rights and engage a set of competing, constitutionally protected interests that courts have struggled to balance.[239] Instead the child challenges Section 2 of DOMA, which authorizes states to adopt laws that nullify the existing filial relationship with his or her non-biological parent.

The child's claim to an extant, legal, parent-child relationship is identical to the parent's corresponding claim to the same, and both claims allege that Section 2 of DOMA authorizes unconstitutional infringement of children's and parents' constitutional rights. Though the invalidation of the legal parent-child

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> rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, and, critically, *the child's own complementary interest in preserving relationships that serve her welfare and protection.*

Id. (emphasis added) (citations omitted).

236. Meyer, *supra* note 195, at 1134 ("[P]arent-focused constitutional doctrine often serves as a cover, rather than a cause, for many decisions subordinating children's welfare.").

237. *Bellotti*, 443 U.S. at 634.

238. *Id.* at 634-35 (emphasis added).

239. The Doe court's treatment of children's and parental rights as "co-extensive" provides a clear example of this jurisprudential machination. *In re* Adoption of John & James Doe (*Gill*), 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); Washington, *Suffer Not the Little Children*, *supra* note 8, at 245, 259.

relationship may result in different substantive deprivations for a parent than a child,[240] as a descriptive matter, a claim of infringement of the child's right to the filial relationship mirrors a parent's claim of infringement of the same relationship. A child's challenge to Section 2 does not advance in opposition to parental rights; rather it derives from the dyadic privacy interests shared by parent and child in the filial relationship. Accordingly, children's and parent's claims against Section 2 can advance contemporaneously, without divesting parental rights of their legitimacy or force. Indeed, the argument advanced here should meet with less resistance because it challenges harmful government action unencumbered by constitutionally protected parental autonomy over decisions for their children.[241]

C. Reinforcing the Primacy of Marriage

Professor Nancy Polikoff has written extensively and eloquently about how challenges to same-sex marriage bans revive the now-constitutionally defunct distinction between legitimate and illegitimate children.[242] Historical distinctions between legitimate and illegitimate children[243] have, in large part, been removed

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240. Parents have well defined and widely recognized right to their relationship with their child and to rear that child, both of which enjoy substantial constitutional protection. The child has a less developed right to the kind of care inherent in the filial relationship and which the best interests standard is considered to secure.

241. Meyer, *supra* note 195, at 1117-18.

> [T]he courts have been fairly receptive to claims for children's rights where the claims have seemed least novel—in classic individual-versus-state conflicts, where the child was posed directly against the coercive power of government. . . . The suggestion that children might have rights corresponding to those held by adults against state coercion and abuse was essentially amendatory, not revolutionary.

242. *See, e.g.*, Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 208-15, 226 (2009); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 226-29 (2003); Polikoff, *For the Sake of All Children*, *supra* note 13, at 584-91; Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722-23 (2012) [hereinafter Polikoff, *New Illegitimacy*].

243. 1 WILLIAM BLACKSTONE, COMMENTARIES *459. In his Commentaries on the Laws of England, William Blackstone, expresses the condemning common law view of illegitimate children, noted, "The rights [of a bastard] are very few, being only such as he can *acquire*: for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullus* [son of no one], sometimes *filius populi* [son of the people]." *Id.* This view of illegitimate children persisted well into the 20th century and perpetuated a judgment of illegitimacy as a characteristic or consequence of immorality. Since The U.S. Supreme Court's 1968 decision in *Levy v. Louisiana*, the Court's equal protection jurisprudence has provided a vehicle for the invalidation of laws discriminating against children born out of wedlock. Levy v. Louisiana, 391 U.S. 68 (1968). *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Nonmarital*

by constitutional and legislative mandate.[244] In 1968, the U.S. Supreme Court first acknowledged children born to unmarried parents as "persons" within the meaning of the Equal Protection Clause.[245] In *Levy,* the Court interpreted the Equal Protection Clause to protect against the deprivation of wrongful death awards, by state statutes denying entitlement to children of unmarried parents.[246] In *Levy* and later cases, the Court expressly rejected the argument that the child's legal status and resulting entitlements are dependent upon the marital status of the parents.[247] Underwriting these decisions is an implicit acknowledgment of the value of the parent-child relationship, independent of the parents' marital status.

Professor Polikoff argues that recognition of same-sex marriage revives the distinction based on legitimacy and produces, what she has refers to as, the new illegitimacy. She argues,

> The prominent argument that same-sex couples must be permitted to marry to further the best interests of their children also intensifies the impression that parentage within marriage provides benefits that cannot be obtained in any other way. Furthermore, every success limited to married couples will compound the distinction between those children whose parents marry and those who do not. . . . Cases or campaigns that will result in parentage recognition only for married couples are a mistake because they prioritize marriage equality goals at the expense of the children of unmarried same-sex couples. The child of two heterosexuals who are not married has two parents. The child of two lesbians deserves the same.[248]

The children's claim presented here may provoke Professor Polikoff's illegitimacy critique because it is challenging Section 2 for authorizing states to

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Children, 63 FLA. L. REV. 345, 346-47 (2011).

244. *See Levy*, 391 U.S. 68, at 71. The Uniform Parentage Act, promulgated in 1973 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), sought to "provid[e] substantive legal equality for all children regardless of the marital status of their parents . . . ." Doe v. Doe, 99 Hawai'i 1, 52 P.3d 255 (2002) (citing STAND. COMM. REP. NO. 190, in 1975 HOUSE J., at 1019); *see also* Unif. Parentage Act § 2 (1973). Revised provisions of the Act seek to establish legal equality by mandating that "child[ren] born to parents who are not married to each other ha[ve] the same rights under the law as [ ] child[ren] born to parents who are married to each other." *Id.* § 202. The 1973 Act was adopted by nineteen states and many others have adopted significant portions of it. *Id.* at Prefatory Note. Few states have yet to enact the revised UPA. *Id.*

245. *Levy*, 391 U.S. 68, at 70.

246. *See generally id.* at 72.

247. *Id.* at 71-72; Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.").

248. *See* Polikoff, *New Illegitimacy, supra* note 242, at 740.

create non-recognition laws. In doing so, it could be said to support the creation of a distinction between two classes of children: children of married same-sex parents (i.e., legitimate children) who would be able to maintain legal parentage with their non-biological parent and children of un-wed, same-sex parents (i.e., illegitimate children) who would not. This type of pseudo caste system would arguably prioritize marriage by making children's rights to a legal filial relationship dependent upon recognition of an out-of-state, marital relationship.

As a substantive matter, the children's challenges to Section 2 are neither asserting nor dependent upon the argument that marriage is the *sine qua non* of children's best interests.[249] Rather, the proposed claim invokes marriage in an instrumental capacity, highlighting its value as a vehicle for the creation of the most protected legal relationship available to a child and her non-biological parent. It is not making or supporting a normative claim regarding the superiority of marriage as the optimal domestic arrangement. Though marriage provides but one avenue for the construction of legal parentage, as explained generally *supra*, parentage incident to marriage provides the most secure guarantee of protection available for the relationship between a child and his or her non-biological parent in a same-sex family.

The claim presented here does not advocate for the marital relationship because it inherently serves the best interests of children. In fact, the proposed challenge would confront the government's assertion of this premise as a legitimate or compelling justification for Section 2.[250] Claimants would present evidence demonstrating that the relationship between the child and the parent, not the relationship between the parents, is the most reliable measure of whether a child's interests are served.[251] A child's challenge to Section 2 would assert

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249. Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1293 n.41 (N.D. Okla. 2014) (rejecting the state's claim that opposite-sex marriage provides the optimal environment for child rearing in support of Oklahoma's non-recognition law).

250. In *Bishop v. United States*, defenders of Oklahoma's marriage law justified the ban as serving the legitimate goal of insuring the ideal family unit, which they described as:

> "1) 'a family headed by two biological parents in a low-conflict marriage' because 'benefits flow in substantial part from the biological connection shared by a child with both mother and father'; . . . 2) a family unit where children are being 'raised by both a mother and a father in a stable family unit;' and 3) a family unit with 'gender-differentiated parenting' . . . ."

Bishop, 962 F. Supp. 2d at 1293 (citations omitted). The court questioned the characterization of the ban's purpose stating, "many adoptive parents would challenge this defined 'ideal,' and [ ] many 'non-ideal' families would question this paternalistic state goal of steering their private choices into one particular model of child-rearing." *Id.* at 1293 n.41.

251. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295 (1988) ("The law should force parents to state their claims, and courts to evaluate such claims, not from the competing, individuated perspectives of either parent or even of the child, but from the perspective of each parent-child relationship."); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *In re* Adoption of John & James Doe (*Gill*), 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G, 45 So. 3d 79

that the provision authorizes laws that prohibit recognition of an existing filial relationship in contravention of the child's best interests and in violation of his or her constitutional rights. Accordingly, it avoids Professor Polikoff's critique that challenges to marriage bans reinforce the primacy of marriage, devalue family formations other than marriage, and invite discrimination against children whose parents are not married.[252]

Concededly, many of the post-*Windsor* challenges to state marriage bans advance the argument that same-sex marriages serve the same goals as opposite-sex marriages, including providing the optimal environment for child rearing.[253] These claims, unlike the challenge proposed in this Article, undoubtedly reinforce the primacy of marriage, not for its utility in securing the most protected form of parentage, but rather for its inherent value as promoting and serving the child's best interests.[254] However, courts have recognized the legal parent child relationship as securing children's best interests,[255] and in the context of custody, visitation and single parent adoption have done so without regard for the parents' marital status.

The lack of coherence in the treatment of children's rights complicates the analysis that tests the constitutionality of enactments encroaching upon those rights. The incoherence is partially attributable to children's dependent status relative to their parents. There is some justification for children's rights to be accorded less weight than adults' rights where infringement of those rights is demonstrably related to the preservation of children's physical, mental and emotional well-being and where the parent is vested with the authority and responsibility of ensuring the child's best interests are served.[256] There is less, if any, justification for deprivations that pursue governmental ends that are not only unrelated to children's best interests but actually contravene them.[257]

(Fla. Dist. Ct. App. 2010).

252. Polikoff, *For the Sake of All Children*, *supra* note 13, at 593-94.

253. *See, e.g.*, Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014).

254. Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014).

255. *See generally* Parham v. J.R., 442 U.S. 584 (1979) and cases cited *supra* note 169.

256. Fineman, *supra* note 209, at 229 ("The child is clearly an individual, but one who is not fully actualized or capable of autonomous decision making. Children are dependent in many ways—economically, emotionally, and often physically."); *see also* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 604, 650 1976 ("Precisely because of their lack of capacity, minors should enjoy legally protected rights to special treatment (including some protection against their own immaturity) that will optimize their opportunities for the development of mature capabilities that are in their best interest.").

257. Hafen, *supra* note 256, at 644. Professor Hafen notes :

> When children are involved, a significant distinction can be drawn between legal rights that protect one from undue interference by the state or from the harmful acts of others and legal rights that permit persons to make affirmative choices of binding consequence,

There is no reason to accord children's constitutional rights to an existing filial relationship less protection than adults' rights to the same relationship. Arguably the disability Section 2 enables (i.e., authorizing the deprivation of an existing, legal parent-child relationship) causes greater harm to children because of their vulnerability and capacity as dependents. Despite the reality of DOMA's harmful impact on children in same-sex families, it was characterized as a child welfare measure devised to ensure opposite-sex parenting and the optimal environment for responsible procreation and child rearing.[258] For Section 2 to survive equal protection and due process challenges by children in same-sex families, in states with non-recognition laws, its defenders must present evidence that the law serves legitimate governmental ends consistent with the child's best interests.

IV. THE CONSTITUTIONAL CALCULUS

Section 2 authorizes non-recognition laws that inflict material and stigmatic harm on children in same-sex families, and that punish children for parental conduct. Non-recognition laws categorically deprive children of the filial relationships that serve their best interests without an individualized evaluation of quality of the filial relationship and without procedural safeguards. Accordingly, children in families with married same-sex parents can challenge Section 2 as an infringement of their Equal Protection and Substantive Due Process rights. This Article will now turn to these constitutional claims.

> such as voting, marrying, exercising religious preferences, and choosing whether to seek education. For purposes of this discussion, the first category will be referred to as rights of protection; the second, rights of choice.

Id.; *see also generally* Gregory Z. Chen, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131 (1997); Bernard P. Perimutter, *"Unchain the Children:" Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1 (2007). *But see* Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1367 (1995) (noting that, from the empowerment rights perspective, "[c]apacity would be irrelevant"). *See also* examples cited *infra* note 323 (discussing various court holdings that find marriage bans actually harm, not help kids).

258. H.R. REP. NO. 104-664, pt. 5, at 2917 (1996). As the court observed in *Henry v. Himes*,

> the U.S. Supreme Court in *Windsor* . . . similarly rejected a purported government interest in establishing a preference for or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court was offered the same false conjectures about child welfare . . . and the Supreme Court found those arguments so insubstantial that it did not deign to acknowledge them.

Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014); *see also* Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1 252 (N.D. Okla. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); Greigo v. Olider, 316 P.3d 865 (N.M. 2013).

A. The Equal Protection Infringement

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."[259] At the heart of this mandate is a command "that all persons similarly [situated] should be treated alike."[260] Children in same-sex families whose parent-child relationships are nullified by the non-recognition laws that Section 2 authorizes are denied equal protection because they are treated differently from children in opposite-sex families whose filial relationships are recognized.[261] Even though defenders of state same-sex marriage bans have argued that same-sex couples and opposite-sex couples are not similarly situated because they have different procreative capacities, there is no reasonable argument to be made that children in same-sex and opposite-sex families are not similarly situated.[262] Both categories of children are entitled to benefit from the protections and benefits an existing legal parent-child relationship affords, which arguably constitute a fundamental liberty interest.[263] Section 2 authorizes the enactment of laws that discriminate against children in same-sex families by invalidating an extant filial relationship that serves their best interests.

In certain equal protection claims the right advanced is "not the right to any specific amount of denied governmental benefits; it is 'the right to receive benefits distributed according to classifications which do not without sufficient justification differentiate among covered applicants solely on the basis of [impermissible criteria].'"[264] Additionally, the Court has held that children should not suffer discriminatory treatment because of parental conduct,[265] and the imposition of the barrier itself, authorizing laws that nullify a child's filial

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259. U.S. CONST. amend. XIV, § 1.

260. Plyler v. Doe, 457 U.S. 202, 216 (1982).

261. Equal protection analysis can also entail the consideration of differential treatment, with respect to a fundamental right. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

262. *Himes*, 2014 WL 1418395, at *15 (finding no justification for Ohio's non-recognition law's disparate treatment of children of same-sex parents married in other states).

263. *See infra* Part IV.B.

264. Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1 252, 1267 (N.D. Okla. 2014) (quoting Day v. Bond, 500 F.3d 1127, 1133 (10th Cir. 2007)); *see also* Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (citation omitted) (the Court emphasized, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants, can cause serious 'injuries to those who are denied equal treatment solely because of their membership in a disfavored group'").

265. Levy v. Louisiana, 391 U.S. 68, 72 (1968) ("We conclude that it is invidious to discriminate against [non-marital children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother."); *see also Plyler*, 457 U.S. at 219-20.

relationship with her non-biological parent, is the constitutional injury.[266]

In addition to the barrier erected by the state marriage bans authorized by Section 2, specific, tangible deprivations result from nullification of legal parentage These specific, tangible deprivations include, but are not limited to, denial of: the right to register a child for school; the right to make medical decisions for a child; the right to obtain a social security card for a child; securing social security survivor benefits for a child upon a parent's death; the right to ensure a child's entitlement to inheritance upon a parent's death; the right to claim the child as a dependent on a parent's insurance plan or for federal income tax purposes; the right to obtain a passport for a child; and the right to travel with a child internationally.[267] The infringement of parental rights resulting from invalidation of the filial relationship, at a minimum, mirrors the infringement of children's rights and arguably these deprivations inflict greater harm on children due to their inherent vulnerability as dependents. The laws that Section 2 authorize also cause stigmatic harm which many courts, including the U.S. Supreme Court in *Windsor*, have acknowledged as an actionable injury.[268] Children in same-sex families suffer the humiliation of having their families and their familial relationships relegated to a status inferior to opposite-sex families.

The degree of constitutional scrutiny applicable to intentional discrimination by the government against classes of citizens varies according to whether the targeted group qualifies as suspect, quasi-suspect or non-suspect.[269]A law that disadvantages a suspect class (e.g., those that discriminate on the basis of race or national origin) is subject to strict scrutiny, which regards the enactment with a jaundiced eye and requires that the enactment be narrowly tailored to achieve a compelling state interest.[270] A law that harms a quasi-suspect class (e.g., those that discriminate on the basis of gender and legitimacy) is subject to intermediate

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266. Ne. Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

267. *Himes*, WL 1418395, at *11 (describing Ohio's non-recognition law, which prohibited inclusion of non-biological mother's name on child's birth certificate as "the basic currency by which parents can freely exercise . . . protected rights and responsibilities. . . . The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities.").

268. United States v. Windsor 133 S. Ct. 2675, 2694-96 (2013); *see also* Bostic v. Rainey, 970 F. Supp. 2d 456, 468 (E.D. Va. 2014) ("Stigmatic injury is sometimes sufficient to support standing. . . . [Plaintiffs] satisfy the first requirement predicating standing on stigmatic injuries. Virginia Code § 20-45.3 prohibits the recognition of their valid California marriage. Similarly married opposite-sex individuals do not suffer this deprivation. Plaintiffs . . . suffer humiliation and discriminatory treatment on the basis of their sexual orientation. This stigmatic harm flows directly from current state law" (citations omitted)).

269. *See generally Windsor*, 133 S. Ct. 2675.

270. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Korematsu v. United States, 323 U.S. 214, 216 (1944).

constitutional scrutiny and must substantially serve an important state interest.[271] A law that inflicts injury on a class of persons that considered neither suspect nor quasi-suspect is presumed constitutional, and the law is only required to be rationally related to a legitimate governmental interest to pass constitutional muster.[272] Courts may consider any available governmental goal to satisfy the rational basis test as long as the goal is not arbitrary or capricious.[273]

Furthermore, Section 2 authorizes laws that draw distinctions between children according to their married parent's sexual orientation, thereby discriminating against children because the state objects to their parents' marriage. In *Henry v. Himes*, the court struck down Ohio's non-recognition law on equal protection grounds citing its harmful impact on children in same-sex families. However, despite the presence of children in the families challenging the law, children were not plaintiffs in the suit. Nevertheless, the court highlighted the distinction the law drew between children based on the sexual orientation of their parents and explained,

> Defendant's discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. . . . The children in Plaintiffs' and other same-sex married couples' families cannot be denied the right to two legal parents . . . without a sufficient justification. No such justification exists.[274]

Laws, like the ones Section 2 authorizes, that punish children for parental conduct that a state considers immoral have historically been subject to heightened constitutional scrutiny and have been ruled unconstitutional.[275] There

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271. Clark v. Jeter, 486 U.S. 456, 461 (1988); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982).

272. Romer v. Evans, 517 U.S. 620, 631 (1996).

273. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985) (holding "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

274. *Id.* at *15.

275. *See* Pickett v. Brown, 462 U.S. 1, 8 (1983); *see also* Plyler v. Doe 457 U.S. 202, 216 n.14 (1982) ("[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."); Weber v. Aetna Cas. & Surety, 406 U.S. 164, 175 (1972) (describing condemnation of a child for the actions of his parents as "illogical and unjust"); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (ruling it invidious to discriminate against illegitimate children for the actions of their parents); *Amicus Brief in* United States v. Windsor *by Scholars for the Recognition of Children's Constitutional Rights*, 17 IOWA J. GENDER, RACE, & JUST. 467, 482 (2014) (Tanya Washington, Catherine Smith, and Susannah Pollvogt) ("This Court has consistently expressed special concern with discrimination against children—in particular protecting their right to self-determination and to flourish fully in society, without being hampered

is no consensus as to the applicable level of constitutional scrutiny among courts deciding adult challenges to marriage bans;[276] however, children's challenges to Section 2 and the laws it authorizes make a persuasive argument for the application of heightened scrutiny.

In *Plyler v. Doe*, where the U.S. Supreme Court invalidated a Texas law denying public education to the children of undocumented immigrants, the Court made clear, "Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[277] Similar to the law at issue in *Plyler*, Section 2 authorizes laws that nullify existing filial relationships between children and their parents' in same-sex families as a sanction for their parents' out-of-state, same-sex marriages. Accordingly, Section 2 should be subject to heightened scrutiny because it enables discrimination against children based on parental conduct. However, the absence of any justification for the disparate treatment of children in same-sex families makes it challenging for Section 2 to clear even the lowest constitutional hurdle erected by rational basis review.

B. The Substantive Due Process Infringement

The Due Process Clause of the Fourteenth Amendment prohibits the government "from abusing [its] power, or employing it as an instrument of oppression."[278] Rights derived from the liberty interests that fall within the scope of substantive due process protection are characterized as either fundamental or non-fundamental and are granted different degrees of constitutional protection according to their status.[279] The two applicable constitutional tests are the same tests that are used to evaluate a law's infringement of equal protection guarantees. Within the substantive due process framework, state infringement of a fundamental right is subject to strict scrutiny,[280] and state impairment of a

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by legal, economic and social barriers imposed by virtue of the circumstances of their birth (citation omitted). . . . [I]t is impermissible for laws to disadvantage children for matters outside of their control, in an effort to control the conduct of their parents, or as an expression of moral disapproval of their parents' relationships and conduct.")

276. *Compare* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012); Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1, 11 (1st Cir. 2012), *with* Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *5 (W.D. Ky. Feb. 12, 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013).

277. Plyler v. Doe, 457 U.S. 202, 219-20 (1982).

278. Davidson v. Cannon, 474 U.S. 344, 348 (1986).

279. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests.").

280. Zablocki v. Redhail, 434 U.S. 374, 381 (1978) (requiring strict scrutiny when "the classification created by the statute infringed upon a fundamental right").

non-fundamental right is subject to rational basis review.[281]

The U.S. Supreme Court characterizes fundamental rights as those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."[282] U.S. Supreme Court rulings make clear that parental rights are fundamental and only exceptional circumstances justify their infringement.[283] The interests of parents in the care, custody and control of their children are considered among the oldest fundamental liberty interests;[284] therefore children should be said to possess complementary, fundamental rights to the care, custody and control the legal parent-child relationship provides and which serves their best interests.[285]

The Court has instructed, "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right."[286] Though the permanency, security and stability inherent in the filial relationship are not enumerated constitutional rights, because they serve to ensure children's best interests, they should be considered fundamental in character. The Court has recognized that the Due Process Clause protects a number of un-enumerated rights from infringement by government action, and explained:

> [T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . .This 'liberty'. . . includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[287]

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281. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

282. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

283. Troxel v. Granville, 530 U.S. 57, 66 (2000); Parham v. J.R., 442 U.S. 584, 602 (1979); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). *See generally* Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014) (recognizing "a number of fundamental rights and/or liberty interests protected by the Due Process clause that are implicated by [Ohio's] marriage recognition ban, including the right to marry, the right to remain marry (citation omitted), and the right to parental autonomy.").

284. *See* discussion *supra* Part III.B.

285. Washington, *What About the Children?*, *supra* note 8, at 42-43 ("Despite the Supreme Court's reluctance to recognize new fundamental rights (citation omitted), it has done so most frequently in the area of family relations."). *See generally* Barbara Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption* , 34 CAP. U. L. REV. 297 (2005). If children's rights to an existing filial relationship do not rank as fundamental, one can hardly conceive of children's rights that would. *But see* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (explaining, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . .").

286. Reno v. Flores, 507 U.S. 292, 302 (1993).

287. Poe v. Ullman, 367 U.S. 497, 543 (1961).

Indeed, if these quintessential qualities of the legal parent-child relationship, do not constitute fundamental rights then arguably children possess no such rights—a conclusion at odds with U.S. Supreme Court jurisprudence.[288] There is a persuasive argument to be made that Section 2 infringes children's fundamental rights because it authorizes laws that invalidate *existing* filial relationships, thereby depriving children of the quantum and kind of care they have been receiving. Children's best interests have been recognized as a "substantial governmental interest;"[289] therefore, heightened scrutiny should apply.[290]

Though children's rights infringed by Section 2 should be adjudicated as fundamental, the success of children's challenges to that provision is not

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288. Bellotti v. Baird, 443 U.S. 622, 634-35 (1979) ("The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State."); Powell v. Alabama, 287 U.S. 45, 50, 57-58 (1932).

289. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (characterizing the best interests of the child as "indisputably a substantial governmental interest for purposes of the Equal Protection Clause").

290. There is some debate about whether the adult rights infringed are fundamental in character. The debate centers on whether the right infringed by marriage bans is the right to marry or whether same-sex couples are seeking recognition of a new right (i.e., the right to marry someone of the same-sex). Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014) (noting, "Some courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry."); *see* Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *5 (W.D. Ky. Feb. 12, 2014) ("Neither the Supreme Court nor the Sixth Circuit has stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex. . . . In *Windsor* the Supreme Court did not clearly state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right . . . ."); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1096 (D. Haw. 2012) (referencing right infringed as "an asserted new right to same-sex marriage"). *But see* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2014) ("Both same-sex and opposite sex marriage are therefore simply manifestations of one right—the right to marry—applied to people with different sexual identities."). The *Windsor* majority's reticence to clearly define the nature of the constitutional right infringed by Section 3 of DOMA and to articulate the applicable constitutional test further fuels the debate. Some of language in the opinion suggests the majority is applying rational basis. United States v. Windsor, 133 S. Ct. 2675, 2996 (2013) (noting "no legitimate purpose overcomes the purpose and effect to disparage and to injure"). However, the level of scrutiny applied seems inconsistent with rational basis review. *Id.* at 2706 (Scalia, J., dissenting) (the majority "does not apply strict scrutiny, and [although] its central propositions are taken from rational basis cases . . . the Court certainly does not apply anything that resembles that deferential framework"); *see Bourke*, 2014 WL 556729, at *4 ("Although the majority opinion [in *Windsor*] covered many topics, it never clearly explained the applicable standard of review. . . So, we are left without a clear answer."). Fundamental rights adjudication of the rights asserted in the proposed children's claims against Section 2 should not be encumbered by conflicting interpretations of the liberty interests infringed (i.e., permanency, stability and security).

dependent upon this classification. Even under rational basis review, the State must establish that marriage bans are not "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[291] Because Section 2 authorizes laws that nullify children's filial relationships and compromise, rather than serve, their best interests, it should be difficult for it to withstand even rational basis review.

C. Interrogating Governmental Interests

In both the equal protection and due process contexts the applicable constitutional tests require a sufficient nexus between the law and its purpose.[292] The Court has explained:

> [t]he purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.[293]

The Court has made clear that government has no "interest in enforcing private, moral or religious beliefs without an accompanying secular purpose,"[294] and it has emphasized that where a law is "so discontinuous with the reasons offered for it that . . . [it] seems inexplicable by anything but animus toward the class it affects; it lacks a relationship to legitimate state interests."[295]

Under rational basis review the legitimacy of the state's interest is presumed and the plaintiffs are burdened with challenging the legitimacy of the government's interest.[296] For the proposed challenges to Section 2 to be

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291. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

292. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000)(holding, "[W]e will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."); Romer v. Evans, 517 U.S. 620, 633 (1996) (courts must "insist on knowing the relation between the classification adopted and the object to be attained.").

293. Lochner v. New York, 198 U.S. 45, 64 (1905).

294. Lawrence v. State, No. 14-99-00109, 2000 WL 729417 (Tex. Ct. App. June 8, 2000) (unpaginated), *withdrawn* , 41 S.W.3d 349 (2001), *cert. granted*, 537 U.S. 1044 (2002), *rev'd*, 539 U.S. 558 (2003).

295. *Romer*, 517 U.S. at 632.

296. Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *5-6 (W.D. Ky. Feb. 12, 2014) (applying rational basis review to Kentucky's constitutional amendment banning gay marriage and opining, "Ultimately, the result in this case is unaffected by the level of scrutiny applied. . . . Plaintiff's have the burden to prove either that there is no conceivable legitimate purpose for the law or that the means chosen to effectuate a legitimate purpose are not rationally related to that purpose. This standard is highly deferential to government activity but is surmountable, particularly in the context of discrimination based on sexual orientation. . . . Even under this most deferential standard of review, courts must 'still insist on knowing the *relation*

successful, plaintiffs would need to establish, as an evidentiary matter, that sexual orientation does not inform parental competency; that parenting by gays and lesbians does not impair children's best interests; and that categorically depriving children of an existing filial relationship compromises the permanency, stability, and security that serves their best interests.[297]

In *Bourke v. Beshear*,[298] adults and children in same-sex families challenged Kentucky's non-recognition laws.[299] The court, applying the rational basis test, considered the following justifications for the ban: "the legitimate government interest of preserving the state's institution of traditional marriage,"[300] responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage.[301] The court, describing the reasons cited for the ban as "compris[ing] all those of which the Court might possibly conceive," held that all of the

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between the classification adopted and the object to be attained'"); *see also* Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014) (observing, "the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003).

297. Under rational basis review, any conceivable state interest is sufficient to save a statute from invalidation. Romer v. Evans, 517 U.S. 620, 631 (1996) (holding that "the legislative classification [will survive] so long as it bears a rational relation to some legitimate end."). However, to date all of the federal circuit courts tasked with deciding appeals to lower court decisions striking state marriage bans have rejected every justification asserted by proponents in defense of these bans including: federalism, preserving traditional marriage, respecting democratic processes, ensuring opposite-sex parenting, promoting responsible procreation and facilitating optimal childrearing. *See* Latta v. Otter, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); Baskin v. Bogan, No 14-2386, 2014 WL 4359059 (7th Cir. Sept. 4, 2014); Bostic v. Schafer, 760 F.3d 352 (4th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014). If heightened scrutiny is, as has been argued, the applicable test within the equal protection or substantive due process contexts, the burden of proof and production would shift to DOMA's defenders and the purposes for which Section 2 was enacted would no longer enjoy presumptive legitimacy.

298. *Bourke*, 2014 WL 556729.

299. Kentucky, like Georgia, enacted laws and amended its constitution to prohibit same-sex marriage and to deny recognition to out-of-state, same-sex marriages. *See* KY. CONST. § 233A; KY. REV. STAT. ANN. § 402.005 (West 2013).

300. *Bourke*, 2014 WL 556729, at *7.

301. *Id.* at *8. The court considered justifications offered by the state of Kentucky and by the Family Trust Foundation of Kentucky Inc., which submitted an amicus brief that the court described as "cast[ing] a broader net in search of reasons to justify Kentucky's laws." *Id.*; *see also* Wright v. Arkansas, No. 60CV-13-2662 at 7 (Cir. Ct. of Pulaski Cnty. May 9, 2014) ("The defendants offer several rationalizations for the disparate treatment of same-sex couples such as the basic premise of the referendum process, procreation, that denying marriage protections to same-sex couples and their families is justified in the name of protecting children, and continuity of the laws and tradition. None of these reasons provide a rational basis for adopting the amendment.").

proffered justifications failed to constitute legitimate government ends. The court rejected the characterization of Kentucky's non-recognition law as a child welfare measure, and held:

> The Court fails to see how having a family could conceivably harm children. Indeed, Justice Kennedy explained that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex . . . . . [N]o one in this case has offered factual or rational reasons why Kentucky's laws are rationally related to any of these purposes . . . . And no one has offered evidence that same-sex couples would be any less capable of raising children . . . . [T]he Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review.[302]

The court in *Himes*, which gave due consideration to the Ohio ban's harmful impact on children in same-sex families, observed that post-*Windsor* trial court decisions have uniformly reached the conclusion that "child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples."[303] The court further noted, "[t]he Supreme Court was offered . . . false conjectures about child welfare . . . and the . . . Court found those arguments so insubstantial that it did not deign to acknowledge them."[304]

As the Court has noted, government action infringing on constitutional rights must "find some footing in the realities of the subject addressed by the legislation."[305] Laws, like Section 2, that parade as child protectionist measures must be grounded in more than conjecture and prejudice.[306] It would not be constitutionally sufficient for the government to describe and justify Section 2 as preserving and protecting children's interests when its actual effect authorizes the invalidation of existing filial relationships and deprives children of the permanency, stability, and security inherent in those relationships. The legitimacy of the government's justification for Section 2 should be assessed according to credible research and data reporting whether and how children's

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302. *Bourke*, 2014 WL 556729, at *8 (citations omitted).

303. Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5 (M.D. Tenn. Mar. 14, 2014) ; Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1 252 (N.D. Okla. 2014); Bonauto, *supra* note 22, at 13. It is important, however, to note that this reasoning credits the marital relationship with providing that which serves children's best interests rather than the parent-child relationship itself. *See* discussion *supra* Part III.C.

304. *Himes*, 2014 WL 1418395, at *16.

305. Heller v. Doe, 509 U.S. 312, 321 (1993).

306. De Leon v. Perry 975 F. Supp. 2d 632, 654 (W.D. Tex. 2014) (rejecting defenders of Texas' marriage ban on the grounds that "Defendants' preferred rationale presumes that same-sex couples cannot be good parents-this is the same type of unconstitutional and unfounded presumption that the Supreme Court has held 'cannot stand.' (citation omitted)").

best interests are served by categorically depriving them of existing filial relationships and the benefits and protections inherent in those relationships.[307] The Supreme Court has highlighted courts' "constitutional duty to review factual findings where constitutional rights are at stake" and the Court described "uncritical deference to factual findings . . . [as] inappropriate."[308]

The conclusion that marriage bans protect children and serve their interests contradicts "thirty-five years of studies showing that children of gay and lesbian parents are normal and healthy on every measure of child development."[309] In *DeBoer* the court carefully considered the evidence presented by defenders of Michigan's marriage and adoption bans in support of their argument that the laws served to provide "children with 'biologically connected' role models of both genders that are necessary to foster healthy psychological development."[310] The court accorded considerable weight to empirical evidence presented by the plaintiffs' experts challenging the state's presumptions about gay parenting and establishing that the best interest of the child is served by particular parental competencies, not the sexual orientation of the caregiver.[311] The court

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307. Latta v. Otter, No. 14-35420, 2014 WL 4977682, at *5 (9th Cir. Oct. 7, 2014) (noting that defendants failed to meet their evidentiary burden, the court opined, "We pause briefly before considering the substance of defendants' arguments to address the contention that their conclusions about the future effects of same-sex marriage on parenting are legislative facts entitled to deference. Defendants have not demonstrated that the Idaho and Nevada legislatures actually found the facts asserted in their briefs; even if they had, deference would not be warranted. Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court.").

308. Gonzales v. Carhart, 550 U.S. 124, 165-66 (2007).

309. American Psychological Association, *Sexual Orientation, Parents, & Children*, COUNCIL POLICY MANUAL (July 30, 2004), http://www.apa.org/about/policy/parenting.aspx ("research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."); *see also* Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 HUMAN RTS. 3, 7 (2003); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 321 (2001) (stating that "all of the evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples").

310. DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014) (defendants also proffered "avoiding the unintended consequences that might result from redefining marriage; . . . upholding tradition and morality; and . . . promoting the transition of 'naturally procreative relationships into stable unions'" as justifications for its ban).

311. *Id.* at 761. Psychologist David Brodzinsky "testified that decades of social science research studies indicate that there is no discernible difference in parenting competence between lesbian and gay adults and their heterosexual counterparts (citation omitted)." Dr. Brodzinsky noted no "discernible difference in the developmental outcomes of children raised by same-sex parents as compared to those children raised by heterosexual parents (citation omitted)." He identified the primary factors influencing childhood development to include:

concluded, "What matters is the 'quality of parenting that's being offered' to the child . . . . [and] studies, approximately 150 in number, have repeatedly demonstrated that there is no scientific basis to conclude that children raised by same-sex parents fare worse than those raised by heterosexual parents."[312] The court was convinced by testimony showing that "children being raised by same-sex couples have only one legal parent and are at risk of being placed in 'legal

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> [the] quality of parent-child relationships; quality of the relationships between the parents . . . [t]he characteristics of the parent, the styles that they adopt, parental warmth and nurturance [sic], emotional sensitivity. The ability to employ age appropriate rules and structure for the child. And the kinds of educational opportunities that children are afforded is important, as well as the resources that are provided for the child, not only in the family itself, but the resources that, from the outside, that impact the family and the child in particular. And of course, the mental health of the . . . parents.

Id. Sociologist Michael Rosenfeld described the strong consensus among professional organizations finding no differences in parenting based on the sexual orientation and no differences in outcomes for children in same-sex families. He stated in his expert report:

> Every major professional organization in this country whose focus is the health and well-being of children and families has reviewed the data on outcomes for children raised by lesbian and gay couples, including the methods by which the data were collected, and have concluded that these children are not disadvantaged compared to children raised in heterosexual parent households. Organizations expressing support for parenting, adoption, and/or fostering by lesbian and gay couples include (but are not limited to): American Medical Association, American Academy of Pediatrics, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Psychoanalytic Association, American Psychological Association, Child Welfare League of America, National Association of Social Workers, and the Donaldson Adoption Institute.

Id. at 762. One important development reflected in the litigation of marriage bans has been the presentation of empirical data confronting the state's proffered justifications for these laws. In addition, Plaintiffs have also subjected state experts to intense cross-examination, designed to reveal the absence of credible, reliable social science data underwriting claims about the harmful impact of these bans on children. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927, 936 (N.D. Cal. 2010) (Plaintiffs' challenging California's marriage ban, Proposition 8, made an evidentiary showing that resulted in the following findings of fact by the District Court:

> The factors that affect whether a child is well-adjusted are: (1) the quality of a child's relationship with his or her parents; (2) the quality of the relationship between a child's parents or significant adults in the child's life; and (3) the availability of economic and social resources . . . The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.

Id. at 980.

312. *DeBoer*, 973 F. Supp. 2d at 761.

limbo' if that parent dies or is incapacitated."[313] It concluded, "[d]enying same-sex couples the ability to marry therefore has a manifestly harmful and destabilizing effect on such couples' children."[314]

In contrast to the court's regard for the plaintiffs' witnesses as "fully credible"[315] and "highly credible,"[316] the court determined the defendants' witnesses' testimony to be "entirely unbelievable and not worthy of serious consideration"[317] and to be representative of "a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields."[318] The court rejected the state's optimal child-rearing rationale and held, "the isolated studies cited by the state defendants do not support the argument that children raised by heterosexual couples have better outcomes than children raised by same-sex couples. . . .the overwhelming weight of the scientific evidence supports the 'no differences' viewpoint."[319]

Even as the U.S. Supreme Court was deciding *Windsor*, The American Pediatrics Association, which reviewed 30 years of research on the subject of gay parenting, issued a policy statement endorsing gay marriage as promoting children's best interests.[320] Children's claims against Section 2, as authorizing

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313. *Id.* at 764.

314. *Id.*

315. *Id.* at 761, 764.

316. *Id.* at 762, 764.

317. *Id.* at 766. In support of its justifications for its marriage and adoption bans the state called its star witness, Sociologist Mark Regnerus, to testify. His testimony focused on the results of a 2012 study he conducted (New Family Structures Study). His findings resulted in the following conclusions:

> [C]hildren who reported that their mothers had a same-sex relationship were less likely to pursue an education or obtain full-time employment and more likely to be unemployed and receiving public assistance, more likely to experience sexual assault, more likely to cheat on their partners or spouses and more likely to have been arrested at some point in their past. Similarly, Regnerus discovered that children who reported that their fathers had a same-sex relationship were more likely to have been arrested, more likely to have plead guilty to non-minor offenses and more likely to have numerous sexual partners.

Id. at 765. The court questioned the credibility and reliability of the study and noted that Regnerus' study was "heavily criticized . . . on several grounds" by sociological and demographic experts. Further noting the limitations of the study, the court also observed, "Regnerus acknowledged that 'any suboptimal outcomes may not be due to the sexual orientation of the parent' and that '[t]he exact source of group differences' are unknown." *Id.* at 765. The court described the study as "hastily concocted at the behest of a third-party funder, which found 'it essential that the necessary data be gathered to settle the question in the forum of public debate about what kinds of family arrangement [sic] are best for society' and which 'was confident that the traditional understanding of marriage will be vindicated by this study.'" *Id.* (citation omitted).

318. DeBoer v. Snyder, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014).

319. *Id.* at 771.

320. AMERICAN ACADEMY OF PEDIATRICS, *Promoting the Well-Being of Children Whose*

laws that deprive them of their existing filial relationships, would directly challenge the government's characterization of the provision as a child protective measure. These claims would compel a court to examine the impact of Section 2, within the context of evidence that depriving children of the permanency, stability, and security provided for in an existing filial relationship impairs their best interests. The available credible evidence significantly frustrates the state's ability to demonstrate even a rational relationship between Section 2 and its purported purpose of protecting children and preserving their best interests.

Rational basis review may be an obsequious standard; however, it "is not a toothless one."[321] The court in *Latta v. Otter* rejected the state of Idaho's optimal child rearing justification for its non-recognition law, and stated,

> Idaho's Marriage Laws fail to advance the State's interest because they withhold legal, financial, and social benefits from the very group they purportedly protect—children. . . . Failing to shield Idaho's children in any rational way, Idaho's Marriage Laws fall on the sword they wield against same-sex couples and their families.[322]

The overwhelming majority of post-*Windsor* courts deciding the constitutionality of state marriage bans have recognized protecting children as a legitimate or compelling state interest; however, they have found no logical link between that interests and laws prohibiting the recognition of same-sex marriages.[323] In *Latta* the court held:

Parents are Gay or Lesbian, 131 PEDIATRICS 827, 830 (2013) ("There is extensive research documenting that there is no causal relationship between parents' sexual orientation and children's emotional, psychosocial, and behavioral development."). To be sure, this study and others like it, highlighting the positive benefits of marriage for children in same-sex marriage, confirm Professor Polikoff's critique that focusing on the marital relationship, rather than on the parent-child relationship, as serving children's best interests reinforces the primacy of marriage. *See* Polikoff, *For the Sake of All Children*, *supra* note 13, at 593-94.

321. Matthews v. Lucas, 427 U.S. 495, 510 (1976).

322. Latta v. Otter, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *24 (D. Idaho May 13, 2014).

323. *See* Latta v. Otter, No. 14-35420, 2014 WL 4977682, at *11 ("Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. . . . Defendants have presented no evidence of any such effect."); Bostic v. Schafer, 760 F.3d 352, 384 (4th Cir. 2014) ("Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws."); Bostic v. Rainey, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite sex couples fails to further this interest. . . . [N]eedlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest . . . . The 'for the children rationale' rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-

> Children are indeed both vulnerable and essential to the perpetuation of society . . . . [a]nd although the Court agrees that the State has a compelling interest in maximizing child welfare, the link between the interest in protecting children and Idaho's Marriage Laws is so attenuated that it is not rational, let alone exceedingly persuasive.[324]

In light of Section 2's direct and harmful impact on children's best interests, it cannot be said to rationally relate to any legitimate governmental goal and it should be determined to be unconstitutional on equal protection and due process grounds.

CONCLUSION

Despite the direct and adverse impact of same-sex marriage bans on children of same-sex parents, children's interests are routinely marginalized in the gay marriage debate and in cases challenging marriage bans. Even after the Court's ruling in *Windsor*, the civil and constitutional rights of adults and the primacy of marriage continue to occupy center stage—dominating the discourse and framing litigation efforts to invalidate marriage bans. In the court of public opinion, politicians, legislators, religious leaders, community activists, and jurists have expressed their views on same-sex marriage; however, one voice has been

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sex marriage."); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) ("The Court fails to see how having a family could conceivably harm children . . . [a]nd no one has offered evidence that same-sex couples would be any less capable of raising children. . . ."); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1212 (D. Utah 2014) ("[T]he State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure he State wishes to promote. . . [T]he State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiff's assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah (citation omitted). These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples."); De Leon v. Perry 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) ("There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. . . . Instead, Section 32 causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted . . . . Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing. Accordingly, this Court agrees with other district courts that have recently reviewed this issue and concludes that there is no rational connection between Defendants' assertion and the legitimate interest of successful childrearing."). *But see* Robicheaux v. Caldwell, No. 13-5090, slip op. at 23 (E.D. La. Sept. 8, 2014) ("This Court is persuaded that Louisiana has a legitimate interest . . . whether obsolete in the opinon of some, or not, in the opinion of others . . . in linking children to an intact family formed by their two biological parents, as specifically understood by Justice Kennedy in *Windsor*.").

324. *Latta* , 2014 WL 1909999, at *22.

conspicuously absent—the voice of children in same-sex families. During oral arguments in *Perry* and *Windsor*, there was only one substantial reference, over two days of hearings, to the interests of children.[325] At the *Perry* hearing, Justice Kennedy remarked, "There are some 40,000 children in California . . . that live with same-sex parents, and they want their parents to have full recognition and full status. The voice of those children is important in this case don't you think?"[326] The proposed claim would respond to Justice Kennedy's query in the affirmative, turn the spotlight on children who are deprived of existing filial relationships by non-recognition laws authorized by Section 2, and give greater voice and force to children's rights.

Children in same-sex families are a particularly vulnerable demographic. They deserve government action that serves rather than compromises their best interests. They deserve to be protected from, not victimized by, harmful and discriminatory governmental action, authorizing states to enact laws that invalidate existing filial relationships with their parents. Section 2 operates to harm children by depriving them of relationships that serve their best interests, and for that reason it should be invalidated as an infringement of children's constitutional rights.

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325. Transcript of Oral Argument at 21, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf.

326. *Id.*