

## ***Obergefell* and the “New” Reproduction**

**Courtney Megan Cahill<sup>†</sup>**

Alternative reproduction has become the new frontier in the continuing culture wars over the family. Commentators with longstanding anxieties over non-traditional kinship have turned their regulatory gaze to it, as have more progressive scholars who support non-traditional family formation but nevertheless favor proposals to regulate the “new kinship” and the “new reproduction.”<sup>1</sup> Excavating *Obergefell v. Hodges*’s<sup>2</sup> less obvious reproductive dimension, this Essay argues that the Court’s landmark marriage equality decision renders these regulatory proposals of alternative procreation constitutionally vulnerable. It further maintains that *Obergefell* could transform even existing laws on procreation by eroding a distinction on which so many of them rest: the distinction between sexual and alternative life creation. Thus understood, *Obergefell* is a case that unsettles not just the traditional underpinnings of marriage, but also the very edifice supporting the legal regulation of intimate and family life.

This Essay proceeds as follows: Part I sets forth commentators’ proposed regulations of alternative reproduction and their

---

<sup>†</sup> Copyright © 2016 by Courtney Megan Cahill.

1. Naomi Cahn refers to the families created by alternative reproduction as “the new kinship.” See Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012) [hereinafter *The New Kinship*]. Dorothy Roberts refers to some alternative reproductive methods as “the new reproduction.” Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1996). While some alternative reproductive technologies, such as in vitro fertilization, are relatively new, others, such as surrogacy and alternative insemination, have a much longer ancestry—one that in some cases extends back to biblical times. See generally KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA* 200–25 (2014) (providing a detailed history of insemination with donor sperm in the 19th and early-to-mid 20th centuries); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1107 (2002) (“Surrogacy by natural means . . . was practiced since biblical times.”). This author places “new” in smart quotes in order to contest what is routinely assumed, namely, the novelty of alternative reproduction and the kinship that it helps to create.

2. 135 S. Ct. 2584 (2015).

justifications for them. Part II considers the fate of those proposals after *Obergefell v. Hodges*, which destabilizes both traditionalist and non-traditionalist justifications for alternative reproductive regulation. Part III concludes.

## I. PROPOSED REGULATIONS OF ALTERNATIVE REPRODUCTION

### A. REGULATORY PROPOSALS

Calls to regulate the practices of alternative reproduction are sounding from diverse ideological camps and creating surprising bedfellows. On the more conservative side, David Blankenhorn, the lead witness for Proposition 8's supporters in the federal trial over that amendment's constitutionality and a longtime skeptic of non-traditional kinship,<sup>3</sup> opposes the industry norm of gamete donor anonymity<sup>4</sup> and advocates laws that limit sperm bank use to married heterosexual couples.<sup>5</sup> Lynn Wardle and Marsha Garrison have embraced similar proposals.<sup>6</sup>

---

3. See, e.g., DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 171–84 (1995) (cataloguing and discussing the perceived costs of “sperm fatherhood”); David Blankenhorn, President, Inst. Am. Values, The Rights of Children and the Redefinition of Parenthood (June 2, 2005), <http://americanvalues.org/catalog/pdfs/family-humanrights.pdf>. For recent scholarly treatment of Blankenhorn's traditionalist project vis-à-vis alternative reproduction, see Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183, 191, 228 (2015); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 820–22 (2014); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016) (on file with author).

4. Cf. David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html>. Blankenhorn concludes his *New York Times* Op-Ed by announcing his newfound support for same-sex marriage and pressing individuals to reconsider whether they ought to be “denying” children born of assisted reproductive means the right to biological parenthood. See *id.* This same argument emerged in Blankenhorn's testimony against same-sex marriage in the Proposition 8 trial, where he testified that children have a right to “know and be known by the two people who brought [them] into this world.” Transcript of Proceedings, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010) (No. C 09-2292-VRW). Remarks like these suggest that alternative reproduction has become the new resting place for Blankenhorn's (and his Institute's) anxiety over unconventional kinship.

5. See BLANKENHORN, *supra* note 3, at 233.

6. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 905–10 (2000); Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 453 (2006).

Conservative commentators are not alone in turning their regulatory eye to alternative reproduction, as progressive commentators who otherwise support alternative family formation advocate stricter regulation of alternative reproduction. Naomi Cahn, for instance, supports laws that eliminate donor anonymity,<sup>7</sup> place caps on the number of children born from any individual donor,<sup>8</sup> and establish “special birth certificates for . . . donor conceived children.”<sup>9</sup> Dov Fox advances the regulation of a different industry norm: donor banks’ arrangement of donors in race salient ways.<sup>10</sup> He supports taxing banks that do so,<sup>11</sup> or subjecting them to a commercial advertising ban.<sup>12</sup> Finally, Michele Goodwin supports the private regulation of alternative reproduction through the application of tort law to its routine practices.<sup>13</sup> Tort law, she argues, ought to regulate “reckless [alternative] reproduction” no less than it regulates “reckless driving.”<sup>14</sup>

These regulatory proposals depart from the status quo, which reflects a largely non-interventionist approach toward alternative reproduction;<sup>15</sup> indeed, some of them would alter its practice in dramatic ways that are likely to have a disparate impact on historically marginalized groups, like sexual minorities.<sup>16</sup> In addition, these proposals represent the position that today dominates academic commentary on alternative reproduction. While some scholars resist the call to regulate alterna-

---

7. See, e.g., NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* 129 (2012); *The New Kinship*, *supra* note 1, at 413; Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 223 (2009).

8. See *The New Kinship*, *supra* note 1, at 412.

9. Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1104–05 (2014); see also CAHN, *supra* note 7, 151 (calling for such a change and explaining the legal and policy elements that support limits on a single donor sperm’s use).

10. See Dov Fox, *Choosing Your Child’s Race*, 22 HASTINGS WOMEN’S L.J. 3 (2011); Dov Fox, Note, *Racial Classification and Assisted Reproduction*, 118 YALE L.J. 1844 (2009) [hereinafter *Racial Classification*].

11. *Racial Classification*, *supra* note 10, at 1897.

12. *Id.* at 1897–98.

13. Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1039 (2010).

14. *Id.* at 1054.

15. See CAHN, *supra* note 7, at 27 (stating that the fertility industry’s regulatory practices reflect “self-policing” rather than “top-down governance” (citing Steven Kotler, *The God of Sperm: In an Industry Veiled in Secrecy, a Powerful L.A. Sperm Peddler Shapes the Nation’s Rules on Disease, Genetics—and Accidental Incest*, L.A. WEEKLY, Sept. 27, 2007)).

16. See MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* 62 (2015).

tive reproduction, theirs, Martha Ertman writes, is “a minority view.”<sup>17</sup>

#### B. REGULATORY JUSTIFICATIONS

Some commentators support reproductive regulation for overtly normative reasons. Blankenhorn, for instance, contends that the government ought to eliminate gamete donor anonymity because children have a “right to know” their “biological parents,”<sup>18</sup> and supports limiting access to alternative insemination to married, heterosexual couples on the basis that “[i]n a good society, people do not traffic commercially in the production of radically fatherless children.”<sup>19</sup> Wardle and Garrison agree, arguing, respectively, that anonymous gamete donation is akin to a “badge” and “incident of slavery,”<sup>20</sup> and undermines societal norms in favor of biological, dual-gendered parenthood.<sup>21</sup>

Less conservative scholars who favor reproductive regulation turn away from traditional family values rhetoric, and often center instead on the constitutional status of procreation. They variously contend that *Skinner v. Oklahoma*,<sup>22</sup> on its face a case about equal protection rather than fundamental rights,<sup>23</sup>

---

17. *Id.* at 60. For other critiques of recent proposals to regulate alternative reproductive technologies, see Cahill, *supra* note 3; I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431 (2012); Martha M. Ertman, *Unexpected Links Between Baby Markets and Intergenerational Justice*, 8 L. & ETHICS HUM. RTS. 271 (2014); NeJaime, *supra* note 3; see also Courtney Megan Cahill, *Reproduction Reconceived* (Jan. 10, 2016) (unpublished manuscript) (on file with author and the *Minnesota Law Review*) (arguing that the strong constitutional norms in favor of unregulated sexual reproduction must apply as well to alternative reproduction given both the factual similarities between sexual and alternative procreation and emerging constitutional principles in favor of procreative and familial autonomy).

18. Blankenhorn, *supra* note 4.

19. BLANKENHORN, *supra* note 3, at 233.

20. Wardle, *supra* note 6, at 451.

21. See Garrison, *supra* note 6, at 905–06, 912.

22. 316 U.S. 535 (1942).

23. *Skinner* held that Oklahoma’s mandatory sterilization law for particular classes of criminal offenders violated the federal Equal Protection Clause. *Id.* at 542–43. For scholars who argue that *Skinner* establishes a fundamental right to procreate notwithstanding its equal protection holding, see Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1019 (1979); John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1493 (2008) (“Although [Skinner] couched its decision in the language of equality . . . the rhetoric of a liberty right to reproduce . . . explains the frequency with which the case is now cited.”).

“says little about the importance or value of reproduction or the right to reproduce,”<sup>24</sup> says nothing about whether that right includes alternative reproductive technologies,<sup>25</sup> and at most prohibits the government from regulating alternative reproductive technologies in unequal ways—not from regulating alternative reproductive technologies for everyone.<sup>26</sup> They also suggest that the mechanical differences between sexual and alternative reproduction justify different constitutional treatment of them, sometimes reasoning that “non-intimate” alternative reproduction is sufficiently distinct from “intimate” sexual reproduction to warrant less constitutional protection—and greater regulation.<sup>27</sup>

Unlike the more overtly traditionalist arguments put forth by alternative reproduction skeptics, the arguments in this latter group appear to be driven by doctrine and fact, rather than by dogma and ideology. Even so, they ought to trouble those who favor procreative and familial choice and who are wary of the many emerging proposals to curtail it, emanating as they do an air of neutrality that renders them more universally appealing—and therefore more likely to be codified as law—than their visibly ideological cohorts.

## II. OBERGEFELL ON REPRODUCTION

*Obergefell* destabilizes both traditionalist and non-traditionalist arguments in favor of alternative reproductive regulation. Section A considers *Obergefell*'s impact on ideologically conservative arguments, that is, on those arguments that justify reproductive regulation by underscoring the importance of preserving the traditional nuclear family. Section B turns to *Obergefell*'s effect on the more rhetorically neutral arguments considered above, that is, on those arguments that justify reproductive regulation by focusing on the constitutional status of procreation in general and alternative procreation in particular.

---

24. Goodwin, *supra* note 13, at 1089.

25. See, e.g., Cahn, *supra* note 1, at 424; Fox, *Racial Classification*, *supra* note 10, at 1882; Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1461–63 (2008).

26. Rao, *supra* note 25, at 1460 (“[T]he government could prohibit use of a particular reproductive technology across the board for everyone; however, once the state permits use in some contexts, it should not be able to forbid use of the same technology in other contexts. Hence, all persons must possess an equal right, even if no one retains an *absolute* right, to use ARTs.”).

27. Cahn, *supra* note 9, at 1106; Goodwin, *supra* note 13, at 1091–92; Fox, *Racial Classification*, *supra* note 10, at 1882–83.

A. TRADITIONALIST ARGUMENTS AFTER *OBERGEFELL*

The fate of arguments that favor reproductive regulation for patently normative reasons is clear after *Obergefell*: such arguments, and any laws they might inspire, are likely unconstitutional. *Obergefell* acknowledges the reality of gay parenthood, including gay “biological” parenthood,<sup>28</sup> and dispels hoary stereotypes about sexual minorities as sterile pedophiliacs prone to unfamiliar, and unfamiliar, behavior.<sup>29</sup> In addition, *Obergefell* explicitly extends constitutional shelter to “choices concerning . . . family relationships, procreation, and childrearing.”<sup>30</sup> Finally, *Obergefell* establishes a constitutional norm of sexual orientation equality in marriage as well as in what it refers to as the “related rights” of childrearing and procreation.<sup>31</sup> In all of these ways, *Obergefell* disrupts the traditionalist argument for reproductive regulation, motivated as that argument is by an impulse to promote, privilege, and replicate the conventional nuclear family and to cast sexual minorities in “family unfriendly” ways.

B. LESS (OVERTLY) TRADITIONALIST ARGUMENTS AFTER *OBERGEFELL*

Less immediately evident is the fate of arguments that favor reproductive regulation for more rhetorically neutral, procreation-centered reasons. This Essay submits that *Obergefell* unsettles those arguments no less than it upends their more overtly ideological companions, and that it does so in three ways. First, *Obergefell* suggests that procreation is a fundamental right under the Due Process Clause, thus complicating regulatory proposals that derive from a belief that the Constitution extends moderate equality protection, rather than expansive liberty protection, to procreation. Second, *Obergefell* suggests that constitutional parity exists between sexual and alternative reproduction not only with respect to the right to marry, but also with respect to the right to procreate. Third,

---

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (“[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”).

29. *See id.* at 2596, 2600. On these stereotypes, see Franklin, *supra* note 3, at 829 (“For the better part of a century, stereotyped conceptions of homosexuals (particularly gay men) depicted them as sexually predatory, dangerous to children, and antithetical to the family.”); Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 460–63 (2007).

30. *Obergefell*, 135 S. Ct. at 2599.

31. *Id.* at 2600.

*Obergefell* furthers a constitutional trend away from the sex exceptionalism that animates large swaths of the law—including proposed and actual regulations of alternative reproduction.

### 1. Procreation as a Fundamental Right

*Obergefell* first upsets procreation-based arguments in favor of reproductive regulation by suggesting that procreation is a constitutionally protected liberty right. Recall the argument that *Skinner v. Oklahoma* at most establishes a principle of “equal liberty” in reproductive matters.<sup>32</sup> This more restrained reading of *Skinner* avers that the Constitution prohibits the state from passing certain laws that curb the procreative liberties of particular groups, not from passing certain laws that curb the procreative liberties of everyone. It posits that certain regulations of alternative reproduction, as long as they do not target specific groups, would likely pass constitutional muster.

*Obergefell* renders this more modest, equality-based reading of *Skinner*—and the regulatory regimes that could flow from it—problematic. *Obergefell* conceptualizes procreation much in the same way that it conceptualizes marriage: as *both* an equality *and* a liberty right. That it does so is unsurprising, given that it acknowledges more than once the interconnectedness of marriage and procreation, calling them “related rights” that compose a “unified whole.”<sup>33</sup>

Consider first *Obergefell*’s description of marriage. Prior marriage decisions either interweave equality and liberty or rest exclusively on the Equal Protection Clause,<sup>34</sup> leading commentators to suggest that those cases at most establish that the Constitution guarantees “equal access” to marriage,<sup>35</sup> not that marriage is a fundamental right. Unlike those decisions, *Obergefell* is a persistent meditation on the marriage “right.” *Obergefell* refers to marriage as a form of “liberty” three times in just its first paragraph,<sup>36</sup> and reiterates throughout its majority opinion that marriage is a fundamental right under the

32. See, e.g., Rao, *supra* note 25, at 1460.

33. *Obergefell*, 135 S. Ct. at 2600.

34. See *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978) (finding only a violation of the Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1, 2, 12 (1967) (finding a violation of the Equal Protection and Due Process Clauses).

35. See, e.g., Cass R. Sunstein, *The Right To Marry*, 26 CARDOZO L. REV. 2081, 2083 (2005) (suggesting that the state could abolish marriage without violating due process); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right To Marry*, 158 U. PA. L. REV. 1375, 1400–07 (2010).

36. *Obergefell*, 135 S. Ct. at 2593.

Due Process Clause of the Fourteenth Amendment.<sup>37</sup> Even as it observes the equality dimension of marriage,<sup>38</sup> *Obergefell* insists that “[t]he Due Process Clause and the Equal Protection Clause . . . set forth *independent* principles”<sup>39</sup> and that “[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, *too*, from that Amendment’s guarantee of the equal protection of the laws.”<sup>40</sup> The adverbial “too” suggests that, for the majority, marriage is protected as a matter of substantive due process as well as equal protection.

*Obergefell* conceptualizes the constitutional status of procreation in similar terms. “[I]n *Skinner v. Oklahoma ex rel. Williamson*,” *Obergefell* says, “the Court invalidated *under both principles* [liberty and equality] a law that allowed sterilization of habitual criminals.”<sup>41</sup> Given the *Obergefell* majority’s deliberate parsing of liberty and equality as “independent principles” animating the constitutional status of marriage; given its allusion to *Skinner* as a case that, like marriage, involves “both” liberty and equality; and given its conceptualization of marriage and procreation as “related rights,” it would not be implausible to say that *Obergefell* provides an opening for what many scholars see lacking in *Skinner*: a robust articulation of procreation’s substantive constitutional dimension.<sup>42</sup>

If that is correct, then *Obergefell* could unsettle arguments favoring reproductive regulation that are predicated on an “equal liberty” theory of procreation. In a world where procreation is not protected under substantive due process, reproductive regulation that burdens all alternative procreators is of little constitutional moment. But in a world where procreation is a fundamental right, reproductive regulation that burdens any alternative procreator—including mandatory donor non-anonymity regulation—raises serious constitutional concern.

## 2. Constitutional Parity Between Sexual and Alternative Reproduction

*Obergefell* unsettles procreation-based arguments in favor of alternative reproductive regulation for a second reason: the

---

37. See, e.g., *id.* at 2598.

38. See *id.* at 2602–05.

39. *Id.* at 2603 (emphasis added).

40. *Id.* at 2602 (emphasis added).

41. *Id.* at 2604 (emphasis added).

42. See, e.g., John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 453–54 (2003).

Court suggests constitutional parity between sexual and alternative reproduction. Recall the argument that *Skinner* at most extends constitutional protection to traditional—that is, sexual—procreation. *Obergefell* appears to differ. First, it overrules *Baker v. Nelson*,<sup>43</sup> a case that rested implicitly on a constitutionally relevant distinction between sexual and alternative reproduction. Second, it declares that even non-traditional practices, like certain forms of alternative reproduction, receive constitutional protection under the Due Process Clause.

Binding on courts until *Obergefell*, *Baker* held that Minnesota’s marriage exclusion did not violate the federal Constitution because marriage was necessarily procreative. “Marriage and procreation are fundamental to the very existence and survival of the human race,” it reasoned.<sup>44</sup> *Baker*’s procreation rationale, which became authority for courts hearing marriage claims for the next three decades,<sup>45</sup> did not just link marriage and procreation, however: it linked marriage and *sexual* procreation in particular—albeit without explicitly saying so. When *Baker* was decided in 1971, the public was well aware of the practice of alternative insemination, which had become not only “popular” by the 1940s,<sup>46</sup> but also legal in some states.<sup>47</sup> Courts and legislators in several states, including Minnesota, had been wrestling with issues surrounding alternative insemination for years before *Baker* was decided in 1971,<sup>48</sup> and by 1973 the Uniform Law Commissioners had codified the trend toward legalization of alternative insemination through the passage of an act that legitimized alternative reproduction: the Uniform Parentage Act.<sup>49</sup> By the 1980s, as courts were continu-

---

43. 191 N.W.2d 185 (Minn. 1971).

44. *Id.* at 186 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

45. *See, e.g.*, *Singer v. Hara*, 522 P.2d 1187, 1197 (Wa. Ct. App. 1974) (quoting *Baker*, 191 N.W.2d at 186).

46. Bernstein, *supra* note 1, at 1060.

47. *See id.* at 1083–97.

48. *See id.* at 1069 n.125.

49. UNIF. PARENTAGE ACT § 5(b) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1973), <http://www.uniformlaws.org/shared/docs/parentage/upa73.pdf> (stating that a male donor will not be considered a father of a child born from alternative insemination if the sperm is provided to a licensed physician for use in alternative insemination of a married woman other than the donor’s wife). The Uniform Parentage Act was revised in 2000 (and amended in 2002). *Parentage Act Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited Jan. 4, 2016). Among other things, the revised UPA dispenses with the physician assistance and marriage requirements. UNIF. PARENTAGE ACT § 702 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2002), <http://www>

ing to justify same-sex marriage exclusions by adverting to procreation,<sup>50</sup> the commercial gamete market began to cater to lesbian women in particular, with the country's first lesbian-owned sperm bank, Pacific Reproductive Services, opening for business in California in 1984.<sup>51</sup>

By upholding marriage exclusions on the basis of procreation at a time when increasing numbers of sexual minorities were procreating, *Baker* and its progeny signaled that marriage was not just about procreation generally, but about sexual procreation specifically. In fact, every iteration of the procreation rationale, from *Baker*'s "perpetuation of the species" rationale to the more recent "responsible procreation" rationale rejected by the *Obergefell* majority,<sup>52</sup> assumed that the state could deny same-sex couples the right to marry because of their inability to procreate *in a certain manner*—sexually—not because of their inability to procreate at all.

*Obergefell* reverses that trend by (1) rejecting all versions of the procreation rationale,<sup>53</sup> (2) recognizing the non-traditional kinship often made possible by alternative reproduction<sup>54</sup> and citing it as a reason to extend marriage to same-sex couples,<sup>55</sup> and (3) overruling *Baker*: "*Baker v. Nelson* must be and now is overruled," it declares.<sup>56</sup> In all of these ways, *Obergefell* renders procreative mechanics irrelevant with respect to the right to marry.

Even more, *Obergefell* renders procreative mechanics irrelevant with respect to the right to procreate. *Obergefell* states that non-traditional practices, like same-sex marriage, may qualify for fundamental right status under the Due Process Clause, notwithstanding the Court's earlier insistence in *Washington v. Glucksberg* that "the [Due Process] Clause specially protects those fundamental rights and liberties which are, ob-

---

.uniformlaws.org/shared/docs/parentage/upa\_final\_2002.pdf.

50. See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (finding *Baker* to be persuasive).

51. See *Why a Lesbian-Owned Bank Is a Positive Choice for Any Woman*, PAC. REPROD. SERVS., [https://www.pacrepro.com/index.php?main\\_page=why\\_prs](https://www.pacrepro.com/index.php?main_page=why_prs) (last visited Jan. 4, 2016). For a complete history of sperm banks' operation in the United States, see SWANSON, *supra* note 1, at 198–237.

52. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

53. See *id.* at 2601 (rejecting perpetuation of the species rationale); *id.* at 2607 (rejecting responsible procreation rationale).

54. See *id.* at 2600.

55. See *id.* at 2600–01.

56. *Id.* at 2605.

jectively, deeply rooted in this Nation’s history and tradition.”<sup>57</sup> In rejecting the *Glucksberg* approach—at least with respect to some fundamental rights, including “marriage and intimacy”<sup>58</sup>—and in refusing to define rights “by who exercised them in the past,”<sup>59</sup> *Obergefell* lays the foundation for establishing *complete* constitutional parity between (traditional) sexual reproduction and (non-traditional) alternative reproduction—parity, that is, with respect not just to marriage but to procreation also. If marriage and procreation are “related rights,” as *Obergefell* insists,<sup>60</sup> and if the traditional approach for determining rights under the Due Process Clause does not apply to marriage, then it follows that the traditional approach for determining rights probably does not apply to procreation either.

### 3. The Demise of Sex Exceptionalism

*Obergefell* unsettles procreation-based arguments in favor of alternative reproductive regulation for a third reason: by furthering a constitutional trend away from sex exceptionalism. Defined as the idea that the uniqueness of sex warrants different, and often privileged, legal treatment of it, sex exceptionalism pervades legal doctrine, from the regulation of intimate agreements to the punishment of sex work, sexual assault, and sexual offenders.<sup>61</sup> Sex exceptionalism influenced constitutional marriage law until *Obergefell*, and continues to influence proposed—and actual—regulations of alternative reproduction.<sup>62</sup>

The devolution of sex exceptionalism that arguably started with *Lawrence v. Texas*<sup>63</sup>—a case that functions as *Obergefell*’s

57. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

58. *Obergefell*, 135 S. Ct. at 2602 (“[W]hile [the *Glucksberg*] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”).

59. *Id.* at 2602 (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”); *see also id.* at 2597 (“History and tradition guide and discipline this inquiry [of identifying fundamental rights] but do not set its outer boundaries. . . . That method respects our history and learns from it without allowing the past alone to rule the present.”).

60. *Id.* at 2600.

61. For an examination of sex exceptionalism in these and other domains, see Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014).

62. *See generally* Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010) (identifying and questioning the law’s idealization of certain sexual relations).

63. 539 U.S. 558 (2003).

veritable “ur-text”<sup>64</sup>—continues apace in *Obergefell*. *Lawrence* established that heterosexual intercourse is not the *sine qua non* of sexual autonomy. *Obergefell* establishes that heterosexual intercourse is not the *sine qua non* of marital autonomy—nor, arguably, of procreative autonomy. At the very least, *Lawrence* and *Obergefell* challenge justifications for reproductive regulation that are grounded on alleged differences between “intimate” heterosexual reproduction and “non-intimate” alternative reproduction.<sup>65</sup> At their most radical, they decenter the privileged status that heterosexual intercourse has long enjoyed in the law, and destabilize the panoply of existing regimes that embrace sex exceptionalism. Such regimes include, among others, federal regulations of gamete banks and state paternity laws, both of which create a separate set of rules for sexual and alternative procreators.<sup>66</sup>

#### CONCLUSION: *OBERGEFELL*’S TRANSFORMATIVE POTENTIAL

*Obergefell* is a marriage case whose animating logic extends beyond marriage, and into realms like procreation and the family. It poses an obstacle to the many emerging proposals to regulate alternative reproduction, and throws into question myriad existing laws that are predicated on a factual and legal distinction between sexual and alternative reproduction. Viewing *Obergefell*, a case that is sure to be celebrated principally in terms of marriage and gay rights, in the more capacious terms suggested by this Essay helps to uncover the radical, and truly transformative, power that it holds.

---

64. Compare *Obergefell*, 135 S. Ct. at 2598 (“The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions.”) with *Lawrence*, 539 U.S. at 575 (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.”).

65. See *supra* note 27.

66. The Food and Drug Administration burdens non-sexual gamete donation, but not sexual gamete donation, with costly testing requirements. See, e.g., Amber D. Abbasi, *The Curious Case of Trent Arsenault: Questioning FDA Regulatory Authority over Private Sperm Donation*, 22 ANNALS HEALTH L. 1, 16 (2013). In addition, the law in every state that has addressed the legal status of sperm donors makes a distinction between sexual and alternative reproduction in the laws of parentage. See Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Paternal Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 22–23 (2004).