# THE MARITAL PRESUMPTION AS APPLIED TO BIRTH CERTIFICATES, IMMIGRATION, AND SAME-SEX COUPLES: HOW AND WHY SOME STATES HAVE DIVERGED

*Kristin J. Rempe*

# THE MARITAL PRESUMPTION AS APPLIED TO BIRTH CERTIFICATES, IMMIGRATION, AND SAME-SEX COUPLES: HOW AND WHY SOME STATES HAVE DIVERGED

*The Supreme Court has long made clear that parents have a constitutionally protected interest in the care, custody, and control of their children. But the Constitution does not define who qualifies as a "parent" to exercise parental rights. Without meaningful guidance from the Supreme Court, states developed disparate standards for defining "parent." States thus alternatively define legal parentage based on biology, intent, function, or a combination thereof. Historically, however, parenthood was determined by marriage. Indeed, the marital presumption is a pillar in family law that has withstood the test of time and continues to play a pivotal role in determinations of legal parentage. Given the presumption's significance in family law, and its derived significance in immigration law, it is unlikely that it will be discarded in either context. Adapting the traditional marital presumption to meet the needs of modern families is a herculean task, however, which cannot be accomplished in one fell swoop or through the efforts of any one rulemaking body.*

*To the extent lawmakers would endeavor to and could possibly accomplish this task, this Comment seeks to alert those lawmakers to the informative overlaps found in three circumstances applying the marital presumption: birth certificates, same-sex couples, and immigration. State family law's interpretation of the marital presumption as it is applied to same-sex couples demonstrates that the presumption can be adapted to accommodate the modern family.* Pavan v. Smith*'s gloss on* Obergefell v. Hodges *instructs that those benefits of marriage initially thought tied to biology need not be, but it leaves open the possibility of a strict biology regime. The U.S. State Department's biological interpretation of immigration law's marital presumption illustrates the negatives of such a strict biology regime. This Comment analyzes application of the marital presumption in the three circumstances and presents at least one way in which a nongendered, nonbiological marital presumption could be formulated to accommodate married same-sex couples.*

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## INTRODUCTION

Parents have a constitutionally protected interest in the "care, custody, and control of their children."[1] "The Constitution does not, however, define 'parent.'"[2] Without meaningful guidance from the Supreme Court, states developed disparate standards for defining "parent."[3] How, then, should the law determine legal parentage?[4] A parent could be a "genetic parent" who is the biologically related donor of genetic material to offspring.[5] A parent could also be an "intended parent," or the individual who seeks out procreation with the intent to foster a child from youth to adulthood.[6] A parent could

1. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *see also* Kerry Abrams, *The Rights of Marriage:* Obergefell, Din, *and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 515 (2018) ("Constitutional family law has established the right of parents to the care, custody, and control of their children . . . .").

2. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1492 (2018).

3. *Id.* at 1487–88.

4. *See* Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 308 (2017) (describing the "law of parentage" as "the set of rules and doctrines that determine who is a legal parent").

5. *See, e.g.*, Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 635–36 (2014).

6. *See, e.g.*, P.M. v. T.B., 907 N.W.2d 522, 525 (Iowa 2018) (holding surrogacy agreement valid while recognizing intended genetic father as exclusive

alternatively be a "functional parent" who acts as a parental figure, offering guidance, care, and support to a child, absent any genetic or intended relationship.[7] Or, a parent could be some combination of these definitions.[8]

Historically, however, parenthood was determined by marriage: The law relied on the legal presumption that the husband of a child born to a married woman was the legal parent of that child.[9] The common law developed the marital presumption as a means of legitimizing a child born in wedlock.[10] Applied in a series of unwed father cases,[11] the presumption "both reinforced and fueled a shift in the conception of the non-marital family," leading courts and legislatures to "rethink the parameters of parent-child relationships."[12] Nevertheless, the presumption remains[13] and is inextricably linked to marriage,[14] a relationship which continues to enjoy preferential treatment.[15]

Recently, the Supreme Court in *Obergefell v. Hodges*[16] recognized the "constellation of benefits" linked to marriage and afforded those benefits to same-sex couples.[17] *Obergefell* challenges lawmakers to conform the gendered[18] marital presumption to same-sex married

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legal parent of child born to gestational surrogate using intended genetic father's sperm); *see also* Abrams & Piacenti, *supra* note 5, at 636.

7. *See* Abrams & Piacenti, *supra* note 5, at 636.

8. *See, e.g.*, Grossman, *supra* note 4, at 318 ("Biology, marriage, intent, function, and contract have all emerged as possible bases on which to recognize legal parentage, but, in any given case, those factors can be in tension or even completely at odds with one another.").

9. *See infra* notes 30–32 and accompanying text.

10. *See infra* notes 36–37 and accompanying text.

11. *See infra* note 42.

12. Grossman, *supra* note 4, at 320.

13. *See* June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post*-Obergefell, 84 UMKC L. REV. 663, 664 (2016) (noting that the marital presumption "continues to apply to some degree in all states"); *see also* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 315 (2020) ("With its marriage equality decisions [in *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *United States v. Windsor*, 570 U.S. 744 (2013)], the Court made clear that the constitutional status of marriage is related to parenting, and that this emphasis on parenting applies to same-sex couples.").

14. *See, e.g.*, Higdon, *supra* note 2, at 1493.

15. *See infra* notes 56–58 and accompanying text.

16. 576 U.S. 644 (2015).

17. *Id.* at 670.

18. *See generally* Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221 (2020) (discussing the constitutional jurisprudence assumption that maternity and motherhood are certain and simple to determine, whereas paternity and fatherhood are uncertain and difficult to ascertain).

parents.[19] Doing so would involve changes that range from listing those individuals' names on birth certificates[20] to determining parentage for purposes of citizenship under immigration law.[21] Lawmakers have begun to adopt and apply the gendered marital presumption in these circumstances using varying definitions of parentage, yet no single definition seems to effectively address all concerns.[22]

Since the presumption is tied to marriage,[23] and since "regulation of domestic relations is traditionally the domain of state law,"[24] the onus is on states to craft a legal method of recognizing parentage that conforms with *Obergefell*'s mandate while maintaining some semblance of uniform application to all forms of the modern family,[25] particularly same-sex couples. Accordingly, this Comment aims to deconstruct the divergent approaches to recognizing legal parentage—specifically the varying interpretations of the marital presumption—when supporting married same-sex couples' desire to start families, listing married individuals as parents on birth certificates, and determining citizenship for children born abroad to married couples in the immigration law context.[26]

Part I of this Comment provides a brief overview of the history of the marital presumption and the values the presumption intended to protect. Part II reviews how states apply a gendered rule like the marital presumption to same-sex couples and the viability of states' diverging approaches. Part III discusses the application of the marital presumption to birth certificates and discusses the Supreme

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19. *See infra* Part II. For purposes of this Comment, reference to same-sex couples and opposite-sex couples presumes a married couple, unless stated otherwise.

20. *See infra* Part III.

21. *See infra* Part IV.

22. *See, e.g.*, Carbone & Cahn, *supra* note 13, at 663 ("Like restrictions on marriage, parentage law is state-based, and the states vary widely in how they determine parenthood and the importance of marriage and biology to those legal decisions.").

23. *See* Higdon, *supra* note 2, at 1486.

24. Hillman v. Maretta, 569 U.S. 483, 490 (2013).

25. *See* Troxel v. Granville, 530 U.S. 57, 63 (2000) ("[D]emographic changes of the past century make it difficult to speak of an average American family.").

26. This Comment is narrow in its discussion, addressing only the use of the marital presumption to determine parentage in the context of marriage; it does not discuss the use of that presumption to determine parentage in the context of nonmarital couples, the rights of unwed biological fathers individually or as against a married couple, or the rights of surrogates or donors of genetic material. *See generally* Grossman, *supra* note 4 (discussing the aforementioned concepts). For additional information, see Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 190 (2020). Similarly, this Comment takes no position on the constitutional treatment of marriage as a privileged relationship but instead addresses this narrow familial relationship as one small part of the broader scope of modern families.

Court's recent decision in *Pavan v. Smith*,[27] which illustrates the constellation of benefits afforded to same-sex couples. Part III also provides a lens through which to view the ways states treat the marital presumption. It analyzes whether states treat their birth certificates as a record of biological parentage, applying the gendered marital presumption, or as record of parentage, applying a marital presumption that rejects a biological reality, and addresses the impact this treatment has on states that ground birth certificates in biology post-*Pavan*. Part IV analyzes where state family law and immigration law diverge when balancing parentage claims of marital parents seeking citizenship for their children born abroad, addresses the ways in which the two areas of law inform one another, and predicts the likelihood that immigration laws grounded in gendered presumptions will continue.

Part V evaluates the varying applications of the marital presumption in the context of same-sex couples, birth certificates, and immigration and citizenship and addresses how these circumstances can be combined to formulate a uniform marital presumption of parentage. In Part V, this Comment proposes that the marital presumption should not be abrogated but, rather, should adapt a nongendered application of the presumption for same-sex couples that does not rely on a biological connection. This formulation of the presumption could then be used to determine the names to list on a birth certificate and used as a model for immigration law when determining citizenship.

## I. A BRIEF HISTORY OF THE MARITAL PRESUMPTION

The common law describes the marital presumption[28] as "one of the strongest presumptions known to the law."[29] The presumption operated such that "parenthood flowed from marriage,"[30] meaning that "the woman who gave birth to the child was the mother, and that

27. 137 S. Ct. 2075 (2017).

28. The marital presumption is also referred to as the presumption of legitimacy. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (describing the "presumption of legitimacy" as a "fundamental principle of the common law").

29. Hynes v. McDermott, 91 N.Y. 451, 459 (1883); *see also, e.g.*, R.N. v. J.M., 61 S.W.3d 149, 159 (Ark. 2001) (Thornton, J., concurring) (noting that the presumption "that a child born during marriage is the legitimate child of the parties to the marriage, is one of the strongest presumptions recognized by the law" (quoting Thomas v. Pacheco, 740 S.W.2d 123, 125 (1987))); *In re* Russell's Estate, 110 S.E. 791, 793 (S.C. 1922) (describing the presumption as one of the strongest known to the law). The presumption dates back to early English common law. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2272 (2017); *see also* Katharine K. Baker, *Bargaining for Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 24 (2004) (discussing an early British court's decision in 1304 in a legitimacy case applying the marital presumption).

30. Higdon, *supra* note 2, at 1493.

woman's husband was the father."[31] Thus, the presumption "instantaneously designates a man as a child's legal father at the time of birth."[32]

In the past, absent a legally recognized father, a child born out of wedlock was a *filius nullius*, or "son of nobody."[33] As a *filius nullius*, a child was deemed illegitimate,[34] with no recognized legal relationship to his or her parents and no right to claim inheritance, maintenance, or custody.[35] To avoid declaring nonmarital children "illegitimate" and rendering them wards of the state,[36] the presumption worked to assure that children born to married parents had legally recognized fathers, even if the husband of the woman giving birth had no biological relation to the child.[37] When it came to determining legitimacy, "[m]arriage was the arbiter because the law needed some arbiter; biological questions were too messy."[38] The law "simply ignore[d] biology and instead link[ed] fatherhood to marriage."[39]

Over the years, the Supreme Court chipped away at the doctrines discriminating against nonmarital children, slowly affording them

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31. *Id.* at 1486.

32. Alexandra Eisman, Note, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARDOZO J.L. & GENDER 579, 581 (2013). In contrast, at common law married mothers were legal mothers to their children; "[t]he mother-child relationship was established by proof of giving birth." NeJaime, *supra* note 29, at 2279–80; *see also* Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.").

33. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *447; *Filius Nullius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

34. Children born out of wedlock have been described in various terms such as "bastard" and "illegitimate." Significant stigma, however, is attached to those terms. *See, e.g.*, Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 934–38 (1996); Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 428 n.7 (1993). Accordingly, this Comment uses the term "nonmarital" to describe children born to unmarried parents.

35. NeJaime, *supra* note 29, at 2273 (quoting MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 197 (1985)). The principles of *filius nullius* were also incorporated into immigration law. *See* Leticia Saucedo & Rose Cuison Villazor, *Illegitimate Citizenship Rules*, 97 WASH. U. L. REV. 1179, 1229 (2020); *see also infra* Part IV.

36. Michael H. v. Gerald D., 491 U.S. 110, 125 (1989).

37. *See* NeJaime, *supra* note 29, at 2272; *see also id.* at 2339 (noting that all but one state—Washington—"derives a spouse's parentage from marriage to 'the woman giving birth' or 'the natural mother'" (citations omitted)).

38. Baker, *supra* note 29, at 23.

39. Higdon, *supra* note 2, at 1493.

equal protection of the laws.[40] Accordingly, "the stigma of illegitimacy faded in power and importance."[41] Nevertheless, lawmakers continue to use the marital presumption to confer preferential parental status to husbands, even in the face of DNA evidence demonstrating an absence of biological connection between husband and child.[42]

Various rationales weigh in favor of continuing to recognize and apply the marital presumption. Historically, legal scholar William Blackstone considered the goals of the presumption as "being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong" and asserting that "this end is undoubtedly better answered" by legitimating children.[43] Thus, "[b]ecause of the very great uncertainty there will generally be, in the proof" that the child is that of the husband, the marital presumption served to "render[] it perfectly certain, what child is legitimate, and who is to take care of

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40. *See* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (striking down as unconstitutional an Illinois statute that barred children from inheriting from a nonmarital father via intestacy); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust."); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (striking down as unconstitutional on equal protection grounds a Louisiana wrongful death statute that allowed a marital child, but not a nonmarital child, to recover for the wrongful death of his or her mother).

41. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 244 (2006).

42. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding California's marital presumption and denying that biological father had a constitutional right to establish a relationship with his child while recognizing husband as legal father). The Supreme Court recognized in a series of cases that unwed biological fathers have limited rights to their children. *See generally id.*; Lehr v. Robertson, 463 U.S. 248 (1983) (concluding that biological unwed father's genetic relation to his nonmarital child creates an "opportunity" for the father to develop a relationship with the child and thereby acquire constitutionally protected parental rights); Caban v. Mohammed, 441 U.S. 378 (1979) (concluding unwed father was not afforded equal protection of the laws where father acknowledged paternity and established a substantial relationship with his nonmarital children); Quilloin v. Walcott, 434 U.S. 246 (1978) (concluding that unwed father did not have a right to veto adoption where unwed father never sought custody and only provided irregular support); Stanley v. Illinois, 405 U.S. 645 (1972) (concluding that unwed father was entitled to a hearing on his fitness as a parent before his children could be removed from his custody). For a discussion of these cases, see Higdon, *supra* note 2, at 1494–1501.

43. BLACKSTONE, *supra* note 33, at *443; *see also* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 336 n.159 (2010) ("Blackstone perceived the goals of the marital presumption as focusing on the child's needs . . . .").

the child."[44] In essence, these rationales emphasize the purpose of the presumption to promote child welfare.[45]

More recently, in a case pitting an unwed biological father against a married woman and her husband, the Court in *Michael H. v. Gerald D.*[46] applied the marital presumption to recognize the husband as the child's legal father and to deny the biological father of the constitutional right to establish a relationship with his child.[47] In its ruling, the Court recognized two policy rationales supporting the marital presumption: (1) an "aversion to declaring children illegitimate . . . thereby depriving them of rights of inheritance and succession . . . and likely making them wards of the state,"[48] and (2) an "interest in promoting the 'peace and tranquility of States and families.'"[49] The Court also cited the presumption as a means of reducing government spending by "ensuring that a greater number of children had two legal parents obligated to support them from the time of birth."[50]

Scholars continue to criticize the presumption as a "means of imposing patriarchal and racist norms of protecting husbands' vanity."[51] Some even argue that the presumption's reliance on gendered stereotypes causes it to run afoul of constitutional law.[52] Others have gone so far as to argue that the presumption actually harms children and undermines the presumption's stated goal of promoting child welfare.[53]

Despite its shortcomings, the presumption continues to pervade state and federal legislation and court rulings.[54] Moreover,

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44. BLACKSTONE, *supra* note 33, at *443.

45. Appleton, *supra* note 41, at 237; Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 249 (2019).

46. 491 U.S. 110 (1989).

47. *Id.* at 121–27.

48. *Id.* at 125.

49. *Id.* (quoting JAMES SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 225, at 304 (3d ed. 1882)).

50. Feinberg, *supra* note 45, at 251; *see also* McLaughlin v. Jones, 401 P.3d 492, 499–500 (Ariz. 2017) (describing the two primary purposes for the marital presumption as being "to ensure children have financial support from two parents" and to "promote[] the family unit"); June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 224–25 (2011) ("In an era in which biology can be determined with certainty, courts have articulated two rationales to support continued application of the marital presumption: the state interest in upholding the sanctity of marriage and a preference for function over biology.").

51. Appleton, *supra* note 41, at 237.

52. *See* Cahill, *supra* note 18, at 2224–25.

53. *See, e.g.*, Byrn & Ives, *supra* note 43, at 336 ("[T]here is reason to conclude that the marital presumption harms children.").

54. Feinberg, *supra* note 45, at 259 (noting that "it is unlikely that most states will abrogate the marital presumption any time soon"); *id.* at 254 (noting that states are unlikely to discard the marital presumption because it "continues

constitutional jurisprudence continues to recognize marriage as a uniquely protected and favored relationship.[55] Thus, rather than discard the presumption or remove the special protection it affords married parents, courts and legislatures need to understand the rationales underlying application of the presumption in varying circumstances in order to craft approaches capable of accommodating the modern family.

## II. ADAPTATION OF THE GENDERED MARITAL PRESUMPTION TO SAME-SEX COUPLES

As the Court stated in *Obergefell*, "hundreds of thousands of children are presently being raised by [same-sex] couples" who "provide loving and nurturing homes to their children."[56] Despite *Obergefell*'s call for the "constellation of benefits" accompanying marriage to be afforded to same-sex married couples,[57] "[t]here is no automatic parentage presumption for same-sex couples."[58] Rather, "[u]nlike the traditional presumption, where the protected husband could plausibly be the genetic father of the child, the presumption as applied to a same-sex couple reflects a policy determination regarding who should get to be a parent, notwithstanding biological reality."[59] Some state legislatures adapted their marital presumption statutes to accommodate same-sex couples by eliminating the use of gendered

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to play an extremely significant role . . . as it remains the most common way of establishing a person other than the individual who gave birth as a child's legal parent"); *see also, e.g.*, *McLaughlin*, 401 P.3d at 494 (holding that the state's marital presumption applies to children born to same-sex married couples); Boquet v. Boquet, 269 So. 3d 895, 900 (La. Ct. App. 2019) (same); Carbone & Cahn, *supra* note 50, at 223 ("All states continue to recognize at least a rebuttable presumption that a child born within marriage is the child of the husband, and many limit the circumstances in which it can be rebutted."); Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 76 (2017) ("The marital presumption . . . still exists in some form in every state.").

55. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015) (describing marriage as "a keystone of our social order" and the states' "basis for an expanding list of governmental rights, benefits, and responsibilities"). *But see* Abrams, *supra* note 1, at 556 ("In a society in which over half of us are unmarried, and over 40% of children are born to unmarried parents, a Supreme Court opinion expressly preferring marriage to nonmarriage is of serious concern.").

56. *Obergefell*, 576 U.S. at 668.

57. *Id.* at 670.

58. Eisman, *supra* note 32, at 589.

59. Anna Marie D'Ginto, Comment, *The Birth Certificate Solution: Ensuring the Interstate Recognition of Same-Sex Parentage*, 167 U. PA. L. REV. 975, 982 (2019); *see also* Higdon, *supra* note 2, at 1514 ("[A]ny biological child in a same-sex relationship will, at most, be the biological child of only one of the adults in that family.").

terms,[60] while others did so through judicial interpretation.[61] Still, other states have yet to address the issue.[62] In light of the absence of a clear rule and the varying state interpretations of the marital presumption, states generated a number of rationales to extend—or decline to extend—the marital presumption to same-sex couples.

A primary point of contention among the varying approaches is whether a biological connection—or the possibility of a biological connection—is necessary to apply the presumption to same-sex married couples.[63] Prior to *Obergefell*, some state courts declined to extend the marital presumption to the same-sex spouse of a birthing mother. For example, in *Q.M. v. B.C.*,[64] the New York State Family Court emphasized the importance of a biological connection in holding that the marital presumption did not establish that the biological mother's wife was the child's second mother.[65] Even post-*Obergefell* but pre-*Pavan*, some state courts used the biology argument to decline to extend the marital presumption to same-sex couples. For example, the Texas Court of Appeals, in the unpublished opinion of *In re A.E.*[66] declined to extend the marital presumption to a same-sex spouse because of the "uncontested fact that the child is genetically unrelated" to the petitioning spouse.[67] The court refused to interpret *Obergefell* as requiring that "every state law related to the marital relationship or the parent-child relationship must be 'gender neutral.'"[68]

In contrast, today, the vast majority of state courts that address the issue conclude that the presumption should be applied to same-

60. *See, e.g.*, ARK. CODE ANN. § 28-9-209(a)(2) (2021); N.Y. DOM. REL. LAW § 24(1) (Consol. 2021).

61. *See, e.g.*, McLaughlin v. Jones, 401 P.3d 492, 494 (Ariz. 2017); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 340–41 (Iowa 2013); Christopher YY v. Jessica ZZ, 69 N.Y.S.3d 887, 891 (App. Div. 2018); Appel v. Celia, 98 Va. Cir. 140, 140 (2018).

62. For example, North Carolina and North Dakota.

63. *See, e.g.*, Carbone & Cahn, *supra* note 13, at 667–70.

64. 995 N.Y.S.2d 470 (Fam. Ct. 2014).

65. *Id.* at 474; *see also In re* Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (App. Div. 2015) ("[T]he presumption of legitimacy . . . is one of a biological relationship . . . ."); Shineovich v. Shineovich, 214 P.3d 29, 36 (Or. Ct. App. 2009) (holding that a same-sex partner was not entitled to declaration of legal parentage of the children born to her former partner under the statute presuming parentage for a child born in wedlock because she was indisputably not the biological parent of the children).

66. No. 09-16-000019-CV, 2017 WL 1535101 (Tex. Ct. App. Apr. 27, 2017).

67. *Id.* at *21.

68. *Id.* In a post-*Pavan* case, the dissent in *McLaughlin v. Jones* interpreted *Pavan* in light of *Nguyen* to conclude that the state's gendered marital presumption was not unconstitutional on its face. 401 P.3d 492, 503 (Ariz. 2017) (Bolick, J., dissenting). Rather, it was "the *absence* of a mechanism to provide parenthood opportunities to single-sex couples on equal terms appropriate to their circumstances" that made the statute problematic. *Id.*

sex couples even absent a genetic connection.[69] These courts sometimes justify their decisions by recognizing that "the state's interest in the welfare of the child and the integrity of the family" are furthered by extending the marital presumption to same-sex couples.[70] Other courts reason that "[t]he policy underlying the presumption of paternity is the preservation of marriages."[71] Still, others rely on the important function of child support and the fact that all children deserve to be supported by their parents to conclude that the presumption extends to same-sex couples.[72] Additionally, post-*Pavan*, at least two state courts have concluded that *Pavan* requires courts to "give effect to the ancillary benefits of a same-sex marriage, including the determination of maternity for the non-gestational spouse of a child born to the marriage."[73]

As discussed, much of the contention centers on applying a biology-based and gendered marital presumption to same-sex couples.[74] It is easier, however, to apply the biology-based marital presumption to same-sex lesbian couples than same-sex gay couples.[75] Lesbian same-sex couples can use artificial insemination[76] to impregnate one spouse, such that, along with the anonymously

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69. *See, e.g.*, Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *16 (Conn. Super. Ct. Jan. 16, 2015); LC v. MG, 430 P.3d 400, 402 (Haw. 2018); *In re* Interest of A.M., 223 A.3d 691, 695 (Pa. Super. Ct. 2019).

70. *In re* Guardianship of Madelyn B., 98 A.3d 494, 500 (N.H. 2014) (quoting *In re* Salvador M., 4 Cal. Rptr. 3d 705, 708 (2003)).

71. *In re Interest of A.M.*, 223 A.3d at 695.

72. Treto v. Treto, 622 S.W.3d 397, 402–03 (Tex. Ct. App. 2020).

73. *Id.* at 402; *In re* Gestational Agreement 449 P.3d 69, 80–82 (Utah 2019) (holding unconstitutional a gestational surrogate statute that required at least one of the intended parents be female, which gendered interpretation precluded married same-sex couples from obtaining a valid agreement—a benefit undoubtedly linked to marriage under *Obergerfell* and *Pavan*).

74. Although not the focus of this Comment, the inequality advanced by application of a gendered, biological application of the marital presumption also prejudices opposite-sex married couples using artificial insemination and gestational surrogacy. *See, e.g.*, Cary Franklin, *Biological Warfare: Constitutional Conflict Over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 191 (noting that nonbiological mothers and gay men are penalized because "[a] woman who relies on a gestational surrogate to carry a child produced with a donor egg and her husband's sperm generally cannot derive parentage by being married to the biological father, whereas if donor sperm is used, a man can derive parental rights by being married to the child's biological mother").

75. Appleton, *supra* note 41, at 260–62.

76. *Id.* at 260–61; Higdon, *supra* note 2, at 1503 (describing artificial insemination as "a process through which a child is conceived not through sexual intercourse, but through the injection of sperm into the intended mother's cervix").

donated sperm,[77] the couple creates an embryo, and the impregnated spouse either: (1) uses her own egg; (2) acts as a gestational surrogate using the other spouse's donor egg; or (3) acts as a gestational surrogate using a donated egg. In the first scenario, the impregnated spouse is a genetic and intended parent,[78] and the other spouse is an intended parent. In the second situation, the impregnated spouse is an intended parent and a biological parent by virtue of her gestation,[79] and the other spouse is a genetic and intended parent. In the third scenario, the impregnated spouse is an intended parent and a biological parent, and the other spouse is an intended parent.[80] In each scenario, the marital presumption can be applied to assume that upon birth,[81] the impregnated spouse giving birth is the legal parent.[82] The presumption can operate to recognize the other spouse as a legal parent by virtue of the marital unity.[83] Notably, in each scenario, the lesbian same-sex couple provides a readily workable scenario for a presumption that requires a biological connection.

Alternatively, gay same-sex couples necessarily require the involvement of a third party with only one spouse capable of claiming parental rights by virtue of a genetic connection through use of that spouse's sperm.[84] The easiest solution would be to simply apply the marital presumption upon birth of the child:[85] the biological spouse is a legal parent by virtue of the genetic connection, and the presumption operates to make the nonbiological spouse a legal parent

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77. Legal parentage of the anonymous sperm donor is not at issue here because "sperm donors are typically denied all parental rights and obligations." Higdon, *supra* note 2, at 1504.

78. *See, e.g.*, NeJaime, *supra* note 29, at 2298–2303.

79. *See id.*

80. *See id.* at 2298–2300.

81. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 223–24 (2012) ("There is a single point in time, generally at the time of birth, in which a marriage either exists or does not exist, and parentage is assigned accordingly.").

82. *See, e.g.*, Cahill, *supra* note 18, at 2258–59 (describing the assumption that all pregnant women are "mothers" under the law).

83. *See id.* at 2247–48; *see also* D.C. CODE § 16-909(a-1)(2) (2021) (outlining presumption of parentage for woman married to child's mother); Schaberg v. Schaberg, No. ED109200, 2021 WL 5066661, at *6–7 (Mo. Ct. App. Dec. 13, 2021) (holding the required gender-neutral reading of the marital presumption applies to same-sex married couples such that the "longstanding statutory presumption of natural parentage of children born during a legally recognized marriage" works to "grant[] married couples the privilege of assuming that the non-birthing spouse is a natural parent, provided the child is born during their marriage").

84. Appleton, *supra* note 41, at 261–62.

85. *See* Higdon, *supra* note 2, at 1514–15; *see also* NeJaime, *supra* note 13, at 336 ("*Obergefell* involved marriage, and the Court's subsequent decision in *Pavan* clarified that *Obergefell* required the recognition of nonbiological parents in *married* same-sex couples.").

by virtue of the marital unity.[86] Thereafter, if another individual sought to rebut the presumption, that individual could do so by demonstrating a genetic relationship to the child, as well as an intent to parent the child prior to the child's birth.[87]

If, however, the presumption is not applied, these couples are faced with additional hurdles for the nonbiological spouse to claim legal parentage. Lawmakers could, for instance, force both spouses to demonstrate a biological connection—an insurmountable hurdle for the nonbiological spouse and a clear flaw in the a strict biological view of legal parentage.[88] The nonbiological spouse could also demonstrate a functional relationship, but that relationship only creates the possibility of legal parentage after the child's birth.[89] Alternatively, states can adopt a strict-intent regime to recognize

86. Professor Higdon describes a similar scenario in his proposal for a "biology plus intent" standard. *See* Higdon, *supra* note 2, at 1527. In his proposal, Professor Higdon asserts "[t]he father who donated the sperm" qualifies as a parent "given that he is both the biological and the intended parent," and "the husband's status as an intentional parent would be sufficient to qualify him as the child's other legal parent." *Id.* Application of the marital presumption to the scenario as described in this Comment differs in that intent is presumed for both spouses due to the marital unity; the marital unity alone is enough—as it is for opposite-sex couples—to establish the husband as a legal parent.

87. This formulation of the marital presumption applies Professor Higdon's "biology plus intent" standard as the means of rebutting the legal relationships established by the presumption rather than establishing the legal relationship in the first instance, which a gender-neutral application of the marital presumption would already do.

88. *See* Higdon, *supra* note 2, at 1513 ("[T]he law of gestational surrogacy, just like the law of artificial insemination, reveals that parenthood—be it motherhood or fatherhood—can no longer be based exclusively on biology."). This requirement for a biological connection for both spouses in a gay same-sex marriage is the irrational application of the presumption at issue in immigration law. *See infra* Part IV.

89. *See* Purvis, *supra* note 81, at 227 ("A functional understanding of parenthood, however, by definition does not foster advance planning: a functional relationship can be created only after birth, once the potential parent has had an opportunity to build a relationship with the child."). For a discussion of functional parentage, see NeJaime, *supra* note 13, at 319–34.

both spouses as legal parents using instruments such as pre-birth orders[90] and gestational surrogate agreements.[91]

Despite persistent inconsistencies in the application of the marital presumption both within a single state and among states,[92] as well as variation for lesbian and gay same-sex couples, the trend suggests that states will apply the presumption to recognize parentage for nonbiological spouses in same-sex married couples.[93] But the continued application of genetics to determine parentage remains tenuous,[94] particularly when considering that proof of a genetic connection is an oft-used means of rebutting the martial presumption.[95] The problem is further exacerbated by the fact that judicial determinations of parentage rely on birth certificates as prima facie evidence of parentage.[96] In those circumstances, it

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90. For a discussion of pre-birth orders, see Purvis, *supra* note 81, at 244–52. "A prebirth order directs who the legal parent or parents of a future child will be. Most concretely, such an order directs which names will appear on the child's birth certificate, but the order also prevents later challenges to the child's parentage." *Id.* at 244. Voluntary acknowledgments of paternity ("VAPs") are another method of establishing paternity available to men. *See, e.g.*, Feinberg, *supra* note 54, at 83. Although "at least one scholar has set forth a comprehensive proposal to expand the use of VAPs to same-sex parents, to date same-sex parents generally have not been able to utilize VAPs to establish legal parent status." *Id.* at 83–84.

91. In a recent decision, the Supreme Court of Utah held unconstitutional a statutory requirement that required at least one of the intended parents be female, which gendered interpretation precluded married same-sex couples from obtaining a valid agreement—a benefit undoubtedly linked to marriage under *Obergefell* and *Pavan*. *See In re* Gestational Agreement, 449 P.3d 69, 80–82 (Utah 2019).

92. *See, e.g.*, Grossman, *supra* note 4, at 339.

93. *See, e.g.*, NeJaime, *supra* note 13, at 264 ("Courts and legislatures also have adapted existing parentage presumptions—which conventionally were assumed to correspond to biological parentage—to nonbiological parents. For example, they recognize as a parent the individual, whether a man or a woman, who is married to the woman who gives birth to the child.").

94. *See, e.g.*, Pippin v. Pippin, No. M2018-00376-COA-R3-CV, 2020 WL 2499633, at *6–7 (Tenn. Ct. App. May 14, 2020) (declining to extend the marital presumption to a woman who had no biological connection with the child because "the statutes governing parentage contemplate a biological or genetic connection between the child and the putative parent").

95. Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 U.C. DAVIS L. REV. 1507, 1520 (2021) (noting that "the grounds for rebuttal, which have always centered on proving a lack of genetic connection between the spouse of the individual who gave birth and the child, will need to be restructured in order for the presumption to fully and meaningfully encompass same-sex couples").

96. *See generally* COURTNEY JOSLIN ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:25 (2021) (noting that while a "birth certificate is merely prima facie evidence of the information stated within . . . this does not

remains to be determined what weight should be given to birth certificates if listing an individual thereon is based on application of a marital presumption that does not reflect a biological reality.[97]

Some might advocate for preserving a biological reading of the presumption, arguing that removing all reliance on or reference to genetic lineage in determinations of legal parentage would dissolve the presumption into a meaningless accumulation of words, void of any means of enforceability or rebuttal. Even so, given the longstanding, pervasive acceptance of the marital presumption, it is unlikely that states would (or should) take this approach. Instead, states should look to the Court's decision in *Pavan* as a means of justifying a nonbiological application of the marital presumption to the constellation of benefits afforded by *Obergefell* to same-sex married couples.

## III. BIRTH CERTIFICATES: APPLYING THE MARITAL PRESUMPTION TO AFFORD SAME-SEX MARRIED COUPLES THE CONSTELLATION OF BENEFITS ACCOMPANYING MARRIAGE

The government traditionally used birth certificates to "compile vital statistics and record population information, primarily for purposes of taxation and ascertaining military resources."[98] Today, birth certificates are essential documents necessary to acquire driver's licenses, attend school, get a marriage license, sign up for sports, demonstrate eligibility for Social Security benefits, obtain a passport, and engage in numerous other commonplace activities.[99] With respect to parentage, when parenthood is legally established, the parent's name is listed on the child's birth certificate, thereby conferring parental recognition.[100] Thus, the modern birth certificate is more than a record of vital statistics—it is a means of demonstrating legal parentage and proving the right to engage in the important decisions associated with the child whose birth it

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eliminate or reduce the need to obtain a court judgment declaring the parties' respective legal status vis-a-vis the child").

97. For a brief discussion of the difference between using a birth certificate as prima facie evidence versus a presumption of parentage, see Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN. ST. L. REV. 1, 9 n.42 (2018).

98. D'Ginto, *supra* note 59, at 1001.

99. *See Birth Certificates*, AM. BAR ASS'N (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates; *see also* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (recognizing that birth certificates are "document[s] often used for important transactions like making medical decisions for a child or enrolling a child in school").

100. *See* Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 571 (2019) ("When paternity is legally established, the father's name is listed as a parent on the child's birth certificate, thereby conferring him with parental recognition.").

records.[101] Recently, the significance of birth certificates as a means of evidencing legal parentage has come to the forefront of legal discourse as same-sex parents seek to have their names listed thereon.

In *Obergefell*, the Supreme Court made clear that same-sex couples are entitled to various rights within the "constellation of benefits" afforded to opposite-sex couples, including all "aspects of marital status."[102] Among the "rights, benefits, and responsibilities" afforded to same-sex couples, the Court expressly identified "birth and death certificates."[103] *Obergefell*'s plain language suggests that, just as with opposite-sex couples, same-sex couples should be afforded the right to be listed as parents on birth certificates and afforded the legal recognition accompanying such listing.[104]

Following *Obergefell*, the Court issued a per curiam order in *Pavan*.[105] The case involved two same-sex married couples who conceived using anonymous sperm donation and who challenged Arkansas's statute that required the name of the mother's male spouse to appear on the child's birth certificate—regardless of his biological relationship to the child—but not the name of a female spouse.[106] "[W]hen a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child's birth certificate."[107] In contrast, Arkansas state law allowed "officials in those very same circumstances to omit a married woman's female spouse from her child's birth certificate."[108] "As a result," the Court reasoned, "same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate."[109] Since "*Obergefell* proscribes such disparate treatment,"[110] the Court held that

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101. *See, e.g.*, Bruce L. Wilder, *Evolution of the Birth Certificate: A Tale of Gender, ART, and Society*, 33 J. AM. ACAD. MATRIM. L. 543, 568 (2021) ("Given the overwhelming degree to which, as a matter of practice, it is used almost entirely to establish a child's legal status and access to rights and privileges that are due, we should view the birth certificate as a legal instrument."); D'Ginto, *supra* note 59, at 1012 ("The birth certificate has evolved from a mere medical record into a symbolic embodiment of parentage, and this benefit must be extended equally to same-sex couples.").

102. *Id.* at 670.

103. *Id.*

104. *See, e.g.*, Sheardown v. Guastella, 920 N.W.2d 172, 176 (Mich. Ct. App. 2018) (noting that "*Obergefell* requires states to afford the same *marriage-related* benefits to same-sex married couples that are afforded to heterosexual married couples").

105. Pavan v. Smith, 137 S. Ct. 2075, 2076 (2017).

106. *Id.* at 2077.

107. *Id.* at 2078.

108. *Id.*

109. *Id.*

110. *Id.*

Arkansas's law denied the married same-sex couples the "constellation of benefits that the Stat[e] ha[s] linked to marriage."[111]

In holding that Arkansas could not rely on biological justifications to support its disparate treatment of same-sex couples and opposite-sex couples, the Court put special emphasis on the fact that Arkansas "chose[] to make its birth certificates more than a mere marker of biological relationships," using the certificates as a means of giving married parents a form of legal recognition.[112] As Justice Gorsuch noted in his dissent, however, the majority's opinion in *Pavan* does not "purport to identify any constitutional problem with a biology-based birth registration regime."[113] This leaves open the opportunity for courts to determine that a gendered application of the marital presumption is appropriate for birth certificates when rooted in biology.[114] Other commentators, however, have read the majority's opinion as effectively leaving biology behind and expanding the marital presumption to same-sex couples.[115]

Since "[t]he regulation of domestic relations is traditionally the domain of state law,"[116] states remain free to adopt family law legislation and common law regimes that reflect the diverging policy preferences of their citizenry, and these preferences are reflected in a state's treatment of its birth certificates. Some states show an increased willingness to issue birth certificates listing both spouses in a same-sex couple as parents.[117] Some states also interpret

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111. *Id.* (alteration in original) (quoting Obergefell v. Hodges, 576 U.S. 644, 670 (2015)).

112. *Id.* at 2078–79.

113. *Id.* at 2079 (Gorsuch, J., joined by Alito & Thomas, JJ., dissenting).

114. Pippin v. Pippin, No. M2018-00376-COA-R3-CV, 2020 WL 2499633, at *6 (Tenn. Ct. App. May 14, 2020) (declining to adopt a "marriage-neutral" construction of the marital presumption when applied to birth certificates).

115. *See, e.g.*, Frank J. Bewkes, *Unequal Application of the Marital Presumption of Parentage for Same-Sex Parents*, CTR. FOR AM. PROGRESS (Nov. 25, 2019), https://www.americanprogress.org/article/unequal-application-marital-presumption-parentage-sex-parents/ (concluding that the Court's ruling in *Pavan* "effectively left biology behind and expanded the presumption of parentage to all spouses of gestational parents . . . giving greater recognition to parenthood based on intent rather than biology").

116. Hillman v. Maretta, 569 U.S. 483, 490 (2013).

117. *See, e.g.*, D'Ginto, *supra* note 59, at 996 n.86 (noting that North Carolina Vital Records changed its policies to require birth certificates be issued listing both same-sex parents); Beth Walton, *New Birth Certificate Rules Recognize Lesbian Mothers*, CITIZEN TIMES (May 15, 2015, 7:22 PM), https://www.citizen-times.com/story/news/local/2015/05/15/new-birth-certificate-rules-recognize-lesbian-mothersnew-birth-certificate-guidelines-welcome-news-lesbian-parents/27400819/ (reporting that North Carolina Vital Records "will now issue a parent/parent birth certificate rather than a mother/father certificate"); *see also* McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017) (holding that the state's marital presumption must protect the parental rights of a lesbian spouse); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 347–48, 354 (Iowa 2013)

*Obergefell* to require states to "provide equal protection to same sex couples seeking to amend a birth certificate" such that a biological parent could not invoke a former partner's lack of biological connection as justification to remove the nonbiological parent from the birth certificate.[118] Indeed, a majority of states seem to treat birth certificates as a marker of functional parentage, not just biology-based parentage.[119] Nevertheless, some states still treat their birth certificates as records of biology.[120]

If a state grounds its birth registration regime in biology, keeping somewhat closer to the certificate's original purpose to record vital statistics such that only biological relations are recorded as parents, the question becomes whether such a regime would be constitutional. At first, a birth certificate regime that recognizes a biological reality seems to be constitutional,[121] particularly considering the Court's immigration law decisions permitting gender-differentiated requirements based on "our most basic biological differences."[122] But if a state treats its birth certificates as a record of biological parentage

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(reiterating the importance of the marital presumption and its role in preserving the family and preventing illegitimacy, while finding that the marital presumption's gendered language requiring "the name of the husband" on a birth certificate as applied to married lesbian couples who have a child born to them during marriage was a violation of the equal protection provisions of the Iowa Constitution).

118. Chaisson v. La. Dep't of Health & Hosps., 239 So. 3d 1074, 1081–82 (La. Ct. App. 2018). The court in *Chaisson* found that the decision to place the non-biological spouse's name on the birth certificate was based on the marital presumption, not on a biological connection. *Id.*

119. D'Ginto, *supra* note 59, at 1011.

120. Some states maintain their birth certificates serve only as a record of biological parentage, constituting prima facie evidence of parentage but not conferring legal parentage. *See, e.g.*, HAW. REV. STAT. § 338-41(b) (2021); Vital Records Act, 410 ILL. COMP. STAT 535/25(6) (2021); VT. STAT. ANN. tit. 18, § 5016(b)(4) (2021).

121. Franklin, *supra* note 74, at 189 ("If the biological justification for maintaining the sex classification in marriage was always a little shaky, the argument for treating male and female spouses of birth mothers differently with respect to birth certificates seemed . . . more plausible. But once again, the Court declined to defer to the government's proffered biological justifications.").

122. Nguyen v. I.N.S., 533 U.S. 53, 73 (2001). Despite the Court's seeming reluctance to endorse a mandatory biological tie for purposes of determining constitutional parentage, elsewhere the Court has relied on biology for that determination. *See, e.g.*, *id.* at 63–65 (upholding an immigration regulation making it more difficult for fathers to confer citizenship on nonmarital children while recognizing that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood"); *see also infra* Part IV. In his *Pavan* dissent, Justice Gorsuch cited precedent relying on biology for the proposition that the Court's precedent "indicates that a birth registration regime based on biology" would not be unconstitutional. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., joined by Alito & Thomas, JJ., dissenting).

while applying the traditional marital presumption, the two legal regimes—the biology regime and the gendered marital presumption—would conflict. A state treating its birth certificates as records of genetic parentage would permit only biological parents to be listed on birth certificates. Yet, applying the traditional construction of the marital presumption to birth certificates would mean listing the husband of the birth mother as the parent, regardless of any biological relation. In this circumstance, a state would seemingly be unable to constitutionally argue that applying the marital presumption affords same-sex couples equal protection of the laws where nonbiological same-sex spouses are prohibited from being listed on birth certificates.[123]

Yet another problem arises. What if a state maintains that its birth certificates serve only as a record of biological parentage, constituting prima facie evidence of parentage, but not conferring legal parentage? A crafty litigator might be able to argue that, because the birth certificate is merely prima facie evidence of parentage designed to reflect a biological reality, it is constitutionally permissible to limit parents listed on a birth certificate to those who have a biological connection to the child.[124] In that instance, the marital presumption operates separately to confer parental rights to the spouse of a birth mother (an issue different from recognizing biological relations in a birth certificate), and the biological regime is used to determine the name listed on the birth certificate.

This seems to be the argument proffered by the State of Indiana in *Henderson v. Box*.[125] In *Henderson*, lesbian same-sex married couples and their children sought injunctive relief to list both the birth mother and her spouse on their children's birth certificates.[126] Under Indiana's statute, "a husband is presumed to be a child's

123. This was the Oregon Court of Appeals's argument in a pre-*Pavan* case where the court held that Oregon's artificial insemination statute must be extended to same-sex couples while also affirming that it was acceptable to limit the marital presumption to opposite-sex couples because the critical distinction between the two was the "possibility of a biological relationship." Shineovich v. Shineovich, 214 P.3d 29, 39 (Or. Ct. App. 2009). Such an argument would likely be struck down after the Court's ruling in *Pavan*.

124. This argument was put forth in Justice Gorsuch's dissent in *Pavan* and got the votes of three Justices—Gorsuch, Alito, and Thomas. *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., joined by Alito & Thomas, JJ., dissenting).

125. *See* Henderson v. Box, 947 F.3d 482, 485–86 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 953 (2020); *see also* Bill Browning, *Indiana Asks Supreme Court to Strip Parental Rights from Gay Couples & They May Succeed*, LGBTQ NATION (Nov. 25, 2020), https://www.lgbtqnation.com/2020/11/indiana-asks-supreme-court-strip-parental-rights-gay-couples-may-succeed/ ("The case deliberately challenges *Pavan* by dubiously claiming the state can reasonably assume a male is the father without so much as a DNA test, but two women require sperm to make a child, so they can't both be parents.").

126. *Henderson*, 947 F.3d at 484.

biological father so that both spouses are listed as parents on the birth certificate," but there was no similar presumption for same-sex couples.[127] Indiana argued that "the presumption of parenthood in an opposite-sex marriage does not have legal consequences."[128] The Seventh Circuit, however, noted that the presumption effectively deemed the husband the father, with parental rights and parental duties applied in a way not applicable to same-sex married individuals.[129] Accordingly, the court held that "after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages."[130]

But the Seventh Circuit's opinion did not end there; it went on to assert that "the Fourteenth Amendment does not forbid a state from establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage."[131] The court recognized that "[a] state is entitled to separate the questions 'whose genes does a given child carry?' from 'what parental rights and duties do spouses have?'"[132] The problem with Indiana's statute was simply that it "appears to merge these questions while specifying that biological heritage wins in the event of conflict" while also "providing husbands with a presumption, withheld from wives, that a given legal status supports an inference of parenthood."[133] The Supreme Court's subsequent denial of certiorari suggests that the Court accords with the Seventh Circuit's reasoning and might still uphold a statute that adopts a biology regime rather than the marital presumption for birth certificates.[134]

Despite the arguments in favor of finding a biology-based birth certificate regime constitutional, such a regime would still run afoul of *Obergefell*'s mandate, especially because *Pavan* made clear that being listed on a birth certificate is a benefit linked to marriage. Moreover, while a biology-based regime might accommodate some same-sex lesbian couples, both of whom are biological mothers,[135]

127. *Id.* at 485.
128. *Id.* at 486.
129. *Id.*
130. *Id.* at 487.
131. *Id.*
132. *Id.*
133. *Id.*
134. *See* Box v. Henderson, 141 S. Ct. 953, 953 (2020). *But see* Chris Johnson, *Supreme Court Rejects Challenge to Same-Sex Parents on Birth Certificates*, WASH. BLADE (Dec. 14, 2020), https://www.washingtonblade.com/2020/12/14/supreme-court-rejects-challenge-to-same-sex-parents-on-birth-certificates/ ("Based on the Supreme Court's decision to turn down the challenge, however, justices appeared to have signaled the cases are no different and reaffirmed *Obergefell* and *Pavan*'s guarantee same-sex parents to have their names on the birth certificates of their children.").
135. *See, e.g.*, *Henderson*, 947 F.3d at 486; *see also supra* Part III.

such a regime would not be able to accommodate same-sex gay couples who could never both be biological parents of one child.[136] Considering the use of birth certificates both as evidence of legal parentage[137] and in conducting activities involved in the care and custody of a child,[138] the right to be listed on a birth certificate is clearly a benefit. When the marital presumption is applied to determine who is listed thereon based on marital unity, the benefit is conditioned on marriage.[139] If a gendered, biology-based version of the marital presumption is applied to birth certificates, this application deprives same-sex couples of the associated benefits. If a gender-neutral version of the marital presumption is applied, however, no such disparate treatment ensues.

Absent a comparable alternative document, based on the Court's rulings in *Obergefell* and *Pavan* and the prolific modern use of birth certificates, same-sex married couples must be afforded some means of inclusion on a child's birth certificate. Adopting a biology-based regime would, as Justice Gorsuch suggests in *Pavan*, require reviving gender-differentiating precedent from immigration law.[140] Rather than restore antiquated views and adapting state family law to immigration law, a gender-neutral nonbiological marital presumption should be adopted and state family law used to inform immigration law instead.

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136. *See, e.g.*, *Henderson*, 947 F.3d at 487 (leaving open the question of how to resolve the issue but noting that some language in the district court's opinion suggests that "female-female married couples must be treated differently from male-male couples, for whom adoption is the only way" to list both fathers' names on the birth certificate).

137. *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. C.R. & C.L. 201, 238–39 (2009) (noting that even though a birth certificate "is only evidence of parentage, not definitive proof, it is the one piece of commonly accepted evidence"); Abrams & Piacenti, *supra* note 5, at 672 (noting that "birth certificates and marriage certificates suffice to demonstrate the required relationship for a family-based visa petition"); *see also In re* Interest of A.M., 223 A.3d 691, 693 n.1, 695 (Pa. Super. Ct. 2019) (noting in a case involving a man who "was born female but uses male pronouns and titles to refer to himself" and his former wife that the fact the man was listed on the child's birth certificate was evidence supporting application of the marital presumption); 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 301.4-1(D)(1)(d)(2) (2018) [hereinafter FAM] (asserting that one circumstance giving rise to doubt as to the biological connection between parent and child is "[n]aming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents").

138. *See supra* note 103 and accompanying text.

139. *See* Polikoff, *supra* note 138, at 215.

140. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., joined by Alito & Thomas, JJ., dissenting).

## IV. IMMIGRATION LAW'S APPLICATION OF THE MARITAL PRESUMPTION FOR DETERMINING CITIZENSHIP

"At first glance immigration law and family law may seem like unrelated fields."[141] Yet "legal scholars have engaged in important conversations over how family law and immigration law intersect and inform one another," and now is the time to "systematize critical family law concepts into the conception and practice of immigration law."[142] With respect to the marital presumption specifically, that means using state family law conceptions of a gender-neutral marital presumption to inform immigration law's application of a gendered marital presumption to determine the citizenship of a same-sex married couple's child who is born abroad.

While the marital presumption is a creature of state law,[143] federal law endeavored to incorporate the presumption into immigration law's citizenship statutes.[144] Derivative citizenship is the immigration law principle affording U.S. citizens the right to pass citizenship on to their children.[145] "Derivative citizenship rests on the ancient principle of *jus sanguinis* (right of blood) . . . ."[146] As early as 1790, the federal government enacted legislation recognizing the rule of *jus sanguinis* whereby U.S. citizens could transmit citizenship to their children born abroad.[147] This early legislation conditioned the

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141. Jamie R. Abrams, *Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All*, 14 HARV. L. & POL'Y REV. 77, 81 (2019).

142. Kari E. Hong, *Famigration (Fam-Imm): The Next Frontier in Immigration Law*, 100 VA. L. REV. ONLINE 63, 74–75 (2014); *see also* Abrams, *supra* note 141, at 80 ("A family law lens exposes how modern laws and policies do not align with the constitutional norms and values surrounding the family, even if they might be constitutional through a highly deferential immigration law lens.").

143. *See* Hillman v. Maretta, 569 U.S. 483, 490 (2013); *see also* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 47 (2005) ("There is no area of law in which the federal government's power is more robust than in immigration and there is no area of law more fully reserved to the states than domestic relations.").

144. *See* Abrams & Piacenti, *supra* note 5, at 657–58 (noting that in the first immigration act, "children acquiring citizenship at birth had to be *legitimate* children" and "[m]arriage was the conduit by which a man could transfer citizenship to the children of his wife"); *see also* Minasyan v. Gonzales, 401 F.3d 1069, 1076–77 (9th Cir. 2005) (deferring to state family law "because there is no federal law of domestic relations" and there is a "long standing policy of looking to state law to determine questions of family relations").

145. M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do with It?*, 28 GEO. IMMIGR. L.J. 391, 395 (2014).

146. *Id.*

147. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104 (repealed 1795) ("And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens.").

right of citizenship on persons whose fathers had been U.S. residents.[148] Additionally, "[u]nwed fathers also risked rendering their children non-U.S. citizens, as sex-differentiated citizen-transmission law made it more difficult for biological fathers to transmit U.S. citizenship to their children."[149] Thus, to accommodate the gendered citizenship-transmission laws, immigration law relied on the institution of marriage and the marital presumption as foundational pillars for determining familial relations when children born abroad acquire citizenship at birth.[150] Immigration law's application of the marital presumption can be found in Sections 301[151] and 309[152] of the Immigration and Nationality Act of 1965 ("INA").[153]

Despite immigration law's reliance on the marital presumption, the goals of immigration law differ significantly from the goals of family law.[154] The INA demonstrates that immigration policy focuses on skills-based immigration and family reunification.[155] In addition,

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This law also included overtly racist provisions which excluded children of slaves from citizenship and applied its grant of citizenship only to "free white person[s]." § 1, 1 Stat. at 103.

148. § 1, 1 Stat. at 104 (delineating the exception whereby "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States").

149. Cahill, *supra* note 18, at 2238.

150. *See* Abrams & Piacenti, *supra* note 5, at 659–61 (discussing the early formulations of immigration law and noting that "*birth* provided the necessary connection between mother and child . . . and *marriage* provided the necessary connection between father and child if the father was married to the child's mother"); *see also* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (describing Section 301 as providing "[t]he general rules for acquiring U.S. citizenship"); Jaen v. Sessions, 899 F.3d 182, 188 (2d Cir. 2018) ("Given the statute's use of a term with centuries-old, common law meaning and its failure to articulate any additional or alternative definition of 'parent' specific to [Section 301] of the INA, it is clear to us that Congress incorporated the common law meaning of 'parent' into the INA. When it did so, it therefore incorporated the longstanding presumption of parentage based on marriage.").

151. 8 U.S.C. § 1401 (granting citizenship to certain children born in wedlock).

152. 8 U.S.C. § 1409 (granting citizenship to certain children born out of wedlock).

153. *See generally* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (current version at multiple sections in Title 8 of the U.S. Code). "These provisions of the INA are notorious for maintaining a differential system based on the marital status and gender of the citizen parent." Abrams & Piacenti, *supra* note 5, at 691; *see also Morales-Santana*, 137 S. Ct. at 1689 ("Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are.").

154. *See* Hong, *supra* note 142, at 68 ("On the parent-child question, most state legitimation and parentage laws use love, support, and care as proof of parentage. By contrast, immigration courts often will declare that blood alone is the *sine qua non* of parentage.").

155. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911–13 (current version at 8 U.S.C. §§ 1151–53); *see also* H.R. REP. NO. 85-

immigration law "implicate[s] the federal government's interest in achieving optimal numbers of immigrants and citizens" and the "important state interest . . . in the ferreting out and prevention of fraud."[156] In contrast, state family law's interests are in promoting child welfare and "privatizing the dependency of children."[157]

These contrasting interests led to stark differences in the application of the marital presumption. For instance, in the latter half of the twentieth century, states began to remove legal impediments to nonmarital status for children, but immigration law "continued to impose illegitimate citizenship rules."[158] Today, although "marriage still plays an important role in the immigration context . . . genetics have begun to undercut it substantially."[159] Significantly, and in contrast to family law, in immigration law "the lack of a genetic tie can be used to undercut marital parentage, even when no competing genetic parent exists."[160]

Following the Supreme Court's opinion in *United States v. Windsor*[161] striking down the Defense of Marriage Act's prohibition on same-sex marriage,[162] the Department of Homeland Security issued a guideline instructing the immigration agency to recognize same-sex marriage as valid for immigration purposes.[163] Yet, at the same time, the immigration agency "opted to treat children born through [assisted reproductive technology] like nonmarital

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1199, at 2020 (1957) (recognizing the intent of the INA to "provide for a liberal treatment of children" and to address "the problem of keeping families of United States citizens and immigrants united"); Abrams & Piacenti, *supra* note 5, at 661–62.

156. Abrams & Piacenti, *supra* note 5, at 634; *see also* Saucedo & Villazor, *supra* note 35, at 1220 (discussing the use of fraud as a rationale for illegitimate citizenship rules).

157. Abrams & Piacenti, *supra* note 5, at 634; *id.* at 674 ("[F]amily law has two core goals: the privatization of dependency and the physical and psychological well-being of children."). *But see* Hong, *supra* note 143, at 70 (arguing that the goals of family and immigration law do not diverge because of policy differences for determining the ideal number of new immigrants because there is "no policy interest in limiting the parent-child definition" and "no numerical limits on how many children will be citizens by birth"; asserting that "the federal government never has suggested that fraud was an issue in its litigation of derivative citizenship claims").

158. Saucedo & Villazor, *supra* note 35, at 1219.

159. Abrams & Piacenti, *supra* note 5, at 663.

160. *Id.*

161. 570 U.S. 744 (2013).

162. *See id.* at 775.

163. *See* Press Release, Janet Napolitano, Sec'y of Dep't of Homeland Sec., Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), https://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.

children."[164] Notably, although the INA does not explicitly require a genetic relationship between married parents and their children,[165] the U.S. Department of State interprets it to require a genetic relationship.[166] Specifically, the State Department asserts:

> The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born.[167]

Thus, the State Department interprets the INA provisions that confer citizenship at birth for children born abroad[168] to place an additional barrier on citizenship for the children of same-sex couples. In support of its interpretation, the State Department argues that the marital presumption "is not determinative in citizenship cases . . . because an actual biological relationship to a U.S. citizen parent is required."[169] Therefore, skepticism as to the existence of such biological relationship arises when "[t]he child was born through surrogacy or other forms of assisted reproductive technology"[170] such that "the consular officer is expected to investigate carefully."[171]

Respecting the additional barriers facing same-sex couples, the State Department expressly states that "[a]pplicants must meet

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164. Saucedo & Villazor, *supra* note 35, at 1224–25.

165. *See, e.g.*, Jaen v. Sessions, 899 F.3d 182, 190 (2d Cir. 2018) ("[A] blood relationship is not required to establish parentage for purposes of acquired citizenship when the child is born into marriage."); Scales v. I.N.S., 232 F.3d 1159, 1164 (9th Cir. 2000) (holding that the INA does not require a blood relationship for a child born to parents who were married at the time of his birth).

166. *See* U.S. Dep't of State, *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html (last visited Mar. 20, 2022) ("The U.S. Department of State interprets the INA to mean that a child born abroad must be genetically or gestationally related to a U.S. citizen parent . . . ."); FAM, *supra* note 137, § 301.4-1(D)(1)(d), ("Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required.").

167. FAM, *supra* note 137, § 301.4-1(D)(1)(a).

168. 8 U.S.C. §§ 1401(c), (g).

169. FAM, *supra* note 137, § 301.4-1(D)(1)(d).

170. *Id.* § 301.4-1(D)(1)(d)(5). Another circumstance giving rise to doubt and reason for careful investigation is "[n]aming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents." *Id.* § 301.4-1(D)(1)(d)(2). This illustrates the problems discussed in Part III arising from the use of birth certificates as prima facie evidence of parentage when states base their certificate on a nonbiological reality.

171. *Id.* § 301.4-1(D)(1)(d).

different standards of proof of blood relationship depending on the circumstances of their birth."[172] Furthermore, the State Department asserts that the basis of establishing a "blood relationship" varies by gender: "A man has a biological relationship with his child . . . when he has a genetic parental relationship to the child. A woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship."[173] Thus, while opposite-sex married couples are afforded the benefits of a presumed biological relationship—even when the woman does not have such a relationship—same-sex married couples are not afforded such benefits.

The arguments for and against reading a biology-regime into immigration law's marital presumption can be better understood through the lens of unwed father immigration cases. Unlike rulings in state family law cases that afforded more rights to unwed fathers, Supreme Court immigration law cases have not looked so favorably upon unwed fathers. For example, the Court has previously upheld the constitutionality of the INA's system of granting citizenship despite its differential application based on marital status and the gender of the citizen parent.[174] Similarly, in *Nguyen v. I.N.S.*,[175] the Supreme Court upheld as constitutional an immigration law imposing more burdensome requirements on unwed fathers than on unwed mothers for transmission of citizenship to children born overseas.[176] In justifying its decision, the Court relied on the proposition that "proof of motherhood . . . is inherent in birth itself," although proof of fatherhood is not.[177] *Nguyen* can thus be viewed as advocating for a biology-based regime for application of the marital presumption in the immigration context.

Notwithstanding immigration law's continued differential system based on gender and marital status, several equal protection challenges brought to the Supreme Court have been unsuccessful.[178]

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172. *Id.* § 301.4-1(D)(1)(b).

173. *Id.* § 301.4-1(D)(1)(c).

174. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 424 (1998) (upholding INA Section 309 which conferred automatic citizenship on a child born out of wedlock outside the United States whose mother is a U.S. citizen but denied automatic citizenship to the foreign-born child born out of wedlock of U.S. citizen father unless the father undertook actions to acknowledge paternity); *see also* Adams & Piacenti, *supra* note 5, at 691 (noting that Sections 301 and 309 of the INA are "notorious for maintaining a differential system based on marital status and gender of the citizen parent").

175. 533 U.S. 53 (2001).

176. *Id.* at 58–60.

177. *Id.* at 64.

178. *See* Flores-Villar v. United States, 564 U.S. 210, 210 (2011) (affirming Ninth Circuit's holding that there was no deprivation of equal protection rights by subjecting foreigner to different residency requirements for unwed mothers and fathers); *Nguyen*, 533 U.S. at 58–60; *Miller*, 523 U.S. at 424.

This trend suggests the Supreme Court is using a different set of rules to negotiate its conception of the marital presumption—one that relies on a biological link.[179] If the Court upholds a biological connection requirement for the marital presumption in the immigration context, the Court would give credence to an interpretation of the marital presumption that demands at least the possibility of a biological connection.[180]

Recently, however, the Court in *Sessions v. Morales-Santana*[181] struck down a federal immigration law that required unwed citizen fathers to reside in the U.S. for a longer time than unwed citizen mothers to transmit their citizenship to children born overseas.[182] In contrast to the Court's reasoning in *Nguyen*,[183] the Court in *Morales-Santana* did not rely on the proposition that motherhood was inherently certain (unlike fatherhood),[184] instead describing such a view as "stunningly anachronistic."[185] The Court's departure from gender-differentiated requirements in *Morales-Santana* thus provides support for a gender-neutral application of the marital presumption in the immigration context.[186]

In contrast to the State Department's biology-regime argument, another argument supported by lower courts purports that Sections 301 and 309 of the INA, when read together, imply that although a blood relationship is required between a nonmarital child and a parent, no such blood relationship is required between a marital child

179. *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., joined by Alito & Thomas, JJ., dissenting) (noting that there are rational reasons to uphold a biology-based regime for reasons such as "helping individuals determine their . . . citizenship").

180. Since the Court has recognized the validity of such a biological connection requirement, it is quite possible that the Court would interpret Section 301 to require a permissible biological parent-child relationship. *Nguyen*, 533 U.S. at 62 ("The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists."). Notably, the Court acknowledged the biological connection requirement in *Nguyen* after *Obergefell*. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1694 (2017) (noting that *Nguyen*'s decision was justified based on the fact that the paternity acknowledgment requirement at issue in that case was a "means of ensuring the existence of a biological parent-child relationship").

181. 137 S. Ct. 1678 (2017).

182. *Id.* at 1686.

183. *See* Adams & Piacenti, *supra* note 5, at 705–06 ("The *Nguyen* Court's application of intermediate scrutiny to uphold INA Sections 301 and 309, for example, relies on a rigid notion of biological sex and outdated and stereotypical conceptions of fathering that many find offensive.").

184. *Morales-Santana*, 137 S. Ct. at 1693.

185. *Id.*

186. *See, e.g.*, Adler, *supra* note 97, at 14 (arguing that *Morales-Santana* "*diminished* the legal distinction between the maternal and paternal biological relationship in the immigration context").

and a parent.[187] Additionally, lower courts that address the issue post-*Pavan* suggest that a biological connection is not required.[188] Those courts rely on the doctrine of constitutional avoidance to interpret the language "born of . . . parents" in Section 301(a)(3)[189] to conclude that the statute does not require a biological connection between married citizen parents and their child.[190]

Even if immigration law is applying a different set of rules that relies on a biological connection between parents and their children born abroad, reading a biological parent-child requirement into immigration law's marital presumption would result in a law that deprives same-sex married couples of the constellation of benefits afforded to opposite-sex married couples.[191] As with birth certificates, the question remains whether the INA's citizen-transmission laws can divorce themselves from the marital aspect of the presumption in a manner that allows for a constitutional biological reading. Considering how entrenched the marital presumption is in common

187. *See* Abrams & Piacenti, *supra* note 5, at 692–93.

188. *See, e.g.*, Jaen v. Sessions, 899 F.3d 182, 190 (2d Cir. 2018) ("[A] blood relationship is not required to establish parentage of purposes of acquired citizenship [under Section 301] when the child is born into marriage."); Ali v. Pompeo, No. 16-CV-3691-SJB, 2020 WL 6435834, at *6, *6 n.5 (E.D.N.Y. Nov. 2, 2020) (recognizing the "biological" interpretation of Section 301(g) is "legally suspect" and applying a nonbiological reading to that section); Mize v. Pompeo, 482 F. Supp. 3d 1317, 1342 (N.D. Ga. 2020) (noting that "Section 301(c) is reasonably consistent with the Non-Biological Reading" and the doctrine of constitutional avoidance indicates this reading must be adopted in light of the "serious constitutional questions" raised by a biological reading); Kiviti v. Pompeo, 467 F. Supp. 3d 293, 310 (D. Md. 2020) ("[T]he statute is clear and unambiguous that the phrase 'born . . . of parents' in 8 U.S.C. § 1401(c) does not require a biological relationship with both parents."); Sabra v. Pompeo, 453 F. Supp. 3d 291, 320 (D.D.C. 2020) ("[T]he plain language of 8 U.S.C. § 1401 does not require proof of a 'biological relationship' between the child born abroad to married U.S. citizen parents."); Dvash-Banks v. Pompeo, No. CV 18-523-JFW(JCx), 2019 WL 911799, at *7 (C.D. Cal. Feb. 21, 2019) ("Nothing in Section 301 . . . suggests that in using the words 'parent' or 'born . . . of parents,' Congress intended to refer only to biological or genetic parents."). The Ninth Circuit came to the same conclusion when addressing the issue pre-*Pavan*. Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005) (finding that a child was a citizen under Section 301(g) even though the child lacked a biological relationship with his citizen parent); Scales v. I.N.S., 232 F.3d 1159, 1164 (9th Cir. 2000) ("A straightforward reading of § 1401 indicates . . . there is no requirement of a blood relationship.").

189. 8 U.S.C. § 1401(c); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 301(a)(3), 66 Stat. 163, 235.

190. *Mize*, 482 F. Supp. 3d at 1342.

191. *See, e.g.*, *Kiviti*, 467 F. Supp. 3d at 313 (concluding that "based on the less stringent residency requirements in the INA for children of married couples, the ability to confer citizenship on children falls within the 'constellation of benefits that the State has linked to marriage'" (quoting Obergefell v. Hodges, 576 U.S. 644, 646–47 (2015))).

law and immigration law's use of that fundamental common law principle, a strict biological reading that does not run afoul of *Obergefell* and *Pavan* seems unlikely. Instead, immigration law should reform by using a gender-neutral marital presumption that adapts the principles set forth in the context of same-sex couples and birth certificates.

## V. ADAPT OR DISCARD? HOW TO APPLY A GENDER-NEUTRAL MARITAL PRESUMPTION ACROSS CIRCUMSTANCES

Herein lies the ultimate problem: Imagine Mr. A is legally married to Mr. B. Mr. A and Mr. B legally contract with Ms. C, who is married to Mr. D, whereby Ms. C agrees to be the gestational surrogate for an embryo that uses Mr. B's sperm and an egg donated from Ms. E. Can the marital presumption apply to this scenario to determine legal parentage? Discarding the marital presumption and relying on other parentage regimes is not an efficient or likely outcome; as one of the strongest presumptions in law, the marital presumption should adapt, not dissolve. The focus of this analysis is, then, to discern a version of the marital presumption capable of consistent application across circumstances.

The discussions in Parts II through IV generally present three approaches to determining parentage of the child born out of Mr. A and Mr. B's marriage: (1) the traditional, gendered marital presumption; (2) a strict biological approach; or (3) a nongendered marital presumption that does not rely on a biological connection. Each approach can then be used to assess how to determine parentage for same-sex couples generally, what that determination would mean for a birth certificate regime that applies the approach, and how application of the approach in the first two circumstances informs immigration law.[192]

### *A. Applying the Traditional, Gendered Marital Presumption: An Exercise in Futility*

Upon birth, application of the traditional, gendered marital presumption would assume that Ms. C, as the gestational surrogate giving birth to the child, is the child's legal mother, and Mr. D, as her husband, is the legal father.[193] But neither has a biological connection to the child, nor did they intend to become parents. And too, the intended parents, Mr. A and Mr. B, are not afforded the benefit of the presumption because neither is married to Ms. C. Even though Mr. B could demonstrate a biological connection, the traditional marital presumption would simply ignore biology to

192. For the immigration gloss on this problem, assume the child is born abroad to parents both of whom are U.S. citizens and meet the residency requirements of Section 301(c).

193. *See* Higdon, *supra* note 2, at 1486.

designate Mr. D as the legal father. Mr. B could attempt to rebut the presumption by demonstrating a biological connection and an intent to parent the child, but that requires post-birth litigation and does nothing to help Mr. A gain legal parenthood at the time of birth.

As applied to birth certificates, the traditional marital presumption would list Ms. C as "mother" and Mr. D as "father." Although Mr. B is the biological parent, he still would not be listed on the birth certificate unless he rebuts the presumption that Mr. D, as Ms. C's husband, is the father. With no biological connection available to rebut the presumption, Mr. A has no way of getting his name listed on the birth certificate and gaining the benefits associated therewith. Thus, the traditional marital presumption works to deny both Mr. A and Mr. B the benefits afforded Ms. C and Mr. D as an opposite-sex married couple.

In the immigration context, the State Department effectively differentiates when the presumption applies based on the method of conception—the traditional marital presumption applies to determine parentage for children conceived through coitus, whereas the biological approach to the marital presumption applies to determine parentage for children conceived through artificial insemination.[194] Here, since the child was conceived using artificial insemination and surrogacy, the State Department asserts that neither married couple—Mr. A and Mr. B, or Ms. C and Mr. D—benefits from the presumption of Section 301(c). The State Department's reading thus renders the traditional marital presumption ineffective for the modern family.

### *B. Applying the Strict Biological Approach: Strained Departure from a Foundational Principle*

A strict biology regime would assume that Mr. B is a legal parent by virtue of his genetic contribution. The regime would also assume that Ms. C and Ms. E are both potential legal parents—Ms. C by her gestational surrogacy, and Ms. E by the genetic material in her donor egg. Assuming Ms. C enters into a valid surrogacy agreement wherein she denounces her legal rights, and assuming Ms. E is an anonymous donor who claims no rights, they could be removed from the biological construction of parenthood.[195] Nevertheless, Mr. A is still left without any means of gaining the benefits afforded to those parents with biological connections; although the marital presumption would assume a biological connection for Mr. A by virtue

194. *See supra* notes 168–73 and accompanying text.

195. This strict biological reading could lead to three legal parents (Mr. B, Ms. C, and Ms. E), or if Ms. C and Ms. E both contractually renounce their legal rights, it could lead to only one legal parent (Mr. B). Both scenarios present additional problems noted here but not further addressed.

of his marriage to Mr. B,[196] the strict biological approach would afford no such benefit.

Applying the biology regime to birth certificates, Mr. B would be listed thereon because of his genetic contribution.[197] Depending on how the state interprets biological motherhood, either Ms. C or Ms. E could be listed on the birth certificate.[198] But once again, Mr. A is snubbed. In a true biology regime, Mr. A would be completely deprived of the benefits afforded genetic parents who are listed on the birth certificate.[199]

In the citizen-transmission context, if Ms. C and Mr. D were U.S. citizens meeting the requirements of Section 301(c), they could claim the benefit of the presumption by virtue of the State Department's interpretation that Ms. C's gestation created a biological relationship that satisfies the requirements of Section 309(a).[200] Mr. B could also demonstrate a biological relationship through his genetic contribution and gain legal recognition under Section 309(a).[201] But unfortunately, since Mr. A has no way of demonstrating a biological connection and because the traditional presumption in immigration law assumes a "mother" and a "father," Mr. B's biological connection would not afford Mr. A legal recognition.

### *C. Applying the Nongendered, Nonbiological Marital Presumption: Seeking Simple Certainty for All*

The nongendered, nonbiological marital presumption necessarily makes two presumptions. First, it presumes that Mr. B is a parent because he contributed his efforts in facilitating creation of the child and contributed his genetic material for use in gestating a child to be born during his marriage to Mr. A.[202] Second, it presumes that Mr. A is a legal parent by virtue of his marital relationship with Mr. B.[203]

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196. *See supra* notes 69 & 93 and accompanying text (demonstrating that vast majority of state courts apply the material presumption to same-sex couples even when there is no genetic connection).

197. *See supra* Part III.

198. *See supra* Part III.

199. The biology regime would arguably prohibit Mr. A from using second-parent adoption to get his name listed on the birth certificate. *See supra* notes 136–39 and accompanying text; *see also In re* T.J.S., 16 A.3d 386, 389 (N.J. Super. Ct. App. Div. 2011) (explaining that for intended parents and a gestational surrogate, adoption is not an adequate substitute for the marital presumption which confers parentage by operation of law "because the extended legal process would place the legal status of the child in limbo").

200. *See supra* notes 172–73 and accompanying text.

201. *See* 8 U.S.C. § 1409(a).

202. This approach generally models Professor Higdon's "biology plus intent" standard, but it slightly modifies the intent aspect and takes the concept one step further to consider its use in the immigration context. *See supra* notes 85–87 and accompanying text.

203. *See supra* notes 85–87 and accompanying text.

In essence, this version of the marital presumption adopts the "origination concept" to conclude that the parents gain legal recognition because the child originates from Mr. A and Mr. B as two married individuals who played an instrumental role in creating the child.[204]

Potentially problematic, however, is the fact that Ms. C and Mr. D would also be entitled to the traditional marital presumption by virtue of Ms. C's gestational connection and Mr. D's marital status. Pitting the two against one another, the nongendered, nonbiological marital presumption would, at the very least, put the two couples on equal footing as against one another at the outset. But assuming Ms. C entered into a gestational surrogacy agreement with Mr. A and Mr. B whereby Ms. C denounced her parentage, and assuming Mr. A and Mr. B demonstrate their instrumental role in creating the child, Mr. A and Mr. B's rights would gain irrebuttable preference.[205] This version of the marital presumption would apply to birth certificates in the same manner: Mr. A and Mr. B would be listed thereon by virtue of their facilitating the birth of a child during their marriage.

For citizen-transmission, this version of the marital presumption would decline to adopt the State Department's biological reading as an interpretation of textual support in the governing INA statutes.[206] Instead, relying on immigration law's incorporation of the longstanding marital presumption, this approach requires no biological relationship. Likewise, this version would decline to distinguish application of the presumption based on the method of conception. Rather, the marital presumption would apply equally across circumstances to assume that the married parents who facilitated the creation of the child are the legal parents of a child born during the marriage.[207] This approach thus creates a colorable argument that recent Supreme Court precedent—specifically *Obergefell*'s mandate, *Pavan*'s extension of that mandate, and *Morales-Santana*'s willingness to recognize antiquated assumptions of unrealistic gendered assumptions—operate together to afford same-sex married couples the benefit of transmitting citizenship to children born of their marriage as a benefit linked to marriage and without the need to demonstrate a biological connection.

Moreover, adapting the nongendered, nonbiological marital presumption from family law would support immigration law's policy

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204. *See* Mize v. Pompeo, 482 F. Supp. 3d 1317, 1337 (N.D. Ga. 2020).

205. The preference would be irrebuttable because Mr. A and Mr. B's nongendered, biology-lite marital presumption would supersede Ms. E's strict biology claim, and Ms. C, as the only other genetic parent who might be able to make a claim, would have renounced her rights in the surrogacy agreement.

206. *See supra* notes 166–68 and accompanying text.

207. *See supra* notes 166–68 and accompanying text; *see also* Kiviti v. Pompeo, 467 F. Supp. 3d 293, 312–14 (D. Md. 2020); Dvash-Banks v. Pompeo, No. CV 18-523-JFW(JCx), 2019 WL 911799, at *7–8 (C.D. Cal. Feb. 21, 2019).

of supporting maintenance of the family unit because this version of the presumption construes in favor of recognizing more family units.[208] With respect to the policy interest in preventing fraud—an interest that is "not the core animating interest of the field"[209]—continuing to use a presumption that is grounded in marriage provides a strong check on fraud because it requires parents to demonstrate marital unity when they seek legal recognition of their status without a biological connection.[210] Thus, rather than adopting a strict biology regime that requires a biological connection and prejudices many same-sex married couples, adapting the marital presumption to reflect family law's nongendered, nonbiological understanding of children born to married couples ensures protection of immigration law's interests while providing equivalent benefits to same-sex couples.

## CONCLUSION

The marital presumption is a pillar in family law that withstood the test of time and continues to play a pivotal role in determinations of legal parentage. Given the presumption's significance in family law, and its derived significance in immigration law, it is unlikely that it will be discarded in either context. Nor should the presumption be discarded in favor of a biology regime that ignores the importance of the marital relationship in constitutional jurisprudence and the beneficial social assumptions made based on marital unity. Nevertheless, the traditional presumption needs to undergo significant modification to accommodate same-sex couples.

Adapting the traditional marital presumption to meet the needs of modern families is a herculean task, which cannot be accomplished in one fell swoop or through the efforts of any one rulemaking body. To the extent lawmakers would endeavor to and could possibly accomplish this task, this Comment seeks to alert those lawmakers to the informative overlaps found in the three circumstances discussed. State family law's interpretation of the marital presumption as it is applied to same-sex couples demonstrates that the presumption can be adapted to accommodate the modern family. *Pavan*'s gloss on *Obergefell* instructs that those benefits of marriage initially thought tied to biology need not be, but it leaves open the possibility of a strict biology regime. The State Department's biological interpretation of immigration law's marital presumption illustrates the negatives of such a strict biology regime. Analyzing

208. *See* Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1093–94 (9th Cir. 2005) (holding Section 301(g) does not require a blood relationship and that the INA's goal to keep families together supports a reading of the statute that "construe[s] in favor of family units and the acceptance of responsibility by family members").

209. Abrams & Piacenti, *supra* note 5, at 678.

210. *See id.* at 681.

application of the marital presumption in the three circumstances presents at least one way in which a nongendered, nonbiological marital presumption could be formulated to accommodate married same-sex couples.

*Kristin J. Rempe*[*]

* J.D. Candidate 2022, Wake Forest University School of Law; Psychology, B.A. 2016, Boston University. Thank you to the Board and Staff of the *Wake Forest Law Review* for their hard work and time spent on this Comment. Thank you to my family and friends for their endless love, support, and encouragement. Thank you also to Suzanne Reynolds, Dean and Professor of Law Emerita, for her editorial feedback and inspiration. Lastly, thank you to Ryan Foarde, my partner in life, for his patience, especially while enduring many hours of my vocalized internal monologue regarding the marital presumption.