No. 10-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, *et al*.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, *et al*.,
Defendants,

and

DENNIS HOLLINGSWORTH, *et al*.,
Defendant-Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, CASE NO. 3:09-CV-02292
(HONORABLE VAUGHN R. WALKER)

BRIEF OF *AMICUS CURIAE*, GAGE RALEY, IN SUPPORT OF DEFENDANT-INTERVENORS-APPELLANTS URGING REVERSAL OF THE DISTRICT COURT

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INTEREST OF *AMICUS CURIAE*

Gage Raley ("*Amicus*") recently authored a note, scheduled to published in December, titled *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Cases*.[1] The note directly addresses this case, examining how the paternity establishment narrative of marriage might affect the due process and equal protection claims made by the Plaintiffs-Appellees. As the author of the note, *Amicus* has a interest in assuring that the arguments made therein are brought to the attention of this Court.

Both parties have granted their consent to the filing of this *amicus* brief.

SUMMARY OF THE ARGUMENT

This brief examines the connection between paternity establishment and marriage, and the implications it has for same-sex marriage constitutional claims. The brief presents a genealogy of the marital presumption of paternity, which began in prehistoric times as an evolutionary reproductive strategy, was recognized and co-opted by the state for legal purposes in Classical Antiquity, and continues to establish legal paternity for over half of children born in the United States

[1] 19 VA. J. SOC. POL'Y & L. __ (2011) (forthcoming).

today.[2] It ultimately shows that same-sex unions are incompatible with California's marital presumption of paternity.

The issue of paternity establishment is very relevant to same-sex marriage due process and equal protection claims. As an integral part of "the history, tradition and practice of marriage in the United States,"[3] it must be considered when evaluating whether same-sex marriage is a fundamental right for due process purposes. As an important government interest in marriage, it must be considered when evaluating whether the state has a rational basis for distinguishing between same-sex and opposite-sex unions in regard to marriage.

This brief asserts that the historic relationship between marriage and paternity establishment shows that same-sex unions do not fall under the fundamental right to marry. It also argues that, since same-sex marriages would be incompatible with the marital presumption of paternity, the state has a rational basis for limiting marriage to unions between a man and a woman. For these reasons, the brief concludes that this Court should overturn the lower court's ruling and find that Proposition 8 does not violate the Due Process and Equal Protection Clauses of the U.S. Constitution.

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[2] CENTER FOR DISEASE CONTROL AND PREVENTION, BIRTHS: FINAL DATA FOR 2008 1 (Dec. 8, 2010) ("40.6 percent of births were to unmarried women in 2008").
[3] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

ARGUMENT

I. THE INSEPARABLE HISTORICAL RELATIONSHIP BETWEEN MARRIAGE AND PATERNITY ESTABLISHMENT SHOWS THAT SAME-SEX UNIONS DO NOT "ENCOMPASS THE HISTORICAL PURPOSE AND FORM OF MARRIAGE," AND THUS SAME-SEX UNIONS DO NOT FALL UNDER THE FUNDAMENTAL RIGHT TO MARRY

A. The U.S. Supreme Court favors certain types of historical authorities when evaluating fundamental rights claims, which the court below failed to consult

Under the concept of substantive due process, a state may not infringe upon "fundamental" rights unless the infringement is narrowly tailored to serve a compelling state interest.[4] To determine whether a right is fundamental under the Due Process Clause, a court inquires into whether the right is rooted in "our Nation's history, legal traditions, and practices."[5]

The Supreme Court has held that the right to marry is a fundamental right.[6] The question in same-sex marriage litigation is, as the lower court observed, whether same-sex couples "seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new

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[4] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301-02 (1993).
[5] *See, e.g.*, Washington v. Glucksberg*,* 521 U.S. 702, 710 (1997).
[6] *See, e.g.,* Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"), *citing* Loving v. Virginia, 388 U.S. 1, 12 (1967) (The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

right."[7] This inquiry requires courts to delve into the historic nature and scope of traditional marriage to determine whether same-sex unions fulfill the same functions and purposes.[8] If so, then same-sex couples could claim the same fundamental right to marry, and laws preventing their nuptials would be subject to strict scrutiny review.[9]

The Supreme Court relies on particular historical authorities when determining whether a right is "deeply rooted" in our history. In two of the more recent cases containing in-depth analyses of fundamental rights claims, *Michael H. v. Gerald D.*[10] and *Washington v. Glucksberg*,[11] the Supreme Court looked to remarkably similar historical sources in considering two very different claims. *Michael H.* addressed whether an "adulterous natural father" had a fundamental right to challenge the marital presumption of paternity,[12] while *Glucksberg* considered whether there was a fundamental right to assisted suicide.[13] In both of these cases, the Court surveyed "over 700 years" of Anglo-American common-law tradition, starting with the 13th century scholar Henry de Bracton, "one of the first

[7] *Perry*, 704 F. Supp. 2d at 992.
[8] *See id*. (listing the characteristics and functions marriage has retained "throughout the history of the United States.").
[9] *Id*. at 994.
[10] 491 U.S. 110 (1989).
[11] 521 U.S. 702 (1997).
[12] *See generally Michael H.*, 491 U.S. 110.
[13] *See generally Glucksberg*, 521 U.S. 702.

legal-treatise writers."[14] *Glucksberg* further noted that "other late-medieval treatise writers" echoed Bracton's writings on suicide.[15] In both cases, the Court relied on the writings of Sir William Blackstone,[16,17] and noted in *Glucksberg* that his "Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers."[18] In both *Michael H.* and *Glucksberg*, the Court examined how early American courts treated the issues in dispute by looking to treatise authors such as James Kent and Zephaniah Swift.[19] The Court then considered how the states had approached each asserted right in the previous century by examining model codes and American Law Reports.[20] Finally, in both cases, the Court noted that though technology had advanced, attitudes had softened, and circumstances had changed, state laws had largely remained unchanged, underscoring enduring and important policy reasons for observing the marital presumption of paternity and for prohibiting assisted suicide.[21]

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[14] *Glucksberg*, 521 U.S. at 711; *Michael H.*, 491 U.S. at 124.
[15] *Glucksberg*, 521 U.S. at 711 n.10.
[16] *Id.* at 712; *Michael H.*, 491 U.S. at 124.
[17] *Michael H.*, 491 U.S. at 124.
[18] *Glucksberg*, 521 U.S. at 712.
[19] *Id.* at 713; *Michael H.*, 491 U.S. at 125.
[20] *Glucksberg*, 521 U.S. at 715-16; *Michael H.*, 491 U.S. at 125-26.
[21] *Glucksberg*, 521 U.S. at 719 ("Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decision making, we have not

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

The lower court, however, held that same-sex unions "encompass the historical purpose and form of marriage"[24] without consulting any of the historical sources the Supreme Court finds authoritative. Rather, it based its findings

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retreated from this prohibition."), 728-35 (finding several continuing state interests in prohibiting assisted suicide); *Michael H.*, 491 U.S. at 125 ("in modern times . . . the rigid protection of the marital family has in other respects been relaxed"), 140 (Brennen, J., dissenting) ("[T]he original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child"), 130 (discussing why "the people of California" might wish to continue recognizing the marital presumption of paternity).

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

[23] *Id*. at 138 (Brennen, J., dissenting).

[24] *Perry*, 704 F. Supp. 2d at 993.

primarily on testimony from a history professor.[25] The lower court's decision makes no mention of historical authorities such as Blackstone or Bracton.

B. Historical sources show that paternity establishment has long been considered a fundamental purpose of marriage in Western law and thought

If the lower court had inquired into the writings of historical authorities, it would have discovered that paternity establishment—an issue relevant only to opposite-sex relationships—has long been considered a central function of marriage in Western law and thought. Aristotle was one of the earliest Western thinkers to define marriage in terms of its ability to identify a child's father. Ancient Rome, which borrowed heavily from Greek teachings, understood marriage to be a relationship through which a man could identify his children. Medieval ecclesiastical scholars, including St. Thomas Aquinas, built on Aristotelian and Roman ideals in articulating a very lucid description of the relationship between paternity establishment and marriage. Medieval church courts introduced Roman marriage law and concepts into England, and those doctrines were eventually carried over to the United States. Even today, the Roman marital presumption of paternity is still in effect in American courts. The paternity establishment narrative of marriage has survived for centuries, appearing in the work of Enlightenment-era scholars such as John Locke, Frances Hutcheson and

[25] *Id*. at 956-977 (extensively citing historian Nancy Cott).

Blackstone, and persists to this very day in the form of modern evolutionary theory.

What follows is a genealogy of the modern marital presumption of paternity. It traces the presumption's history from its beginnings in prehistory as an evolutionary reproductive strategy, to Classical Antiquity, when marriage's natural paternity establishment function was recognized and co-opted by the state for legal purposes, and finally to present-day America, where it establishes legal paternity for over half of the children born in this country,[26] making it arguably the most significant contemporary legal function of marriage. This history has major implications for the lower court's decision, as it undermines its finding that same-sex unions "encompass the historical purpose and form of marriage."[27]

i. Modern evolutionary theory

Some modern evolutionary theorists argue that the origins of monogamy are traceable back to the African savanna, when prehistoric humans took their first steps upright. When early humans began walking upright, their bodies, and especially their hips, became more slender to accommodate this new practice.[28]

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[26] CENTER FOR DISEASE CONTROL AND PREVENTION, *supra* note 2.
[27] *Perry*, 704 F. Supp. 2d at 993.
[28] *See, e.g.*, John L. Locke, *Language and life history: A new perspective on the development and evolution of human language*, 29 BEHAVIORAL AND BRAIN SCIENCES 259, 261 (2006) (stating that bipedalism "realigned the spine and narrowed the pelvis").

Unfortunately, the bipedal-suited skeletal structure was not optimal for pregnancy. The tension between the demands of bipedalism and childbearing is known as the "obstetrical dilemma."[29] "[T]he wider maternal pelvis that could enable more prenatal brain growth (and hence the birth of a bigger-brained baby) simply isn't feasible, because of the competing demands of bipedalism on a woman's skeleton."[30] As a result, "[t]o be born, rather than snagged in the birth canal, a big-brained hominin baby has to be born with a smaller head than expected."[31] This means that for humans, "a larger proportion of brain growth compared with, say, that of a chimpanzee baby must be postponed until after birth. The consequence is that human babies are born more helpless."[32] These vulnerable children "command more care, even require more care, than a mother alone can provide."[33]

Because of the unique needs of human newborns, "[w]e number among the small fraction of mammalian species in which males play important roles in raising

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

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

[31] *Id.*

[32] *Id.*

[33] *Id.*

offspring."[34] When it comes to paternal investment, in many species, males contribute little more than sperm.[35] For human males, however, "[f]ollowing the generic male sexual strategy—roaming around, seducing and abandoning everything in sight—won't do a male's genes much good if the resulting offspring gets eaten."[36] Due to the unusually long time that humans take to mature and their consequent need for care and protection during infancy, a baby "seriously compromise[d] a mother's food gathering" in prehistoric times; this placed both the mother and her child in a very vulnerable position.[37] It thus became a better evolutionary strategy for the human male to stick around to help raise and protect his offspring, rather than mate with as many women as possible and hope that at least a few of the resulting children would somehow survive to adulthood.

Natural selection, however, is strongly biased against males who invest precious time and resources in children who may not by their biological own. "Not long for this world," notes one theorist, "are the genes of a man who spends his time rearing children who aren't his."[38] Prehistoric mothers, of course, knew beyond a doubt that the infant she gave birth to was her biological child, and thus had no reason to second-guess her investments in raising the child. By contrast,

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[34] *Id.* at 30.
[35] MICHELA GALLAGHER ET. AL., HANDBOOK OF PSYCHOLOGY: VOL. III 12 (2003).
[36] ROBERT WRIGHT, THE MORAL ANIMAL 58 (1994).
[37] *Id.* Wright goes on to describe prehistoric children as basically helpless, fleshy mounds of "tiger bait."
[38] *Id.* at 66.

males lacked this built-in paternity verification, and therefore had less of a natural incentive to invest in offspring.[39]

A male primate will only "protect an infant, and be closely associated with it if, on average, the likelihood of paternity is high enough to outweigh the costs" of rearing the child.[40] "Hence, in order to gain this protection . . . a female needs to provide the male with a high enough probability of paternity to make it selectively advantageous for the male."[41] In a species with high male parental investment, such as humans, "adaptations should evolve to help guarantee that the female's offspring are also [the investing male's] own."[42]

Female monogamy—which is arguably the defining characteristic of marriage across almost every culture[43]—is such an adaptation.[44] Woman began limiting themselves to one man in order to assure him of his paternity; in return,

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[39] MICHAEL P. MUEHLENBEIN, HUMAN EVOLUTIONARY BIOLOGY 356 (2010) ("A direct consequence of internal fertilization is that men cannot be absolutely certain about their paternity. . . . It is therefore not surprising that natural selection has favored the production of behavioral mechanisms that predispose men (in general) to invest more heavily in mating effort than paternal effort.").

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

[41] *Id*.

[42] WRIGHT, *supra* note 36, at 65.

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

[44] MUEHLENBEIN, *supra* note 39 ("The level of paternal investment is directly correlated with both paternity confidence and assessment of a wife's fidelity.").

the man shared the responsibilities of child rearing.[45] The father's investment improved the child's chances of survival, making female monogamy an evolutionarily-favored strategy.[46]

Anthropologists have pointed to paternal identification concerns to explain why there are many examples of polygynous marriages (one husband and multiple wives) throughout history but few examples of polyandrous marriages (one wife and multiple husbands),[47] since the biological father can be easily identified in a polygynous marriage but not a polyandrous marriage.

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

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

[47] *See, e.g.*, Berghe & Barash, *supra* note 43 ("Some three-fourths of all human societies permit polygyny, and most of them prefer it. Monogamous societies often have been polygynous in a more or less recent past, and typically their monogamy is a legal fiction. [. . .] Polyandry, on the other hand, is extremely rare."). Consistent with the hypothesis that males are only interested in investing in children who share their genes, Berghe and Barash found that the most frequent form of human polyandry was *fraternal* polyandry, in which multiple brothers share one wife. *Id*. at 812 ("In the few cases of polyandrous mating in humans, kin selection theory would lead one to expect that if several men shared a wife and contributed to the fitness of her offspring, they would want to maximize the probability of the children sharing genes with them. This probability would be maximized in the case of fraternal polyandry.").

ii. Ancient Greece

Though humankind has only very recently begun to appreciate the role of evolution in our behavior, the connection between paternity establishment and marriage has been observed by Western thinkers for over two millennia. The paternity establishment theory of marriage can be traced back as far as ancient Greece, when Aristotle used it to dispute Socrates' teachings on marriage.

In Plato's *Republic*, Socrates had proposed a radical new system of marriage. His proposal is best described as *polisgamy*: marriage to a whole city. In Socrates' ideal society, every man would have sexual access to every woman in the city.[48] In such a situation, it would be impossible to discern who fathered which children.[49] Socrates argued that the consequence of this ambiguity would be that all men would assume fatherly responsibility for all children in the city since, if wives are communal, any given child might be any man's offspring. Social cohesion would be high because familial links would be imputed between everyone in the

[48] PLATO, THE REPUBLIC 147 (Benjamin Jowett trans., Colonial Press 1901), *available at* http://books.google.com/books?id=1RgwAAAAYAAJ ("the wives . . . are to be common").

[49] *See id*. at 147 ("no parent is to know his own child, nor any child his parent") *and* 152 ("how will they know who are fathers and daughters, and so on? They will never know.")

society.[50] The lives of citizens in such a city, Socrates predicted, "will be as blessed as the life of Olympic victors and yet more blessed."[51]

In *Politics*, Aristotle attacked Socrates' communal wives scheme. His rebuttal was based on a "tragedy of the commons"-type argument. Because "all men regard most what is their own, and care less for common property,"[52] Aristotle predicted that "each citizen in the state will have a thousand children but none of them will be as the children of any individual,"[53] as "it would be uncertain to whom each child belonged and who should preserve it when born."[54] As a consequence, fathers "will all alike neglect them."[55]

Aristotle defense of monogamous marriage rested on the assertion that when men can say "this is his own son and his own wife,"[56] fathers, assured of their paternity, are more likely to care for their children. "There are two things which principally inspire mankind with care and love of their offspring," Aristotle wrote;

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[50] *Id*. at 154 ("every one whom they meet will be regarded by them either as a brother or sister, or father or mother, or son or daughter, or as the child or parent of those who are thus connected with him.").
[51] *Id.* at 157.
[52] 1 ARISTOTLE, POLITICS 38 (H. G. Bohn trans., 1853), *available at* http://books.google.com/books?id=D-4kAAAAMAAJ.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 30.

"knowing it is their own, and what ought to be the object of their affection."[57] This principle, according to Aristotle, should define the contours of marriage.

iii. Ancient Rome

Aristotle's teachings appear to have greatly influenced the Roman understanding of marriage, as "[t]he Romans conventionally regarded marriage as an institution designed for the production of legitimate children."[58] The Romans considered paternity establishment to be integral function of marriage because "marriage made possible the link between father and child. The father could acknowledge the child as his own and undertake to rear it."[59] This concept of marriage was adopted from the Greeks and "was ingrained in Roman consciousness."[60]

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[57] *Id.* at 32. This passage from *Politics* was not the only time Aristotle drew a connection between paternal devotion and paternal certainty. In *The Nicomachean Ethics*, Aristotle states that "mothers are more fond of their children than fathers are" because "they feel more convinced that [the children] are their own." 2 ARISTOTLE, THE NICOMACHEAN ETHICS 248 (R.W. Browne trans., George Bell & Sons 1889), *available at* http://books.google.com/books?id=Mb7WAAAAMAAJ.

[58] SUSAN TREGGIARI, ROMAN MARRIAGE: IUSTI CONIUGES FROM THE TIME OF CICERO TO THE TIME OF ULPIAN 8 (1993); *see also* ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW, Volume 43 563 (1953) ("Procreation of legitimate children was the aim of a Roman marriage").

[59] TREGGIARI, *supra* note 58, at 13.

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

This understanding of marriage formed the basis of Roman marital law. The phrase *liberorum quaerendorum causa* ("for the reason of desiring children") was "a legal formula indicating that the purpose of marriage is to beget legal heirs."[61] "At the registration of citizens," one scholar explains, "the head of a family was asked whether he was living with a wife *liberorum quaerendorum causa*."[62] There were several types of quasi-marriage relationships in Ancient Rome, such as concubinage and relationships with slaves, but children born to women in these relationships did not have a legal father.[63] A "wife" was defined as "the woman whom a man takes for the breeding of legitimate children."[64] This explains why a man was asked if he was living with a woman *liberorum quaerendorum causa.*

"In Roman law," marriage was "accompanied by precise legal results. Its purpose was clear and pragmatic: the production (and consequent rearing) of legitimate children."[65] Under the marital presumption of paternity, a Roman doctrine that was a later incorporated into English common law, a child born into a marriage was considered the husband's child.[66] Conversely, Roman law also held

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[61] SUETONIUS, THE LIVES OF THE CAESARS 27 (Kessinger 2004), *available at* http://books.google.com/books?id=UrGdu3CwL2IC.
[62] BERGER, *supra* note 58, at 563.
[63] TREGGIARI, *supra* note 58, at 8.
[64] *Id.*
[65] *Id.* at 13.
[66] *See* GDK v. State, Dept. of Family Services, 92 P.3d 834, 836 (Wyo. 2004) ("The marital presumption was derived from Roman civil law and adopted as part of English common law."), *citing* Edward R. Armstrong, *Putative Fathers and the*

that a child born out of wedlock was *nullius filius*, and had no legal father.[67] Paternity was established only through marriage, as the Roman maxim *pater est quem nuptiae demonstrant* indicates.[68] Even the Roman definition of adultery was based on the desire to protect the integrity of the marital presumption, as Roman law held that "a married woman committed adultery by having sexual relations with anyone other than her mate," while a husband "transgressed the law only if he carnally knew another man's wife."[69]

iv. Medieval Ecclesiastic Scholarship

The central role of paternity establishment in marriage was widely endorsed by medieval ecclesiastical philosophers, who took Aristotle's conception of marriage and expounded on it. During the Middle Ages, "all the commentators of Aristotle, from Thomas Aquinas to Albert of Saxony, from Oresme to Buridanus,"

Presumption of Legitimacy-Adams and the Forbidden Fruit: Clashes Between the Presumption of Legitimacy and the Rights of Putative Fathers in Arkansas, 25 U. ARK. LITTLE ROCK L.REV. 369, 373 (2003).

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

[68] Dominik Lasok, *Virginia Bastardy Laws: A Burdensome Heritage*, 9 WM. & MARY L. REV. 402, 406 (1967-1968). *See also* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOL. 1 435 (1753) (Childs & Peterson, eds., 1860) *available at* books.google.com/books?id=faZFAAAAcAAJ (translating *pater est quem nuptiae demonstrant* as "[t]he nuptials show who is the father").

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

along with Giles of Rome and Ptolemy of Lucca, "recognized that female fidelity was the only way to ensure the legitimacy of progeny and that a husband's control over his wife's body was the only means of ensuring paternity."[70] Their writings are an important link in the history of Anglo-American marriage because they reveal the theoretical underpinnings of church doctrine, and many of our legal traditions concerning marriage were introduced in England by medieval church courts.

St. Thomas Aquinas, who as "the most famous and influential of all natural law theorists"[71] had a profound impact on Western thought, set out perhaps the most well-developed medieval articulation of the paternity establishment theory. "[I]n the case of animals among whom there is no concern on the part of the males for their offspring," he observed, "the male has promiscuous relations with several females and the female with plural males."[72] However, "in every species of animal in which the father has some concern for offspring," monogamy is practiced.[73] Because "the male in the human species has the greatest concern for offspring," a

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[70] CHRISTIANE KLAPISCH-ZUBER ET. AL., A HISTORY OF WOMEN IN THE WEST: SILENCES OF THE MIDDLE AGES 114 (1992).
[71] Robert P. George, *Kelsen and Aquinas on "The Natural-Law Doctrine"*, 75 NOTRE DAME L. REV. 1625 (2000).
[72] 1 ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES BOOK III § 124.3 (Anton C. Pegis et al. trans., Hanover House 1957).
[73] *Id*.

man "naturally desires to know his offspring."[74] A man's ability to identify his children "would be completely destroyed if there were several males for one female," and therefore, "that one female is for one male is a consequence of natural instinct."[75] Aquinas reasoned that this natural instinct set the contours of the institution of marriage, stating that "[t]he reason why a wife is not allowed more than one husband at a time is because otherwise paternity would be uncertain."[76] He noted that, for this reason, "no law or human custom has permitted one woman to be a wife for several husbands,"[77] an observation that was confirmed centuries later by modern anthropologists.[78] Aquinas concluded that paternity establishment is a defining function of marriage, going so far as to state that "certainty as to offspring is *the principal good* which is sought in matrimony."[79]

Aquinas' contemporaries echoed this view. One historian writes that Giles of Rome believed that a wife's most important duties to her husband were "modesty, chastity, and fidelity" because "nothing else could guarantee his legitimate paternity. All other feminine virtues were in some way related to this need for

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[74] *Id*. at § 124.1.
[75] *Id*.
[76] 2 ST. THOMAS AQUINAS, *OF GOD AND HIS CREATURES* 288 (Joseph Rickaby, trans., Carroll Press 1950).
[77] 1 AQUINAS, *supra* note 72, at § 124.2.
[78] *See* Berghe & Barash, *supra* note 43, at 811 ("Polyandry . . . is extremely rare.").
[79] 1 AQUINAS, *supra* note 72, at § 124.2 (emphasis added).

assurance."[80] Medieval thought considered paternity establishment so integral to marriage that Ptolemy of Lucca was skeptical that Socrates and Plato actually endorsed polisgamy. After noting that the care of offspring depends on parents' ability to identify their own children,[81] Ptolemy stated that the communal wives proposal was so absurd that "it does not seem credible that [Socrates and Plato] could advocate such a community as the one Aristotle seemingly imputes to them."[82]

v. English Law

Medieval English marital law was largely a continuum of the Greco-Roman-ecclesiastical concept of marriage. Church courts imported Roman legal doctrines concerning marriage into England.[83] Bracton's writing shows that as early as the

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[80] KLAPISCH-ZUBER ET. AL., *supra* note 70, at 114.

[81] Ptolemy rejected Socrates' polisgamy idea by arguing that "[c]hildren […] make [communal wives] impossible, since in the act of generation two seeds do not come together, but one alone, from the man." Pointing to monogamous species in nature such as birds, Ptolemy observed, "For this reason even animals know their own offspring for as long as is necessary to nourish their children, especially young birds before they can fly." BARTHOLOMEW OF LUCCA ET. AL., ON THE GOVERNMENT OF RULERS: DE REGIMINE PRINCIPUM 226-27 (James M. Blythe trans., U. of Penn. Press 1997), *available at* http://books.google.com/books?id=aFXTbpsUMvAC.

[82] *Id*. at 226.

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

13th century, England had adopted the Roman marital presumption of paternity.[84] English common law also borrowed the doctrine of *filius nullius*.[85] And like Rome, English common law defined adultery as "sexual relations between a married woman and a man not her husband, whether the man was married or single," a double-standard "explained by the fact that the common law was concerned with illicit intercourse only when it was calculated to adulterate the blood and expose a husband to the maintenance of another man's children and to the risk of their inheriting his property."[86]

This adaptation of Roman marital traditions would by itself show the importance of paternity establishment to the English concept of marriage. A

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[84] HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 45 (Longman & Co., 1878) ("[A] person is presumed to be a son from the very fact, that he is born of a wife, because marriage proves him to be a son, and this presumption will always hold good, until the contrary is proved."), *available at* http://books.google.com/books?id=olXSAAAAMAAJ. *See also* KARL GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW: A CONTRIBUTION TO THE HISTORY OF THE ROMAN LAW IN THE MIDDLE AGES 130 (1866) ("The Roman presumption, *pater est quem nuptiæ demonstrant*, was valid in England, being thus expressed: 'legitimus filius est quem nuptiæ demonstrant,' or thus: 'nuptiæ probant filium esse.'"), *available at* http://books.google.com/books?id=Sa0DAAAAQAAJ.

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

[86] Moore, *supra* note 69, at 219-20.

centuries-long debate over informal marriages, however, throws the central role of paternity establishment concerns in English marriage law into even sharper relief.

The history of informal marriage in the Anglo tradition began with England's failure to adopt the Roman doctrine of *legitimatio per subsequens matrimonium*. Under Roman and canon law, if a child was born before his parents were married, the parents' subsequent marriage would legitimate the child.[87] The church, whose marriage laws were heavily influenced by Roman tradition, managed to introduce many of its marital principles into English law, such as the marital presumption of paternity and the doctrine of *filius nullius*,[88] but it failed in its attempt to establish the doctrine of *legitimatio per subsequens matrimonium*.[89] England's Special Bastardy Act of 1235 declared: "He is a Bastard that is born before the Marriage of his Parents,"[90] and made no provision for the legitimization of the child if his parents married after his birth.

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[87] ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 207 (1795), *available at* http://books.google.com/books?id=dBE4AAAAIAAJ; GÜTERBOCK, *supra* note 74, at 127 (stating that the doctrine of *legitimatio per subsequens matrimonium* was sanctioned by the church's own law and by Roman law).

[88] GÜTERBOCK, *supra* note 84, at 126 (Stating that, "owing to the Church," Roman laws had an indirect effect on English inheritance laws, and that "the law concerning the legitimacy and the bastardy of children as bearing on their capacity to inherit, presents an example of the effects of Roman influence.").

[89] *Id*. at 127; *see also* Lasok, *supra* note 68, at 406.

[90] 20 Hen. III, c.9 (1236).

The Special Bastardy Act posed a problem for the church. Illegitimacy was a major concern for local parishes, and "[a] recurrent problem for most communities was to ensure a male provider for women and children."[91] Because ex-ante legitimacy was not recognized, the church was left with few options when an illegitimate child was born.

To mitigate the consequences of the Special Bastardy Act and ensure that mothers and children had a male provider, church courts began recognizing "informal" marriages. In the late twelfth century, the English church decided that a marriage promise—even one made privately—was sufficient to create a binding marriage.[92] This enabled the church to treat most sexual relationships resulting in pregnancies as "clandestine" marriages, allowing the church to avoid labeling the child illegitimate.[93] "[C]onsent to intercourse and consent to marriage were not separated analytically" by local church courts, "and were perhaps deliberately blurred in some communities."[94] Though the church's formally-stated preference was for marriages to be solemnized in a church, it did not insist upon this because,

[91] STEPHEN PARKER, INFORMAL MARRIAGE, COHABITATION AND THE LAW 9 (1990).
[92] *Id*. at 12.
[93] *Id*.
[94] PARKER, *supra* note 91, at 19.

if it refused to recognize "informal" marriages, "sin would multiply at a stroke" and many children would be left without legal fathers.[95]

This informal system of marriage served the country well until the Industrial Revolution. Before that time, England was a "'face-to-face' society," consisting of many small, rural villages with relatively stable and immobile populations.[96] In these small communities, the villagers would have a good idea of who the father of an unwed woman's baby was, and could hold him accountable. While not all pregnant women were eventually married to their lovers in traditional rural society, as with transient workers who impregnated young women and then moved on,[97] the retroactive attribution of informal marriage vows largely managed to mitigate the consequences of premarital sex and out-of-wedlock pregnancies.[98]

By the 18th century, however, the 500-year-old practice of informal marriage became difficult to sustain with the increase in urbanization and

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[95] *Id.* at 12-13. "Banns" are the public announcements in a church of an impending marriage between two specified persons, the purpose of which is to enable anyone to raise any potential canonical or legal impediment to the marriage, so as to prevent marriages that are invalid.

[96] *Id.* at 9.

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

[98] PARKER, *supra* note 91, at 19 (stating that practice of retroactively attributing a marriage promise when there was an unwed pregnancy meant that "[i]n effect for the peasant community there was very little premarital sex.").

geographical mobility brought on by the Industrial Revolution.[99] Economic conditions and the relative anonymity of urban living resulted in an increased number of transient relationships and unwed pregnancies.[100] A contemporary writer observed that single mothers were numerous, "bastardy rampant, and

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[99] Meteyard, *supra* note 97 at 488-89. One team of historians argues that informal marriages were not as successful in anonymous urban areas because the safeguards that facilitated informal marriage in rural communities did not exist in cities. Many young women came to cities for work and soon started looking for husbands, but these girls, without a family and close-knit village community to look after her (and its) interests, were often impregnated and abandoned by their boyfriends. In the cities, "'seducers could pursue their ends more easily, because they did not fear an avenging father, often violent, ready to make them pay for the dishonor.'" 1 Louise A. Tilly et. al, *Women's Work and European Fertility Patterns*, 6 J. OF INTERDISCIPLINARY HIST. 447, 466 (1976). Economic factors also played a role in the breakdown of marriage. As the English economy moved away from farming, many young men, especially those in "professions marked by unstable tenure, such as servants, traveling workers, or soldiers," were unable to provide the steady support that a fledgling family needed. *Id.* Even if a couple *did* intend for an informal relationship to be permanent, "sometimes the men moved on to search for work," or else "poverty created unbearable emotional stress,"[99] making relationships difficult to sustain. 2 Louise A. Tilly et al, Women's Work and European Fertility Patterns 28 (Center for Research, Working Paper #95, 1974), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/50872/1/95.pdf (last visited March 4, 2011). Unable to support their "wives" and children, many men facing such obstacles simply gave up on the relationships and moved on. *Id.* at 34. One historian writes that "[m]arriage failed to take place for many reasons," but "no major change in values or mentality was necessary to create these cases of illegitimacy." 1 Tilly, *supra*, at 466-67. In many cases, young people indulged in premarital sex with the expectation that the relationships would progress into marriage, but those expectations went unfulfilled in the new economic context. 2 Tilly, *supra*, at 34.

[100] *Id. See also* CHARLES MARSH, *A Letter to the Public: Containing the Substance of what hath been offered in the late Debates upon the Subject of the Act of Parliament for the better preventing of Clandestine Marriages in* THE MARRIAGE ACT OF 1753: FOUR TRACTS 25 (1984) (stating that failed relationships "have happened very frequently of late Years, to the Ruin of a Multitude.").

'licentiousness' the rule rather than the exception."[101] Middle class observers were disturbed by the unstable state of informal relationships, and "especially by the increase in the numbers of abandoned pregnant women."[102]

The breakdown of informal marriage in England led to a robust eighteenth century debate about the ultimate objectives of marriage. The paternity establishment narrative of marriage assumed a prominent position during this debate, appearing in works by several very influential authors, including John Locke,[103] Francis Hutcheson,[104] William Blackstone,[105] and the author of the influential tract *A Letter to the Public*.[106]

Locke's understanding of marriage might be of particular interest in a fundamental rights claim for same-sex marriage, considering that his writings provided the inspiration for the Due Process Clause.[107] Locke maintained that

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[101] EVE TAVOR BANNET, THE DOMESTIC REVOLUTION: ENLIGHTENMENT FEMINISMS AND THE NOVEL 99 (2000).
[102] 1 Tilly, *supra* note 99, at 465.
[103] *See infra* notes 108-110.
[104] *See infra* notes 112-114.
[105] *See infra* notes 116-117.
[106] *See infra* notes 124-132.
[107] *See, e.g.,* Michael Hoggan, *Settled Expectations and the Takings Clause: Property and Law Are Born and Must Die Together*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 379 (1996) ("John Locke's theory of natural law clearly influenced the framers of the Constitution when they wrote that no person shall 'be deprived of life, liberty, or property, without Due Process of law.'"); Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990) ("Modern substantive due process analysis and the privacy rights it purportedly protects

humans began entering long-term, monogamous relationships because human infants required more parental care than the mother alone could provide.[108] He supported this argument with a long discussion of pair-bonding in animal species, observing that long-term relationships were found only in those species whose infants were so vulnerable that they required support from the father as well as the mother, such as birds.[109] Locke concluded that marriage was necessary for men and

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reflect a liberal tradition whose backbone is a natural rights philosophy most persuasively articulated by John Locke."); Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. BALT. INTELL. PROP. L.J. 75, 83 n.38 (2002) (stating that the Fourteenth Amendment "embodied John Locke's natural-law theory."); Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 146 n. 240 (1999) ("The intellectual source of the constitutional Due Process doctrine is found in the philosophy of John Locke."); Eric E. Walker, *State Action and Punitive Damages: A New Twist on an Old Doctrine*, 38 CONN. L. REV. 833, 837 (2006) ("The guarantees embodied in the Fourteenth Amendment, and in the Constitution generally, find their foundation in the natural rights philosophy of John Locke.").

[108] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Ch. VII, § 80 ("[H]erein I think lies the chief, if not the only reason, why the male and female in mankind are tied to a longer conjunction than other creatures, viz. because the female is capable of conceiving, and de facto is commonly with child again, and brings forth too a new birth, long before the former is out of a dependency for support on his parents help, and able to shift for himself, and has all the assistance is due to him from his parents: whereby the father, who is bound to take care for those he hath begot, is under an obligation to continue in conjugal society with the same woman."

[109] *Id.* at § 79 (Stating that "[i]n those viviparous animals which feed on grass, the conjunction between male and female lasts no longer than the very act of copulation; because the teat of the dam being sufficient to nourish the young, till it be able to feed on grass, the male only begets, but concerns not himself for the female or young, to whose sustenance he can contribute nothing." As for birds, however, "except some domestic ones, where plenty of food excuses the cock from feeding, and taking care of the young brood whose young needing food in the nest,

women to raise children successfully, as it assured that "their interests [would be] better united, to make provision and lay up goods for their common issue." He added that "*uncertain mixture* . . . would mightily disturb" this end.[110]

Frances Hutcheson was a prominent figure in the Scottish Enlightenment and "was probably the most influential and respected moral philosopher in eighteenth-century America."[111] In *A System of Moral Philosophy*, Hutcheson turned his attention to marriage. In that treatise, he identified paternity identification as the most important function of marriage:

> The *first and most necessary article* [of marriage] is that the fathers should have their offspring ascertained, and therefore the woman who professes to bear children to any man must give the strongest assurances that she will not at the same time cohabit with other men. . . . In the marriage-contract therefore *this is the first article*.[112]

To prove this point, Hutcheson presented a picture of what the world would look like without marriage. "[U]nlimited indulgences in promiscuous fornication," he argued, "would have this effect, that the fathers would generally be uncertain

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the cock and hen continue mates, till the young are able to use their wing, and provide for themselves.").

[110] *Id.* at § 80.

[111] NORMAN FIERING, MORAL PHILOSOPHY AT SEVENTEENTH-CENTURY HARVARD 199 (The University of North Carolina Press 1981).

[112] FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY, IN THREE BOOKS VOL. 2 156 (1755), *available at* http://books.google.com/books?id=n_zQ8Przu2AC (emphasis added).

about their own offspring, and have no other incitement to any cares about them than the general tye of humanity, which we know is not sufficient."[113]

In the context of the debate about informal marriage, Hutcheson suggested that men could be prevented from abandoning their wives and children by ending the practice of informal marriage and forcing couples to acknowledge publicly that they were married. "[M]arriages should be publickly known," he argued, so "that no married persons may deny them."[114]

William Blackstone's *Commentaries on the Laws of England*, "arguably the single most influential work of jurisprudence in American history,"[115] also posited that paternity establishment was the primary purpose of marriage. In the chapter on parent-child relationships, Blackstone made this point twice. First, after noting that the Roman rule "*Pater est quem nuptiae demonstrant* ['The nuptials show who is the father']" was the law in England, he cited Montesquieu to assert that

> the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way.[116]

A few paragraphs later, he noted that there was generally "very great uncertainty"

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[113] *Id*. at 154.
[114] *Id.* at 169.
[115] William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J. L. & RELIGION 255, 255 (2007).
[116] BLACKSTONE, *supra* note 68, at 435.

in proving who a child's father is, and so "[t]he main end and design of marriage [was] . . . to ascertain and fix upon some certain person [the husband] to whom the care, the protection, the maintenance, and the education of the children should belong."[117]

While 18th-century scholars were delving into the ultimate purpose of marriage, Lord Hardwicke proposed the Marriage Act of 1753,[118] a landmark piece of legislation which "arguably suppl[ied] the basis of modern marriage law."[119] The Act required that a relationship be formally and publicly declared a marriage in order to gain state recognition. The Act required couples either to have their impending nuptials announced by "banns" and celebrated formally in a church, or else to obtain a marriage license,[120] and declared that any marital contract that did

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[117] *Id.* at 443. One contemporary author argues that "one might reject Blackstone's view that marriage was an institution designed primarily to protect children and instead argue that marriage was an institution designed primarily to facilitate the orderly distribution of property." She points out that "[i]t is far easier for a probate court to identify the children of an intestate's marriage than all the children whom the intestate may have begotten." Katharine K. Baker, *Bargaining Or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 24-25 (2004). But whether marriage's purpose is to identify fathers in order to assure that they care for their offspring or to make the probate courts' task of distributing deceased men's property easier, Blackstone's ultimate premise—that the establishment of paternity is the state's central concern—remains the same.

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

[119] R.B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850 xxi (1995).

[120] 26 Geo. II., c. 33.

not follow these provisions would be null and void.[121] The Act also included various provisions to ensure the accurate recognition and recording of marriages, such as a requirement that local parishes keep marriage records on "good and durable Paper" and that witnesses be present at the ceremony.[122]

The only surviving published tract that provides the rationale behind the Marriage Act is *A Letter to the Public: Containing the Substance of what hath been offered in the late Debates upon the Subject of the Act of Parliament For the better preventing of Clandestine Marriages*.[123] The tract's arguments in support of the Act rely heavily on the paternal establishment theory of marriage.

First, the *Letter* asserted that marriage's requirement of mutual fidelity was designed to assure a husband of his paternity: "[t]he Engagement of mutual Constancy . . . as to the Woman's Part . . . [is] meant to be a Security to the Man, that her Children are his Offspring, by which Means the Father becomes interested with the Mother in a joint Care of their Issue." The *Letter* argued that marriage's conduciveness to the care of children "must be understood to be one of the great political Ends of public Wisdom in the Institution of Marriage."[124]

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[121] *Id.*
[122] *Id.*
[123] R.B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850 101 (1995).
[124] MARSH, *supra* note 100, at 21.

The *Letter* used this understanding of marriage's paternity establishment objectives as the basis of its criticisms of informal marriage. Clandestine marriages, it argued, facilitated casual sexual encounters.[125] Such a marriage contract "might be legally negotiated in a Tavern, or private House between the two Parties concerned, without the Presence of a Clergyman, or any other third Person."[126] Without public accountability, the author asked, "[w]hat can Marriages so contracted end in, according to the natural Course of Things, but Separation of the Parties?" Hookups may have led to long-term relationships in the past, but with the system of informal marriage not longer functioning properly in the urban context, many women fell into a pattern of subsequent "short-lived encounters."[127] *A Letter to the Public* identified this relationship volatility as a source of paternal abandonment. "[T]he real father," it states, "being uncertain whether he is so or not, and likewise unconcerned in the Fate of the Woman, will not be prompted by any natural Motive, either to assist towards her Support, or the Care of her Offspring."[128] When this occurs, "the whole public Purpose that can be served by a Marriage-Contract is in their Case defeated."[129]

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[125] *Id*. at 23-24.
[126] *Id*. at 23.
[127] 1 Tilly, *supra* note 99, at 465.
[128] MARSH, *supra* note 100, at 21.
[129] *Id*. at 25.

The *Letter* suggested that the Marriage Act would reduce instances of abandonment and illegitimacy by creating proof of marriages. It noted that with informal marriage, "Any Person who doth not regard the Honesty of observing a Contract, might readily enter into all the Marriage Covenants, without the least design of keeping any one of them, except that which relates to carnal Knowledge," and after a short affair, the man "might disclaim the Contract with little Risk of being disprov'd; and thus innocent Women would be daily deluded and abandoned to Infamy and Want, beyond a Possibility of Redress."[130] The *Letter* argued that "Fraud and Surprize ought to be guarded against, as destructive to the political Ends proposed by this Institution: And therefore the Solemnization of Matrimony ought to be open, public, and subject to Notoriety . . . ."[131] It concluded that the Marriage Act's new publicity measures would accomplish this goal, because its requirements for the public celebration of marriages and the keeping of records would "together compose a very good System to make Marriages notorious."[132]

[130] *Id*. at 23.
[131] *Id*.
[132] *Id*. at 26.

vi. American Law

Across the Atlantic, American common law imported from England the marital presumption of paternity[133] and the doctrine of *nullius filius*.[134] Some states adopted the Roman-English double-standard concerning adultery punishment.[135] Even the English debate over informal marriage carried over into American courts.

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

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[133] R.R.K. v. S.G.P., 507 N.E.2d 736, 739 (Mass. 1987) ("The presumption that a child born in wedlock is legitimate is one of great antiquity. Several courts have noted that it was a maxim of the Roman law which the common law copied."), *citing* Estate of Cornelious, 35 Cal.3d 461, 464 (1984), appeal dismissed sub nom. Hall v. Taylor, 466 U.S. 967 (1984) *and* Kennedy v. State, 173 S.W. 842 (Ark. 1915).

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

[135] Moore, *supra* note 69, at 220, *citing* State v. Lash, 1 Harr. 380 (N.J. 1837) (explaining that the reason for "the heinousness of adultery consists in exposing an innocent husband to the maintenance of another man's children and to having them succeed to his inheritance.").[135]

that the law [of informal marriage] would mercifully protect," allowing courts to avoid labeling the children "bastards."[136]

One judge complained that courts' desire to legitimize children whenever possible led to arbitrary standards concerning informal marriage. He observed that "facts [were] tortured to allow a common-law marriage" when the legitimization of children was at stake.[137] "However sound the motivation," the judge continued, "a fact situation cannot be twisted to establish a common-law marriage where there are children of that marriage, but to condemn a relationship as meretricious when there is no offspring of that union."[138]

Also, just as the English critics did in the mid-18th century, American courts cited paternity establishment concerns in policy arguments *against* informal marriage. These courts feared that state recognition of uncelebrated marriages would open the door to "the imposition upon estates of suppositious heirs."[139] Because claims about the existence of informal marriages presented a "fruitful source" of paternity fraud by false heirs, courts "closely scrutinized" claims of common law marriage—even going so far as to view such claims "with hostility."[140]

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[136] Umbenhower v. Labus, 97 N.E. 832, 834 (Ohio 1912).
[137] In re Soeder's Estate, 209 N.E.2d 175, 177 (Ohio Prob. Ct. 1965).
[138] *Id*.
[139] Duncan v. Duncan, 10 Ohio St. 181, 188 (1859).
[140] Staudenmayer v. Staudenmayer, 552 Pa. 253, 261-62 (1998).

In the late 1960s and early 1970s, the Supreme Court issued a series of decisions under the Equal Protection Clause that gave illegitimate children many of the same rights as children born to married parents,[141] effectively ending the doctrine of *filius nullius*.[142] In *Gomez v. Perez*, while stating that the "lurking problems with respect to proof of paternity" could not be "lightly brushed aside," the Court held that states could not give legitimate children a judicially enforceable right to support from their biological fathers but deny that right to illegitimate children.[143] Similarly, in *Trimble v. Gordon*, the Court held that laws barring illegitimate children from inheriting their father's estate violated the Equal Protection Clause.[144] Again expressing "sensitivity" to the difficulty of proving paternity, the Court concluded that "[d]ifficulties of proving paternity in some

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[141] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (holding that under the Equal Protection Clause of the Fourteenth Amendment a state may not create a right of action in favor of children for the wrongful death of a parent but deny illegitimate children such a right); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (holding that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent); Gomez v. Perez, 409 U.S. 535 (1973) (holding that a state cannot not give legitimate children a judicially enforceable right to support from their biological fathers but deny that right to illegitimate children); Trimble v. Gordon, 430 U.S. 762 (1977) (holding that a statutory disinheritance of illegitimate children whose fathers die intestate was unconstitutional).

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

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

[144] *See generally Trimble*, 430 U.S. 762.

situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[145] These decisions largely eliminated the paternity establishment concerns that had previously motivated courts to recognize informal marriages. Indeed, the rulings led the Commonwealth Court of Pennsylvania to conclude in 2003 that the circumstances creating a need for informal marriage are not present in today's society, as the right to obtain child support from a father is no longer dependent upon his marital status, and legitimacy status no longer determines the inheritance rights of children.[146]

Though informal marriage and the doctrine of *nullius filius* are obsolete, the marital presumption of paternity still stands. The Supreme Court has recognized it as "a fundamental principle of the common law,"[147] and the presumption has even been codified in many states through their adoption of the Uniform Parentage Act.[148]

Even though states can now compel paternal support of children born out of wedlock, state governments continue to have a strong interest in establishing

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[145] *Id.* at 772.
[146] PNC Bank Corp. v. Workers' Comp. Appeals Bd. (Stamos), 831 A.2d 1269, 1279 (Pa. Commw. 2003).
[147] *Michael H.*, 491 U.S. 110 at 124.
[148] *See* Legal Information Institute, Uniform Matrimonial and Family Laws Locator, http://www.law.cornell.edu/uniform/vol9.html#paren.

paternity by default through marriage.[149] It is difficult and expensive to track down unwed fathers and establish their paternity through litigation, so the marital presumption of paternity is very convenient for the state. Without it, state attorneys general would have to file more lawsuits to establish paternity and obtain child support judgments. Presuming a woman's husband to be the father of her children saves states an enormous amount of hassle and expense, as "[p]rocedure by presumption is always cheaper and easier than individualized determination."[150]

[149] It could be argued that one of the state's interests in marriage is that it fosters "instinctive" paternal bonds. Philosopher Bertrand Russell argued that men evolved to recognize their wife's children as their biological own, stating that "if a man remains with his wife during pregnancy and child-birth"—a practice scientists refer to as "mate-guarding"—"he has an instinctive tendency to be fond of the child when it is born, and this is the basis of the paternal sentiment." BERTRAND RUSSELL, MARRIAGE AND MORALS 13 (W. W. Norton & Co., 1970). Russell's hypothesis has been confirmed by modern research, which has found that "[h]uman male biology does respond in an interesting manner to pair bonding and fatherhood. Such behaviors are characterized by elevated prolactin and suppressed testosterone levels in men. Combined, these may function to decrease interest and effort in acquiring new mates as well as facilitate interest in paternal behaviors." MUEHLENBEIN, *supra* note 39, at 357. A mere paternity test may not be sufficient to inspire paternal bonding at an *instinctual* level. If marriage promotes generous, voluntary paternal investment, while DNA testing and child support orders produces only begrudging, forced paternal investment, the state would have an interest in encouraging the former.

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

C. "Our Nation's history, legal traditions, and practices" show that same-sex unions do *not* "encompass the historical purpose and form of marriage"

The history of marriage in the Anglo-American tradition reveals that marriage has functions that are incompatible with same-sex relationships. First of all, the writings of Aristotle, Thomas Aquinas, John Locke, William Blackstone, modern evolutionary theorists, and many other prominent scholars shows that paternity establishment has long been, and continues to be, seen as a central function of marriage in the Western tradition. Second, through the writings of sources such as Bracton, Blackstone, Kent, and Swift, the modern marital presumption of paternity can be traced all the way back to ancient Rome, showing that our marriage laws are rooted in a legal tradition that considered paternity establishment to be the primary purpose of marriage. Finally, the tortured history of informal marriage in both England and the United States reveals that paternity establishment concerns have long dictated which relationships the government recognizes as marriages and which it did not.

The "history, legal traditions, and practices"[151] concerning marriage and paternity establishment show that the lower court erred in finding that same-sex unions "encompass the historical purpose and form of marriage."[152] The lower court noted that "[m]arriage has retained certain characteristics throughout the

[151] *Glucksberg*, 521 U.S. at 710.
[152] *Perry*, 704 F. Supp. 2d at 993.

history of the United States,"[153] but it failed to recognize that paternity establishment is one of them. The history of marriage in the Anglo-American tradition is inseparably intertwined with paternity establishment concerns. Furthermore, paternity establishment is not some antiquated function of marriage that has been discarded; it continues to be perhaps the most significant legal function of marriage, as it provides a legal father to over half of the children born in the United States today.[154]

The paternity establishment function of marriage is incompatible with same-sex unions. The marital presumption of paternity is one of *biological* paternity.[155] The fact that the presumption has always been rebuttable with evidence that the husband is not the biological father[156] makes the connection between the presumption and biology clear. Awareness of a biological connection is what drives men to instinctually care for their children, and this reality provides the state

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[153] *Id*. at 992.

[154] CENTER FOR DISEASE CONTROL AND PREVENTION, *supra* note 2.

[155] *See, e.g.,* Shineovich and Kemp, 229 Or.App. 670 (2009) (stating that the marital presumption of paternity "creates a presumption as to who is the biological parent of a child. By the very terms of the statute, for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child.").

[156] *See, e.g.,* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 8 Boston L. Rev. 227, 251 (2006) ("The conclusive presumption did not apply unless the husband and wife were cohabiting . . . [T]he presumption never applied when the husband was sterile or impotent or when he was "beyond the four seas" for more than nine months. Perhaps more significantly, a child whose race did not match the husband's was not covered by the presumption.")

with its justification for imposing the marital presumption of paternity.[157] Because a child cannot be the biological child of both partners of a same-sex union, such unions do not promote the same ends that marriage traditionally has. Contrary to what the lower court found, a spouse's sex *is* "relevant to the state in determining spouses' obligations to each other and to their dependents."[158] The marital presumption of paternity is based on a recognition of the dynamics of an opposite-sex relationship—dynamics that are simply not present in a same-sex relationship.

Because paternity establishment is "part of the historical core of the institution of marriage,"[159] the lower court erred in finding that same-sex relationships "are consistent with the core of the history, tradition and practice of marriage in the United States."[160] This Court should overturn the lower court's due process ruling and find that same-sex marriages is not a fundamental right.

II. BECAUSE THE MARITAL PRESUMPTION OF PATERNITY IS INCOMPATIBLE WITH SAME-SEX UNIONS, THE STATE OF CALIFORNIA HAS A RATIONAL BASIS FOR LIMITING MARRIAGE TO A MAN AND A WOMAN

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[157] This justification for imposing the responsibilities of parenthood would not exist in same-sex marriages. If the state recognized a presumption of parentage in same-sex marriages, the presumption would have be "that the non-biological partner consented to the other partner either conceiving or giving birth to a child." Lewis v. Harris, 188 N.J. 415, 450 n.18 (2006).

[158] *Perry*, 704 F. Supp. 2d at 993.

[159] *Id.*

[160] *Id.*

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[161] This guarantee of equal protection coexists with the reality that some legislation makes legitimate and necessary distinctions between groups of individuals.[162] If a law targets a group that has been defined as a "suspect class," courts will apply heightened scrutiny in their review of the law, finding it invalid unless the government can show that the law advances a compelling state interest.[163] When a law creates a classification that does not target a suspect class, however, it is presumptively valid, and courts will uphold it as long as it is rationally related to some legitimate government interest.[164]

The Supreme Court "has never ruled that sexual orientation is a suspect classification for equal protection purposes."[165] Further, the Court indicated in *Lawrence v. Texas* that it was unlikely to do so, stating that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[166] This conclusion seems to preclude the application of strict

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[161] U.S. Const. amend. XIV, § 1.
[162] *See* Romer v. Evans, 517 U.S. 620, 631 (1996).
[163] *See, e.g.,* Clements v. Fashing, 457 U.S. 957, 963 (1982) (stating that the Court will depart from the usual rational basis review when a challenged statute places burdens upon "suspect classes" of persons or on a constitutional right that is deemed to be "fundamental.").
[164] *See, e.g.,* Heller v. Doe, 509 U.S. 312, 319-320 (1993).
[165] Citizens for Equal Protection v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006).
[166] Lawrence v. Texas, 539 U.S. 558, 559 (2003).

scrutiny review. In light of this fact, the lower court struck down Proposition 8 as a violation of the Equal Protection Clause by finding that it cannot withstand even rational basis review.[167]

The lower court erred, however, in finding that, "[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples" in regard to the legal functions of marriage.[168] Same-sex unions are incompatible with existing California marriage doctrines. California's statutorily-enshrined marital presumption of paternity states "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage" unless a blood test shows otherwise.[169] The California Court of Appeals has held that "a gender neutral reading of [the marital presumption statute], which presumes a husband is capable of impregnating his wife, would be absurd as applied to a same-sex cohabiting couple."[170]

Because application of the existing presumption to same-sex marriages would lead to inequitable, illogical outcomes, if California were to recognize same-sex marriages, the state would either have to exempt for them from the

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[167] *See Perry*, 704 F. Supp. 2d at 997 ("[T]he Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review.").
[168] *Id*. at 993.
[169] Cal. Fam. Code § 7540 (2011).
[170] In re M.C., 195 Cal. App. 4th 197, 217 n.9 (2011).

presumption or create a separate presumption for same-sex marriages, based on consent rather than biology.[171] In either case, one set of laws would apply to opposite-sex marriages and another would apply to same-sex marriages. This makes it clear that same-sex and opposite-sex couples are not similarly situated in regard to this crucial function of marriage.

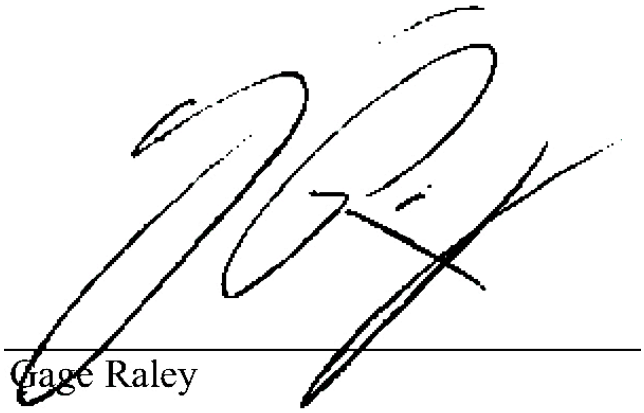
Because same-sex unions are incompatible with a central legal function of marriage, the state of California has a rational basis for limiting marriage to a man and a woman.

CONCLUSION

For the reasons stated above, *Amicus* respectfully asks this Court to reverse the lower court's decision and hold that Proposition 8 does not violate the Due Process and Equal Protection Clauses of the U.S. Constitution.

[171] *See Lewis*, 188 N.J. at 450 n.18 ("The presumption of parentage would apply differently for same-sex partners inasmuch as both partners could not be the biological parents of the child. It appears that the presumption in such circumstances would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child.").

Respectfully submitted,



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Date: October 27, 2011

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for leave to exceed the type-volume limitation pursuant to Circuit Rule 32-2 and contains 11,420 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word processing system used to generate the brief.

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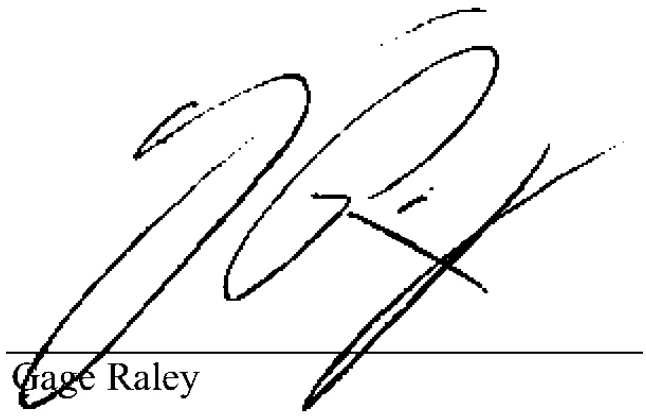

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 27, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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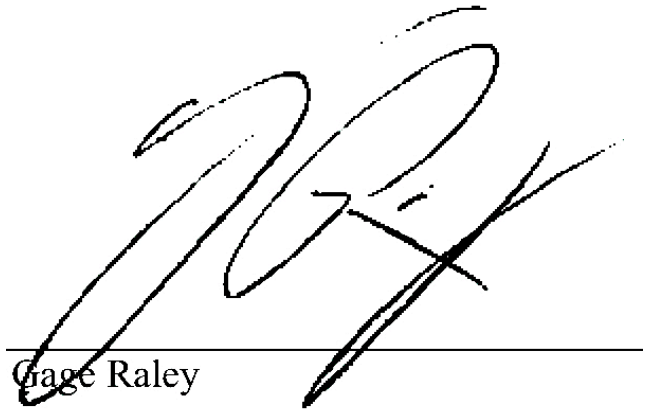

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