

Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality

Douglas NeJaime

In *Griswold v. Connecticut*,¹ the Supreme Court ruled that a Connecticut statute criminalizing the use of contraception violated married couples' privacy rights. On the decision's fiftieth anniversary, this brief Essay takes cues from a principle at stake in *Griswold*—that procreative liberty is integrally related to equality²—and shifts the focus to a new form of procreation, namely assisted reproductive technology (ART), and an emergent form of equality, namely sexual orientation equality.

With same-sex couples on the verge of nationwide access to marriage, new sites of conflict are emerging. The very legitimacy of same-sex family formation is being challenged by some now working to restrict ART. Even as the success of same-sex couples' legal claim to marriage rests in part on a *non-procreative* view of marriage supported specifically by *Griswold*, LGBT advocates also have articulated a *procreative* view of marriage tied to same-sex family formation through ART. This latter view, bolstered today by both important state family-law developments and recent same-sex marriage decisions, may ultimately provide the foundation for a reading of *Griswold* that supports same-sex couples' procreative rights in the battles just beginning to take shape.

I. THE EMERGING BATTLE OVER ART

As same-sex couples have gained access to marriage, some who opposed same-sex marriage have shifted their views, expressing support for marriage

1. 381 U.S. 479 (1965).

2. See Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349 (2015), <http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right> [<http://perma.cc/XZ7X-NRL5>]; see also Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843 (2007); Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013).

equality while attempting to limit its impact.³ In particular, some now accept same-sex marriage while maintaining their commitment to biological, gender-differentiated parenting. In other words, they abandon their opposition to same-sex couples' exclusion from marriage without abandoning a chief argument used to support that exclusion.

Consider the position of David Blankenhorn, a prominent social conservative leader. During his 2010 testimony in support of California's Proposition 8, Blankenhorn justified the same-sex marriage ban based on "[t]he need . . . to make it as likely as we can, that the biological parents are also the social and legal parents."⁴ In 2012, Blankenhorn announced his newfound support for same-sex marriage⁵ but nonetheless expressed hope that "both gays and straight people" can agree that "children born through artificial reproductive technology [should have] the right to know and be known by their biological parents."⁶ Of course, many same-sex couples have children through ART, and large numbers of LGBT parents are raising children to whom they are not biologically related. Blankenhorn thus accepted same-sex marriage while continuing to view families formed by same-sex couples as inferior.

Blankenhorn's Institute for American Values is currently devoting significant resources to curb ART,⁷ urging "an active public debate over whether it is ethical for the state to support the deliberate conception of children who will never have the chance to be raised by their biological parents."⁸ Elizabeth Marquardt, the director of the Institute's Center for Marriage and Families, recommends significant restrictions on access to ART.⁹ For same-sex couples spe-

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3. On this point, see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 820-23 (2014).
 4. Transcript of Proceedings at 2746, *Perry v. Schwarzenegger*, No. C 09-2292-VRW (N.D. Cal. Jan. 26, 2010).
 5. David Blankenhorn, Op-Ed, *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> [<http://perma.cc/4C94-9HAQ>]; see also *A Call for a New Conversation on Marriage*, PROPOSITIONS, Winter 2013, at 1, <http://americanvalues.org/catalog/pdfs/2013-01.pdf> [<http://perma.cc/LU7K-KHZZ>] ("We propose a new conversation that brings together gays and lesbians who want to strengthen marriage with straight people who want to do the same.").
 6. Blankenhorn, *supra* note 5.
 7. See Elizabeth Marquardt et al., *My Daddy's Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, INST. FOR AM. VALUES (2010), http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf [<http://perma.cc/4T7N-ZLJW>].
 8. See *id.* at 80.
 9. See Marquardt et al., *supra* note 7, at 77 (arguing that "[t]he U.S. should . . . end the practice of anonymous donation of sperm and eggs" and should, in family law, "question [the] principle . . . that 'intentional parenthood' is good for children"). For a compelling critique focused on just some of the arguments that Marquardt and others rely on, see Courtney Me-

cifically, she suggests adoption as the exclusive route to parenthood.¹⁰ To the extent ART is allowed—for both LGBT and non-LGBT individuals—Marquardt and her colleagues argue that “the state should treat [it] like adoption,”¹¹ rather than provide relatively open access or automatically recognize the intentional parents as the legal parents. Accordingly, for the vast majority of same-sex couples wanting children, the government would act as a gatekeeper to family formation—either through the traditional adoption regime or through a new ART-as-adoption regime.

If the prevailing view of same-sex marriage neatly separates marriage from procreation—a view that has been bolstered as a constitutional matter by *Griswold*—then the rise of marriage equality may do little to impede emerging efforts to restrict family formation through ART. But, as the remainder of this Essay explains, if same-sex marriage signifies family-based equality for lesbians and gay men, and if this equality is premised on the liberty interests at stake in same-sex couples’ procreative and familial decision-making, then marriage equality casts serious doubt on attempts to restrict access to ART and to privilege biological parenthood.

II. (SAME-SEX) MARRIAGE AND PROCREATION

Procreative arguments historically have been the province of opponents of LGBT rights. Those opposing same-sex marriage have long argued that marriage is uniquely about procreation and that the government therefore has a legitimate interest in excluding same-sex couples. Over time, this procreative justification has become more elaborate. Same-sex marriage opponents treat biological reproduction as special¹²—and in so doing, often advance arguments that reiterate sex stereotypes about the distinct roles of women and men in the family.¹³ On this view, marriage should prioritize biological, dual-gender parenting—the “optimal” model of parenting and one that same-sex couples cannot meet.¹⁴ In addition, some contend that marriage promotes “responsible

gan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality* (unpublished manuscript) (on file with author).

10. Elizabeth Marquardt, *One Parent or Five: A Global Look at Today’s New Intentional Families*, INST. FOR AM. VALUES 27 (2011), http://americanvalues.org/catalog/pdfs/one_parent_or_five.pdf [<http://perma.cc/VR22-X3D5>].

11. See Marquardt et al., *supra* note 7, at 78.

12. See Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1476–81 (2013).

13. See Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 92–95 (2013).

14. See, e.g., Motion of the Governor and Attorney General for Summary Judgment and Memorandum in Support at 34, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (No. 2:13-cv-217).

procreation” by channeling procreative sex into stable family units.¹⁵ Since same-sex couples, as the proponents of Virginia’s same-sex marriage ban argued, “bring children into their relationship[s] only through intentional choice and pre-planned action,”¹⁶ they have little need for marriage’s channeling function.

Advocates for marriage equality have developed two principal—and potentially inconsistent—responses to these procreative arguments. First, they have separated marriage from procreation, so that same-sex couples’ procreative capacity and methods of family formation are deemed immaterial to their right to marry. Here, *Griswold* has become a central precedent. By embracing married couples’ right to use contraception, *Griswold* underwrites a non-procreative model of marriage that focuses on marriage’s adult-centered, rather than child-centered, dimensions. As the Fourth Circuit explained in striking down Virginia’s ban on same-sex marriage, “The Supreme Court rejected the view that marriage is about only procreation in *Griswold v. Connecticut*, in which it upheld married couples’ right not to procreate and articulated a view of marriage that has nothing to do with children.”¹⁷ When procreative capacity is held to be irrelevant to marriage, same-sex and different-sex couples seem to be similarly situated, and procreative rationales for excluding same-sex couples appear unpersuasive.¹⁸

In other ways, however, LGBT advocates have made procreation and child-rearing central to same-sex couples’ claims to marriage. While opponents of same-sex marriage articulate a procreative view focused on biological, dual-gender parenting—or what some term “natural” reproduction¹⁹—supporters have focused on the intentional and functional families formed by same-sex couples, including through ART. If what matters is family formation—regardless of the method of conception—then procreative sex, biological parenting, and sexual orientation are all rendered immaterial.

One could imagine *Griswold* resonating here as well, presenting a challenge to the state’s authority to prescribe a particular mode of family formation. When the Court extended *Griswold* to unmarried individuals in *Eisenstadt v. Baird*, it announced “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally af-

15. See *id.* at 26.

16. *Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014).

17. *Id.* at 380.

18. See Douglas NeJaime, *Windsor’s Right To Marry*, 123 YALE L.J. ONLINE 219 (2013), <http://www.yalelawjournal.org/forum/windsors-right-to-marry> [<http://perma.cc/BJQ5-VV8B>].

19. See, e.g., Janna Darnelle, *Breaking the Silence*, PUB. DISCOURSE (Sept. 22, 2014) <http://www.thepublicdiscourse.com/2014/09/13692> [<http://perma.cc/T8YK-J64M>] (“There is not one gay family that exists in this world that was created naturally.”).

fecting a person as the decision whether to bear or beget a child.”²⁰ Read through the lens of *Eisenstadt*, *Griswold* recognizes the constitutional dimensions of procreative decision-making—whether, and under what conditions, to engage in procreative activity—and may therefore cast doubt on government justifications that privilege specific forms of procreation. This reading of *Griswold* remains largely undeveloped in same-sex marriage jurisprudence.

Instead, LGBT advocates rely on state family-law developments to support their procreative vision of marriage.²¹ Around the time that *Griswold* and *Eisenstadt* were decided, ART began to emerge in family-law regulation. In 1968, the California Supreme Court held that a husband who consented to his wife’s insemination was the legal father of the resulting child.²² In 1973, the National Commission on Uniform State Laws (later the Uniform Law Commission) promulgated the Uniform Parentage Act, which included a provision on alternative insemination recognizing the mother’s husband as the legal father and foreclosing the sperm donor’s paternity claim.²³ States in turn regulated donor insemination by statute.²⁴

Over time, the availability and regulation of ART expanded.²⁵ The Uniform Law Commission, as well as some states, included unmarried individuals within the reach of their ART provisions.²⁶ And states gradually began to recognize nonbiological, unmarried partners as legal or equitable parents, even without adoption.²⁷ State family-law regimes also began to accommodate additional forms of ART. While some states rejected surrogacy,²⁸ others accepted it.²⁹ In addition, the Uniform Law Commission promulgated model statutes regulating surrogacy agreements and recognizing intended parents.³⁰

20. 405 U.S. 438, 453 (1972).

21. As I show in other work, LGBT advocates rely on the fact that same-sex couples have formed families with children and have been recognized as parents under state family law as a justification for their inclusion in marriage. See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016).

22. *People v. Sorensen*, 437 P.2d 495 (Cal. 1968).

23. UNIF. PARENTAGE ACT § 5 (1973) (revised 2000).

24. See, e.g., MINN. STAT. ANN. § 257.56(2) (WEST 2007); MO. ANN. STAT. § 210.824(2) (WEST 2004).

25. See CARLOS A. BALL, *THE RIGHT TO BE PARENTS* 6 (2012).

26. See, e.g., UNIF. PARENTAGE ACT §§ 702, 703 (2000) (amended 2002); 50 ILL. COMP. STAT. ANN. 40/3(b) (West 2009); N.J. STAT. ANN. § 9:17-44(b) (West 2002).

27. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

28. See, e.g., N.Y. Stat. § 122 (2010); *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

29. See, e.g., CAL. FAM. CODE § 7630(f) (2006); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

30. See UNIF. PARENTAGE ACT § 801; see also UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, at 1, 10 (1988).

With these changes, same-sex couples formed families with children and increasingly gained parental recognition under state law. And of course, different-sex couples also used ART to have children.³¹ These developments ultimately formed the basis on which to argue that same-sex couples are similarly situated to their different-sex counterparts *for the purposes of a model of marriage that prioritizes procreation and childrearing*.

As I explore more extensively in other work,³² courts adjudicating same-sex couples' marriage claims have increasingly found differences between modes of reproduction to be immaterial. For instance, the Seventh Circuit rejected the argument that marriage's purpose "is to encourage child-rearing environments where parents care for their biological children in tandem."³³ The court questioned the relevance of "the qualifier 'biological'" and emphasized the commonalities across families "raising children."³⁴ More specifically, the growing acceptance of ART suggests that the government does not have an interest in promoting biological parenthood and instead merely seeks to discriminate based on sexual orientation. As the Ninth Circuit reasoned in striking down state laws barring same-sex marriage, "if Idaho and Nevada want to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by single people. Neither state does so."³⁵ Because these states, in their family-law regimes, had accepted families formed through ART, they could not point to biological reproduction as a distinctive and salient feature of marital family formation for the purposes of excluding same-sex couples from marriage. In deeming differences based on procreation immaterial, courts adopt a vision of marriage and family that includes intentional procreation and functional parenthood—thereby validating same-sex-couple-headed families.

III. ART AFTER MARRIAGE EQUALITY

Read in this light, it becomes clear that same-sex marriage jurisprudence signals emerging equality and liberty principles that favor same-sex family formation. While Blankenhorn and his colleagues attempt to separate same-sex marriage from same-sex procreation and parenting, these various aspects of family life are closely related. The principles of sexual orientation equality and familial liberty bolstered by marriage equality embrace same-sex couples' pro-

31. Of course, adoption long had represented a route to nonbiological parenthood.

32. See NeJaime, *supra* note 21.

33. Baskin v. Bogan, 766 F.3d 648, 663 (7th Cir. 2014).

34. *Id.*

35. Latta v. Otter, 771 F.3d 456, 472 (9th Cir. 2014).

creative and parental capacities in ways that may drive developments in the law of ART.

As states accommodate the use of ART by different-sex couples, the constitutional principles on which same-sex marriage is premised may compel those states to include same-sex couples on equal terms. Consider developments in Florida, a state that has traditionally been hostile to LGBT parents.³⁶ The state had increasingly accepted ART for different-sex married and unmarried parents, while excluding same-sex parents. More specifically, the state had provided that egg and sperm donors relinquish their claims to parental rights unless they are part of a “commissioning couple,” defined as “the intended mother and father.”³⁷ The Florida Supreme Court ruled in 2013 that the state cannot allow different-sex couples to qualify as “commissioning couple[s]” but withhold that route to intent-based parentage from same-sex couples.³⁸ The court based its ruling on federal constitutional grounds, and in doing so invoked *United States v. Windsor*,³⁹ which struck down Section 3 of the federal Defense of Marriage Act. *Windsor*, as the Florida Supreme Court understood it, recognized same-sex couples’ interests in familial equality and liberty.⁴⁰ As courts and lawmakers come to appreciate the equal status of families headed by same-sex couples, it becomes more difficult to justify denying “same-sex couples . . . the same opportunity as heterosexual couples to demonstrate [parental] intent.”⁴¹ Here, the expansion of same-sex couples’ procreative and parental rights emerges from a reading of sexual orientation equality pushed in part by the growing acceptance of same-sex marriage.

The constitutional embrace of same-sex family formation may extend beyond simply the equalization of ART regulation and instead yield greater access to—and recognition of parentage flowing from—ART more generally. Consider debates over the regulation of surrogacy. While lesbian couples have long used alternative insemination to have children, gay male couples, as well as lesbian couples seeking “co-maternity,” have increasingly turned to surrogacy.⁴² Yet in many states surrogacy continues to be legally restricted.⁴³ In a

36. See *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida ban on “adoption by any ‘homosexual’ person”).

37. FLA. STAT. § 742.13(2) (2012).

38. *D.M.T. v. T.M.H.*, 129 So. 3d 320, 330 (Fla. 2013) (recognizing the parental status of the genetic mother over the objection of her former partner, who was the birth mother).

39. 133 S. Ct. 2675 (2013).

40. *D.M.T.*, 129 So. 3d at 337.

41. *Id.* at 343.

42. See Dana Berkowitz, *Gay Men and Surrogacy*, in *LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE* 83 (Abbie E. Goldberg & Katherine R. Allen eds., 2013) (“[C]linicians need to acknowledge that surrogate parenthood is increasingly common for gay men, both in the USA and abroad.”); Lauren B. Paulk, *Embryonic Parenthood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22

world where same-sex families enjoy equal constitutional status and where ART is understood as a constitutionally legitimate form of procreation, access to ART, including through surrogacy, becomes an issue of both equality and liberty. Laws that limit access to surrogacy and deny parental recognition to intended parents may arise out of and perpetuate the unequal treatment of same-sex families and may restrict the equal procreative liberty of same-sex couples.⁴⁴ In a post-marriage-equality world, states that prohibit surrogacy—or that require adoption rather than recognizing intentional parentage—may be pushed toward legalization and parental recognition. Indeed, recent debate in New York over its longstanding surrogacy ban has been framed around both procreative liberty and sexual orientation equality.⁴⁵

Reading ART through the lens of same-sex family formation points toward a possible future in which ART integrates itself into the constitutional order as a matter of both equality and liberty. This goes beyond efforts simply to ensure even-handed access to, and regulation of, ART.⁴⁶ Rather, understanding procreation in the context of same-sex families suggests that ART, as an acceptable and available mode of family formation, is essential to sexual orientation equality and to same-sex couples' procreative liberty.

This reading also reveals how *Griswold* may ultimately come to support procreative rights that include ART.⁴⁷ As new conflicts over LGBT rights pro-

AM. U. J. GENDER SOC. POL'Y & L. 781, 788 (2014) ("Co-maternity (also called ovum sharing) is a form of surrogacy sometimes used by same-sex female couples in order to allow both parties to participate in the biological process of procreation.").

43. See, e.g., D.C. CODE § 16-402 (2012); MICH. COMP. LAWS. § 722.855 (2011); N.Y. DOM. REL. LAW § 122 (McKinney 2010).
44. Of course, there are countervailing interests, including sex equality and the race and class dimensions of surrogacy practices, which should be considered in debates over surrogacy.
45. See Anemona Hartocollis, *And Surrogacy Makes Three: In New York, a Push for Compensated Surrogacy*, N.Y. TIMES, Feb. 19, 2014, <http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html> [http://perma.cc/XU8F-66YK].
46. Radhika Rao argues that the state should not discriminate in access to ART based on sex, marital status, and sexual orientation. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008). But Rao is clear that the state has no obligation to allow ART. *Id.* This positions heterosexual family formation as a baseline and fails to appreciate the importance of ART to same-sex family formation. See *id.* at 1476.
47. Legal scholars debate the extent to which ART should be understood as constitutionally protected. Compare JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 39-40 (1994) (articulating the right to procreate through reproductive technology as a constitutionally protected substantive due process right), and John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1491-94 (2008) (same), with Rao, *supra* note 46, at 1462 ("[T]he 'liberty' protected under the Due Process Clause of the Fourteenth Amendment doesn't appear to include a fundamental right to use ARTs."), and I. Glenn Cohen, *The Con-*

voke constitutional contestation, LGBT advocates will look to landmark constitutional decisions for support. In *Griswold*, they may find a powerful challenge to the state's authority to dictate decisions regarding procreation and family formation. Accordingly, *Griswold's* future for LGBT rights may have much less to do with non-procreative sex and a non-procreative view of marriage and much more to do with procreative decision-making and familial equality.

CONCLUSION

Fifty years after *Griswold*, the importance of appreciating the relationship between procreation and equality remains. Recent high-profile disputes over the Affordable Care Act's contraceptive coverage requirement demonstrate the urgency of seeing the sex equality dimensions of contraception.⁴⁸ At the same time, emerging debates over ART suggest that conflict over the meaning of sexual orientation equality is moving further into the domains of reproduction and parenting. Here, *Griswold's* meaning may shift from the fairly limited non-procreative view featured in recent same-sex marriage opinions to a more expansive view, driven in part by the logic of same-sex marriage, that recognizes the equality and liberty interests at stake in decisions regarding not simply whether, but how, to procreate.

Douglas NeJaime is Professor of Law, UC Irvine School of Law; Visiting Professor of Law, UCLA School of Law (2014-15). For helpful comments, he thanks Melissa Murray, Erica Newland, Neil Siegel, and Reva Siegel.

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stitution and the Right Not to Procreate, 60 STAN. L. REV. 1135, 1195 n.244 ("It is far from certain that *Skinner* is applicable in the realm of assisted reproduction . . .").

48. See Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J. F. 324 (2015), <http://www.yalelawjournal.org/forum/overlooking-equality-on-the-road-to-griswold> [<http://perma.cc/G5GA-2NS2>]; Siegel & Siegel, *supra* note 2.