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## SPERM RULES

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### ABSTRACT

*This Article considers a body of reproductive health care rules that remain overlooked and undertheorized—the regulation of gametes, that is, sperm and ova used in assisted reproduction. The proposed gamete rules are wide-ranging, from calls to require collection and disclosure of medical history information, to proposals to end anonymous gamete donation, to the enactment of “family limits,” to bills that would require donors to disclose their medical records. In the last several years, there has been an increase in the number of gamete bills introduced in and enacted by state legislatures.*

*To elucidate the doctrinal, as well as the theoretical stakes, this Article situates recent efforts to regulate gametes within a historical context. This intervention uncovers a number of novel insights. First, this context uncovers previously obscured ways that gamete rules can undermine established liberty interests. Imposing new restrictions on gametes can impede decisions about whether, when, and how to procreate. The implications, however, do not stop there. Gamete rules threaten to inflict more sweeping downstream theoretical ripple effects on other existing liberty protections, including the right to marry.*

*Second, a careful explication of this history exposes how this liberty retrenchment will not be felt equally. LGBTQ-parent families and unpartnered women—who account for 75% of all users of donor sperm today—will disproportionately feel the effects of gamete regulation. For some, this differential impact is an intended feature, rather than a bug, of gamete reform. For these advocates, the objection to assisted reproduction with donor gametes and the opposition to LGBTQ family formation are two sides of the same coin. Both are rooted in an objection to families that defy deeply rooted gender scripts associated with “traditional” marriage and the family. In this way, gamete rules, and sperm rules in particular, operate as a backdoor channel to reestablish the primacy of the bionormative family. Drawing from this*

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*uncovered story, this Article closes by beginning to chart a more just path forward.*

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## INTRODUCTION

Much attention has been directed to emerging efforts to restrict abortion care in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> This Article examines another form of reproductive health care regulation that, to date, remains largely obscured and undertheorized<sup>2</sup>—the regulation of gametes, that is, the sperm and ova used in assisted reproduction.

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<sup>1</sup> 142 S. Ct. 2228 (2022); see, e.g., Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. 1068, 1074 (2025); Melissa Murray, *Making History*, 133 YALE L.J.F. 990, 996 (2024); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 729-30 (2024); Nicole Buonocore Porter, *Symposium Introduction: The Effect of Dobbs on Work Law*, 27 EMP. RTS. & EMP. POL'Y J. 56, 57 (2024); Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1091-92 (2023); Aaron Tang, *Lessons from Lawrence: How "History" Gave Us Dobbs—and How History Can Help Overrule It*, 133 YALE L.J.F. 65, 65 (2023); Carol Sanger, *The Rise and Fall of a Reproductive Right: Dobbs v. Jackson Women's Health Organization*, 56 FAM. L.Q. 117, 122 (2023); Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics After Dobbs*, 76 SMU L. REV. 27, 27 (2023); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 1 (2023).

<sup>2</sup> There is a limited body of literature on this topic, and almost all the pieces were written before *Dobbs*; hence, they were written in the context of a different legal and political backdrop. See, e.g., NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 17-18 (2009) [hereinafter CAHN, TEST TUBE FAMILIES] (exploring how gametic material should be regulated and related legal issues); Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183, 189-90 (2015) [hereinafter Cahill, *Oedipus Hex*] (critiquing prominent argument offered to justify limiting access to assisted reproduction); Courtney Megan Cahill, *Universalizing Anonymity Anxiety*, 3 J.L. & BIOSCIENCES 647, 647 (2016) [hereinafter Cahill, *Anonymity*] (questioning "desirability and constitutional validity of regulating the practices of alternative reproduction in order to fulfill normative ideals about family, identity, and their interrelationship"); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 371 (2012) [hereinafter Cahn, *New Kinship*] (proposing model of legal protection for "donor family networks"); Naomi Cahn & Sonia M. Suter, *The Art of Regulating ART*, 96 CHI.-KENT L. REV. 29, 30 (2021) [hereinafter Cahn & Suter, *Regulating ART*] (examining approaches to regulating assisted reproduction); Sonia M. Suter, *The Limits of Empirical Data: How to Understand Survey Results with Respect to Gamete Donor Anonymity*, 3 J.L. & BIOSCIENCES 377, 382 (2016) (examining data on stakeholders' attitudes toward anonymous donation and data's relevance to policymakers); Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 220 (2009) [hereinafter Suter, *Baby Markets*] (arguing "commodification of reproductive material is intrinsically harmful" and rejecting "completely free and unfettered markets" for reproductive materials).

In recent years, stories centering the experiences of individuals conceived with donor gametes have appeared on the pages of *The Wall Street Journal*,<sup>3</sup> *The Washington Post*,<sup>4</sup> and *The New York Times Magazine*.<sup>5</sup> Some of the individuals featured in these articles did not learn until later in life that they were donor conceived. For some of these individuals, altering disclosure practices is a critical concern; for others, a key issue is their desire for more information about their gamete donors.<sup>6</sup>

Other recent media accounts highlight particularly egregious practices. Consider the story of Dr. Donald Cline, the subject of the 2022 Netflix movie *Our Father*.<sup>7</sup> The movie reveals that Dr. Cline used his own sperm to treat dozens of fertility patients without their knowledge or consent.<sup>8</sup>

Prompted by these and other experiences, some donor-conceived people are becoming involved in pushing for new regulations governing gamete donation. For example, several donor-conceived people formed the U.S. Donor Conceived Council (“USDCC”) in late 2021.<sup>9</sup> USDCC is dedicated to “increas[ing] awareness of” and “advanc[ing] change that promotes” the interests of donor-conceived people.<sup>10</sup> These stories and the calls to respond to them have captured the attention of both the public and legislators.<sup>11</sup> Indeed,

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<sup>3</sup> See, e.g., Amy Dockser Marcus, *As DNA Donors’ Secrets Emerge, What Should the Children Know?*, WALL ST. J. (May 27, 2022, at 11:03 ET) [hereinafter Marcus, *Secrets*], <https://www.wsj.com/articles/as-dna-donors-secrets-emerge-what-should-the-children-know-11653663778>; Amy Dockser Marcus, *Push to Vet Sperm Donors’ Health Information Gains Traction*, WALL ST. J. (July 13, 2022) [hereinafter Marcus, *Push to Vet*], <https://www.wsj.com/story/push-to-vet-sperm-donors-health-information-gains-traction-4a4a1dec>.

<sup>4</sup> Amber Ferguson, *America Has a Black Sperm Donor Shortage. Black Women Are Paying the Price.*, WASH. POST (Oct. 20, 2022), <https://www.washingtonpost.com/business/2022/10/20/black-sperm-donors>.

<sup>5</sup> Emily Bazelon, *Why Anonymous Sperm Donation Is Over, and Why That Matters*, N.Y. TIMES MAG. (Dec. 8, 2023), <https://www.nytimes.com/2023/12/03/magazine/anonymous-sperm-donation-genetic-testing.html>.

<sup>6</sup> See, e.g., Marcus, *Secrets*, *supra* note 3.

<sup>7</sup> OUR FATHER, Netflix (Blumhouse 2022); see also Lydia Wang, *Everything to Know About the Fertility Fraud Documentary ‘Our Father’: Inside the Sinister True Story of Donald Cline*, TUDUM BY NETFLIX (Apr. 15, 2022), <https://www.netflix.com/tudum/articles/our-father-true-story-don-cline-details> [<https://perma.cc/8AH7-KBP2>] (“*Our Father* tells the story of Jacoba Ballard and her half-siblings—over 50 people in total—who discovered that they were all paternally related through Donald Cline, a former fertility doctor in Indianapolis.”).

<sup>8</sup> OUR FATHER, *supra* note 7; Wang, *supra* note 7.

<sup>9</sup> Marcus, *Secrets*, *supra* note 3; ABOUT USDCC, U.S. DONOR CONCEIVED COUNCIL, <https://www.usdcc.org/about> [<https://perma.cc/U84T-88BQ>] (last visited Dec. 21, 2025).

<sup>10</sup> See U.S. DONOR CONCEIVED COUNCIL, *supra* note 9.

<sup>11</sup> See *infra* notes 140-43 and accompanying text.

just one year after its founding, USDCC celebrated the enactment of the first law in the United States to ban anonymous gamete donation.<sup>12</sup>

The gamete reform proposals offered by USDCC and others are numerous and wide-ranging. They include proposals to require the collection and disclosure of medical and family history information about gamete donors;<sup>13</sup> legislation to prohibit “anonymous” gamete donation;<sup>14</sup> calls to impose “family limits,” that is, limits on the number of families that can be created using gametes from a single donor;<sup>15</sup> efforts to end compensation for gamete donors;<sup>16</sup> and bills that would require donors to disclose their medical records.<sup>17</sup> In the last several years, there has been a marked escalation in the number of gamete bills being considered.<sup>18</sup> These introduced bills are also increasingly likely to be enacted.<sup>19</sup>

For some advocates and stakeholders—including individuals who were conceived with third-party gametes—demands for reform emerge from an authentic sense of injury and pain. Their concerns and calls for change warrant careful consideration. Indeed, some legal reform is warranted and appropriate. But like with other types of reproductive health care and family law rules, the stakes are high. Gamete regulations affect a range of potential stakeholders. In addition to the children conceived through assisted reproduction, gamete rules also implicate the interests of intended parents, gamete donors, and fertility care providers.<sup>20</sup>

Critically, the interests of these varied stakeholders include ones of constitutional magnitude. Family laws—including reproductive health care rules—can implicate deeply personal and fundamental decisions about when, how,

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<sup>12</sup> Donor-Conceived Persons and Families of Donor-Conceived Persons Protection Act, COLO. REV. STAT. § 25-57-101; *Making History: Colorado SB 22-224*, U.S. DONOR CONCEIVED COUNCIL (May 13, 2022), <https://www.usdcc.org/2022/05/13/making-history-colorado-sb224> [<https://perma.cc/5BFR-HJWB>].

<sup>13</sup> See COLO. REV. STAT. § 25-57-101; see also *infra* notes 140-49 and accompanying text.

<sup>14</sup> See COLO. REV. STAT. § 25-57-106(1); see also *infra* notes 150-57 and accompanying text.

<sup>15</sup> See *infra* notes 312-19 and accompanying text; see also *infra* note 420.

<sup>16</sup> See *infra* notes 116, 133, 421.

<sup>17</sup> See *infra* note 153.

<sup>18</sup> See *infra* Section II.B.

<sup>19</sup> See *infra* notes 127-43 and accompanying text (noting all but two of fifteen states with fertility fraud statutes enacted them in last five years).

<sup>20</sup> See *infra* Part I; see also David D. Meyer, *Family Law Equality at a Crossroads*, 2013 MICH. ST. L. REV. 1231, 1245 (2013) [hereinafter Meyer, *Crossroads*] (“[D]isputes within families can present conflicts among competing rights holders . . .”). Cf. Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2174-77 (2007) (“[F]amily law may simultaneously pursue multiple purposes, some of which may be in conflict with each other or point in different policy directions . . .”).

and whether to procreate and form families.<sup>21</sup> Indeed, most of the interests recognized as protected liberty interests under the Due Process Clause involve profound family-formation decisions. As the Court put it in *Lawrence v. Texas*,<sup>22</sup> they include “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>23</sup> Moreover, family laws often implicate equality concerns. For this reason, many of the Court’s key equal protection decisions are family law decisions.<sup>24</sup> These decisions include *Loving v. Virginia*,<sup>25</sup> *Orr v. Orr*,<sup>26</sup> *Levy v. Louisiana*,<sup>27</sup> and *Obergefell v. Hodges*.<sup>28</sup>

Because family law rules frequently implicate constitutional liberty and equality principles, courts, including the Supreme Court, regularly play a role in reviewing and shaping them. As Douglas NeJaime explains, these constitutional values not only shape “top-down” constitutionally-based court decisions about the permissibility of family law rules; these values also shape “aspects of state family law . . . in more subtle ways.”<sup>29</sup> This includes the ways in which constitutionally-based liberty and equality principles are vindicated through legislative lawmaking.<sup>30</sup>

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<sup>21</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). To be sure, this body of law is in a state of flux. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>22</sup> 539 U.S. 558 (2003).

<sup>23</sup> *Id.* at 574.

<sup>24</sup> *Meyer*, *supra* note 20, at 1233 (“[E]volving notions of equality in constitutional law have also been an important spur for family law reform.”).

<sup>25</sup> 388 U.S. 1, 12 (1967) (striking down Virginia’s anti-miscegenation law because it constituted impermissible race discrimination).

<sup>26</sup> 440 U.S. 268, 270-71, 283 (1979) (holding Alabama law providing “husbands, but not wives, may be required to pay alimony upon divorce” constituted impermissible sex discrimination).

<sup>27</sup> 391 U.S. 68, 72 (1968) (striking down under Equal Protection Clause Louisiana wrongful death statute permitting “legitimate” children, but not “illegitimate” ones, to recover for wrongful death of parent).

<sup>28</sup> 576 U.S. 644, 672 (2015) (“The right of same-sex couples to marry . . . is derived, too, from [the Fourteenth] Amendment’s guarantee of the equal protection of the laws.”).

<sup>29</sup> Douglas NeJaime, *The Family’s Constitution*, 32 CONST. COMMENT. 413, 415, 418 (2017) [hereinafter NeJaime, *Family’s Constitution*].

<sup>30</sup> See, e.g., UNIF. PARENTAGE ACT, prefatory note (UNIF. L. COMM’N 2017) (amending uniform act after *Obergefell* “to ensure the equal treatment of children born to same-sex couples”); UNIF. PARENTAGE ACT, prefatory note (UNIF. L. COMM’N 1973) (providing model statutory scheme for enactment by state legislatures to “provid[e] substantive legal equality for all children, regardless of the marital status of their parents,” and, in turn, to “fulfill[] the mandate of the Constitution”); see also William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1886 (2012) (discussing how “government has a normative role to play in

To identify and elucidate the doctrinal as well as the theoretical stakes implicated by gamete laws, this Article locates this contemporary reproductive justice issue within a historical background. Situating the conversation in this way uncovers a number of novel insights.

First, this context reveals how gamete regulation is not felt equally across all populations.<sup>31</sup> While these laws are typically facially neutral—applying to all gamete donors and all users of donated gametes—their effects are not experienced equally. Today, approximately 75% of all users of donor sperm—the most commonly used donor gamete<sup>32</sup>—are LGBTQ people and unpartnered women.<sup>33</sup> Thus, gamete rules are felt disproportionately by these groups—groups which have long been the subject of discrimination and exclusion.

This Article also uncovers that, for some, this differential impact is a feature rather than a bug of gamete rules. For these advocates, the objection to assisted reproduction with donor gametes and the opposition to LGBTQ family formation are simply two sides of the same coin. Both concerns are rooted in complaints about families who defy stereotypical gender- and biology-based views about parenthood and the family. Consider Project 2025, the “Presidential Transition Project,” which directs that: “In the context of . . . reproductive technologies, [Health and Human Services] HHS policies

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guiding and sometimes correcting today’s plurality of family forms”); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2266 (2017) [hereinafter NeJaime, *Nature of Parenthood*] (“Slowly, American law departed from the harshest aspects of its common-law origins. Legislatures and courts began to recognize a legal relationship between a mother and her ‘illegitimate’ child . . .”).

<sup>31</sup> Taking account of this kind of differential impact is consistent with a reproductive justice approach, which centers the impact of law and policy on the people most impacted within the social context in which they live. Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, 4 (2007) (“The Reproductive Justice framework analyzes how the ability of any woman to determine her own reproductive destiny is linked directly to the conditions in her community . . .”); see also Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851, 1885 (2022) (“[R]eproductive justice understands how intersecting factors, such as race and disability [and sexual orientation], constrain the reproductive freedom of marginalized populations.”).

<sup>32</sup> See *infra* note 106 and accompanying text.

<sup>33</sup> See, e.g., Daniela Diego, Alexandra Medline, Lisa M. Shandley, Jennifer F. Kawwass & Heather S. Hipp, *Donor Sperm Recipients: Fertility Treatments, Trends, and Pregnancy Outcomes*, 39 J. ASSIST. REPROD. & GENET. 2303, 2305 (2022) (reporting among patients who used donor sperm in assisted reproduction between 2014 and 2020, almost a quarter (23.5%) were single, and over half (50.3%) were in same-sex female partnerships); Bazelon, *supra* note 5 (“Lesbian couples and single parents make up 70 percent of the people who now use sperm donors, according to a 2022 study of an assisted-reproduction clinic.”). Most children conceived with donor gametes are conceived with donor sperm. As of 2015, only approximately 8,000 children had been conceived with donor eggs. See *infra* note 106.

should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them.”<sup>34</sup> By iterating the view that children need to be raised by their biological mother and father, these arguments reproduce deeply rooted gender scripts associated with “traditional” marriage and the family.

For some, the proffered concerns are not only gender-based; they are also gender-specific, resting on particular fears about “fatherless” children. Consider the arguments of David Blankenhorn, a key opponent of both donor gametes and LGBTQ-parent families. Blankenhorn argues that “dads are essential for the well-being of children and society.”<sup>35</sup> “[T]he rise of the Sperm Father,” Blankenhorn continues, “constitutes nothing less than father killing, the witting enactment of cultural patricide.”<sup>36</sup>

In this way, gamete rules—and sperm rules in particular—operate as a backdoor channel to reestablish the primacy of a vision of the family rooted in reproductive biology.<sup>37</sup> On this view, gamete rules are examples of what

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<sup>34</sup> Roger Severino, *Department of Health and Human Services*, in *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE, PROJECT 2025*, at 449, 451 (Paul Dans & Steven Groves eds., 2023), [https://static.heritage.org/project2025/2025\\_MandateForLeadership\\_FULLL.pdf](https://static.heritage.org/project2025/2025_MandateForLeadership_FULLL.pdf) [<https://perma.cc/MQ3S-RZLX>]; see also Jordan Boyd, *Netflix’s ‘The Man With 1000 Kids’ Shows the Dangers of Serial Sperm Sale*, *FEDERALIST* (July 10, 2024), <https://thefederalist.com/2024/07/10/netflixs-the-man-with-1000-kids-shows-the-dangers-of-serial-sperm-sale> [<https://perma.cc/56WY-PLB5>] (“Reproductive technologies, such as making babies with supplied sperm that come with no relational strings, are morally problematic because they sideline the natural right children have to a mother and father in favor of adults’ selfish desires.”); Emma Waters, *Technology Can Make Us Less Human, If We Let It*, *HERITAGE FOUND.* (Feb. 1, 2024), <https://www.heritage.org/marriage-and-family/commentary/technology-can-make-us-less-human-if-we-let-it> [<https://perma.cc/F7W8-VMMC>] (asserting IVF and surrogacy retrieve “[t]he view of children as the property of their parents”); Alana S. Newman, *Children’s Rights, or Rights to Children?*, *PUB. DISCOURSE* (Nov. 10, 2014), <https://www.thepublicdiscourse.com/2014/11/13993> [<https://perma.cc/XBD8-WUNP>] (“Third-party reproduction is inherently unethical, because it serves as a market to manufacture children for any adult who wants them, purposely severing the biological parent-child relationship for the sake of profit.”).

<sup>35</sup> *Father Hunger*, *SYD. MORNING HERALD*, Sep. 2, 1995, at 1, 1995 WLNR 5824033. Notably, David Blankenhorn is the author of the book *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995) [hereinafter *BLANKENHORN, FATHERLESS AMERICA*].

<sup>36</sup> *BLANKENHORN, FATHERLESS AMERICA*, *supra* note 35, at 184; see also Bettina Arndt, *In the Name of the Father*, *AGE* (Melb.), Dec. 21, 2002, at 4, 2002 WLNR 15439727.

<sup>37</sup> See, e.g., Cahill, *Oedipus Hex*, *supra* note 2, at 226 (making similar point about use of incest justification for gamete regulation).

Reva Siegel calls “preservation through transformation.”<sup>38</sup> They offer newly packaged reasoning that iterates key elements of the bionormative family.<sup>39</sup>

Second, this context uncovers previously obscured ways that gamete rules can undermine established liberty interests. Current proposals—particularly if enacted in combination—may restrict access to an increasingly utilized method of family creation. Consider the impact of “family limits.” At one major sperm bank today, that purports to follow existing industry “family limit” recommendations, a vial of sperm from an anonymous donor costs \$1,195; in contrast, at the same bank, sperm from a donor with a family limit of one costs \$70,000, and sperm from a donor with a family limit of two to ten costs \$35,000 per unit.<sup>40</sup> It is hard to know exactly what accounts for this dramatic price increase. Nonetheless, this suggests that lowering family limits could impact costs and, thus, access.<sup>41</sup>

In this way, gamete rules—individually and collectively—can directly affect one of the most profound liberty interests—the decision about whether, when, and how to procreate. Again, this rights retraction will be felt most acutely by families, including LGBTQ-parent families, who defy traditional stereotypes regarding the nature of motherhood and fatherhood. But the liberty implications do not stop there. Legal and social developments regarding LGBTQ parenting preceded and laid the foundation for the extension of other fundamental due process rights to LGBTQ people, including the right to marry.<sup>42</sup> This Article shows how the reverse may also be true. That is, this

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<sup>38</sup> Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 106 YALE L.J. 2117, 2119 (1996) [hereinafter Siegel, *Rule of Love*]; see also J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2326 (1997) (“[S]tatus hierarchies can manipulate or work around other kinds of legal distinctions to reproduce themselves in ever new forms.”).

<sup>39</sup> Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2553 (2015) [hereinafter NeJaime & Siegel, *Conscience Wars*] (explaining “preservation through transformation” occurs “when an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that preserve elements of the challenged regime” (quoting Siegel, *Rule of Love*, *supra* note 38, at 2119)).

<sup>40</sup> *Pricing*, CAL. CRYOBANK, <https://www.cryobank.com/pricing> [<https://perma.cc/H8N5-RWBW>] (last visited Dec. 21, 2025).

<sup>41</sup> Increased costs may push some people to use sperm from unregulated sources, or to turn to sexual intercourse as a means of achieving pregnancy, thereby increasing medical risks and legal risks for the family. See, e.g., Naomi Cahn & Sonia M. Suter, *Developing a Reproductive Justice Approach to Regulating Formal and Informal Sperm Donation*, in SEMINAL: ON SPERM, HEALTH, AND POLITICS (Rene Almeling, Lisa Campo-Engelstein & Brian T. Nguyen eds., 2025).

<sup>42</sup> See, e.g., Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. F. 197, 200 (2016) [hereinafter Joslin, *Marriage Equality*]; see also Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185,

Article reveals how restrictions on the ability of LGBTQ people to become parents may be leveraged to imperil other liberty interests of LGBTQ people.<sup>43</sup> These insights uncover un- or underappreciated ways<sup>44</sup> that these contemporary narratives in support of gamete regulation can inflict and—for some advocates, are intended to inflict—distinctive and profound harms on a key subset of users of fertility care.<sup>45</sup> To be clear, just because a particular rule might have a negative effect on some stakeholders does not necessarily mean the proposal should be rejected. Some regulation of gametes is warranted and appropriate. But, this Article argues that as policymakers decide the contours of this regulation, they ought to take account of these liberty and equality impacts, along with the rationales in favor of them.

This intervention is not only important, it is timely. Today, fifteen states spanning the ideological spectrum—Arkansas, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Nevada, Ohio, Texas, Utah, and Washington—have “fertility fraud” laws, imposing retrospective penalties for past behavior of fertility care providers and gamete donors.<sup>46</sup> In all but two of these fifteen states, the laws were enacted within the last five years.<sup>47</sup> Seven states—California, Colorado, Connecticut, Oregon, Rhode Island, Utah, and Washington—have laws imposing new, prospective requirements on gamete banks and fertility centers.<sup>48</sup> Six of the seven were enacted since 2018.<sup>49</sup> Gamete regulations are the subject of multiple recently promulgated model laws.<sup>50</sup> These newly available models include one promulgated

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1230 (2016) [hereinafter NeJaime, *Marriage Equality*] (tracing “how earlier LGBT family law advocacy contributed to . . . marriage equality”); Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 313 (2015) (“[A]doption [by LGBTQ people] has functioned as a stealth path to marriage equality.”).

<sup>43</sup> See *infra* Section III.B.

<sup>44</sup> This Article builds on important earlier work by Courtney Cahill, who offers a careful explication of the role and productive effects of the so-called accidental incest justification for gamete regulation. Cahill, *Oedipus Hex*, *supra* note 2, at 226.

<sup>45</sup> Cf. NeJaime & Siegel, *Conscience Wars*, *supra* note 39, at 2519 (examining “distinctive features of complicity-based conscience claims”).

<sup>46</sup> See *infra* note 140.

<sup>47</sup> See *infra* note 140.

<sup>48</sup> See *infra* note 142.

<sup>49</sup> See *infra* note 142.

<sup>50</sup> These models are discussed in more detail in Part IV *infra*. In addition to the two models mentioned here, a third model was promulgated by the Uniform Law Commission. See UNIF. PARENTAGE ACT art. 9 (UNIF. L. COMM’N 2017) (amended 2023) (setting forth uniform laws governing collection and dissemination of information regarding gamete donors); see also, e.g., Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 437, 444 (2018) [hereinafter Joslin, *Preface*]. I served as the Reporter for the Uniform Parentage Act of 2017 (“UPA”) (2017) and for the Study Committee on Gamete Donor Identity Disclosure, which approved revisions to Article 9 of the UPA (2017) in 2023.

by The Heritage Foundation<sup>51</sup> and another promulgated by The Ethics and Public Policy Center (“EPPC”),<sup>52</sup> for which Leonard Leo, the co-chairman of the Federalist Society, serves as a Board member.<sup>53</sup>

All of this is happening during a period of broader rights retrenchment. Reproductive rights are under assault.<sup>54</sup> LGBTQ people—people who are disproportionately likely to be users of the gametes impacted by these new proposals—are increasingly the target of political and legal attacks.<sup>55</sup> Justice Thomas recently expressly called for the overruling of critical LGBTQ rights decisions, including *Obergefell* and *Lawrence*.<sup>56</sup> In short, it is critical to pay careful attention to the theoretical and normative stakes of gamete reform.

Again, that the stakes are high does not mean that no reform is appropriate. Donor-conceived people are key stakeholders, and their expressed concerns ought to be considered. This Article makes a more modest claim: As policy-makers consider how to proceed in this space, they should be attentive to these features of the contemporary debates.<sup>57</sup> Resolving these questions holds critical and very real potential consequences for the families and children caught in the crosshairs.

This Article proceeds in four Parts. Part I begins by offering context. It tells the evolution of assisted reproduction use in the United States. Part II explores the regulation of the gametes used in assisted reproduction. It demonstrates that proposals to impose new and additional fertility care

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<sup>51</sup> *Donor-Conceived Persons Protection Act*, HERITAGE FOUND., <https://www.heritage.org/model-legislation/donor-conceived-persons-protection-act> [<https://perma.cc/KDG2-GZWV>] (last visited Dec. 21, 2025).

<sup>52</sup> STATE ASSISTED REPROD. TECH. MODEL LEGIS. (ETHICS & PUB. POL’Y CTR. 2024).

<sup>53</sup> *Board of Directors*, ETHICS & PUB. POL’Y CTR. [hereinafter *EPPC Board*], <https://eppc.org/about/board-of-directors> [<https://perma.cc/R5TY-QZAR>] (last visited Dec. 21, 2025). In addition to Leo, EPPC’s Board members include Barb Van Andel-Gaby, a member of the Board of Trustees for the Heritage Foundation, and Mary Ellen Bork, board member of the James Wilson Institute and surviving spouse of former Judge Robert H. Bork. *Id.*

<sup>54</sup> See, e.g., *State Attacks on Sexual and Reproductive Health*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/state-attacks> [<https://perma.cc/9JME-4BGC>] (last visited Dec. 21, 2025); see also sources cited *supra* note 1 (discussing post-*Dobbs* legal environment).

<sup>55</sup> MOVEMENT ADVANCEMENT PROJECT, UNDER FIRE: THE WAR ON LGBTQ PEOPLE IN AMERICA 1 (2023), [https://www.mapresearch.org/file/Under%20Fire%20report\\_MAP%202023.pdf](https://www.mapresearch.org/file/Under%20Fire%20report_MAP%202023.pdf) [<https://perma.cc/5LVP-HGVE>] (“LGBTQ people in America are under attack like never before.”).

<sup>56</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2238, 2301 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

<sup>57</sup> See, e.g., Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIF. L. REV. 401, 463 (2021) (offering comprehensive typology of surrogacy statutes, and theorizing whether and to what extent varied surrogacy schemes achieve normative goals of equality and autonomy).

regulations are garnering increased interest from policymakers. They are also increasingly likely to be enacted. Part II offers a descriptive account of this shift as well as a meticulous typology of recently enacted gamete laws.

Part III situates this recent regulatory transformation within a historical background. This intervention uncovers a number of novel insights. First, this context reveals how this impact is not felt equally across all populations; LGBTQ people are disproportionately likely to feel the effects of gamete regulation.<sup>58</sup> A historical lens reveals that this impact is not coincidental. For some proponents, their opposition to gamete donation and their objection to LGBTQ-parent families are two sides of the same coin. Both emerge from a complaint about defiance of stereotypical gender- and biology-based views about parenthood and the family.

Second, this context also exposes how gamete regulation holds the potential to impact liberty interests. This includes direct impacts on decisions about whether, when, and how to have children. Critically, however, gamete regulation also holds the potential to inflict additional downstream theoretical ripple effects. Legal and social developments regarding LGBTQ-parent families have begun to “cleave[] the biological process of reproduction” from the status of parenthood.<sup>59</sup> Gamete reform holds the potential to reverse these developments. Moreover, retrenchment regarding LGBTQ parenting may be leveraged to justify the overruling or cutting back of other critical rights for LGBTQ people. Finally, Part IV closes by drawing insights from this uncovered story to chart a more just path forward for the law of gamete regulation and beyond.

## I. ASSISTED REPRODUCTION

Assisted reproduction<sup>60</sup> is an increasingly common way of forming families today. Due to changes in technology and social practice, the types of assisted reproduction, as well as the demographics of who is using assisted reproduction, have changed over time. This Part provides a brief overview.

### A. *What and Why*

Assisted reproduction includes a range of techniques for achieving pregnancy other than sexual intercourse. Assisted reproduction includes more

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<sup>58</sup> Taking this impact into account is consistent with a reproductive justice approach. See discussion *supra* note 31.

<sup>59</sup> NeJaime, *Nature of Parenthood*, *supra* note 30, at 2305 (examining parentage rules for children born through assisted reproduction).

<sup>60</sup> I use the phrase “assisted reproduction” to refer to all means of achieving pregnancy other than sexual intercourse. This definition is broader than that used by some, including the CDC. The CDC defines “assisted reproductive technology” or “ART” to refer only to means of achieving pregnancy that involve the handling of ova or embryos. *About ART*, CDC (Dec. 10, 2024), <https://www.cdc.gov/art/about/index.html> [<https://perma.cc/ES35-6SH7>].

complex technologies, like in vitro fertilization (“IVF”); IVF involves the fertilization of a human ovum outside the body.<sup>61</sup> Assisted reproduction also includes simpler methods like intracervical (“ICI”) and intrauterine (“IUI”) insemination, both of which do not involve the handling of ova.<sup>62</sup> In most pregnancies achieved through assisted reproduction, the person who gets pregnant intends to be the parent of the resulting child. That is not true, however, in surrogacy, which is another form of assisted reproduction.<sup>63</sup>

People turn to assisted reproduction for a range of reasons. Some, including many different-sex couples, turn to assisted reproduction because they experience medical infertility. Medical infertility is often defined to mean the inability to conceive after some period—often one year—of unprotected sexual intercourse.<sup>64</sup> Medical infertility is common. The National Survey of Family Growth reported in its most recent edition that approximately 9% of women in the United States, aged fifteen to twenty-nine years old, experience impaired fecundity (i.e., meaning either that they experience difficulty getting pregnant or carrying a pregnancy to term).<sup>65</sup> An earlier version of the same survey estimated that a similar share of men aged fifteen to forty-four years old—9.4%—likewise reported “[s]ome form of infertility.”<sup>66</sup> Globally, the World Health Organization (“WHO”) reports that “[a]pproximately one in six people have experienced infertility at some stage in their lives.”<sup>67</sup>

Rates of infertility are rising, particularly among men. For example, a 2019 study found: “Over the past 40 years, sperm counts worldwide have halved and sperm quality has declined alarmingly with 1 in 20 men currently facing

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<sup>61</sup> Rebouché & Ziegler, *supra* note 1, at 65 (“[I]n vitro fertilization (IVF), [is a process] in which an egg is fertilized with sperm outside the womb and inserted into the uterus.”).

<sup>62</sup> See, e.g., Rachel Nall, *Everything You Need to Know About Artificial Insemination*, HEALTHLINE (Mar. 8, 2023), <https://www.healthline.com/health/artificial-insemination> [<https://perma.cc/XMH2-TMW9>].

<sup>63</sup> Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL’Y REV. 365, 365-66 (2020).

<sup>64</sup> See, e.g., Weei Lo & Lisa Campo-Engelstein, *Expanding the Clinical Definition of Infertility to Include Socially Infertile Individuals and Couples*, in REPRODUCTIVE ETHICS II: NEW IDEAS AND INNOVATIONS 71, 71 (Lisa Campo-Engelstein & Paul Burcher eds., 2018) (“The Centers for Disease Control currently defines infertility as ‘not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.’ ‘Unprotected sex’ here refers exclusively to vaginal-penile intercourse. This definition is widely used in the medical literature . . . .” (citation omitted)).

<sup>65</sup> See *Key Statistics from the National Survey of Family Growth—I Listing*, CDC, [https://www.cdc.gov/nchs/nsfg/key\\_statistics/i.htm#impaired](https://www.cdc.gov/nchs/nsfg/key_statistics/i.htm#impaired) (last visited Jan. 13, 2026).

<sup>66</sup> ANJANI CHANDRA, CASEY E. COPEN & ELIZABETH HERVEY STEPHEN, INFERTILITY AND IMPAIRED FECUNDITY IN THE UNITED STATES, 1982-2010: DATA FROM THE NATIONAL SURVEY OF FAMILY GROWTH 1 (2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr067.pdf> [<https://perma.cc/3C2P-L6QP>].

<sup>67</sup> WHO, INFERTILITY PREVALENCE ESTIMATES: 1990-2021, at xi (2023), <https://iris.who.int/server/api/core/bitstreams/a22ced65-46b1-4482-bf85-058719fec649/content>.

reduced fertility.”<sup>68</sup> This study speculated that reasons for the rise in male infertility include increased exposure to chemicals, elevated rates of obesity, and delayed childbearing.<sup>69</sup> “More than two decades ago the average age of a first-time mother was 24.9. Now, the average woman or birthing person is having their first child at 27.5—a record high in the country.”<sup>70</sup> Infertility rates increase with age.<sup>71</sup> Hence, a recent study found that the respondents who delayed childbearing “were more likely to experience infertility than those who did not delay.”<sup>72</sup>

Other individuals turn to assisted reproduction because they experience social infertility. Social infertility refers to a situation in which the person lacks a partner who can provide a needed gamete.<sup>73</sup> These individuals include LGBTQ people as well as unpartnered people.

Due to either medical or social infertility, or both, many people utilize assisted reproduction. Indeed, it is estimated that 12.2% of “women 15-49 years of age . . . have ever received any infertility services.”<sup>74</sup> For these millions of individuals, assisted reproduction offers an important family formation option. Assisted reproduction also enables people to have more control over the timing of their reproduction. For example, the availability of assisted

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<sup>68</sup> Vardit Ravitsky & Sarah Kimmins, *The Forgotten Men: Rising Rates of Male Infertility Urgently Require New Approaches for Its Prevention, Diagnosis and Treatment*, 101 *BIOL. REPROD.* 872, 872 (2019).

<sup>69</sup> *Id.*; see also Sara Chernikoff, *The Average Age of First-Time Mothers Continues to Rise*, USA TODAY (May 18, 2024, at 09:01 ET), <https://www.usatoday.com/story/news/health/2024/05/18/graphics-show-changing-trend-average-age-parents/73707908007> [<https://perma.cc/2CRN-CWZT>] (“Women in the U.S. are more likely to delay motherhood now, compared to decades past . . .”).

<sup>70</sup> Chernikoff, *supra* note 69.

<sup>71</sup> See Becca Stanek, *Female Fertility by Age*, FORBES (Aug. 14, 2023, at 06:54 ET), <https://www.forbes.com/health/womens-health/female-fertility-by-age> [<https://perma.cc/4B7H-CDLX>].

<sup>72</sup> Jennifer B. Bakkensen et al., *Childbearing, Infertility, and Career Trajectories Among Women in Medicine*, 6 *JAMA NETWORK OPEN*, July 27, 2023, at 1, 9.

<sup>73</sup> See, e.g., Lo & Campo-Engelstein, *supra* note 64 (“Infertility due to relationship status is known as relational infertility or social infertility and can be contrasted with physiological infertility, which is infertility due to a medical condition (e.g., low sperm count, blocked fallopian tube).” (citation omitted)). Judith Daar refers to social infertility as “structural infertility.” Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 *BERKELEY J. GENDER L. & JUST.* 18, 24 (2008) [hereinafter Daar, *Invisible Barriers*] (“Structural infertility occurs when an individual or couple desires to reproduce but must do so through means other than sexual intercourse because of the social structure in which they self-identify. Single individuals and same-sex couples provide examples of structural infertility.”).

<sup>74</sup> See *Key Statistics from the National Survey of Family Growth—I Listing*, CDC, [https://www.cdc.gov/nchs/nsfg/key\\_statistics/i-keystat.htm#infertility](https://www.cdc.gov/nchs/nsfg/key_statistics/i-keystat.htm#infertility) [<https://perma.cc/Q6GK-6FX4>] (last visited Dec. 21, 2025).

reproduction—a process that increases the likelihood of pregnancy for older women—facilitates the decision to delay pregnancy. Having control over the timing of reproduction has had important implications for women’s equality. For example, studies report that the ability to control pregnancy timing increases women’s entrance into and completion of college, as well as their attainment of professional degrees.<sup>75</sup>

Due in part to its importance to the lives of so many people, there is widespread public support for access to assisted reproduction. A 2024 Pew Study found that 70% of American adults reported that “IVF access is a good thing.”<sup>76</sup> The Study revealed strong support for IVF even among people who identified as white Evangelical Protestant (63% support) and Catholic (65% support), as well as those who identified as a Republican or Republican-leaning Independent (63% support).<sup>77</sup> The strong and widespread support for IVF indicates that many people think the decision to have a child is an important one, and reflects an appreciation for the struggles faced by people experiencing infertility.<sup>78</sup>

#### B. *Changes Over Time*

Who is and how people are forming families through assisted reproduction have changed over time. Assisted reproduction, at least in its simpler forms, has been practiced for centuries. The first successful assisted reproduction was reportedly performed in 1785.<sup>79</sup> It gained more prominence in the early

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<sup>75</sup> ADAM SONFIELD, KINSEY HASSTEDT, MEGAN L. KAVANAUGH & RAGNAR ANDERSON, GUTTMACHER INST., *THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN’S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 8-9* (Haley Ball ed., 2013), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/social-economic-benefits.pdf> [<https://perma.cc/VD8Y-DHHP>].

<sup>76</sup> Gabriel Borelli, *Americans Overwhelmingly Say Access to IVF Is a Good Thing*, PEW RSCH. CTR. (May 13, 2024), <https://www.pewresearch.org/short-reads/2024/05/13/americans-overwhelmingly-say-access-to-ivf-is-a-good-thing> [<https://perma.cc/462L-3SSX>]. The same study found that “[j]ust 8% say it is a bad thing, while 22% are unsure.” *Id.*; see also Colleen Long & Amelia Thomson-Deveaux, *More than 6 in 10 Americans Support Protecting Access to In Vitro Fertilization, AP-NORC Poll Finds*, PBS NEWS (July 12, 2024, at 10:42 ET), <https://www.pbs.org/newshour/health/more-than-6-in-10-americans-support-protecting-access-to-in-vitro-fertilization-ap-norc-poll-finds>.

<sup>77</sup> Borelli, *supra* note 76.

<sup>78</sup> See Long & Thomson-Deveaux, *supra* note 76 (“I just don’t want people to be having more trouble to access IVF; it’s already hard enough.” (quoting Alexa Voloschenko)).

<sup>79</sup> Yehezkel Margalit, *Artificial Insemination from Donor (Aid)—From Status to Contract and Back Again?*, 21 B.U. J. SCI. & TECH. L. 69, 77 (2015) (“[T]he first successful [assisted] insemination of a woman with her husband’s sperm was conducted around the year 1785 by the English surgeon John Hunter.”); see also Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591, 596-97 (2012) (“This early scientific literature contained reports of experimentation with artificial

1900s, when Dr. Robert Latou Dickinson discussed “artificial impregnation” in his first address as the newly elected president of the American Gynecological Society in 1920.<sup>80</sup>

At that time, and throughout most of the twentieth century, the users of assisted reproduction were overwhelmingly different-sex married couples.<sup>81</sup> Sex outside of marriage was a crime in most states through the 1970s and 1980s.<sup>82</sup> Throughout this period, nonmarital children and their families were subjected to significant legal disabilities and harsh social stigma.<sup>83</sup> Given this legal and social context, until the 1980s, most fertility care providers and sperm banks would not work with unmarried women.<sup>84</sup> Because same-sex couples were barred from marriage at that time,<sup>85</sup> most LGBTQ people also lacked access to sperm banks and physician-supervised assisted reproduction.

Some of these different-sex married couples utilized sperm from the woman’s husband. Many others used sperm from a man other than the woman’s husband. A 1934 article published in *Scientific American* discussed findings from a survey of two hundred doctors from eight cities.<sup>86</sup> The article reported “that at least a quarter of the doctors surveyed had received patient requests for donor insemination by 1934, with the requests increasing in

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insemination in animals, and by 1799, Englishmen were claiming that John Hunter had performed the first successful assisted insemination in a human decades previously.”)

<sup>80</sup> Swanson, *supra* note 79, at 600.

<sup>81</sup> See, e.g., *Vision, Values and History*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/about/vision-values-and-history> [<https://perma.cc/Y7UG-F3ZJ>] (last visited Dec. 21, 2025) (“In the early 1980’s [sic] there were no sperm banks that would serve unmarried people.”).

<sup>82</sup> See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1268 (2009) (noting most states criminalized sex outside of marriage until late twentieth century); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 429 (2017) (“Until recently, having sex outside of marriage (i.e., fornication) and living together outside of marriage (i.e., cohabitation) were criminal acts.”).

<sup>83</sup> See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346 (2011) (“[F]or most of U.S. history, ‘illegitimate’ children suffered significant legal and societal discrimination.”). See generally Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967) (chronicling legal disabilities imposed on nonmarital children).

<sup>84</sup> See SPERM BANK OF CAL., *supra* note 81.

<sup>85</sup> In 2004, Massachusetts became the first state to permit same-sex couples to marry. *20 Years Ago, Massachusetts Became the First State to Allow Same-Sex Marriage*, NPR (May 17, 2024, at 05:13 ET), <https://www.npr.org/2024/05/17/1252012776/20-years-ago-massachusetts-became-the-first-state-to-allow-same-sex-marriage> [<https://perma.cc/C96P-ZPH4>].

<sup>86</sup> John Harvey Caldwell, *Babies by Scientific Selection*, SCI. AM., Mar. 1934, at 124, 124; see also Swanson, *supra* note 79, at 600 (describing early twentieth-century medical adoption of artificial insemination techniques).

frequency within the last decade.”<sup>87</sup> A 1941 article published in the *Journal of American Medical Association* reported, based on survey data, that almost ten thousand children had been born through assisted reproduction, and that about one-third of the instances of assisted reproduction by married couples involved the use of donor sperm.<sup>88</sup>

The total number of children born through assisted reproduction has increased dramatically since that time. Today, tens of thousands of children are born each year through assisted reproduction. In 2021, for example, approximately 86,146 babies, accounting for approximately 2.3% of all infants born in the United States, were conceived using assisted reproductive technology—those involving “all fertility treatments in which either eggs or embryos are handled outside a woman’s body.”<sup>89</sup> Almost all of these children were conceived through IVF.<sup>90</sup> These numbers will likely increase over time. A recent study projects that births resulting from IVF “will increase from 2.1% among women born in 1968 to 5.7% among women born in 1986.”<sup>91</sup> These already large numbers do not include children conceived using other less sophisticated forms of assisted reproduction, such as ICI and IUI.<sup>92</sup>

By the late twentieth century, the demographics of assisted reproduction users shifted. Single women and same-sex couples began utilizing assisted reproduction.<sup>93</sup> New patterns regarding the types of assisted reproduction also emerged. In the past, most of the users of donated gametes—which, at the time included only donated sperm<sup>94</sup>—were married different-sex couples. But the use of donated sperm by different-sex couples began to decline

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<sup>87</sup> Swanson, *supra* note 79, at 606; Caldwell, *supra* note 86, at 124.

<sup>88</sup> Swanson, *supra* note 79, at 610.

<sup>89</sup> SASWATI SUNDERAM, YUJIA ZHANG, AMY JEWETT, SARAH MARDOVICH & DMITRY M. KISSIN, STATE-SPECIFIC ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE, UNITED STATES: 2021 DATA BRIEF 24 (2023), <https://stacks.cdc.gov/view/cdc/158671> [<https://perma.cc/4Z9P-BL8M>].

<sup>90</sup> SASWATI SUNDERAM ET AL., ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2018, at 3 (2022), <https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7104a1-H.pdf> [<https://perma.cc/KA3P-E8DQ>] (“More than 99% of ART procedures performed are IVF.”).

<sup>91</sup> Ester Lazzari, Michaela Potančoková, Tomáš Sobotka, Edith Gray & Georgina M. Chambers, *Projecting the Contribution of Assisted Reproductive Technology to Completed Cohort Fertility*, POPUL. RSCH. & POL’Y REV., Feb. 10, 2023, at 1, 1.

<sup>92</sup> *Id.* at 6 (“Fertility treatments that do not involve fertilization outside of the woman’s body, such as intrauterine insemination and ovulation induction, are not included because only births resulting from treatments involving ART are reported in [the assisted reproduction database].”).

<sup>93</sup> For example, the Sperm Bank of California opened in 1982 with the express goal of providing access to unmarried women and LGBTQ people. SPERM BANK OF CAL., *supra* note 81.

<sup>94</sup> See *infra* note 104 (noting first children born through use of donated ova were born in mid-1980s).

around the mid-1990s. A key driver of this decline was the advent of Intra-cytoplasmic Sperm Injection (“ICSI”).<sup>95</sup> This technique “allow[s] for the use of previously nonviable sperm in some cases.”<sup>96</sup> In this way, ICSI reduces the number of different-sex couples who need to utilize donor sperm.<sup>97</sup>

Declining use by married different-sex couples coincided with increased demand from other groups, including unmarried women and LGBTQ people.<sup>98</sup> By the early 2000s, newspaper accounts suggested that at least one-third of users of assisted reproduction with donor sperm were unmarried women.<sup>99</sup> More recent data suggest that unpartnered women and LGBTQ people collectively account for almost 75% of all users of donated sperm.<sup>100</sup> For example, a study on patients who used donor sperm in assisted reproduction between 2014 and 2020 reported that almost one-quarter (23.5%) were single, and over one-half (50.3%) were in a same-sex female partnership.<sup>101</sup>

In terms of total numbers of children born through donor gametes, for several decades, the literature commonly reported “‘30,000 to 60,000 annual births’ from donated sperm.”<sup>102</sup> More recent sources, however, suggest much larger numbers. For example, a 2023 article estimates that nearly half a million women have used donor sperm in recent years.<sup>103</sup>

Most of the children born through the use of donor gametes have been conceived using donor sperm. A much smaller number of children have been conceived with donated ova. Unlike sperm donation, which has been used for more than a century, the first children born through donated ova were not conceived until the mid-1980s.<sup>104</sup> Until the early 2000s, the technology for freezing ova was still considered experimental and, as a result, was rarely utilized. Indeed, as late as 2007, there were only an estimated two hundred

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<sup>95</sup> Katherine Kraschel, *Reconceiving IVF* (Dec. 2025) (unpublished manuscript) (on file with author).

<sup>96</sup> Rachel Arocho, Elizabeth B. Lozano & Carolyn T. Halpern, *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995-2017*, 112 *FERTIL. & STERIL.* 718, 721 (2019).

<sup>97</sup> *Id.*

<sup>98</sup> Margalit, *supra* note 79, at 72 (“While historically the most prevalent reason for donated sperm was to contend with male infertility, in recent years sperm donation has been increasingly utilized by both single women and same-sex female partners . . .”).

<sup>99</sup> Daar, *Invisible Barriers*, *supra* note 73, at 25.

<sup>100</sup> *See supra* note 33.

<sup>101</sup> Diego et al., *supra* note 33, at 2305.

<sup>102</sup> Arocho et al., *supra* note 96, at 719.

<sup>103</sup> *Id.*

<sup>104</sup> RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 35 (2011); Mark V. Sauer, *Revisiting the Early Days of Oocyte and Embryo Donation: Relevance to Contemporary Clinical Practice*, 110 *FERTIL. & STERIL.* 981, 981-82 (2018).

children in the world who had been born using frozen ova.<sup>105</sup> While assisted reproduction with donated ova has become more common, it remains less utilized than sperm donation. In 2015, it was estimated that more than eight thousand children had been born using donated ova.<sup>106</sup>

More and more families are being formed through assisted reproduction. Different-sex couples historically accounted for almost all users of assisted reproduction. Today, single women and LGBTQ people now make up the overwhelming majority of users of donated gametes. Part II explores past and emerging laws regulating these gametes.

## II. GAMETE REGULATION

Historically, the regulation of assisted reproduction in the United States has tended to be in the form of “targeted laws aimed at specific areas.”<sup>107</sup> This Part briefly describes this legal landscape and offers a descriptive typology of the more recently enacted gamete rules.

### A. *An Overview*

At the federal level, the relevant rules relate largely to fertility care success rates and basic health and safety concerns. Only one federal law directly regulates assisted reproduction—the Fertility Clinic Success Rate and Certification Act of 1992.<sup>108</sup> That law has two key parts.<sup>109</sup> First, it requires “all ART programs to report their pregnancy success rates.”<sup>110</sup> Second, the Act requires “the CDC to develop a model program for the certification of embryo laboratories that could be adopted by each state.”<sup>111</sup> On the administrative agency

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<sup>105</sup> Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 78-79 (2009).

<sup>106</sup> Tiffany D. Gardner, *Forgotten Parties: Shifting the Focus of Donor Conception to Donor-Conceived Persons Through Reasonable Regulation*, 74 MERCER L. REV. 503, 510 (2023) (“In 2015, an estimated 30,000-60,000 children were born as a result of sperm donation and more than 8,000 from egg donation in the multi-billion dollar gamete-donation industry.”).

<sup>107</sup> Judith Daar, *Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?*, 23 COLUM. J. GENDER & L. 257, 266 (2012) [hereinafter Daar, *Wild West*].

<sup>108</sup> 42 U.S.C. §§ 263a-1 to -7; see also Myrisha S. Lewis, *The American Democratic Deficit in Assisted Reproductive Technology Innovation*, 45 AM. J.L. & MED. 130, 150 (2019) (“[T]he Fertility Clinic Success Rate and Certification Act is the only federal statute that regulates ART.”).

<sup>109</sup> Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOU. L. REV. 609, 642 (1997).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 643.

level, federal regulations require banks to screen and test gametes and embryos for a range of sexually transmitted diseases.<sup>112</sup>

Fertility care is also regulated nationally by what Judith Daar refers to as “quasi-public ordering.” This “quasi-public ordering” includes “self-regulatory schemes developed and monitored by affected stakeholders.”<sup>113</sup> Two key stakeholder groups are the American Society for Reproductive Medicine (“ASRM”) and the Society for Assisted Reproductive Technology (“SART”). ASRM and SART promulgate practice guidelines or standards addressing a range of issues related to assisted reproduction care, including the selection and screening of gamete donors,<sup>114</sup> counseling of donors and recipients,<sup>115</sup> and compensation for donors.<sup>116</sup> These guidelines function as “a form of quasi-regulation,”<sup>117</sup> to which many gamete banks and fertility centers voluntarily comply. Some commentators, however, have questioned the degree to which these guidelines are followed,<sup>118</sup> as well as whether and to what extent they can be enforced.<sup>119</sup>

At the state level, relevant laws generally fall into one of three categories: (1) parentage rules; (2) insurance coverage mandates for assisted reproduction; and (3) rules regarding the practices, policies, and procedures governing the provision of fertility care.<sup>120</sup> Most states have at least one of these types of laws related to assisted reproduction.<sup>121</sup>

With respect to the first category, most states now have statutes addressing the legal parentage of children born through assisted reproduction and the legal status of people who provide gametes.<sup>122</sup> Regarding the second category,

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<sup>112</sup> 21 C.F.R. § 1271.80 (2025) (“To adequately and appropriately reduce the risk of transmission of relevant communicable diseases . . . if you are the establishment that performs donor testing, you must test a donor specimen for evidence of infection due to communicable disease agents . . .”); *see also* CAHN, TEST TUBE FAMILIES, *supra* note 2, at 61-63 (describing federal and state safety standards).

<sup>113</sup> Daar, *Wild West*, *supra* note 107, at 267.

<sup>114</sup> Prac. Comm. of ASRM & Prac. Comm. of SART, *Guidance Regarding Gamete and Embryo Donation*, 115 FERTIL. & STERIL. 1395, 1396-97 (2021).

<sup>115</sup> *Id.* at 1402-06.

<sup>116</sup> Ethics Comm. of ASRM, *Financial Compensation of Oocyte Donors*, 116 FERTIL. & STERIL. 319, 321 (2021).

<sup>117</sup> Cahn & Suter, *Regulating ART*, *supra* note 2, at 43.

<sup>118</sup> *See, e.g.*, CAHN, TEST TUBE FAMILIES, *supra* note 2, at 71 (noting guidelines promulgated by these groups are “not . . . enforceable by law” and “families using these services are dependent on the good-faith effort of the sperm bank to comply”).

<sup>119</sup> *Id.*

<sup>120</sup> *See generally* Daar, *Wild West*, *supra* note 107.

<sup>121</sup> *Id.* (“[T]he majority of U.S. states have adopted at least one . . . law[] that deal[s] directly and exclusively with the practice of reproductive medicine.”).

<sup>122</sup> *See generally* Joslin, *supra* note 57 (providing comprehensive taxonomy of state surrogacy laws); NeJaime, *Nature of Parenthood*, *supra* note 30, at 2291 (examining parentage rules for children born through assisted reproduction); Courtney G. Joslin,

a growing number of states now impose requirements on health insurance companies to cover some types of fertility care.<sup>123</sup> Where they exist, these laws reflect the view that access to this family formation method is important and, accordingly, that it should be broadly available.<sup>124</sup> These laws also reflect the appreciation that practical limitations—including cost—can put this family formation choice out of reach for some families.

The final bucket of regulations relates to laws regulating the provision of fertility care either retrospectively,<sup>125</sup> through what is often referred to as a “fertility fraud” statute, or affirmatively through process and procedure laws.<sup>126</sup> Although the next Part briefly describes both types of provisions, the core focus of this Article is this last category of regulations.

### B. *Regulation: Then and Now*

A few states have early, first-generation gamete laws. These first-generation laws typically apply to all fertility care, regardless of whether the care involves the use of donated gametes. Some of these first-generation rules regulate health and safety aspects of fertility care. For example, some states

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*Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) [hereinafter Joslin, *Protecting*] (examining legal consequences that can result when person lacks legal parent-child relationship). In the past, assisted reproduction parentage rules tended to be limited to children born to married different-sex couples. *Id.* at 1188. Increasingly, states are enacting laws that apply to all children born through assisted reproduction, regardless of the marital status, sex, or sexual orientation of the intended parent(s). See Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589, 592 (2018).

<sup>123</sup> See *Insurance Coverage by State*, RESOLVE, <https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage-by-state> [<https://perma.cc/F5GF-Q2CQ>] (last visited Dec. 21, 2025) (identifying twenty-five such states as of December 21, 2025); see also Lewis, *supra* note 108, at 155 (“Some states have mandated insurance coverage of fertility treatments or the offer of insurance coverage of fertility treatments.”).

<sup>124</sup> For example, when California Governor, Gavin Newsom, signed similar legislation in 2024, he issued a written statement declaring: “California is a reproductive freedom state. . . . As a national leader for increasing access to reproductive health care and protecting patients and providers, including those under assault in other states, I want to be clear that the right to fertility care and IVF is protected in California.” Ana B. Ibarra, *California Expands Access to In Vitro Fertilization with New Law Requiring Insurers to Cover It*, CALMATTERS (Sep. 29, 2024), <https://calmatters.org/health/2024/09/ivf-health-insurance-coverage-law> [<https://perma.cc/K475-ARG5>].

<sup>125</sup> See generally Dov Fox, “Fertility Fraud” Legislation—A Turning Point for Informed Consent?, 387 NEW ENGL. J. MED. 770 (2022) (providing overview of fertility fraud laws in United States).

<sup>126</sup> See, e.g., Courtney G. Joslin, *Gamete Regulation and Family Protection in a Post-Dobbs World*, PETRIE-FLOM CTR.: BILL OF HEALTH (May 17, 2023), <https://blog.petrieflom.law.harvard.edu/2023/05/17/gamete-regulation-and-family-protection-in-a-post-dobbs-world> [<https://perma.cc/XQ6N-F65P>].

enacted early statutes regulating who could provide or perform fertility care. Take Georgia's law, which provides that "[p]hysicians and surgeons . . . shall be the only persons authorized to administer or perform artificial insemination . . . upon any female human being."<sup>127</sup> Other first-generation statutes require fertility clinics to "inform patients of the clinics' success rates related to the success of fertility treatments,"<sup>128</sup> to test gametes for a variety of conditions,<sup>129</sup> or to preserve records related to assisted reproduction.<sup>130</sup>

In contrast to these first-generation laws, that typically apply to fertility care involving all types of gametes, most of the more recently proposed and enacted provisions, second-generation laws, single out donated gametes, either expressly or in practice. These second-generation gamete regulation proposals vary. Some seek to impose new, affirmative process and procedure requirements on gamete banks and fertility centers. These proposals include calls to end "anonymous" gamete donation.<sup>131</sup> For example, in 2022, *The Wall Street Journal* published several stories centering on this issue.<sup>132</sup> Other proposals seek to ban or at least limit compensation for gamete donors.<sup>133</sup> A number of recent bills limit the number of families that can be formed using gametes from a single donor (so-called "family limits").<sup>134</sup> Other proposals

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<sup>127</sup> GA. CODE ANN. § 43-34-37(a) (West 2025).

<sup>128</sup> Lewis, *supra* note 108, at 155; *see also, e.g.*, VA. CODE ANN. § 54.1-2971.1 (West 2025).

<sup>129</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1644.5 (West 2025); DEL. CODE ANN. tit. 16, § 2801(b) (2025) (applying to sperm donors only); 20 ILL. COMP. STAT. ANN. 2310/2310-330 (West 2025) (applying to sperm donors only); IND. CODE ANN. § 16-41-14-5 (West 2025) (applying to sperm donors only).

<sup>130</sup> Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. LEGIS. 1, 31 (2003) (noting at the time fourteen states had such laws). Additional states have enacted laws requiring the collection and retention of records related to assisted reproduction. *See infra* note 142 and accompanying text.

<sup>131</sup> *See, e.g.*, COLO. REV. STAT. ANN. §§ 25-57-101 to -113 (West 2025). This law was the first law in the U.S. requiring all gamete donors to agree to the disclosure of their identifying information.

<sup>132</sup> *See, e.g.*, Amy Dockser Marcus, *What Do the Donor-Conceived Have a Right to Know?*, WALL ST. J. (June 2, 2022), <https://www.wsj.com/story/what-do-the-donor-conceived-have-a-right-to-know-cfef8ad4> [<https://perma.cc/ZRX4-QDYS>]; Marcus, *Secrets*, *supra* note 3; Bazelon, *supra* note 5.

<sup>133</sup> *See, e.g.*, CAHN, TEST TUBE FAMILIES, *supra* note 2, at 197 ("The AATB rules on compensation could be implemented nationally by the FDA to forbid compensation for anything other than lost earnings or costs directly attributable to sperm donation . . ."); *cf. Suter, Baby Markets*, *supra* note 2, at 225, 232 (noting "[w]hen someone intends to use [gametes] to create a family, commodification is particularly threatening to human flourishing," but also noting "[p]rohibiting these markets may limit choice, which can also threaten human flourishing"); *see also infra* Section IV.B (discussing "State Assisted Reproductive Technology Model Legislation," which includes limits on compensation).

<sup>134</sup> CAHN, TEST TUBE FAMILIES, *supra* note 2, at 197.

mandate the provision of state-created scripted information to gamete donors and recipient parents.<sup>135</sup> Still, other bills would require donor health information to be verified by, among other things, requiring donors to agree to the disclosure of their medical records.<sup>136</sup>

Another category of emerging gamete regulations is what is known as “fertility fraud” laws.<sup>137</sup> These laws authorize the imposition of retroactive penalties on parties involved in assisted reproduction for past misconduct. Some of these laws are narrowly targeted towards a behavior that was once more common—fertility care doctors using their own sperm without the knowledge or consent of their patients.<sup>138</sup> Other fertility fraud proposals are more sweeping in scope. For example, a New York bill authorizes the imposition of civil penalties on health care providers and on donors for negligent behavior, including for “negligently provid[ing] . . . misleading information about . . . the donor’s medical history.”<sup>139</sup>

While some of these proposals are not new, there has been a marked uptick in the visibility of these reform calls, as well as the traction they are garnering among state legislators. Today, at least fifteen states have fertility fraud laws.<sup>140</sup> Almost all of them were enacted since 2019.<sup>141</sup> Seven states now have

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<sup>135</sup> Gardner, *supra* note 106, at 527 (describing written material requirements in legislation enacted in Colorado in 2022); *see also* HERITAGE FOUND., *supra* note 51 (setting forth model law mandating distribution of standardized written information to donors and prospective parents).

<sup>136</sup> *See, e.g.*, S. 2122A, 2023-24 Reg. Sess. (N.Y. 2023).

<sup>137</sup> *See, e.g.*, Fox, *supra* note 125, at 770; Jody Lyneé Madeira, *Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform*, 39 COLUM. J. GENDER & L. 110, 199-203 (2019); Jody Lyneé Madeira, *Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud*, 37 LAW & INEQ. 45, 65-67 (2019).

<sup>138</sup> *See, e.g.*, UTAH CODE ANN. § 76-7-402(1) (West 2025) (“A health care provider may not knowingly use the health care provider’s own gamete . . . without the patient’s written consent.”).

<sup>139</sup> S. 1114, 2023-24 Reg. Sess. § 3 (N.Y. 2023).

<sup>140</sup> *See, e.g.*, ARK. CODE ANN. §§ 5-13-212, 5-37-220, 16-118-117 (West 2025); ARIZ. REV. STAT. ANN. § 12-567 (2025); CAL. PENAL CODE § 367g (West 2025); CAL. CIV. CODE § 1708.5.6 (West 2025); COLO. REV. STAT. ANN. §§ 18-13-131, 13-21-132, 12-240-121(gg), 12-255-120(hh) (West 2025); FLA. STAT. ANN. §§ 784.086, 456.072, 459.015(yy), 458.331 (West 2025); 815 ILL. COMP. STAT. ANN. 540/1 (West 2025); IND. CODE ANN. § 34-24-5-3 (West 2025); IOWA CODE ANN. § 714I.3 (West 2025); KY. REV. STAT. ANN. § 311.373 (West 2025); LA. STAT. ANN. § 14:101.2 (2025); NEV. REV. STAT. ANN. §§ 200.975-980 (West 2025); OHIO REV. CODE ANN. §§ 2907.13, 4731.861 (West 2025); TEX. PENAL CODE ANN. § 22.011 (West 2025); UTAH CODE ANN. § 76-7-402 (West 2025); WASH. REV. CODE ANN. § 9A.36.031 (West 2025).

<sup>141</sup> The two exceptions are California and Louisiana. The California law was enacted in 1996 and the Louisiana law was enacted in 1999. CAL. PENAL CODE § 367g (West 2025); LA. STAT. ANN. § 14:101.2 (2025).

second-generation affirmative process and procedure laws.<sup>142</sup> All of these laws were enacted in the last decade. All but one of these laws was enacted since 2018.<sup>143</sup>

There are a number of reasons for this shift. Many donor-conceived people are now adults. Some of them are engaging in advocacy. For example, USDCC, which is run by and for donor-conceived people, was founded in late 2021.<sup>144</sup> Within the last several years, high-profile stories featuring donor-conceived people and their experiences have appeared in the media.<sup>145</sup> Documentaries have been released exploring egregious instances of fertility fraud.<sup>146</sup> These narratives and the calls for reform are sympathetic and compelling. Lawmakers have responded by enacting a significantly increased number and range of gamete laws.<sup>147</sup>

### C. *Contemporary Justifications*

This Section describes some common contemporary justifications for these second-generation gamete process and procedures rules. As noted above, the proposals are varied. Some involve calls to require the collection, dissemination, and verification of certain types of information about donors. Other proposals relate to family limits, as well as to required disclosures of approved information to donors and recipients.

Proposals related to the collection and disclosure of information about gamete donors fall into two distinct buckets. First, proponents call for the collection and disclosure of medical and family medical history information about donors.<sup>148</sup> This information, proponents argue, is important to the health and well-being of donor-conceived children. Advocates contend that having access to this information may improve the quality of medical care

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<sup>142</sup> See, e.g., CAL. HEALTH & SAFETY CODE §§ 1644-1644.6 (West 2025); COLO. REV. STAT. ANN. §§ 25-57-101 to -113 (West 2025); CONN. GEN. STAT. ANN. § 46b-542 to -547 (West 2025); S. 163, 83d Leg. Assemb., Reg. Sess. §§ 84-88 (Or. 2025); 15 R.I. GEN. LAWS ANN. §§ 15-8.1-901 to -906 (2025); UTAH CODE ANN. § 78B-15-708 (West 2025); WASH. REV. CODE ANN. §§ 26.26A.800-.825 (West 2025).

<sup>143</sup> The Utah law was enacted in 2015. UTAH CODE ANN. § 78B-15-708 (West 2025).

<sup>144</sup> U.S. DONOR CONCEIVED COUNCIL, *supra* note 9.

<sup>145</sup> See, e.g., Bazelon, *supra* note 5; Ferguson, *supra* note 4.

<sup>146</sup> OUR FATHER, *supra* note 7.

<sup>147</sup> See *supra* notes 140, 142.

<sup>148</sup> See, e.g., Tiffany D. Gardner, *Lack of Complete Medical Information Leaves Donor Conceived People with the Unknown*, U.S. DONOR CONCEIVED COUNCIL (Jan. 27, 2022), <https://www.usdcc.org/2022/01/27/lack-of-complete-family-medical-history-leaves-donor-conceived-people-with-the-unknown> [[https:// perma.cc/ 4N7M-8UXY](https://perma.cc/4N7M-8UXY)] (“For donor conceived people, a lack of complete, truthful, and updated family medical history can be the difference between life or death.”).

that a donor-conceived person receives or may impact lifestyle choices the donor-conceived person makes.<sup>149</sup>

Proposals to collect and share this type of information are generally less controversial today. While the disclosure of this type of information was more limited in the past, it is now common practice at sperm banks and fertility centers to collect and disclose a gamete donor's comprehensive medical history to prospective parents.<sup>150</sup> Moreover, it is also common today for banks to run extensive genetic testing on gametes and to make this information available to prospective parents.<sup>151</sup> Thus, extensive nonidentifying medical and family medical history information is generally available as a matter of practice. Indeed, some suggest that as a result of these practices, parents and donor-conceived children may have more extensive medical information about gamete donors than they might typically have about a parent who is genetically connected to them.<sup>152</sup> This common practice of sharing nonidentifying medical and family medical history information has been recently codified in a number of states.<sup>153</sup>

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<sup>149</sup> See, e.g., Amy Dockser Marcus, *A Grieving Family Wonders: What if They Had Known the Medical History of Sperm Donor 1558?*, WALL ST. J. (Jan. 2, 2022, at 05:30 ET), <https://www.wsj.com/science/biology/a-grieving-family-wonders-what-if-they-had-known-the-medical-history-of-sperm-donor-1558-11641119405?>

<sup>150</sup> See, e.g., ALMELING, *supra* note 104, at 32 (highlighting increase in donor information provided by commercial sperm bank from “one line,” to “two pages,” and finally to “thirty-five to fifty pages”).

<sup>151</sup> See, e.g., *Genetic Testing*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/donor-screening/genetic-testing> [<https://perma.cc/HV9U-L7MR>] (last visited Dec. 21, 2025) (“Starting in June 2021, all new donors are tested using an Expanded Carrier Screening (ECS) panel which includes all of the above conditions. In 2021 this panel screened for over 260 different autosomal recessive conditions.”); *Genetic Services*, CAL. CRYOBANK, <https://www.cryobank.com/services/genetic-services> [<https://perma.cc/KW9C-9Q78>] (last visited Dec. 21, 2025) (“Genetic Testing is performed on our donors to evaluate the risks for specific disorders in the donor’s offspring. Our DNA Advantage Donors are screened for over 260 recessive conditions!”); *Genetic FAQs*, FAIRFAX CRYOBANK (July 22, 2015), <https://fairfaxcryobank.com/blog/uncategorized/genetic-faqs> [<https://perma.cc/V9CN-92QY>] (“Fairfax Cryobank provides the expertise of board-certified clinical geneticists in evaluation of the donor’s medical and family history as well as reviewing the test results of the extensive genetic screening performed on all sperm donor applicants. Any applicant with a family history that places him at higher than normal risk of transmitting a genetic condition is rejected.”).

<sup>152</sup> See, e.g., ALMELING, *supra* note 104, at 32 (“Basically, if my wife, and I’m married thirty-eight years, read information on a donor, she would know more about the donor than she does of me.”).

<sup>153</sup> See CAL. HEALTH & SAFETY CODE § 1644.3(c) (West 2025); COLO. REV. STAT. ANN. § 25-57-106(2) (West 2025); CONN. GEN. STAT. ANN. § 46b-546(b) (West 2025); S. 163, 83d Leg. Assemb., Reg. Sess. § 87(1) (Or. 2025); 15 R.I. GEN. LAWS ANN. § 15-8.1-905(b) (2025); UTAH CODE ANN. § 78B-15-708 (West 2025); WASH. REV. CODE ANN. § 26.26A.820(2) (West 2025).

Some proposals, however, go further. For example, some would require the verification of medical information and medical history information provided by gamete donors.<sup>154</sup> Consider a pending bill in New York, which would require gamete providers to agree to release their medical records from the last five years to reproductive tissue banks, with the goal of verifying the medical information provided by the donor.<sup>155</sup> This proposal raises medical privacy concerns and could deter some donors from donating. Proponents of this type of legislation argue, however, that some donors provide inaccurate or incomplete information about their medical history.<sup>156</sup> They point, for example, to a lawsuit filed by families who sued a Georgia-based sperm bank after learning that the donor they used failed to disclose a serious mental health condition.<sup>157</sup> The proposed reform, it is said, would allow fertility banks to “verify” the medical information and history provided by donors.

Another bucket of desired information relates to identifying information about donors. These proposals are more contested. Professor Naomi Cahn has been a strong proponent of ending anonymous donation.<sup>158</sup> Some of the arguments in favor of ending anonymous donation are practical in nature. For example, Cahn argues that, given the availability of cheap and easy-to-obtain direct-to-consumer genetic testing, the promise of anonymity for donors is now illusory.<sup>159</sup> Given that anonymity can no longer be promised, Cahn continues, the industry should do away with that fiction and require all donors to agree to the disclosure of their identities.<sup>160</sup>

Other arguments in favor of ending anonymous donation are more normative in nature. Some commentators, for example, contend that some donor-conceived children seek this information and that their interests should be prioritized.<sup>161</sup> Available empirical evidence from the United States reveals that a significant minority of donor-conceived people who have access to this

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<sup>154</sup> See, e.g., S. 2122, 2023-24 Reg. Sess. (N.Y. 2023).

<sup>155</sup> *Id.*

<sup>156</sup> See, e.g., Marcus, *Push to Vet*, *supra* note 3.

<sup>157</sup> See, e.g., *Norman v. Xytex Corp.*, 848 S.E.2d 835, 843 (Ga. 2020) (holding some claims against sperm bank could proceed while others were barred).

<sup>158</sup> CAHN, TEST TUBE FAMILIES, *supra* note 2, at 215 (arguing in favor of what Cahn calls “limited disclosure”).

<sup>159</sup> Naomi Cahn, *Knowing Origins, in* DONOR-LINKED FAMILIES IN THE DIGITAL AGE: RELATEDNESS AND REGULATION 211-12 (Fiona Kelly, Deborah Dempsey & Adrienne Byrt eds., 2023).

<sup>160</sup> See, e.g., *id.* (“[T]he feasibility of promising anonymity to donors is no longer viable.”).

<sup>161</sup> CAHN, TEST TUBE FAMILIES, *supra* note 2, at 221 (“[T]he reasons that adoptees or gamete children seek information go far beyond genetically related rationales. The information provides additional background to their full identities: genetic, emotional, and even cultural. Regardless of how happy children are, and have been, in their families, they still may want and need additional information about their origins.”).

information choose to seek it.<sup>162</sup> A research study focused on the Sperm Bank of California, which allows for identifying information to be shared upon request by the child upon reaching age eighteen, found that “[d]uring the first 10 years of possible releases [of identifying information], adults from 33.2% of eligible families (85/256) contacted the program for their donor’s identity.”<sup>163</sup> Taking into account donor-conceived people who were not told they were donor conceived (most or all of whom were born to different-sex couples), the “estimated rate of requesting was closer to 40%.”<sup>164</sup>

Some commentators go further and posit that withholding this information from donor-conceived people can cause emotional and psychological harm.<sup>165</sup> As others have explored in more detail, a claim of causal harm is contested.<sup>166</sup> Nonetheless, it is certainly the case that some donor-conceived people report that their inability to access this identifying information has caused trauma or harm to them.<sup>167</sup>

Another type of proposal that has garnered more traction in recent years are proposals that limit the number of families that can be formed using gametes from a single donor (so-called “family limits”).<sup>168</sup> A prominent argument in favor of family limits is rooted in asserted “incest concerns.” As Courtney Cahill writes, “conservative and progressive thinkers alike—including David

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<sup>162</sup> See, e.g., Joanna E. Scheib, Alice Ruby & Jean Benward, *Who Requests Their Sperm Donor’s Identity? The First Ten Years of Information Releases to Adults with Open-Identity Donors*, 107 FERTIL. & STERIL. 483, 486 (2017).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 490.

<sup>165</sup> Saira Jhutti, *Genealogical Bewilderment in Egg Donation: A Fertility Psychologist’s Perspective*, COFERTILITY (Aug. 2, 2024), <https://www.cofertility.com/family-learn/genealogical-bewilderment> [<https://perma.cc/7NFX-CEFQ>]; see also CAHN, TEST TUBE FAMILIES, *supra* note 2, at 219 (arguing access to this information is “in children’s best interests” and “may help the child in his or her identity development”); Gary Drevitch, *The Psychological Impacts of Donor Conception*, PSYCH. TODAY (July 11, 2024), <https://www.psychologytoday.com/us/blog/evidence-based-living/202407/the-psychological-impacts-of-donor-conception> (describing study which found “a minority of donor-conceived people reported mental health and identity struggles, including difficulties with identity formation, mistrust, and concerns regarding genetic heritage”).

<sup>166</sup> Some advocates use the phrase “genealogical bewilderment” to describe the harm children are alleged to suffer as a result of not knowing their genetic or genealogical heritage. As Courtney Cahill notes, this “alleged psychological ‘condition’ . . . has in some circles been roundly critiqued and discredited.” Cahill, *Anonymity*, *supra* note 2, at 649 n.14. Kimberly Leighton further posits that “the concept of genealogical bewilderment and the reality ascribed to it are actually part of the cause of the distress people experience rather than a means to alleviate that distress.” Kimberly J. Leighton, *Addressing the Harms of Not Knowing One’s Heredity: Lessons from Genealogical Bewilderment*, 3 ADOPTION & CULTURE 63, 65 (2012).

<sup>167</sup> Drevitch, *supra* note 165.

<sup>168</sup> CAHN, TEST TUBE FAMILIES, *supra* note 2, at 198.

Blankenhorn (on the conservative side) and law professor Naomi Cahn (on the progressive side),<sup>169</sup> contend that the lack of family limits, particularly when combined with donor anonymity, “lay the perfect conditions for accidental incest between consanguineous kin.”<sup>170</sup>

Others offer different or additional justifications for family limits. One donor-conceived advocate argues that family limits are needed because some donor-conceived people seek to form close relationships with the donor or with other children conceived with gametes from the same donor.<sup>171</sup> While it is hard to know how common this issue is, media stories have reported on cases of large numbers of people conceived using gametes from the same donor.<sup>172</sup> “Large sibling numbers,” proponents continue, “could impede the formation of close relationships between siblings due to overwhelming numbers [and] they could detrimentally impact donors who are otherwise open to releasing their identity.”<sup>173</sup>

Another type of proposal that has emerged in recent years requires the provision of specified information to donors and to prospective parents. A law enacted in Colorado in 2022 imposes this type of mandate. Specifically, it requires the state to develop written materials that must be distributed by gamete banks and fertility clinics to donors and to prospective parents, addressing, among other things, “[t]he needs and interests of donor-conceived persons.”<sup>174</sup> Proponents argue that some donors and intended parents may not fully understand or appreciate the long-term impacts of the decisions that they are making.<sup>175</sup>

Today, some of the advocates behind the types of proposals discussed in this Section are donor-conceived people themselves. And many of the contemporary justifications center on claims about their needs and interests. To

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<sup>169</sup> Cahill, *Oedipus Hex*, *supra* note 2, at 185-86.

<sup>170</sup> *Id.* at 194. There is limited empirical data on the actual risks of this possibility and how this risk compares to the risk for children conceived through other means. *Id.* at 208.

<sup>171</sup> See, e.g., Gardner, *supra* note 106, at 521 (“[T]he ever-expanding growth of sibling groups can make it difficult to establish close relationships . . .”).

<sup>172</sup> See, e.g., *Maryland Woman Discovers She Has at Least 60 Siblings Through Genetics Service*, ABC7 (July 27, 2023), <https://abc7ny.com/post/maryland-woman-60-siblings-donor-conceived-sibling-ellcott-city/13555228> [<https://perma.cc/KB5E-JDJB>].

<sup>173</sup> Gardner, *supra* note 106, at 522.

<sup>174</sup> COLO. REV. STAT. § 25-57-108(1)(c) (2025). Developing such written materials has proven to be difficult in practice; as such, the deadline for these materials was extended. S.B. 24-223, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024) (extending deadline from January 1, 2025 to July 1, 2025).

<sup>175</sup> See, e.g., COLO. REV. STAT. § 25-57-102(e) (2025) (including legislative finding stating “[b]efore using donated gametes, people who are considering using donated gametes to conceive children should have access to more information and resources about donor-conceived persons, including tools and resources for discussing donor conception with their children in ways that are age-appropriate and reflect the interests and lived experience of donor-conceived persons”).

be clear, however, the views and positions of donor-conceived people on these proposals are varied. For example, while some donor-conceived people have a strong desire to contact their donors, others do not.<sup>176</sup> And while some donor-conceived people claim that they suffer harm or trauma because they lack information about their donors, others do not report a similar experience.<sup>177</sup> Further, some of the claims of causation are contested.<sup>178</sup> Nonetheless, these interests and concerns are important ones that ought to be considered by policymakers.

As policymakers do consider action in this space, they should be attentive to and balance the full range of interests and stakeholders. To help lawmakers vindicate important equality and liberty interests, the next Part turns to uncover other stakes and stakeholders—ranging from the more obvious ones to those hiding below the surface.

### III. ASSESSING THE STAKES

Some emerging gamete proposals seek to codify what is largely routine policy as a matter of practice. This includes, for example, laws requiring the collection, retention, and dissemination of nonidentifying medical information about gamete providers.<sup>179</sup> Similarly, with regard to proposals to end anonymous donation, most sperm donors today consent to the disclosure of their identifying information.<sup>180</sup> Other proposals, however, seek to alter or significantly shift the way assisted reproduction is practiced. This includes, for example, proposals that require donors to consent to the disclosure of their medical records and proposed legislation that would expose donors to civil liability for negligent misrepresentation of their medical history.

As described above, donor-conceived people and others proffer compelling arguments in favor of some reform. For example, a study published in 2017 estimated that 40% of donor-conceived people who could access identifying

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<sup>176</sup> See, e.g., *We Asked Four Donor Conceived People About Their Life, Here's What They Said*, COFERTILITY (Nov. 12, 2024), <https://www.cofertility.com/family-learn/q-a-wit-h-donor-conceived-people> [<https://perma.cc/L4YQ-APYQ>].

<sup>177</sup> *Id.*

<sup>178</sup> See Leighton, *supra* note 166, at 65.

<sup>179</sup> See, e.g., Bazelon, *supra* note 5 (“[M]ajor sperm banks in the United States are requiring donors to agree to disclose their medical histories up front . . .”); see also ALMELING, *supra* note 104, at 32 (noting characterizing material on gamete donors “grew more elaborate over the years, as commercial banks provided additional details about donors’ characteristics”).

<sup>180</sup> See, e.g., Gardner, *supra* note 106, at 518 (“[S]ome of the largest sperm banks in the United States have shifted away from fully anonymous donors and require all new donors to consent to release of their identity to requesting offspring at age eighteen.”).

information about their gamete donors took steps to obtain that information when it became available to them.<sup>181</sup>

These narratives, expressed interests, and concerns merit careful consideration. Some legal reform is warranted. However, as is often the case in matters related to the family, regulation is complex. Any proposed rule will implicate a number of potential stakeholders.<sup>182</sup> Moreover, these interests include ones of constitutional importance. For example, family laws—including gamete regulations—can implicate deeply personal decisions about when, how, whether, and with whom to form a family.<sup>183</sup> How these interests are balanced can further or undermine principles of equality.

To elucidate the stakes, this Article situates this contemporary conversation within a historical background. This grounding serves a number of novel and important goals. First, this context reveals how the impact of gamete rules is not felt equally across all populations.<sup>184</sup> While these laws are typically facially neutral—applying to all gamete donors and users of donated gametes—their effects are not experienced evenly. Instead, certain groups, including LGBTQ people, are and will be disproportionately impacted by regulations in this space. Moreover, this Article uncovers and brings to the fore how, for some, this impact is a feature, not a bug, of gamete regulation.<sup>185</sup> In this way, gamete regulation offers an indirect or backdoor channel to reestablish the primacy of the bionormative family.<sup>186</sup>

Second, this context uncovers the scope and breadth of the liberty interests implicated by gamete rules. Many proposals hold the potential to reduce access to assisted reproduction, thereby removing this as a practical option for some families. In this way, gamete rules can directly impact decisions about whether, when, and how to procreate. But that is not all. These proposals also hold the potential to inflict broader theoretical ripple effects. Specifically, this Part explores how gamete regulations hold the potential to unwind

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<sup>181</sup> Scheib et al., *supra* note 162, at 490 (estimating rates of requesting identifying information by donor-conceived people to be approximately 40%).

<sup>182</sup> Meyer, *Crossroads*, *supra* note 20, at 1245 (“[D]isputes within families can present conflicts among competing rights holders . . .”); cf. McClain, *supra* note 20, at 2175 (“[F]amily law may simultaneously pursue multiple purposes, some of which may be in conflict with each other or point in different policy directions . . .”).

<sup>183</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”).

<sup>184</sup> Taking account of this differential impact is consistent with a reproductive justice approach. See *supra* note 31 and accompanying text.

<sup>185</sup> See, e.g., Severino, *supra* note 34, at 451 (“In the context of current and emerging reproductive technologies, HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them.”).

<sup>186</sup> See, e.g., Cahill, *Oedipus Hex*, *supra* note 2, at 226 (making similar point about use of incest justification for gamete regulation).

legal and social advancements for LGBTQ relationships and family formation more generally.

These insights uncover unappreciated ways<sup>187</sup> that contemporary narratives supporting gamete regulation can inflict—and for some advocates, are intended to inflict—distinctive harms on a subset of key users of these technologies.<sup>188</sup>

#### A. *Family Law Lawmaking*

Family law lawmaking is complex.<sup>189</sup> Typically, family law rules implicate the interests of multiple stakeholders. For example, a rule governing the allocation of child custody implicates the rights of the child's parents, as well as the interests of the child. Sometimes, the interests of all the stakeholders are aligned. However, that is not always the case. In situations where the stakeholders' interests are not aligned, the competing interests might have to be weighed against each other, as well as against other values or policy objectives. In this way, family law cases often involve situations where the rights and interests of one stakeholder are "necessarily qualified by the competing interests of other family members."<sup>190</sup>

Moreover, in resolving family law matters, the various interests and considerations that courts or policymakers weigh are often of constitutional magnitude.<sup>191</sup> In a child custody dispute, for example, both parents typically have a constitutionally protected interest in their right to control the care and custody of their child.<sup>192</sup> However, other fundamental liberty interests may also be implicated. For example, if a court orders a custodial parent not to leave the state, that order implicates not only both parents' right to the

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<sup>187</sup> This Article builds on important earlier work by Courtney Cahill, who offers an important examination of the role and productive effects of the so-called accidental incest justification for gamete regulation. *Id. passim*.

<sup>188</sup> Cf. NeJaime & Siegel, *Conscience Wars*, *supra* note 39, at 2519-22 (examining "the distinctive features of complicity-based conscience claims" which "amplify the material and dignitary harms that accommodating such claims can inflict" on other citizens).

<sup>189</sup> Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699, 714 (2003) ("[F]amily law is hard because it is difficult to devise a rule that serves either an instrumental or a fairness rationale very well").

<sup>190</sup> David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1466 (2006).

<sup>191</sup> See David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 720 (2001) (noting family law cases involving constitutional claims "have a greater potential than most other fundamental rights to present clashes of intersecting privacy interests").

<sup>192</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (reaffirming "fundamental right of parents to make decisions concerning the care, custody, and control of their children").

care and control of their child, but also the custodial parent's fundamental right to travel.<sup>193</sup>

Other family law rules likewise implicate interests that are of constitutional import or magnitude.<sup>194</sup> Indeed, most interests recognized as protected liberty interests under the Due Process Clause relate to the family. As the Court put it in *Lawrence*, these constitutionally protected liberty interests include “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>195</sup> The Court posited that the reason these core family-related decisions are entitled to constitutional protection is because they implicate some of the “most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” and to “one’s own concept of existence.”<sup>196</sup>

How policymakers balance the relevant interests—again, interests which may themselves be of constitutional magnitude—often implicates equality concerns. Indeed, “[n]o area of law has been more transformed by the demands of equality in the past half century than family law.”<sup>197</sup> This is true in part because family law rules historically played a key role in shaping and perpetuating inequality.<sup>198</sup> “[T]raditional inequalities reflecting bedrock

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<sup>193</sup> See, e.g., *In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) (“[R]elocation disputes present courts with a unique challenge: to promote the best interests of the child while affording protection equally between a majority time parent’s right to travel and a minority time parent’s right to parent.”).

<sup>194</sup> See, e.g., Joslin, *Marriage Equality*, *supra* note 42, at 206 (“Many of the cases taught in constitutional law, for example, are family law cases.”); JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 40 (2014) (“[F]amily law is a pervasive and significant part of the Court’s constitutional jurisprudence interpreting due process, equal protection, and other constitutional principles.”).

<sup>195</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

<sup>196</sup> *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)); see also *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”).

<sup>197</sup> Meyer, *Crossroads*, *supra* note 20, at 1231.

<sup>198</sup> See, e.g., Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1082 (1994) (“[T]he common law of marital status was starkly hierarchical, imposing pervasive constraints on the lives of free women subject to its terms.”). Family law rules also played a key role in shaping racial inequality. See, e.g., Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 *HARV. L. REV.* 2025, 2033 (2021) (tracing “intersection of race and reproduction”); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 24 (2017) (“The essence of Black women’s experience during slavery was the brutal denial of autonomy over reproduction.”); Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 *CONST. COMMENT.* 377, 377 (2017) (“Marital supremacy—the legal privileging of

assumptions about the separate and distinctive capacities of men and women . . . were written into the very grain of family law.”<sup>199</sup> Hence, many of the Court’s later foundational equal protection decisions sought to dismantle some of these long-standing, deeply rooted, and inherently unequal family law rules.<sup>200</sup> Think *Loving v. Virginia*,<sup>201</sup> striking down on equal protection grounds a Virginia statute barring marriage between white people and people of color; *Orr v. Orr*,<sup>202</sup> striking down an Alabama law providing that “husbands, but not wives, may be required to pay alimony upon divorce”; *Levy v. Louisiana*,<sup>203</sup> striking down under the Equal Protection Clause a Louisiana wrongful death statute permitting “legitimate” children—but not “illegitimate” ones—to recover for the wrongful death of a parent; or *Obergefell*, declaring that “[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.”<sup>204</sup>

Because family law rules frequently implicate both liberty and equality principles, courts, including the Supreme Court, have regularly played a role in reviewing and shaping them. As Douglas NeJaime explains, these constitutional values shape not only “top-down” constitutionally based court decisions about the permissibility of family law rules; they also shape “aspects of state family law . . . in more subtle ways.”<sup>205</sup> This includes how constitutionally based liberty and equality principles influence legislative lawmaking.<sup>206</sup>

To be clear, however, as discussed in more detail in Part IV, the fact that reform proposals may negatively impact some stakeholders—including intended parents—does not necessarily mean that the reform should not be pursued. This Article makes a different, more modest claim: As policymakers

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marriage—is, and always has been, deeply intertwined with inequalities of race, class, gender, and region.”).

<sup>199</sup> Meyer, *Crossroads*, *supra* note 20, at 1231, 1233 (“The past fifty years have been marked by enormous change in family law, much of it focused on casting off age-old classifications defined by gender, sexuality, race, and other notions of difference.”).

<sup>200</sup> See, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2019 (2000) (“The movement of twentieth century family law in the United States has been away from a patriarchal model and toward a more egalitarian one.”); see also *Obergefell*, 576 U.S. at 674 (“Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage.”).

<sup>201</sup> 388 U.S. 1 (1967).

<sup>202</sup> 440 U.S. 268, 270 (1979).

<sup>203</sup> 391 U.S. 68, 69, 72 (1968).

<sup>204</sup> *Obergefell*, 576 U.S. at 672.

<sup>205</sup> NeJaime, *Family’s Constitution*, *supra* note 29, at 418.

<sup>206</sup> See, e.g., *id.* at 417 (“[C]onstitutional doctrine has in turn shaped family law disputes over the contours of marital and parental recognition.”); see also Meyer, *Crossroads*, *supra* note 20, at 1233.

consider legislative or regulatory change, they should proceed carefully, taking account of the impacts on all stakeholders. To help explicate the stakes, this Article situates this contemporary conversation within a historical backdrop.

B. *Equality Concerns*

Gamete regulations tend to be facially neutral. That is, on their face, they apply equally to all users of donor gametes. In practice, however, the effects are not felt evenly. Recall the temporal changes in the fertility care market. In the past, different-sex couples were the primary users of donated sperm.<sup>207</sup> Indeed, they were generally the only ones permitted to access this care.<sup>208</sup> Today, by contrast, almost 75% of the users of donated sperm are unpartnered women and LGBTQ people.<sup>209</sup> These populations most acutely feel the impact of gamete rules.

While proof of intentional discrimination is required to establish that a facially neutral law violates the Equal Protection Clause,<sup>210</sup> policymakers can and often do think about equality through a broader register. For these policymakers, the disproportionate impact of gamete reform suggests that caution and careful consideration are warranted.

Critically though, for some proponents, this differential impact is a goal, not an unfortunate side effect of gamete reform. For these advocates, the objection to assisted reproduction with donor gametes and the opposition to LGBTQ family formation are inherently interconnected. The objection to each is rooted in hostility towards families that depart from the bionormative family structure. By iterating the view that children need biological mothers and fathers, these arguments reproduce deeply rooted gender scripts associated with “traditional” marriage and the family. Their arguments in favor of reform are not only gender-based; they are also gender-specific, resting on particular fears of “fatherless” children.

In this way, gamete rules—and sperm rules in particular—can be seen as examples of what Reva Siegel calls “preservation through transformation.”<sup>211</sup> They offer newly packaged reasoning that reiterates key elements of a gender- and biology-based normative family.<sup>212</sup>

This Part unearths and exposes these connections. Section III.B.1 sets the stage by offering a brief historical account of efforts to limit LGBTQ

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<sup>207</sup> See *supra* notes 81-86 and accompanying text.

<sup>208</sup> See *supra* notes 81-86 and accompanying text.

<sup>209</sup> See discussion *supra* note 33.

<sup>210</sup> *Washington v. Davis*, 426 U.S. 229, 239-40 (1976); see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 657 (7th ed. 2023) (“[T]he Supreme Court has held that there must be proof of a discriminatory purpose for such laws . . .”).

<sup>211</sup> Siegel, *Rule of Love*, *supra* note 38, at 2119; see also Balkin, *supra* note 38.

<sup>212</sup> NeJaime & Siegel, *Conscience Wars*, *supra* note 39, at 2553 (describing phenomenon of “preservation through transformation”).

parenting and family formation. Section III.B.2 reveals the commonalities and throughlines between arguments leveraged against LGBTQ people and parents, on the one hand, and those in support of gamete regulation, on the other.

### 1. Opposition to LGBTQ Parenting

Custody disputes involving LGBTQ parents were some of the earliest cases in which courts confronted openly LGBTQ people.<sup>213</sup> The children at the center of these disputes were usually born in the context of different-sex, marital relationships. In subsequent custody litigation between the parents, the non-LGBTQ parent would often invoke the other parent's sexual orientation as leverage in their custody battle.<sup>214</sup> First reported in the 1950s,<sup>215</sup> these cases began to appear with more regularity in the 1970s.<sup>216</sup> Initially, the arguments tended to exploit overtly negative stereotypes about gay people,<sup>217</sup> including "stereotypes of lesbian and gay adults as sexual predators."<sup>218</sup> In the 1970s and 1980s, LGBTQ parents often lost these custody disputes.<sup>219</sup>

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<sup>213</sup> For a detailed study of these cases, see Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 268 (2009) (examining "a collection of 191 opinions from 171 cases reported between 1951 and 2007").

<sup>214</sup> *Id.* at 269 (discussing cases).

<sup>215</sup> David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 532-33 (1999) (citing *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379 (Pa. Super. Ct. 1952)).

<sup>216</sup> *Id.*; see also Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 LAW & HIST. REV. 487, 488 (2016) [hereinafter George, *Custody Crucible*] ("[L]esbian mothers and gay fathers became increasingly visible in the 1970s, asserting their rights in court and building support networks as they pressed their claims."); DANIEL WINUNWE RIVERS, *RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS, AND THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II* 53 (2013) ("In the 1970s, as large numbers of lesbians and gay men openly declared their sexuality, they challenged the longstanding cultural assumption that lesbians and gay men could not be parents.").

<sup>217</sup> Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 714 (1976) ("Judicial predisposition against homosexuals has been demonstrated time and again by the courts' assumptions that lesbianism is equivalent to, or tantamount to, unfitness.").

<sup>218</sup> Jordan Blair Woods, *Bigotry, Civil Rights, and LGBTQ Child Welfare*, 120 MICH. L. REV. 1011, 1023 (2022); see also Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 639 (2013) [hereinafter Rosky, *Fear*] ("Before Stonewall, they had emphasized the specter of seduction—adults initiating children into queerness through sexual activity between adult and child.").

<sup>219</sup> Hunter & Polikoff, *supra* note 217, at 692 ("The cases involving lesbian mothers overwhelmingly demonstrate the difficulty they face in attempting to maintain custody of their children and to affirm their self-identity at the same time. Homosexual fathers

Over time, a growing body of social science evidence supported the view that LGBTQ people were not inherently bad parents.<sup>220</sup> Perhaps sensing that acceptance of LGBTQ parenting held the potential to shift public opinion on LGBTQ issues more generally,<sup>221</sup> rather than back away from arguments about alleged harm to children in the face of this evidence, opponents shifted tactics.<sup>222</sup> In place of the overtly anti-gay arguments, opponents opted for more neutral and politically palatable narratives.<sup>223</sup> Rather than directly assert that LGBTQ people were themselves bad,<sup>224</sup> opponents instead posited that LGBTQ parents were “unable to provide . . . ideal setting[s]” for the raising of children.<sup>225</sup>

There were several variations of this theme. One variant stressed that such households lacked dual-gender parenting models. Consider the claims of George Rekers, a professor of neuropsychiatry and behavioral science<sup>226</sup>

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face no less severe problems.”); *see also* Chambers & Polikoff, *supra* note 215, at 533 (noting during 1970s, “cases in which lesbian mothers lost custody of their children were more numerous” than those in which they won).

<sup>220</sup> *See, e.g.*, Chambers & Polikoff, *supra* note 215, at 535 (“During the late 1970s, the first mental health research on the well-being of children raised by lesbian mothers was published. Using expert witnesses, advocates were in a better position to dispel recurring myths about lesbians as mothers—that lesbians were mentally ill or emotionally unstable; that a lesbian mother was likely to sexually molest her child or engage in sexual behavior in front of her child; that children raised by lesbian mothers would probably become gay or lesbian, would be confused about their gender identity, would be socially stigmatized, or would suffer other psychological harm.”).

<sup>221</sup> *Id.* at 539 (“[In the 1990s, the] number of planned lesbian and gay families skyrocketed . . . . With this visibility came an increased number of heterosexual allies, people in positions of power able to influence mainstream organizations, as well as ordinary people whose children became friends with children of gay and lesbian parents, thereby learning about gay and lesbian families in ways that break down myths, stereotypes, and fear.”).

<sup>222</sup> *See* George, *Custody Crucible*, *supra* note 216, at 520 (“After liberal researchers began publishing studies highlighting the similarities between children raised by heterosexual and homosexual parents . . . conservative psychologists engaged in scholarship to establish the opposite.”).

<sup>223</sup> *See, e.g.*, Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of the Children*, 46 HARV. C.R.-C.L. L. REV. 81, 92 (2011) [hereinafter Joslin, *Searching for Harm*] (tracing evolving arguments of marriage equality opponents).

<sup>224</sup> Rosky, *Fear*, *supra* note 218, at 639-40.

<sup>225</sup> Joslin, *Searching for Harm*, *supra* note 223, at 86; *see also* Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 243 (2018) (“At first, opponents of marriage equality argued that LGBT parents harmed their children. Over time, this argument morphed into a claim that . . . the optimal childrearing environment for a child was with two different-sex, married parents.” (footnote omitted)).

<sup>226</sup> George, *Custody Crucible*, *supra* note 216, at 523.

whose work was relied upon in LGBTQ-parenting litigation.<sup>227</sup> Rekers argued that children were harmed when raised by LGBTQ people because LGBTQ-parent homes “lack[ed] a daily resident model of either a mother or a father, lack[ed] the unique contributions of either a mother or a father to childrearing, and lack[ed] a model of a husband/wife relationship which is significantly healthier, [and is] substantially more stable socially and psychologically.”<sup>228</sup>

Another prominent opponent of LGBTQ parenting was law professor Lynn Wardle.<sup>229</sup> Among other things, Wardle stressed the importance of children being raised by a mother and a father. “Both the common experience of humanity and recent research,” Wardle wrote, “suggest that a daddy and a mommy together provide by far the best environment in which a child may be reared.”<sup>230</sup> According to Wardle, “fatherlessness” was particularly concerning. Children raised without a father, he posited, were more likely to experience a range of negative developmental outcomes: “Separation of children from their fathers is ‘the leading cause of declining child well-being in our society.’”<sup>231</sup> These concerns led Wardle to argue that there should be a statutory presumption against child custody placement with an LGBTQ person.<sup>232</sup>

These concerns also formed the basis of his opposition to marriage for same-sex couples.<sup>233</sup> “Legalizing same-sex marriage,” Wardle argued, “would foster the creation of a new class of disadvantaged children, produced by medically assisted procreative techniques and intended to be born as part or full orphans and reared without both a mom and dad.”<sup>234</sup>

These arguments—which were rooted in the alleged importance of dual-gender role modeling and stressed the particular importance of fathers—also

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<sup>227</sup> Rekers, for example, testified in support of Florida’s ban on adoption by LGBTQ people. John Schwartz, *Florida Court Calls Ban on Gay Adoptions Unlawful*, N.Y. TIMES (Sep. 22, 2010), <https://www.nytimes.com/2010/09/23/us/23adopt.html>.

<sup>228</sup> George A. Rekers, *An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household That Includes a Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325, 328 (2005).

<sup>229</sup> Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 840.

<sup>230</sup> *Id.* at 857. Ken Connor, former president of Family Research Council, raised similar concerns. Marilyn Elias, *Doctors Endorse ‘Co-Parent’ Laws for Gays*, USA TODAY, Feb. 4, 2002, at 1-2, 2002 WLNR 4508805.

<sup>231</sup> Wardle, *supra* note 229, at 859 (quoting BLANKENHORN, FATHERLESS AMERICA, *supra* note 35, at 1).

<sup>232</sup> *Id.* at 894.

<sup>233</sup> *Id.* at 841.

<sup>234</sup> Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 798 (2001).

featured prominently in the marriage equality debate.<sup>235</sup> Consider the Hawaii litigation. After the Hawaii Supreme Court ruled in 1993 that Hawaii's marriage ban presumptively discriminated on the basis of sex, the case was remanded for trial.<sup>236</sup> One of the State's expert witnesses, Dr. Pruett, testified at trial that children in same-sex parent families were burdened because "same-sex relationships do not provide the same type of learning model or experience for children as does male-female parenting."<sup>237</sup> As a result, "there is an overabundance of information about one gender and little information about the other gender."<sup>238</sup>

Similar arguments were presented to the Supreme Court in *Obergefell*. The State of Ohio, for example, argued that "gender-differentiated parenting is important for human development."<sup>239</sup> It is important, they claimed because "commonsense and '[t]he best psychological, sociological, and biological research' confirm that 'men and women bring different gifts to the parenting enterprise, [and] that children benefit from having parents with distinct parenting styles.'"<sup>240</sup>

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<sup>235</sup> See, e.g., George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359, 380-81 (2011) (contending that gender-complementary parenting is essential to child well-being).

<sup>236</sup> *Baehr v. Lewin*, 74 Haw. 530, 572, 582 (1993) (plurality opinion) ("As we have indicated, HRS § 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex.").

<sup>237</sup> *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*4 (Haw. Cir. Ct. Dec. 3, 1996).

<sup>238</sup> *Id.* These gender-role modeling arguments were also iterated in the groundbreaking marriage equality case *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). In *Goodridge*, the State argued that one of the central purposes of marriage was to "ensur[e] the optimal setting for child rearing," which the State described as being "a two-parent family with one parent of each sex." *Id.* at 961. See generally Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J.C.R. & C.L. 357, 377 (2009) (noting same-sex marriage opponents argued different-sex marriages create conditions necessary for "the successful deployment of gender roles [in children], and the medium for the cultivation of these roles in future generations").

<sup>239</sup> Amicus Curiae Brief of Citizens for Cmty. Values in Support of Defendant-Appellants & Reversal at \*21, *Obergefell v. Himes*, 2014 WL 1653834 (2014) (No. 14-3057) [hereinafter Citizens for Cmty. Values Amicus Curiae Brief]. *Obergefell v. Himes* was later consolidated by the United States Court of Appeals for the Sixth Circuit and retitled *Obergefell v. Hodges*, which became the landmark Supreme Court case.

<sup>240</sup> *Id.* (quoting W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, TOUCHSTONE, Nov. 2005, at 32, 36); see also RYAN T. ANDERSON, HERITAGE FOUND., MARRIAGE: WHAT IT IS, WHY IT MATTERS, AND THE CONSEQUENCES OF REDEFINING IT 1 (2013), <https://www.heritage.org/marriage-and-family/report/marriage-what-it-why-it-matters-and-the-consequences-redefining-it> [<https://perma.cc/8FWN-H9LK>] ("[Marriage] is based on the anthropological truth that men and women are . . . complementary . . . and the social reality that children need a mother and a father.").

Litigants and commentators emphasized not just the alleged importance of “dual-gender parenting.” They also worried about the alleged “harms” children experience when raised in “fatherless” households. For example, Citizens for Community Values, an Ohio organization with a mission “to strengthen Ohio families,” wrote that “[g]reater exposure to father absence [is] strongly associated with elevated risk for early sexual activity and adolescent pregnancy.”<sup>241</sup>

Others stressed that same-sex parent households typically included nonbiological parents. Nonbiological parents, opponents argued, were necessarily inferior. For example, Dr. Pruett further testified in the Hawaii litigation that “biological parents have a predisposition which helps them in parenting children.”<sup>242</sup> Hence, children who are raised in families without their two biological parents “live in a ‘burden[ed] system’” because at least one of their parents lacks such a “predisposition.”<sup>243</sup>

Claims about the purported superiority of biological parents<sup>244</sup> also appeared in *Obergefell*. Citizens for Community Values argued that exclusionary marriage laws served “child-centered purposes,” by “avoiding the negative outcomes often experienced by children raised outside a stable family unit led by their biological parents.”<sup>245</sup> They claimed that social science studies “have shown that, on average, children develop best when reared by their married biological parents in a stable family unit.”<sup>246</sup>

Some opponents went further and posited that “separating” children from their biological parents inflicts affirmative harm on them. For example, political scientist, Matthew O’Brien, argued that it was “optimal” for children to be raised by their two married genetic parents: “[D]eveloping a conception of the good requires knowing your mother and father and the family history into which you are born.”<sup>247</sup>

While these arguments about the purported superiority of biological parents sounded in a different register, they necessarily flowed from the “dual-gender parenting” claim.<sup>248</sup> Same-sex parent households, by definition, do

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<sup>241</sup> Citizens for Cmty. Values Amicus Curiae Brief, *supra* note 239, at \*1, \*20 (quoting Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801, 801 (2003)).

<sup>242</sup> Baehr v. Miike, No. 91-1394, 1996 WL 694235, at \*4 (Haw. Cir. Ct. Dec. 3, 1996).

<sup>243</sup> *Id.*

<sup>244</sup> For a more fulsome exploration of arguments against same-sex marriage rooted in claims about biological parentage, see generally Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467 (2013).

<sup>245</sup> Citizens for Cmty. Values Amicus Curiae Brief, *supra* note 239, at \*4.

<sup>246</sup> *Id.* at \*18.

<sup>247</sup> Matthew B. O’Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 BRIT. J. AM. LEGAL STUD. 411, 442 (2012).

<sup>248</sup> Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 94 (2013) (“[O]nce we see that biological preferentialism—biological primacy in its

not include parents of both “genders.” They also typically include at least one nonbiological parent. In this way, as Douglas NeJaime explains, these arguments rooted in biological parentage repackage the core claim about the inherent inferiority of LGBTQ parents in more “neutral and innocuous terms.”<sup>249</sup> “By using biological parenting as code for male-female parenting . . . the argument cleverly conceals and yet invariably rests on traditional gender scripts associated with marriage and the family.”<sup>250</sup>

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Over the last fifty years, LGBTQ rights opponents have relied upon a range of child-related arguments to oppose rights for LGBTQ people. Initially, these claims sounded in expressly anti-LGBTQ tropes. Over time, however, they were repackaged into more neutral, palatable terms—terms which nonetheless preserved a gendered, bionormative vision of the family.<sup>251</sup>

## 2. Early Gamete Regulation Advocacy

Before a strong, visible movement of donor-conceived people existed, others pushed gamete reform. This Section examines who some of these early gamete regulation proponents were, as well as the narratives and rhetoric they mobilized.

Two early United States gamete reform advocates were David Blankenhorn, former president of the Institute for American Values (“IAV”), and Maggie Gallagher. These names may be familiar to those who followed the marriage equality fight—both Blankenhorn and Gallagher were key opponents of marriage equality. Blankenhorn was one of the “star” witnesses who testified in favor of California’s marriage ban.<sup>252</sup> Maggie Gallagher, a former colleague of Blankenhorn’s, was also “one of the nation’s leading voices in opposition to same-sex marriage.”<sup>253</sup> Indeed, in 2007, Gallagher founded the

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normative form—actually repackages dual-gender parenting claims, we can more fully appreciate the highly sex-differentiated model of marriage and parenting it represents.”).

<sup>249</sup> *Id.* at 84.

<sup>250</sup> *Id.*

<sup>251</sup> Huntington, *supra* note 225, at 243 (describing “morph[ing]” of arguments against marriage equality).

<sup>252</sup> Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 *YALE L.J.* 3076, 3101 (2014) (describing David Blankenhorn as “[p]roponents’ star witness”); see also, e.g., Laird Harrison & Scott Shafer, *A Leading Gay Marriage Foe Reconsiders*, KQED (June 22, 2012), <https://www.kqed.org/news/68562/leading-gay-marriage-foe-abandons-fight> [<https://perma.cc/C2FL-QWFG>] (“Blankenhorn served as the star witness for the defense in *Perry vs. Brown*, the federal case against [California’s] ban on same-sex marriage.”).

<sup>253</sup> Tovia Smith, *As Support For Gay Marriage Grows, An Opponent Looks Ahead*, NPR (Mar. 22, 2013, at 15:13 ET), <https://www.npr.org/2013/03/22/175064250/as-support-for->

National Organization for Marriage, which describes itself as “a national resource for marriage-related initiatives at the state and local level,” founded “in response to the growing need for an organized opposition to same-sex marriage in state legislatures.”<sup>254</sup>

But before either Blankenhorn or Gallagher actively and visibly opposed marriage equality, they were pushing gamete regulation. David Blankenhorn took an interest in the issue around the time that his book, *Fatherless America: Confronting Our Most Urgent Social Problem*, was published in 1995.<sup>255</sup> The book’s basic thesis is that “dads are essential for the well-being of children and society.”<sup>256</sup> Unfortunately for children, Blankenhorn continues, “[t]he United States is becoming an increasingly fatherless society.”<sup>257</sup> “Fatherlessness,” Blankenhorn posits, “is the leading cause of declining child well-being in our society.”<sup>258</sup> “[U]nless we reverse the trend of fatherlessness,” he argues, “no other set of accomplishments . . . will succeed in arresting the decline of child well-being.”<sup>259</sup>

While Blankenhorn’s concerns regarding fatherlessness were not limited to families created with the use of donor gametes, it did expressly include them.<sup>260</sup> Indeed, Blankenhorn found the concept of assisted reproduction with donor gametes deeply troubling. “[T]his whole issue of sperm banks,” he remarked, was “both frightening and honestly just repulsive—trafficking in this product of radically fatherless children.”<sup>261</sup> Assisted reproduction with donated sperm, Blankenhorn said, represented “our society’s extreme embodiment of the idea that children do not need fathers.”<sup>262</sup> Or, as he put it using more colorful language, “the rise of the Sperm Father constitutes nothing less than father killing, the witting enactment of cultural patricide.”<sup>263</sup>

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gay- marriage- grows- an- opponent- looks- ahead [<https://perma.cc/AH5J-CUJK>] (describing development of Gallagher’s convictions against same-sex marriage).

<sup>254</sup> *About Us*, NAT’L ORG. FOR MARRIAGE, <https://nationformarriage.org/about-us> [<https://perma.cc/7HVH-TBGH>] (last visited Dec. 21, 2025).

<sup>255</sup> See generally BLANKENHORN, *FATHERLESS AMERICA*, *supra* note 35.

<sup>256</sup> *Father Hunger*, *supra* note 35.

<sup>257</sup> BLANKENHORN, *FATHERLESS AMERICA*, *supra* note 35, at 1.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 222.

<sup>260</sup> Arndt, *supra* note 36 (“David Blankenhorn . . . is strongly critical of what he calls ‘sperm fathers.’”).

<sup>261</sup> Alicia Priest, *Single Mothers: Bringing Up Baby (Alone)*, VANCOUVER SUN, Jan. 21, 1995, at E17, 1995 WLNR 3364474; see also Tony Atherton, *Single-Motherhood Film Is Entirely Delightful*, OTT. CITIZEN, Jan. 23, 1995, at B8, 1995 WLNR 3347354 (“Yes, says David Blankenhorn of the Institute for American Values: ‘There’s something frightening and sad about watching mothers place what is good for (themselves) ahead of what is good for the child.’”).

<sup>262</sup> Arndt, *supra* note 36.

<sup>263</sup> BLANKENHORN, *FATHERLESS AMERICA*, *supra* note 35, at 184 (“[B]eing a Sperm Father is . . . a means of paternal suicide: the collaboration of the male in the eradication of his

To ward against such “fatherlessness,” Blankenhorn urged states to enact “[n]ew laws [that] prohibit sperm banks and others from selling sperm to unmarried women and limit the use of artificial insemination to cases of married couples experiencing fertility problems.”<sup>264</sup> According to Blankenhorn, this was necessary because “[i]n a good society, people do not traffic commercially in the production of radically fatherless children.”<sup>265</sup>

In the years following the release of Blankenhorn’s book, others called for gamete regulation, including columnists,<sup>266</sup> scholars,<sup>267</sup> and organizations (including Blankenhorn’s own).<sup>268</sup> Another prominent proponent was Maggie Gallagher. Gallagher, a former columnist, joined Blankenhorn at the IAV in 1996.<sup>269</sup> Like Blankenhorn, Gallagher was troubled by assisted reproduction use by unmarried women. Gallagher accepted the use of assisted reproduction by different-sex married couples: “When sperm banks serve exclusively married couples, the act may be thought of as a kind of prenatal adoption. We sever the biodad’s rights and obligations because we’re offering the child something much better: a married father.”<sup>270</sup> But the same could not be said, Gallagher continued, for unmarried women: “By choosing to let

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fatherhood. Toward the end of the fatherless society, the Sperm Father represents the final solution.”).

<sup>264</sup> *Id.* at 233.

<sup>265</sup> *Id.*

<sup>266</sup> Tom Lowe, *The Devaluing of Fatherhood to Blame for Many of Our Ills*, S. FLA. SUN-SENTINEL, July 2, 1995, at 2G, 1995 WLNR 4818920 (“So-called alternative lifestyles should be treated with the contempt they deserve for damaging our children’s well-being. State legislatures could reaffirm the value of two-parent families by passing laws to prohibit sperm banks from selling sperm to unmarried women.”).

<sup>267</sup> John Leo, Opinion, *Open Market in Sperm Indicates Lesser Role of Fathers*, TIMES-PICAYUNE (New Orleans), May 9, 1995, at B07, 1995 WLNR 1016557 (noting “a bioethicist and head of the Hastings Center” and “a sociologist at VPI” are “basically saying the same thing: Artificial insemination of single women is . . . an expression of a whole new social policy that turns away from the ideal of an intact family toward what we used to call a non-intact or broken one”).

<sup>268</sup> Bettina Arndt, *A Father’s Place*, SYD. MORNING HERALD, July 26, 1997, 1997 WLNR 7695148 (“The Institute for American Values . . . promotes a list of other controversial proposals, including the prohibition of the sale of sperm to unmarried women and limiting artificial insemination to infertile married couples . . .”). As Courtney Cahill chronicles, IAV’s public position on gamete regulation has at times shifted: “Where *The Revolution in Parenthood* recommends a temporary cessation of alternative reproduction, then, *My Daddy’s Name is Donor* endorses its elimination for those who use it to parent non-biological children.” Cahill, *Oedipus Hex*, *supra* note 2, at 201.

<sup>269</sup> Mark Oppenheimer, *The Making of Gay Marriage’s Top Foe*, SALON (Feb. 8, 2012, at 13:00 ET), [https://www.salon.com/2012/02/08/the\\_making\\_of\\_gay\\_marriages\\_top\\_foe](https://www.salon.com/2012/02/08/the_making_of_gay_marriages_top_foe) [<https://perma.cc/7A6G-UG3S>] (detailing Gallagher’s personal history, career, and rise to notoriety, including her involvement with IAV).

<sup>270</sup> Maggie Gallagher, Comment, *Children Who Are Truly Fatherless*, LONG BEACH PRESS TELEGRAM, Mar. 30, 1998, at A7, 1998 WLNR 1454174.

men sell their paternity to single women, however, the law is doing something radically different: creating the truly fatherless child, orphaned at conception by his parents' design."<sup>271</sup>

Consider, too, the work of Daniel Callahan, a former director of the Hastings Center, a research institute focused on issues related to bioethics.<sup>272</sup> In a 1992 law review article, Callahan argued that anonymous male sperm donation was "fundamentally wrong and should have no place in a civilized, much less a supposedly liberal society."<sup>273</sup> Fatherhood, he argued, "is a biological condition [that] cannot be abrogated by personal desires or legal decisions."<sup>274</sup> A sperm provider, including a sperm donor, according to Callahan, "is a *father* . . . [n]othing more, nothing less."<sup>275</sup> The "acceptance of single-parent procreation and motherhood, for both heterosexual and lesbian women [through assisted reproduction] . . . ha[s] in effect declared fathers biologically irrelevant and socially unnecessary."<sup>276</sup>

As noted above, some of these early gamete regulation proponents, including Blankenhorn, Gallagher, and their organization, the IAV, became leading opponents of marriage equality for same-sex couples. While their opposition to same-sex marriage came later,<sup>277</sup> it flowed naturally and directly from the very rationales that animated their wariness of assisted reproduction with donor gametes.<sup>278</sup> For example, Gallagher explained that her opposition to same-sex marriage was not about homosexuality per se.<sup>279</sup> Rather, it was rooted in her view that "children need a mom and a dad, and after gay marriage, . . . [w]e will not have an institution dedicated to putting together mothers and fathers and children."<sup>280</sup> Thus, a (if not the) critical crisis, in

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<sup>271</sup> *Id.*

<sup>272</sup> Daniel Callahan, 1930-2019, HASTINGS CTR. FOR BIOETHICS (July 18, 2019), <https://www.thehastingscenter.org/news/daniel-callahan-1930-2019> [<https://perma.cc/24T9-6FRT>].

<sup>273</sup> Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735, 739 (1992).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 742.

<sup>277</sup> According to Gallagher, it was not until 2003 that same-sex marriage became a focus for her. *See, e.g.*, Oppenheimer, *supra* note 269. For Blankenhorn, it may have been even later. *See, e.g.*, David Blankenhorn, Opinion, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012) [hereinafter Blankenhorn, *How My View*], <https://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> (identifying his 2007 book, *The Future of Marriage*, as earliest publication in which he "took a stand against gay marriage").

<sup>278</sup> *See, e.g.*, Leighton, *supra* note 166 (showing interconnection between these issues for Blankenhorn and others).

<sup>279</sup> Oppenheimer, *supra* note 269 ("The questions began by talking about what people think about homosexuality,' Gallagher recalls. 'And I said that's a perfectly legitimate question, but that's not my concern.'").

<sup>280</sup> *Id.*

Gallagher's view, was the creation of families that departed from the normative biologically- and gender-based model of the family: "[S]ame-sex marriage challenges the idea that every child should be with its biological mother and father."<sup>281</sup>

For his part, David Blankenhorn, expressed a similar perspective.<sup>282</sup> Like Gallagher, the crux of Blankenhorn's objection to same-sex marriage concerned parenting by LGBTQ people. Same-sex marriage was bad, Blankenhorn argued, *because* it reinforced the view that "a child does not really need a mother and a father."<sup>283</sup>

Indeed, even after Blankenhorn publicly declared in 2012 that the "time ha[d] come for [him] to accept gay marriage,"<sup>284</sup> he continued to oppose LGBTQ parenting. In the very op-ed in which he announced his "accept[ance] [of] gay marriage,"<sup>285</sup> Blankenhorn doubled down on his opposition to so-called fatherless families. He ended his famous piece with a plea to same-sex (presumably married) couples, asking them to "think twice before denying children born through artificial reproductive technology the right to know and be known by their biological parents."<sup>286</sup>

Another argument against donor gametes flows from a related (and now familiar) proposition: that biological parents and biological parenting are superior. On this view, children raised by nonbiological parents are being raised in inferior settings and are thus disadvantaged. George Dent, for example, wrote: "The bond with biological parents is also intrinsically good for children."<sup>287</sup> Because children fare best when raised by their biological parents, the argument continues, "[c]hildren who were commissioned by adults using donated gametes and a gestational carrier are automatically cursed."<sup>288</sup>

Some opponents of assisted reproduction with donor gametes go a step further, positing that children raised in households with nonbiological parents are affirmatively harmed.<sup>289</sup> According to proponents of this contested

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<sup>281</sup> *Id.*

<sup>282</sup> *See, e.g.,* Harrison & Shafer, *supra* note 252 ("In his 2007 book 'The Future of Marriage,' and in testimony defending California's Proposition 8 in court, Blankenhorn argued that marriage should only be between a man and a woman.").

<sup>283</sup> Declaration of David Blankenhorn as Expert Witness for Defendant ¶ 70, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW).

<sup>284</sup> Blankenhorn, *How My View*, *supra* note 277.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Dent, *supra* note 235, at 372.

<sup>288</sup> *See* Jordan Boyd, *We Need to Get Serious About Meeting Advances in Reproductive Tech with an Actionable Moral Framework*, FEDERALIST (Dec. 14, 2022), <https://thefederalist.com/2022/12/14/we-need-to-get-serious-about-meeting-advances-in-reproductive-tech-with-an-actionable-moral-framework> [<https://perma.cc/R7B9-H4F8>].

<sup>289</sup> *See infra* notes 290-95 and accompanying text.

view—referred to as “genetic” or “genealogical bewilderment”<sup>290</sup>—not being raised by one’s genetic progenitors impedes the child’s ability to develop their identity: “[C]hildren and their descendants who don’t know their genetic origin cannot sense themselves as embedded in a web of people past, present, and in the future through whom they can trace the thread of life’s passage down the generations to them.”<sup>291</sup> Or as Vardit Ravitsky puts it, “[i]n the case of donor conception . . . a parent-child relationship is constructed in the absence of the genetic connection.”<sup>292</sup> “This detachment” she continues, “can leave a psychological void that offspring long to fill.”<sup>293</sup>

Other scholars contend that these alleged harms are further compounded when this “severing” is intentional.<sup>294</sup> In 2006, for example, philosopher J. David Velleman wrote that, unlike situations involving adoption, in which “a child whose ties to its biological parents had been ruptured after conception, [parents using assisted reproduction] intentionally created one for whom those ties were ruptured antecedently.”<sup>295</sup> This, it is suggested, compounds the harm and is more morally objectionable. Or, as Jordan Boyd put it more recently in *The Federalist*: “Reproductive technologies, such as

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<sup>290</sup> Cahill, *Anonymity*, *supra* note 2, at 649 n.14, 654 (“[T]he alleged psychological ‘condition’ associated with anonymity anxiety—genealogical bewilderment—has in some circles been roundly critiqued and discredited.”).

<sup>291</sup> *Evidence Hearing on Bill C-38 Before the Leg. Comm.*, 38th Parl. (Can.) (June 2, 2005) (reporting testimony of Margaret Somerville, Samuel Gale Professor of Law, McGill Centre for Medicine, Ethics and Law); *see also* J. David Velleman, *Family History*, 34 PHIL. PAPERS 357, 363 (2005) (“[G]amete donation . . . purposely severs a connection of the sort that normally informs a person’s sense of identity, which is composed of elements that must bear emotional meaning, as only symbols and stories can.”); Lorena Solis, Comment, *The Voiceless Citizens: Surrogacy Contracts and the Rights of the Child*, 3 TEX. A&M L. REV. 417, 437-38 (2015) (“‘Genealogical bewilderment,’ often associated with an adopted child’s identity confusion resulting from not knowing his or her origins, is now sometimes associated with children who were conceived with the help of donors. The resulting state of confusion and uncertainty experienced by a genealogically bewildered child undermines his security and affects his mental health.” (footnotes omitted)).

<sup>292</sup> Vardit Ravitsky, “*Knowing Where You Come from*”: *The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, 11 MINN. J.L. SCI. & TECH. 665, 677 (2010).

<sup>293</sup> *Id.* at 677-78.

<sup>294</sup> Boyd, *supra* note 34 (“The women who employed a system that intentionally distances offspring from their biological roots put their children at a disadvantage from conception.”).

<sup>295</sup> Velleman, *supra* note 291, at 361; *see also* Boyd, *supra* note 288 (“Is intentionally creating motherless and fatherless children good for society? Statistics and science say no.”); Solis, *supra* note 291, at 437-38 (“It is one matter for children not to know their genetic identities as a result of unintended circumstances. It is quite another matter to deliberately destroy children’s links to their biological parents . . .” (quoting Margaret Somerville, *Children’s Human Rights to Natural Biological Origins and Family Structure*, 1 INTL. J. JURIS. FAM. 35, 44 (2010))).

making babies with supplied sperm that come with no relational strings, are morally problematic because they sideline the natural right children have to a mother and father in favor of adults' selfish desires."<sup>296</sup>

Once limited to a relatively small subset of advocates and scholars, these views are now becoming more visible and mainstream. Consider Project 2025, the "Presidential Transition Project," which directs that: "In the context of current and emerging reproductive technologies, HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them."<sup>297</sup>

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Due to changes in the use of assisted reproduction, LGBTQ people will disproportionately feel the effects of any regulations regarding the use and collection of donor gametes. For some, the fact that gamete regulation might limit the ability of LGBTQ people (as well as unmarried women) to access assisted reproduction is an unfortunate side effect. Even when this effect is not the intended outcome, curtailing LGBTQ family formation can nonetheless "reinforc[e] th[eir] marginalization."<sup>298</sup>

But for others, this effect is an intended *feature* of gamete regulation. Emma Waters, for example, opposes assisted reproduction by same-sex couples because the existence of these families "reinforces the myth that a synthetic same-sex coupling is equivalent to the natural family."<sup>299</sup> For advocates like Waters, the concerns about families formed through donor gametes and about LGBTQ parents are interrelated. Her objections to both are rooted in and flow directly from hostility towards families that defy the stereotypical bionormative family. David Blankenhorn expressed this view quite forthrightly: "Every child," he wrote, has a "birthright" to be raised by the two "parents who made [them]. Every single one."<sup>300</sup>

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<sup>296</sup> Boyd, *supra* note 34; Newman, *supra* note 34 ("Third-party reproduction is inherently unethical, because it serves as a market to manufacture children for any adult who wants them, purposely severing the biological parent-child relationship for the sake of profit.").

<sup>297</sup> Severino, *supra* note 34, at 451.

<sup>298</sup> DANIEL GROLL, *CONCEIVING PEOPLE: GENETIC KNOWLEDGE AND THE ETHICS OF SPERM AND EGG DONATION* 192 (2021).

<sup>299</sup> Emma Waters, *California Creates Baby-Selling Market Through "In Vitro Fertilization for All,"* HERITAGE FOUND. (June 20, 2023), <https://www.heritage.org/life/commentary/california-creates-baby-selling-market-through-vitro-fertilization-all> [<https://perma.cc/NK7N-XNJ3>].

<sup>300</sup> David Blankenhorn, *Protecting Marriage to Protect Children*, L.A. TIMES (Sep. 19, 2008, at 00:00 PT), <https://www.latimes.com/la-oe-blankenhorn19-2008sep19-story.html> [<https://perma.cc/GE32-3WVH>].

### C. Liberty Concerns

#### 1. Direct Doctrinal Implications

This Section examines how gamete regulation holds the potential to impact liberty and autonomy interests. The most obvious potential liberty-related impact is the possibility that gamete regulation could reduce access to and thus the practical ability of people to choose to form a family through assisted reproduction. The people who will feel this effect most acutely are LGBTQ people and unpartnered women.

Like non-LGBTQ people, many LGBTQ people want to have children. A recent study by the Williams Institute at UCLA School of Law, for example, found that 41% of the surveyed LGBTQ participants reported that they “wanted children, or more children, in the future.”<sup>301</sup> Many of these individuals report that they would like to use assisted reproduction to do so.<sup>302</sup> For those participants who reported wanting to have children in the future, many worry that this may not be possible. The same study found that “the number one barrier [to having children] identified was cost (79%).”<sup>303</sup> Almost a third of participants (30%) also reported concerns about discrimination.<sup>304</sup>

Some of the enacted and proposed gamete regulations hold the potential to limit access to this method of family formation. For example, there has been an ongoing debate about the extent to which ending anonymous gamete donation might restrict the supply of donor gametes and, if so, how that reduction in supply might affect costs.<sup>305</sup> The available evidence is mixed.<sup>306</sup> For example, a study conducted in the 2010s in the United States found that 29% of “current anonymous sperm donors in the sample would refuse to donate if the law changed such that they were required to put their names in a registry available to donor-conceived children at age 18.”<sup>307</sup> Authors of the

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<sup>301</sup> ABBIE E. GOLDBERG, WILLIAMS INST., PARENTING AMONG MARRIED SAME-SEX COUPLES: EXPERIENCES, ASPIRATIONS, AND BARRIERS 2 (2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Family-Building-Dec-2024.pdf> [<https://perma.cc/YTH9-BAY3>].

<sup>302</sup> The same study found that almost two-thirds of participants (61%) reported their preferred or ideal method of family formation was through “biological parenthood” routes, including through assisted reproduction. *Id.*

<sup>303</sup> *Id.* at 3.

<sup>304</sup> *Id.*

<sup>305</sup> See, e.g., CAHN, TEST TUBE FAMILIES, *supra* note 2, at 228 (“Requiring that gamete providers agree to the possibility of information disclosure may be risky in terms of supply.”).

<sup>306</sup> See, e.g., GROLL, *supra* note 298, at 192 (“This concern is somewhat borne out by the data.”).

<sup>307</sup> Glenn Cohen, Travis Coan, Michelle Ottey & Christina Boyd, *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J.L. & BIOSCIENCES 468, 470 (2016).

study further found that some donors who would be open to participating under such a scheme “would demand an additional \$60 per donation to participate.”<sup>308</sup> These findings suggest that ending the possibility of anonymous gamete donation would deter some people from donating, and that maintaining the current supply might result in passing on costs to intended parents.

There is also some evidence from other countries that likewise suggests that prohibiting anonymous donation can negatively impact supply. For example, some other countries experienced at least an initial decline in the supply of donor sperm after ending anonymous donation.<sup>309</sup> Other evidence, however, suggests that some countries that experienced an initial decline later saw the situation “stabilize.”<sup>310</sup> Ultimately, as Naomi Cahn writes, assessing the effect of such a policy change is complicated. For example, in the countries where the supply later stabilized,<sup>311</sup> it is hard to know whether that later stabilization resulted from other changes in practice, including changes to eligibility requirements.

Ending “anonymous” donation is not the only proposal that could impact accessibility. Stringent family limit requirements could also impact the supply of gametes. In the United States, current ASRM guidance on family limits—which some banks purport to follow—suggests limiting, “in a population of 800,000, . . . a single donor to no more than 25 births.”<sup>312</sup> Some proposals seek not only to codify family limits in statute, but also to impose lower *total* family limits. For example, in 2022, Colorado became the first state in the nation to enact a statute that includes a family limit requirement.<sup>313</sup> The final enacted version includes a total family limit of twenty-five (which is lower

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<sup>308</sup> *Id.*

<sup>309</sup> See, e.g., CAHN, TEST TUBE FAMILIES, *supra* note 2, at 227-28 (noting such declines in Sweden and New Zealand). There is some evidence that the United Kingdom also saw declines in donor supply, at least initially. See, e.g., Peter Wardle, *The Real Impact of the Removal of Donor Anonymity*, BIONEW (Feb. 18, 2008), [https://web.archive.org/web/20100922083923/http://www.bionews.org.uk/page\\_37975.asp](https://web.archive.org/web/20100922083923/http://www.bionews.org.uk/page_37975.asp) (reporting 94% of clinics found it more difficult to purchase donor sperm following legislation removing donor anonymity); see also Rebecca Johns, *Abolishing Anonymity: A Rights-Based Approach to Evaluating Anonymous Sperm Donation*, 20 UCLA WOMEN'S L.J. 111, 122-23 (2013) (“Illegalizing anonymity has historically led to a drastic drop in the availability of sperm. In Australia, where anonymous donation has been eliminated, there are only three available sperm donors at the largest fertility clinic.”).

<sup>310</sup> CAHN, TEST TUBE FAMILIES, *supra* note 2, at 228 (observing donor rates initially fell after Sweden and New Zealand issued donor-identity release mandates, but then rebounded).

<sup>311</sup> *Id.*

<sup>312</sup> ASRM, *Gamete and Embryo Donation Guidance*, 122 FERTIL. & STERIL. 799, 804 (2024).

<sup>313</sup> See, e.g., COLO. REV. STAT. § 25-57-109(1)(a) (2025); see also Gardner, *supra* note 106, at 527-28 (discussing Colorado's family limit requirement).

than the ASRM guideline).<sup>314</sup> An earlier version of the bill included a total family limit of ten.<sup>315</sup> Simple math suggests that if a state enacted a law setting forth a *total* family limit of ten (or even twenty-five families), the supply of available gametes could be reduced.

If supply dwindles, costs may increase. Banks may have to offer more money to donors to fill the demand.<sup>316</sup> In addition, market forces may push prices higher. Consider existing practices at one U.S. bank. A vial of sperm from an anonymous donor with a standard “maximum goal [of] 25-30 family units worldwide per donor” costs \$1,195.<sup>317</sup> In contrast, sperm from a donor with a family limit of one costs \$70,000 per unit, and sperm from a donor with a family limit between two and ten costs \$35,000 per unit.<sup>318</sup> This pricing provides some basis for speculating that family limits could impact costs (maybe dramatically) and, thus, access.<sup>319</sup> The likelihood that gamete regulation could negatively impact supply and access increases if a state enacts more than one of the types of proposals described above—ending anonymous donation, enacting a strict family limit, requiring all donors to consent to the disclosure of their medical records, and authorizing criminal, civil, and/or professional discipline against participants in the process.

## 2. Theoretical Ripple Effects

Limiting access to reproduction, however, is not the only type of liberty or autonomy concern implicated by gamete regulation. Here, again, history and context help expose how rules that limit or impede LGBTQ people’s decisions about procreation could have downstream ripple effects on other important, indeed, fundamental family formation decisions. There is a long history of discrimination against LGBTQ people.<sup>320</sup> Arguments about children

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<sup>314</sup> COLO. REV. STAT. § 25-57-109(1)(a) (2025) (establishing limit of twenty-five families per donor); *see also* ASRM, *supra* note 312 (suggesting limit of twenty-five births per donor in population of 800,000).

<sup>315</sup> S.B. 22-224, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022), [https://leg.colorado.gov/sites/default/files/documents/2022A/bills/2022a\\_224\\_01.pdf](https://leg.colorado.gov/sites/default/files/documents/2022A/bills/2022a_224_01.pdf) [<https://perma.cc/56RQ-XS87>].

<sup>316</sup> *See, e.g.*, Cohen et al., *supra* note 307, at 469-70 (discussing survey finding sperm donors would require additional payment to continue donating if anonymous donation was prohibited).

<sup>317</sup> *Frequently Asked Questions*, CAL. CRYOBANK, <https://www.cryobank.com/learning-center/frequently-asked-questions> [<https://perma.cc/EJM6-E8GK>] (last visited Dec. 21, 2025).

<sup>318</sup> CAL. CRYOBANK, *supra* note 40 (listing pricing information for gamete donors).

<sup>319</sup> Increased costs may push some people to use sperm from unregulated sources, or to turn to sexual intercourse as a means of achieving pregnancy, thereby increasing medical risks as well as legal risks for the family. *See, e.g.*, Cahn & Suter, *supra* note 41.

<sup>320</sup> *See generally* MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES (2011) (tracing historical roots of discrimination against LGBTQ people in United States); JOHN D’EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA

and parenting feature prominently in this history. Conversely, positive legal developments with regard to LGBTQ parenting and parenthood played a critical role in facilitating the extension of other fundamental family formation rights to LGBTQ people.<sup>321</sup>

As Section III.B.1 details, some of the first cases in which judges confronted LGBTQ people were child custody cases. Initially, former different-sex partners sometimes invoked the sexual orientation of the other parent to gain a tactical advantage. In these early cases, the LGBTQ parents typically lost.<sup>322</sup>

Over time, this result became less common. Supported in part by a growing body of social science evidence challenging negative stereotypes about LGBTQ people generally and LGBTQ parents specifically,<sup>323</sup> LGBTQ parents were less likely to lose contested custody cases by the mid- to late-1980s. For example, in the 1986 decision *Anonymous v. Anonymous*,<sup>324</sup> a New York appellate court affirmed an order granting custody to a lesbian mother over the objection of the father. The court held that the mother's sexual orientation alone was an insufficient ground to deny her custody: "In the absence of proof that the child has been adversely affected by plaintiff's life-style, the court correctly determined that plaintiff's sexual preferences do not render her an unfit parent."<sup>325</sup> Eventually, a few jurisdictions even codified this

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(2d ed. 1997) (exploring historical roots of legal and social control over non-normative sexuality); ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 228-29 (1990) (chronicling treatment of lesbian and gay servicemembers in World War II); see also Brief of the Org. of Am. Historians as Amicus Curiae in Support of Petitioners at 2, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004709 ("In twentieth century America, discrimination against gay people reached remarkable proportions.").

<sup>321</sup> NeJaime, *Marriage Equality*, *supra* note 42, at 1187 ("[T]his Article shows how marriage equality was enabled by—and in turn enables—significant shifts in the law's understanding of parenthood.").

<sup>322</sup> See Hunter & Polikoff, *supra* note 217, at 692.

<sup>323</sup> See, e.g., Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363, 382 (2016) [hereinafter George, *Agency Nullification*] ("Social science research had established that parental homosexuality did not impact a child's future sexual orientation, which persuaded mental health professional associations to issue statements supporting gay and lesbian foster care and adoptive rights.").

<sup>324</sup> 120 A.D.2d 983 (N.Y. App. Div. 1986).

<sup>325</sup> *Id.* at 983-84; see also *In re Marriage of Birdsall*, 243 Cal. Rptr. 287, 290-91 (Ct. App. 1988) (holding in absence of evidence that father's sexual orientation was causing some particular harm to child, father's sexual orientation was insufficient grounds to justify restricting father's visitation); *Stroman v. Williams*, 353 S.E.2d 704, 706 (S.C. Ct. App. 1987) (finding mother's sexual orientation, without evidence of adverse effect on child's welfare, was insufficient to justify changing custody from mother to father); *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (upholding grant of joint custody in case in

position. For example, D.C. enacted a statute providing that consideration of “sexual orientation” shall not “in and of itself . . . be a conclusive consideration” in custody litigation.<sup>326</sup>

To be sure, some LGBTQ parents still lose custody.<sup>327</sup> But in most states today, LGBTQ parents will not be denied custody of their children solely because of their sexual orientation.<sup>328</sup> This legal shift reflected an evolving social understanding of LGBTQ people, shifting from a view that being LGBTQ was incompatible with parenting to one that embraced the proposition that LGBTQ people could be good parents.<sup>329</sup>

Starting in the late 1970s and early 1980s, LGBTQ people began to create planned LGBTQ-parent families.<sup>330</sup> Some of these families were formed through adoption and foster placements.<sup>331</sup> In the past, a small number of states enacted formal and informal policies that barred or impeded the ability of LGBTQ people to adopt.<sup>332</sup> Over time, these types of laws and practices were repealed or struck down.<sup>333</sup> Today, married LGBTQ spouses can adopt

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which there was no evidence showing mother’s sexual orientation would adversely affect child).

<sup>326</sup> D.C. CODE § 16-914(a)(1)(A) (2025).

<sup>327</sup> For a careful analysis of some of these decisions, see, for example, Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 627 (1996). See also Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1617-18 (2019).

<sup>328</sup> See, e.g., Nancy D. Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA L. REV. DISCOURSE 226, 237 (2013) (noting positive development of law regarding child custody towards nexus standard, from “rule that a parent living with a same-sex partner was per se an unfit parent”). But see Katyal & Turner, *supra* note 327, at 1657-58 (arguing “even when courts purport to apply the nexus test, they actually apply that test in a distorted fashion to justify the exact same outcome as a blanket ban”).

<sup>329</sup> See, e.g., Polikoff, *supra* note 328.

<sup>330</sup> See, e.g., GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 105 (2004) (“[T]he lesbian baby boom of the 1980s represented something new: a generation of women who lived openly as lesbians and no longer felt obliged to marry a man in order to have a child.”); see also Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1075 (discussing “‘gayby boom’ of the 1980s”).

<sup>331</sup> According to a 2015 report, among all same-sex couples with children, 22% have an adopted or foster child under age eighteen. GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 8 fig. 6 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demo-SS-Couples-US-Mar-2015.pdf> [<https://perma.cc/56UX-SKZP>].

<sup>332</sup> See, e.g., George, *Agency Nullification*, *supra* note 323, at 365 (discussing bans on adoption and foster care by LGBTQ people).

<sup>333</sup> COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:1 (2024-2025 ed. 2024) (noting “the growing numbers of states that prohibit discrimination on the bases of sexual orientation and

in all fifty states.<sup>334</sup> And no state expressly bans LGBTQ individuals from adopting.<sup>335</sup> Due in part to these developments, LGBTQ people make up a disproportionate share of the adoptive parents in the United States today. One study found that same-sex couples are “nearly three times as likely as their different-sex counterparts to be raising an adopted or foster child.”<sup>336</sup> Another recent study reported even larger variations among married couples, finding that “24% of married same-sex couples have adopted a child compared to [only] 3% of married different-sex couples.”<sup>337</sup>

By the early 1980s—the beginning of the so-called “gayby boom”<sup>338</sup>—small but growing numbers of LGBTQ people (primarily female same-sex couples)—also formed families through assisted reproduction. Initially, much of this was fueled by at-home insemination.<sup>339</sup> Recall that sperm banks and fertility doctors at the time typically refused to provide services to unmarried people, including LGBTQ people.<sup>340</sup> Eventually, however, some sperm banks and health care providers began opening their services to people other than married spouses (who, at the time, were all different-sex spouses). The Sperm Bank of California led the way in 1982.<sup>341</sup>

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gender identity in adoption and foster care”). Although, while no state today categorically bans all LGBTQ people from adopting or serving as foster parents, we have seen a recent increase in the number of states with laws authorizing adoption placement agencies to decline to service LGBTQ people. *Id.* § 2:2; *see also Child Welfare Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws) [<https://perma.cc/NV3X-QP7V>] (last visited Dec. 21, 2025) (displaying states authorizing discrimination against LGBTQ people by adoption placement agencies).

<sup>334</sup> *See, e.g.,* JOSLIN ET AL., *supra* note 333, § 5:2 (“[T]oday, for couples who are married . . . stepparent adoptions are available in all 50 states.”).

<sup>335</sup> *Id.* § 2:9 (“[T]oday, no state bars all LGBTQ individuals from adopting children.”).

<sup>336</sup> GATES, *supra* note 331, at 1; *see also* Boucai, *supra* note 330, at 1105 (“Lesbians, gay men, and bisexuals are also more likely than non-LGB people to adopt.”).

<sup>337</sup> *More than 2.5 Million LGBTQ Adults Are Parenting Children Under the Age of 18*, WILLIAMS INST. (July 17, 2024), <https://williamsinstitute.law.ucla.edu/press/lgbtq-parenting-2024-press-release> [<https://perma.cc/N6HQ-7S5M>].

<sup>338</sup> Boucai, *supra* note 330, at 1075 (referring to “‘gayby boom’ of the 1980s”).

<sup>339</sup> *Id.* (noting “boom” was first fueled “by community efforts to circulate information about assisted (or ‘artificial’) insemination”); *see also* Renate Duelli Klein, *Doing It Ourselves: Self-Insemination*, in *TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD?* 382, 382-90 (Rita Arditti, Renate Duelli Klein & Shelley Minden eds., 1984).

<sup>340</sup> Boucai, *supra* note 330, at 1075 (noting “medical establishment” at that time was “hesitant to provide fertility counseling and treatment to unmarried women, especially lesbians”); *see also* SPERM BANK OF CAL., *supra* note 81 (“In the early 1980’s there were no sperm banks that would serve unmarried people.”).

<sup>341</sup> The sperm bank of California was “founded to provide a legally protected and medically safe family building option to all people regardless of marital status or sexual orientation.” SPERM BANK OF CAL., *supra* note 81.

Today, most gamete banks, including sperm banks, serve people regardless of marital status.<sup>342</sup> Indeed, unmarried women and LGBTQ people account for the overwhelming majority of users of donated sperm today.<sup>343</sup> Through these and other routes, many LGBTQ people have become parents. According to the Williams Institute at UCLA School of Law, “18% (2.57 million) of LGBTQ adults are parenting children.”<sup>344</sup>

Some of these families were formed through adoption and foster care. However, among same-sex couples raising children, approximately two-thirds were raising “biological children.”<sup>345</sup> While most of these “biological children” were conceived through sexual intercourse in the context of different-sex relationships,<sup>346</sup> a significant share were conceived through assisted reproduction.<sup>347</sup> A recent study projects that the percentage of LGBTQ people who become parents through assisted reproduction will increase over time.<sup>348</sup>

Even as fertility care became more accessible to LGBTQ people, these families continued to face legal exclusion and vulnerability. For example, until about ten years ago, almost all state laws governing the parentage of children born through assisted reproduction were limited to the children born to married couples.<sup>349</sup> It is only in the last decade that same-sex couples had

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<sup>342</sup> See, e.g., *Single Mothers by Choice*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/single-mothers> [<https://perma.cc/88NQ-TP2J>] (last visited Dec. 21, 2025) (“Our sperm bank supports the dreams of single mothers.”).

<sup>343</sup> See *supra* note 34.

<sup>344</sup> BIANCA D.M. WILSON & LAUREN J.A. BOUTON, WILLIAMS INST., LGBTQ PARENTING IN THE U.S. (2024), <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us> [<https://perma.cc/V35D-XQGQ>].

<sup>345</sup> *Id.*

<sup>346</sup> See, e.g., Nancy D. Polikoff, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. PA. L. REV. ONLINE 99, 106 (2016) (“Most same-sex couples with children are raising children born to one partner while in an earlier different-sex marriage or relationship . . .”).

<sup>347</sup> *LGBTQ Family Building Survey*, FAM. EQUAL. COUNCIL (Jan. 2019) [hereinafter *Family Building Survey*], [https://familyequality.org/wp-content/uploads/2019/02/LGBTQ-Family-Building-Study\\_Jan\\_2019-1.pdf](https://familyequality.org/wp-content/uploads/2019/02/LGBTQ-Family-Building-Study_Jan_2019-1.pdf) [<https://perma.cc/GW2H-YK2W>] (“LGBTQ respondents who are already parents reported that intercourse was utilized 73% of the time to build their families, either within the context of a previous heterosexual relationship or as part of a different-sex relationship where one or both partners identifies as bisexual.”).

<sup>348</sup> *Id.*; see also *LGBT Family Building Survey: Key Findings*, FAM. EQUAL. COUNCIL, [https://familyequality.org/wp-content/uploads/2019/02/LGBTQ-Family-Building-Study-Summary-1.pdf?\\_ga=2.93483229.1537056059.1721065149-166035638.1720635280](https://familyequality.org/wp-content/uploads/2019/02/LGBTQ-Family-Building-Study-Summary-1.pdf?_ga=2.93483229.1537056059.1721065149-166035638.1720635280) [<https://perma.cc/87CA-3CYB>] (last visited Dec. 21, 2025).

<sup>349</sup> See, e.g., Joslin, *Protecting, supra* note 122, at 1179 (reporting “in 2010 only four states and the District of Columbia ha[d] statutory ART provisions that extend[ed] the consent = legal parent rule to nonmarital children”).

nationwide access to marriage.<sup>350</sup> In practical terms, this meant that state parentage laws typically recognized only the birth parent in these families as a legal parent at birth; the nonbirth parent was treated as a legal stranger to the child.<sup>351</sup> As a practical matter, this left the families, and especially the children, extremely vulnerable.<sup>352</sup> These rules also functioned to perpetuate the social denigration of these families.

This body of law has evolved, slowly and incompletely.<sup>353</sup> Today, some states allow nonbiological parents in these LGBTQ families to secure their parental rights through a “second-parent adoption.”<sup>354</sup> In other cases where LGBTQ coparents could not or did not complete second-parent adoptions, courts drew upon existing functional parent doctrines<sup>355</sup> to protect these children and their families.<sup>356</sup> More recently, a growing number of states have updated their assisted reproduction statutes to expressly embrace and protect

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<sup>350</sup> *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015) (striking down all remaining same-sex marriage bans).

<sup>351</sup> *See, e.g.*, NeJaime, *Nature of Parenthood*, *supra* note 30, at 2293 (“Since only one of the women would have a biological connection to the child, the other found herself a legal stranger upon the child’s birth.”); *see also* Joslin, *Protecting*, *supra* note 122, at 1179-80; Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 497-98 (2014) [hereinafter Joslin, *Leaving No (Nonmarital) Child Behind*].

<sup>352</sup> *See, e.g.*, NeJaime, *Nature of Parenthood*, *supra* note 30, at 2293 (“For many years, courts in most states refused to provide comprehensive legal recognition to the nonbiological mother.”); Joslin, *Leaving No (Nonmarital) Child Behind*, *supra* note 351, at 496-98 (highlighting instability caused by not extending parentage rules to unmarried couples).

<sup>353</sup> *See, e.g.*, Eskridge, *supra* note 30, at 1915-16, 1924-28 (exploring this legal evolution).

<sup>354</sup> *See, e.g.*, Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 935 (2000) (arguing second parent adoptions “exemplif[y], and [are] consistent with, other democratic values that emphasize social pluralism and a strong commitment to social equality”).

<sup>355</sup> For a comprehensive examination of functional parent doctrines, *see generally* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023).

<sup>356</sup> *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660, 667-71 (Cal. 2005) (finding nonbiological partner to be legal parent under state’s “holding out” presumption); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891-93 (Mass. 1999) (holding nonbiological same-sex partner could seek visitation under common law de facto parent doctrine); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 436 (Wis. 1995) (concluding nonbiological same-sex partner may seek visitation if she can establish she had “parent-like relationship” with child); Joslin & NeJaime, *supra* note 355, at 375; *see also* Joslin, *Leaving No (Nonmarital) Child Behind*, *supra* note 351 (discussing legal developments).

all families formed through assisted reproduction, regardless of sexual orientation, marital status, or genetic connection.<sup>357</sup>

While these protections remain partial and tentative, they nonetheless facilitated the formation of more and more LGBTQ parent-families. Growing evidence and case law relying on that evidence support the view that LGBTQ people “are fully capable of . . . responsibly caring for and raising children.”<sup>358</sup> And there was a growing (albeit still partial) body of state laws embracing and protecting these LGBTQ-parent families.

These legal developments shifted, and in turn were shaped by, evolving social acceptance of LGBTQ people and parents.<sup>359</sup> In 1977, for example, “only 14% of Americans believed that gays should be legally permitted to adopt children.”<sup>360</sup> About fifteen years later, in 1992, this number had increased to 29%.<sup>361</sup> And by 2006, almost half of Americans (46%) reported support for adoption by LGBTQ people.<sup>362</sup> “As gay families became more common, fears about the impact of parental homosexuality on children receded.”<sup>363</sup>

These developments regarding LGBTQ parenting in turn laid the groundwork for the expansion of other fundamental rights to LGBTQ people. Consider, for example, marriage equality. As noted above, in litigation seeking marriage for same-sex couples, opponents relied heavily on arguments about children and parenting. For example, in the groundbreaking marriage case out of Massachusetts, *Goodridge v. Department of Public Health*,<sup>364</sup> children and LGBTQ parenting featured prominently. In defending their marriage ban, Massachusetts argued that one of the central purposes of marriage was

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<sup>357</sup> See JOSLIN ET AL., *supra* note 333, § 3:3 (“Increasingly, however, states are enacting assisted reproduction provisions that apply equally to married and unmarried couples. Many of these provisions are also expressly gender-neutral.”).

<sup>358</sup> *Perry v. Brown*, 671 F.3d 1052, 1087 (9th Cir. 2012), *vacated and remanded sub nom.*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (quoting *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008)).

<sup>359</sup> See, e.g., Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 352 (2015) (“The movement to gain legal protection of same-sex family relationships also contributed importantly to the transformation of public attitudes about these relationships and ultimately about same-sex marriage.”).

<sup>360</sup> George, *Agency Nullification*, *supra* note 323, at 419.

<sup>361</sup> Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL’Y REV. 83, 128 (2017); see also MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 72 (2013).

<sup>362</sup> *Less Opposition to Gay Marriage, Adoption and Military Service*, PEW RSCH. CTR. (Mar. 22, 2006), <https://www.pewresearch.org/politics/2006/03/22/less-opposition-to-gay-marriage-adoption-and-military-service> [<https://perma.cc/M25R-8J47>].

<sup>363</sup> See George, *Agency Nullification*, *supra* note 323, at 419.

<sup>364</sup> 798 N.E.2d 941, 956-57 (Mass. 2003).

to “ensur[e] the optimal setting for child rearing,” which the State described as being “a two-parent family with one parent of each sex.”<sup>365</sup>

But, in light of the legal developments regarding LGBTQ parenting in Massachusetts and elsewhere, the Massachusetts high court rejected these arguments. Even under the lowest level of constitutional scrutiny—rational basis review—the Court concluded that these interests could not be credited. Excluding same-sex couples from marriage, the Court held, “cannot plausibly further” an alleged interest in protecting the welfare of children in light of the evidence and the law.<sup>366</sup>

Of note, the Massachusetts high court observed that the state already “affirmatively facilitates bringing children into a family regardless of whether . . . the parent or her partner is heterosexual, homosexual, or bisexual.”<sup>367</sup> This affirmative facilitation was evidenced by, for example, case law permitting second-parent adoptions by same-sex couples,<sup>368</sup> as well as laws ensuring equal insurance coverage for assisted reproductive technology used by same-sex couples.<sup>369</sup> Massachusetts law also provided that parental sexual orientation was not relevant to the best interests of the child.<sup>370</sup> Indeed, the law and social science regarding LGBTQ parenting were so clear that the state of Massachusetts “readily concede[d] that people in same-sex couples may be ‘excellent’ parents.”<sup>371</sup> Ultimately, the Massachusetts high court concluded that the State “offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children.”<sup>372</sup>

Consider, too, the Supreme Court’s decision in *Obergefell*. There, Justice Kennedy similarly relied on the factual existence, as well as the legal embrace of LGBTQ parents, in striking down all remaining state same-sex marriage bans. While opponents invoked arguments about children and parenting as a basis for excluding same-sex couples from the institution of marriage, Justice Kennedy relied on the law and social science about children to rule *for* the couples. “[A]ll parties agree,” he wrote, “[that] many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised

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<sup>365</sup> *Id.* at 961.

<sup>366</sup> *Id.* at 962.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 962 n.24 (citing *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (holding second-parent adoptions are permitted under Massachusetts law)).

<sup>369</sup> *Id.* (“[C]ertain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike.”).

<sup>370</sup> *Id.* at 963 (citing *Doe v. Doe*, 452 N.E.2d 293 (Mass. App. Ct. 1983) (providing parental sexual orientation is insufficient ground to deny custody)).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 968.

by such couples.<sup>373</sup> Moreover, the law in many states endorsed and supported LGBTQ-parent families. “Most States,” Justice Kennedy wrote, “have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.”<sup>374</sup> These state policies, he continued, “provide[] powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”<sup>375</sup> In this way, legal and social developments regarding LGBTQ parenting laid the foundation for the extension of other fundamental due process rights to LGBTQ people.<sup>376</sup>

However, while established as a matter of federal constitutional law, these rights remain tentative and vulnerable. Indeed, in his concurring opinion in *Dobbs*, Justice Thomas expressly called for the overruling of *Obergefell*.<sup>377</sup> Just as developments expanding protections for LGBTQ parents led the way to marriage equality, the reverse may also be true. That is, “marriage equality was partly enabled by . . . concepts of parenthood forged in earlier *nonmarital* advocacy.”<sup>378</sup> If, going forward, these family forms are re-stigmatized, this may in turn serve to unsettle other rights that rest upon them. In this way, retrenchment regarding LGBTQ parenting may be leveraged to justify the overruling or cutting back of other rights for LGBTQ people in the future.

#### IV. RECONSIDERING GAMETE RULES

##### A. *Identifying the Issues*

As in most advocacy efforts, the individuals supporting and opposing gamete regulation are not homogeneous. Some of those who are pushing for gamete regulation are also individuals or organizations who have visibly and publicly opposed rights for LGBTQ people.<sup>379</sup> At least for some who fall in this category, their objections to family creation with donor gametes and LGBTQ family formation are necessarily and inherently intertwined. But they are not the only ones currently calling for reform. In recent years, a growing group of donor-conceived people have joined the calls for additional regulation.

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<sup>373</sup> *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015).

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *See supra* note 42.

<sup>377</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”); *see also* *Davis v. Ermold*, 141 S. Ct. 3 (2020) (statement of Thomas, J., joined by Alito, J., respecting the denial of certiorari) (describing *Obergefell* decision as having “read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text”).

<sup>378</sup> NeJaime, *Marriage Equality*, *supra* note 42, at 1236.

<sup>379</sup> *See supra* Section III.B.2.

Many of these individuals are not opposed to LGBTQ rights.<sup>380</sup> Some of these donor-conceived people are LGBTQ; others are children of LGBTQ parents.<sup>381</sup> And some scholars who have argued in favor of gamete reform openly support rights for LGBTQ people.<sup>382</sup>

Due in part to the increased involvement of donor-conceived people, leading arguments in favor of gamete regulation today increasingly focus on the voices and stated interests of donor-conceived people themselves. For example, USDCC reports that many of its members want identifying information about their gamete donors.<sup>383</sup> For donor-conceived people who seek this information—a group that research suggests constitutes a minority, albeit a significant minority, of donor-conceived people—their views are genuine and deeply felt. Their views are clearly important and ought to be part of the policy debate and conversation.

As this Article reveals, however, even among these reform proponents who do not express anti-LGBTQ views, some of the arguments they proffer echo or reflect ones that have long been used to oppose rights for LGBTQ people. For example, in arguing in favor of an end to anonymous gamete donation, some commentators posit that “children of donated gametes may feel a sense of ‘genealogical bewilderment,’ a feeling that they are confused about their identity and different from other children.”<sup>384</sup> As noted above, this contested theory, one that suggests that children are necessarily harmed when raised by people other than their biological progenitors, has been used to oppose LGBTQ parenting.<sup>385</sup>

By directing attention to the purported importance of genetic connection to children and their well-being,<sup>386</sup> these narratives can function as a backhanded way of remagnifying the salience of biogenetic connection. That is,

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<sup>380</sup> See, e.g., U.S. DONOR CONCEIVED COUNCIL, *supra* note 9 (“We do not tolerate homophobia or transphobia. We acknowledge and respect all family structures.”).

<sup>381</sup> See, e.g., *2022 Advocacy Survey Results*, U.S. DONOR CONCEIVED COUNCIL (Nov. 16, 2022), <https://www.usdcc.org/2022/11/16/2022-advocacy-survey-results> [<https://perma.cc/55MS-DN7P>] (reporting 32% of survey respondents identified as “LGBTQIA+”).

<sup>382</sup> See, e.g., Naomi Cahn, *Children’s Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come from?*, 2 GEO. J. GENDER & L. 1, 1 (2000) (“[C]elebrat[ing] the possibilities of reproductive technology and adoption in allowing some lesbian, gay, bisexual, and transgender (LGBT) families to raise children.” (footnote omitted)).

<sup>383</sup> U.S. DONOR CONCEIVED COUNCIL, *supra* note 381 (reporting “substantial support for donor identity release before age 18”).

<sup>384</sup> CAHN, TEST TUBE FAMILIES, *supra* note 2, at 130; see also Suter, *Baby Markets*, *supra* note 2, at 221 (arguing donor anonymity “threaten[s] the child’s relational autonomy in learning about her biological heritage”).

<sup>385</sup> See *supra* note 247 and accompanying text.

<sup>386</sup> See, e.g., Cahill, *Oedipus Hex*, *supra* note 2, at 244 (“[T]he incest prevention justification . . . encourage[s] non-traditional procreators (and their offspring) to think about the families they create (and are born into) in biological terms . . .”).

these narratives “risk re-privileging the view that ‘real’ parent-child relationships are those that are biologically based.”<sup>387</sup> The very conditions that allegedly inflict harm on children are ones that exist in the vast majority of LGBTQ-parent homes. In this way, these narratives can undermine the legitimacy of LGBTQ-parent families.

Whether intentional or not, we can see these arguments as examples of what Reva Siegel calls “preservation through transformation.”<sup>388</sup> Siegel describes preservation through transformation as: “[W]hen an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, [such that] defenders may adopt new rules and reasons that preserve elements of the challenged regime.”<sup>389</sup>

Other narratives in support of gamete regulation could likewise function to leave LGBTQ-parent families more socially and legally vulnerable. Consider Cahn’s proposal to recognize gamete donors and children conceived with gametes from the same person as “donor-conceived and connected family communities,”<sup>390</sup> and to “facilitate connections between donor-conceived families who share the same genetic heritage along with the donors themselves.”<sup>391</sup> While Cahn is careful to describe these groups as “communities” and “[n]ot [f]amilies,”<sup>392</sup> urging the law to recognize and encourage these “connections” could sustain and augment the view that donors are children’s family members. Indeed, the adoption of such a scheme could wittingly or unwittingly bolster the view of some that gamete donors are the child’s “true” family members. To use philosopher Daniel Groll’s words, this kind of regime could “express support for, and thereby reinforce, bionormative prejudice.”<sup>393</sup> This, in turn, could undermine donor-conceived families by (re)suggesting that such families are “less than ideal.”<sup>394</sup>

These concerns are not merely hypothetical. Cases recognizing a gamete donor as a child’s legal family member, over the claims of the child’s intended and actual parents, already exist.<sup>395</sup> For example, in a recent case involving a

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<sup>387</sup> Joslin, *supra* note 126; *see also, e.g.*, Leighton, *supra* note 166, at 87.

<sup>388</sup> Siegel, *Rule of Love*, *supra* note 38, at 2119.

<sup>389</sup> NeJaime & Siegel, *Conscience Wars*, *supra* note 39, at 2553.

<sup>390</sup> Cahn, *New Kinship*, *supra* note 2, at 369.

<sup>391</sup> *Id.* at 408.

<sup>392</sup> *Id.* at 418.

<sup>393</sup> GROLL, *supra* note 298, at 201.

<sup>394</sup> *Id.* at 201-03 (“Parents whose credentials as ‘real’ parents are already questioned by society—precisely because they do not exemplify the full genetic relatedness of ‘traditional’ families—would be singled out for legal attention concerning a matter that is about the very thing that makes people question their status as (ideal) parents in the first place.”).

<sup>395</sup> *See, e.g.*, Bruce v. Boardwine, 770 S.E.2d 774, 775 (Va. Ct. App. 2015) (holding man who provided sperm for assisted reproduction was legal parent); P.D. v. S.K., No. 2725-

child born through assisted reproduction to a married lesbian couple, the Oklahoma trial court declared the child's second parent to be the sperm donor, rather than the lesbian spouse.<sup>396</sup> If Cahn's proposed legal theory urging the development of legal rules recognizing these individuals as "family communities" were embraced,<sup>397</sup> these types of decisions may proliferate, thereby increasing the legal and social vulnerability of families formed through donor conception.<sup>398</sup>

Importantly, these potential harms are felt not only by the intended parents and the many donors who do not want to be recognized as legal family members, but also by the children. Social science evidence demonstrates that "children's secure relationship with their psychological parents[—here, their intended parents—]is the cornerstone of healthy development."<sup>399</sup> This research also demonstrates that disruptions to these relationships are harmful to children.<sup>400</sup> Moreover, when parents experience stress—stress that they might experience if their family remains legally and socially vulnerable—child well-being can suffer.<sup>401</sup>

Some reform in this area may be warranted. A significant minority of donor-conceived people, for example, report that they would like access to identifying information about their donors.<sup>402</sup> These interests and concerns are ones that ought to be considered by lawmakers. As potential legal reform is contemplated, however, policymakers should seek to best vindicate the important liberty and equality interests of the range of affected stakeholders.

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07, 2007 WL 4180640, at \*3 (N.Y. Fam. Ct. 2007) (holding sperm donor was "estopped from denying paternity").

<sup>396</sup> Matt Laviertes, *Lesbian Mom Loses Parental Rights, and Wife, to Child's Sperm Donor*, NBC NEWS (Feb. 15, 2023, at 19:22 ET), <https://www.nbcnews.com/nbc-out/out-news/lesbian-mom-loses-parental-rights-wife-childs-sperm-donor-rcna70884> [<https://perma.cc/AL9B-PM9R>].

<sup>397</sup> See generally *supra* notes 390-91 and accompanying text (positing "holistic family law approach" to "donor family networks" in which "intending parents would create families, donors would have the opportunity to meet their children, and offspring would be able to connect with one another").

<sup>398</sup> See, e.g., Cahn, *supra* note 382, at 3 and accompanying text (raising concerns about "the specter of a [donor] claiming [parental] rights suddenly appearing" to disrupt these families).

<sup>399</sup> Anne L. Alstott, Anne C. Dailey & Douglas Nejaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2373 (2022) (emphasis omitted).

<sup>400</sup> *Id.* at 2373, 2377-78 (describing "serious adverse consequences of the absence of or disruptions to a parental bond" and noting "termination of an attachment relationship is traumatic for a child even where there is no biological or adoptive connection to the parent—including in cases of same-sex parents").

<sup>401</sup> *Id.* at 2377-78 (citing research showing disruptors such as "[c]aregiver depression" or "environmental stressors" can adversely impact parent-child bond).

<sup>402</sup> See, e.g., Scheib et al., *supra* note 162 and accompanying text.

Drawing from insights revealed by this Article, the next Section offers some principles to guide a more just path forward.

B. *Moving Forward*

Given that some reform may be warranted, how should policymakers proceed? As identified in this Article, gamete rules have the potential to impact a range of stakeholders. Those implications can be of profound importance; indeed, they may be of constitutional significance. This Article seeks to foster more thoughtful and just policymaking by revealing the scope of critical liberty and equality concerns implicated by gamete rules. This more careful consideration will likely lead to new insights and ideas. Thus, while this Article offers guiding considerations and principles, it does not offer a final blueprint for reform.

Nonetheless, this Article closes by applying these principles to two concrete proposals to illustrate how this framework can and should shape deliberations going forward. First, consider the revised version of Article 9 of the Uniform Parentage Act of 2017 (“UPA”).<sup>403</sup> Article 9 imposes two key requirements: the disclosure of (1) nonidentifying medical and family history information about gamete providers to families at any point; and (2) identifying information, upon request by the children upon reaching age eighteen.<sup>404</sup>

This proposal responds to two of the most consistent calls from a key stakeholder group: the calls by donor-conceived people to ensure access to comprehensive medical and family history information and to identifying information regarding the gamete donors.<sup>405</sup> But because the proposal is fairly targeted in nature, the potential negative liberty and equality implications for other key stakeholders, including intended parents, are constrained.

As noted above, Article 9 requires sperm banks and fertility centers to collect and then disclose upon request at any time medical and family history information about donors.<sup>406</sup> This statutory requirement—one that has been enacted by six states—is largely consistent with practice on the ground today.<sup>407</sup> While this was not true in the past, today gamete banks typically

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<sup>403</sup> UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2017) (amended 2023).

<sup>404</sup> *Id.* § 905(a)-(b).

<sup>405</sup> *See, e.g.*, Bazelon, *supra* note 5 (noting some advocates “want the government to ban anonymous donation”).

<sup>406</sup> UNIF. PARENTAGE ACT §§ 903, 905(b) (UNIF. L. COMM’N 2017) (amended 2023) (requiring collection of donor medical information and its disclosure to parents or donor-conceived person upon reaching age eighteen).

<sup>407</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1644.3(c); COLO. REV. STAT. ANN. § 25-57-106(2); CONN. GEN. STAT. ANN. § 46b-546(b); S. 163, 83d Leg. Assemb., Reg. Sess. § 87(1) (Or. 2025); 15 R.I. GEN. LAWS ANN. § 15-8.1-905(b); WASH. REV. CODE ANN. § 26.26A.820(2). A seventh state—Utah—has a similar law, but it differs with regard to when the information must be disclosed and to whom. UTAH CODE ANN. § 78B-15-708.

collect and make available comprehensive medical and family history about donors.<sup>408</sup> Because it is largely consistent with current practice, codifying this requirement responds to a strong call from donor-conceived people—as well as their parents who also may want this information—and likely does so without significant impacts on supply or costs.

Requiring disclosure of identifying information could have a negative effect on the supply of gametes by excluding donors who do not want their identifying information disclosed.<sup>409</sup> The mere fact that a proposal may negatively affect some stakeholders does not necessarily mean that the proposal or a variation of it should be rejected. But, this Article argues, those effects ought to be considered. Here, at least with regard to sperm donors, this too reflects a practice that is increasingly common on the ground.<sup>410</sup> A number of the largest sperm banks now “require all new donors to consent to release of their identity to requesting offspring at age eighteen.”<sup>411</sup> Because many gamete banks have already made this shift in the absence of legislation, at least with regard to sperm providers, the impact on supply—and thus on people’s ability to access this method of family formation—may be relatively muted.

In addition, because the model scheme does not allow for identity disclosure until the child has reached age eighteen, concerns about how this disclosure might increase the legal vulnerability of the child’s existing family are less acute. Such concerns would be amplified if the proposal allowed for identity disclosure while the child was still a minor.

Moreover, and critically, Article 9 is part of a comprehensive parentage scheme that recognizes and clearly protects the legal status of the child’s intended family, regardless of the sex or marital status of the intended

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Specifically, it requires the information to be provided to the donor-conceived person upon request after that person has reached the age of 18. *Id.*

<sup>408</sup> See, e.g., *Donor-Info Subscriptions*, CAL. CRYOBANK, <https://www.cryobank.com/donor-subscription/options> [<https://perma.cc/PCZ3-DN76>] (last visited Dec. 21, 2025) (noting free “[l]evel 1” subscription includes, among other things: “Genetic Test Summary,” “Medical History,” and “DNA Ancestry”); *Choose a Donor*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/get-started/choose-a-donor> [<https://perma.cc/RB8R-FZ7S>] (last visited Dec. 21, 2025) (“We offer free donor profiles for each donor. These free profiles summarize each donor’s medical and family history . . . . TSBC donors go through a comprehensive donor screening process including STI testing, medical exams, genetic counseling and testing, implications counseling, and other screening interviews.” (emphasis omitted)).

<sup>409</sup> See *supra* notes 305-07 and accompanying text (citing studies claiming almost third of sperm donors would refuse to donate if anonymous gamete donation was prohibited).

<sup>410</sup> See *supra* note 180 and accompanying text.

<sup>411</sup> See, e.g., Gardner, *supra* note 106, at 518 (“[D]onors who have agreed to release their identifying information . . . report mostly positive experiences and support the removal of anonymity.” (footnote omitted)).

parents.<sup>412</sup> Based on these considerations, a policymaker might decide that this scheme offers a careful, limited, and just path forward. It addresses some of the key concerns identified by the subset of donor-conceived people who seek this information and does so in a way that minimizes equality and liberty concerns of other stakeholders.

To be sure, even if policymakers reach that conclusion, they should be attentive to the narratives and arguments they offer in support of the proposal. Among other things, they should both be attentive to and seek to avoid arguments that denigrate families with nonbiological parents or echo older narratives suggesting that such families necessarily inflict harm on children.

Next consider another pending proposal, the so-called “State Assisted Reproductive Technology Model Legislation.”<sup>413</sup> This legislation has been distributed by the Ethics and Public Policy Center (“EPPC”), an organization that describes itself as “Washington, D.C.’s premier institute working to apply the riches of the Jewish and Christian traditions to contemporary questions of law, culture, and politics.”<sup>414</sup> First, this proposal is much more sweeping in nature than Article 9 of the UPA. As a result, the potential impacts on stakeholders are also likely to be more sweeping.

Like Article 9 of the UPA, the Model Legislation requires nonidentifying medical information to be provided upon request.<sup>415</sup> In addition, again like Article 9, this Model Legislation requires identifying information of all gamete providers to be given to any donor-conceived person upon request.<sup>416</sup> The UPA, however, provides that the information must be disclosed once the child has become an adult.<sup>417</sup> In contrast, the EPPC Model Legislation requires the information to be provided upon request of the donor-conceived person at or after reaching age fourteen.<sup>418</sup> Identity disclosure during the

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<sup>412</sup> See, e.g., Joslin, *Preface*, *supra* note 50, at 439-41, 448-50.

<sup>413</sup> See STATE ASSISTED REPROD. TECH. MODEL LEGIS. (ETHICS & PUB. POL’Y CTR. 2024).

<sup>414</sup> *About*, ETHICS & PUB. POL’Y CTR., <https://eppc.org/about> [<https://perma.cc/NVR4-CNU4>] (last visited Dec. 21, 2025). The Board members of EPPC include: Leonard Leo, co-Chairman for The Federalist Society; Barb Van Andel-Gaby, a member of the Board of Trustees for the Heritage Foundation; and Mary Ellen Bork, a member of the Board of Trustees for the James Wilson Institute and surviving spouse of former Judge Robert H. Bork. See *EPPC Board*, *supra* note 53.

<sup>415</sup> DONOR-CONCEIVED PERSONS PROTECTION ACT § 4(B) (ETHICS & PUB. POL’Y CTR. 2024).

<sup>416</sup> *Id.* § 4(A).

<sup>417</sup> See UNIF. PARENTAGE ACT § 905(a) (UNIF. L. COMM’N 2017) (amended 2023).

<sup>418</sup> DONOR-CONCEIVED PERSONS PROTECTION ACT § 4(A) (ETHICS & PUB. POL’Y CTR. 2024) (“Upon the request of a donor-conceived person who is *fourteen* years of age or older, a gamete agency, gamete bank, or fertility clinic that matched or collected the gametes used in the assisted reproduction of such donor-conceived person shall provide the donor-conceived person with the identifying information of the donor who provided the gametes or embryo.” (emphasis added)). However, other provisions in this model Act appear to include different, inconsistent rules regarding the timing of the disclosure of

child's minority can increase the legal vulnerability of the child's intended family.<sup>419</sup> The EPPC Model Legislation also includes additional requirements, such as a total family limit of twenty-five.<sup>420</sup>

Importantly, it also regulates and limits who can access donor gametes. Specifically, the model legislation provides that no person can obtain donated ova or sperm for compensation (which is how donated gametes are most commonly obtained) for "any purpose other than treating human infertility."<sup>421</sup> "Infertility" is defined to mean "a symptom of an underlying disease or condition within a person's body that makes it difficult or impossible to successfully conceive and carry a child to term, which is diagnosed after [either 6 or] 12 months of [unprotected] intercourse."<sup>422</sup> Most LGBTQ and unpartnered people would not meet this definition of infertility. In contrast, to the extent different-sex couples are using assisted reproduction, they generally are doing so because they experience this type of medical infertility. In other words, in practice, this Act singles out most LGBTQ and unpartnered people and denies them access to the gametes needed to utilize this family formation method. In addition to having particularly acute negative impacts on the liberty and equality interests of this subset of users of donor gametes, this requirement is different in kind from the ones previously discussed. The provisions on information collection and disclosure and on family limits respond to reform demands made by some donor-conceived people. Limiting donor gametes to people who are medically infertile seems unconnected to the more common concerns identified by donor-conceived people and unconnected to their well-being.

Moreover, unlike the UPA's Article 9, this sweeping proposal is not part of a comprehensive parentage scheme. Indeed, the EPPC Model Legislation includes no parentage provisions at all. As a result, under this scheme, the legal status of families formed through assisted reproduction may remain unclear and vulnerable. As Douglas NeJaime explains, it is "those who break from traditional norms of gender and sexuality . . . [who] often find their

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identifying information. *See id.* § 3(b) (providing that "gamete agenc[ies], gamete bank[s], or fertility clinic[s] shall have each donor sign a declaration . . . that the donor agrees to the disclosure of the donor's identity to a donor-conceived person conceived with the donor's gametes or embryo formed with the donor's gametes on request of the donor-conceived person after the donor-conceived person is *eighteen* years of age or older" (emphasis added)).

<sup>419</sup> This legal vulnerability is further exacerbated by the fact that, as discussed in more detail below, these provisions are not part of a scheme that includes comprehensive parentage protections.

<sup>420</sup> DONOR-CONCEIVED PERSONS PROTECTION ACT § 7(A) (ETHICS & PUB. POL'Y CTR. 2024).

<sup>421</sup> DONATED EGG AND SPERM PROTECTION ACT § 2(B) (ETHICS & PUB. POL'Y CTR. 2024).

<sup>422</sup> ART REPORTING REQUIREMENTS-STATE MODEL LEGIS. § 2 (ETHICS & PUB. POL'Y CTR. 2024).

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parent-child relationships discounted.”<sup>423</sup> For these reasons, the EPPC Model Legislation reflects a number of characteristics that should raise concerns. It is sweeping in scope. At least as a practical matter, it singles out and excludes LGBTQ people from meaningful access to this method of family formation. At the same time, it leaves these same families—families that depart from the stereotypical bionormative form—legally vulnerable.

Determining whether and how to regulate gametes is complex. It requires policymakers to consider the interests of a range of stakeholders, including those of constitutional import. These issues merit further consideration and engagement. Hence, the goal here is not to set forth a final, permanent blueprint. Instead, the goal is to identify a set of critical considerations that ought to be, but often are not, part of the conversation as policymakers move forward.

#### CONCLUSION

The calls by donor-conceived people for new gamete rules are compelling. It is therefore unsurprising that lawmakers have responded in recent years by enacting a range of new laws. But as this Article uncovers, the stakes here are high. Some of the potential impacts of gamete reform are more obvious. Imposing additional regulations on the collection of gametes can have a negative impact on supply and in turn limit access to this method of family formation. There are other implications, however, that have remained obscured, hiding below the surface. By viewing gamete reform through a historical lens, this Article uncovers heretofore hidden theoretical ripple effects of these efforts.

This Article also reveals that these effects will not be felt equally. Gamete rules will be felt disproportionately by families who defy stereotypical gender- and biology-based views about parenthood and the family, including LGBTQ-parent families. Critically, this differential impact is, for some, an intended feature rather than an unfortunate side effect. In this way, gamete rules, and sperm rules in particular, have the potential to function as a covert way to reestablish the primacy of the bionormative family. To address these concerns, this Article proposes a framework to help policymakers more fully assess and weigh the range of important interests at stake.

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<sup>423</sup> See, e.g., NeJaime, *Nature of Parenthood*, *supra* note 30, at 2265–66.