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Presumption Junction, What's That Function: Louisiana Marriage and Parenthood Laws Post-Obergefell

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INTRODUCTION

Jimmy and Barbara decided to marry while Barbara was pregnant with another man's child.[1] When Jimmy heard that Barbara was pregnant, Jimmy rushed to her place of employment and asked her to marry him.[2] At the time, Barbara truly believed that Jimmy, rather than the other man, was actually the father of the child.[3] Jimmy and Barbara married in September of 1989, and the child was born on February 6, 1990.[4] Rumors were flying, and Jimmy began to have doubts as to whether the child was biologically his.[5] Nevertheless, Jimmy raised and supported the child for six years despite his suspicions about the child's paternity.[6] After almost a decade of marriage, Jimmy and Barbara ultimately decided to divorce.[7] In the divorce proceeding, Barbara sought child support from Jimmy.[8]

During the divorce, Jimmy took a DNA test and confirmed that the rumors were true: he was not the biological father of the child.[9] Under Louisiana Civil Code article 185, "The husband of the mother is presumed to be the father of a child born during the marriage . . . ."[10] Despite this

1. Lopez v. Lopez, 772 So. 2d 364, 366 (La. Ct. App. 3d Cir. 2000).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 365.
8. *Id.*
9. *Id.*
10. LA. CIV. CODE art. 185 (2019). Before the 2005 revision to the Louisiana Civil Code, the court looked to former Louisiana Civil Code article 184 for the presumption of paternity, but the language is still the same as the presumption of paternity that is now contained in article 185. *Id.* art. 184 ("The husband of the

presumption, under article 185, the husband of the mother is able to deny such paternity through a disavowal action, although the law limits the time allowed to file such an action.[11] Although Jimmy was not the biological father, under Louisiana law, he was still the presumed father.[12] As a result, Jimmy filed a disavowal action, seeking to have the court end his paternal rights and duties over the child who was born but not conceived during his marriage to Barbara.[13]

The Louisiana Legislature revised portions of the Civil Code in 2005 involving disavowal actions; however, the only change in the law is that the article makes explicit that the husband filing the disavowal action has a prescriptive period of one year.[14] This prescriptive period begins to run on the day of the birth of the child, or the day the husband knew or should have known that he may not be the biological father of the child, whichever comes later.[15] Under article 189, Jimmy would have had a year from when he began to have suspicions of the child's paternity based on the rumors he heard after the child's birth.[16] Under this standard, the suit to disavow paternity in 1999 was too late because the rumors began to circulate early in his marriage to Barbara.[17]

Therefore, because his disavowal claim prescribed, article 185 still presumed Jimmy to be the father of the child under the law.[18] By applying the presumption of paternity, the courts extended a safeguard to the child in *Lopez v. Lopez* by maintaining the child's status of having two legally recognized parents.[19] In Louisiana, cases like these, wherein a *husband* seeks to disavow a child born of a marriage, are relatively simple to solve with heterosexual couples by applying the relevant Code articles—in this case article 185 and article 189—to the particular facts of the case.[20] Here, the language clearly states that the husband is presumed to be the father,

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mother is presumed to be the father of all children born or conceived during the marriage.").

11. *See id.* arts. 184, 189 (2000); *id.* arts. 185, 189 (2019).

12. *Id.* art. 185 (2019); *id.* art. 184 (2000).

13. *Lopez*, 772 So. 2d at 365.

14. LA. CIV. CODE art. 189 cmt. a (2005) ("The only change in law made by this Article is that the period of time for instituting a disavowal action under this Article is explicitly prescriptive . . . .").

15. *Id.* art. 189 (2019).

16. *Lopez*, 772 So. 2d at 366–67.

17. LA. CIV. CODE art. 185; *Lopez*, 772 So. 2d at 367.

18. *Lopez*, 772 So. 2d at 367.

19. *Id.*

20. LA. CIV. CODE arts. 185, 189.

regardless of whether the man is actually the biological father of the child.[21]

Consider a similar scenario, wherein a pregnant women gets married before the birth of her child, but instead of marrying Jimmy, her male spouse, the mother marries Brittany, her female spouse.[22] Brittany and Nicole Boquet married on December 18, 2015.[23] At the time of the marriage, Nicole was pregnant from a previous relationship that Brittany knew about.[24] The child was born on February 5, 2016.[25] A little over a year later, Brittany filed a petition of divorce, and Nicole subsequently filed an answer seeking child support from Brittany.[26] The court had not granted the petition of divorce for the couple; so, the court ordered Brittany to pay interim child support until it granted a final divorce.[27] Shortly thereafter, on April 28, 2017, Brittany filed a disavowal action of the child.[28] Brittany argued that article 185's presumption did not apply to her because she was not the "husband" of the mother, but instead was the "wife" of the mother.[29] Brittany's claim hinged on a plain-reading and historical interpretation of the language in article 185 to establish that she was not a presumed parent of the child.[30] The Louisiana Third Circuit Court of Appeal rejected Brittany's argument and decided that because the child was born of the marriage, Brittany was the presumed parent of the child just as a husband would be.[31] The court stated that because the child was born on February 5, 2016, Brittany owed the child support since her time to file a disavowal action had prescribed.[32] The court reasoned that if article 185 did not apply, the law would not award the same benefits to a female spouse as those awarded to a male spouse, like in *Lopez*, and would thereby violate *Obergefell v. Hodges*.[33]

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21. *Id.* art. 185.
22. Boquet v. Boquet, 269 So. 3d 895, 897 (La. Ct. App. 3d Cir. 2019).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 900.
32. *Id.*
33. *Id.* As expressed in *Boquet*, some may not believe that paying child support is a benefit under the law; however, this obligation stems from the duty of being a parent to a child, which is a benefit under the law. *See* LA. CIV. CODE art. 224 (2019) ("Parents are obligated to support, maintain, and educate their child.").

The *Boquet* case demonstrates that the presumption of paternity in article 185, as currently written, denies same-sex couples the same "constellation of benefits" that *Obergefell* requires.[34] This inequitable treatment leaves same-sex couples at an unfair and unwarranted disadvantage when seeking to prove a parent-child relationship.[35] Although *Obergefell* extended the right to marry to same-sex couples, the decision has left the states with many questions as to how to apply *Obergefell* to instances where laws have biological roots.[36] Specifically, the implications of *Obergefell* raise the question of whether the paternal presumption in Louisiana law applies if the married couple is a same-sex couple.[37]

The Louisiana Legislature must redraft the Civil Code articles relating to establishing paternal filiation, specifically article 185, or in the alternative article 188, to ensure that the law extends same-sex couples the same "constellation of benefits" given to opposite-sex couples in the same situation.[38] The current articles pertinent to marriage and filiation still assume the couple in question is of opposite sex, thus making these articles inapplicable to same-sex couples.[39] Redrafting of article 185 would ensure that Louisiana's filiation laws are constitutionally sound under the Supreme Court's decision in *Obergefell*, provide consistency among Louisiana courts, and guarantee that children of same-sex couples are given equitable safeguards under the law.

Part I will explain the historical justification for the biological presumption in the "law of filiation" and show how this presumption has traditionally worked in Louisiana because the state has generally not extended parental rights equally to same-sex couples.[40] Part II will examine the Supreme Court's decision in *Obergefell* and how it affects traditional, biological presumptions often associated with parenthood.[41] In addition, Part II will examine *Pavan v. Smith*, which is the Supreme Court's most recent clarification of the overarching effects and

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34. *See* LA. CIV. CODE art. 185.

35. *Id.*

36. *See generally* Pavan v. Smith, 137 S. Ct. 2075 (2017); *Boquet*, 269 So. 3d at 900.

37. Leslie Joan Harris, Obergefell*'s Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 66 (2017).

38. Obergefell v. Hodges, 576 U.S. 644, 669 (2015).

39. *See generally* LA. CIV. CODE arts. 86, 89.

40. LA. CIV. CODE art. 185; J.-R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 394–95, 400 (2007); Black v. Simms, 12 So. 3d 1140, 1145 (La. Ct. App. 3d Cir. 2009).

41. *Obergefell*, 576 U.S. at 670.

implications of *Obergefell*.[42] Part III will define the parameters and legal effect of a presumption and show how the application of the presumption in article 185 cannot apply in the same-sex marriage context. Part III will also look at Louisiana's current solutions to fix this issue, and the problem that arises when applying those solutions. Part IV will propose that the Louisiana Legislature redraft either article 185 or article 188. A redraft would bring the Civil Code up to date so that it conforms with current Supreme Court jurisprudence and provides necessary safeguards for the children of Louisiana.

I. LAYING THE FOUNDATION ON LOUISIANA FILIATION

Historically, laws established filiation through a biological connection between a child and his mother and father.[43] Traditionally, marriage could only exist between a man and a woman; however, *Obergefell* acknowledged that marriage is a fundamental right that exists between any two persons, including same-sex couples.[44] As a result, states are grappling with how to apply traditional biological laws that establish filiation—specifically, presumptions of paternity.[45] In addition, Louisiana courts face similar struggles with the Louisiana Legislature's general unwillingness to extend same-sex couples rights in marriage and parenthood, and Louisiana courts must address a tough question of how to properly do so after *Obergefell*.[46]

A. Who's Your Momma and Who's Your Daddy?

Long before the U.S. Supreme Court's decision in *Obergefell*, the laws of Louisiana used marriage as an important factor in establishing parental rights and responsibilities in relation to children.[47] Louisiana refers to the parent-child relationship as the "law of filiation," which is the juridical[48]

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42. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

43. Trahan, *supra* note 40, at 394–95, 400.

44. *Obergefell*, 576 U.S. at 670.

45. *See Pavan*, 137 S. Ct. at 2078; *Boquet*, 269 So. 3d at 900.

46. *See generally* LA. CIV. CODE art. 185 (2019); Black v. Simms, 12 So. 3d 1140, 1145 (La. Ct. App. 3d Cir. 2009).

47. *See generally* LA. CIV. CODE art. 185 (establishment of paternity is determined by being the *husband* of the mother which puts an emphasis on a connection between marriage and filiation); *id.* arts. 223–24.

48. *Juridical*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. Of, relating to, or involving judicial proceedings or to the administration of justice. 2. Of, relating to, or involving law; legal.").

bond that unites a child to his mother or father.[49] In essence, the purpose of filiation is to establish the "who" of parental rights and obligations.[50]

The establishment of filiation in Louisiana gives the mother or father the ability to care for, supervise, protect, discipline, and instruct their minor children.[51] This obligation comes with certain rights and duties that a parent owes a child as well.[52] In addition, parents are obligated to support, maintain, and educate their children.[53] In turn, the juridical link of filiation creates reciprocal rights and duties for a child to obey their parents.[54] Filiation bestows upon children certain rights, such as forced heirship, a preeminent position in the law of intestacy, and a place in the first category of beneficiaries entitled to institute wrongful death and survival actions.[55]

There are two categories of filiation: filiation "by nature," often referred to as biological filiation, and filiation "by law," often called adoptive filiation.[56] On the one hand, filiation "by nature" describes a genetic link between parent and child that Louisiana Civil Code articles 184 and 185 provide for.[57] Filiation arises from an actual or presumed biological relationship between the parent and child.[58] Procreation is the biological act that is "presupposed" in the establishment of the parent-child relationship."[59] All of the Louisiana Civil Code articles dealing with the presumption of paternity, except for article 188, "presume[] an act of sexual intercourse between the mother and the man presumed to be the

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49. LA. CIV. CODE art. 178; Trahan, *supra* note 40, at 388 n.1 (citing GÉRARD CORNU, DROIT CIVIL: LA FAMILLE NO. 195 313 (7th ed. 2001)).

50. Katherine Shaw Spaht & William Marshall Jr. Shaw, *The Strongest Presumption Challenged: Speculations on* Warren v. Richard *and* Succession of Mitchell, 37 LA. L. REV. 59, 65 (1976).

51. LA. CIV. CODE art. 223.

52. *Id.* art. 224.

53. *Id.*

54. *Id.* art. 228.

55. *Id.* arts. 888, 2315.1–.2.

56. Trahan, *supra* note 40, at 388 n.1 (citing JEAN CARBONNIER, DROIT CIVIL: LA FAMILLE: L'ENFANT, LE COUPLE 181–82 (20th ed. 1999)).

57. Magdalena Duggan, *Mater Semper Certa Est, Sed Pater Incertus? Determining Filiation of Children Conceived via Assisted Reproductive Techniques: Comparative Characteristics and Visions for the Future*, 4 IRISH J. L. STUDIES 1 (2014); *see* LA. CIV. CODE arts. 184, 185.

58. Trahan, *supra* note 40, at 388 n.1 (citing GÉRARD CORNU, DROIT CIVIL: LA FAMILLE NO. 198 315 (7th ed. 2001)).

59. EDUARDO A. ZANNONI, DERECHO CIVIL: DERECHO DE FAMILIA § 794 (2d ed. 1989).

father."[60] Article 188 is the only exception because it states that "[t]he husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented."[61] Therefore, the foundation of the paternal presumption in article 185 has its roots in biology.[62] The biological roots of the presumption make *Boquet*'s application of the article to a same-sex couple problematic.[63] On the other hand, filiation "by law" in Louisiana Civil Code article 199 requires an act and judgment of adoption that "arises from the legislative will to create something identical to this [natural] filial line so as to attach the adopted child to an individual or to the spouses that the law institutes as parent(s)."[64] In other words, to establish filiation is to demonstrate a biological or legal connection to a child's mother or father.[65]

1. The Modes of Establishing Filiation

Louisiana Civil Code article 179 provides three ways to establish filiation: (1) proof of maternity; (2) proof of paternity; or (3) adoption.[66] Louisiana Civil Code article 184 states that to establish maternity, a mother must prove a certain child was born to a certain woman by a preponderance of the evidence.[67] This article establishes that the mother is the woman who gives birth to the child, and a person may prove maternity at any time.[68] This traditional concept of identifying the mother as the woman who gave birth to the child traces back to the Ancient Romans.[69] The jurisconsults referred to the rule that governs maternal filiation as

60. Original Brief on Behalf of Brittany M. Boquet, Plaintiff-Appellant, Boquet v. Boquet, 268 So. 3d 895 (La. Ct. App. 3d Cir. 2019) (No. 18-798), 2018 WL 1910871, at *8.

61. LA. CIV. CODE art. 188.

62. *Id.* art. 185; Boquet v. Boquet, 269 So. 3d 895, 900 (La. Ct. App. 3d Cir. 2019); *see* Original Brief on Behalf of Brittany M. Boquet, *supra* note 60, at *8.

63. LA. CIV. CODE art. 185; *Boquet*, 269 So. 3d at 900; *see* Original Brief on Behalf of Brittany M. Boquet, *supra* note 60, at *8.

64. Trahan, *supra* note 40, at 388 n.1 (citing DROIT DE LA FAMILLE NO. 1194 389 (Jacqueline Rubellin-Devichi ed., 1999)); *see* LA. CIV. CODE art.199.

65. Lucie R. Kantrow, *Presumption Junction: Honey, You Weren't Part of the Function—A Louisiana Mother's New Right to Contest Her Husband's Paternity*, 67 LA. L. REV. 633, 636–37 (2007).

66. LA. CIV. CODE art. 179; *see* Henry S. Rauschenberger, *To Kill a Cuckoo Bird: Louisiana's Dual Paternity Problem*, 77 LA. L. REV. 1177, 1180 (2017).

67. LA. CIV. CODE art. 184.

68. *Id.* art. 184 cmt. a.

69. Trahan, *supra* note 40, at 394–95; Duggan, *supra* note 57, at 4; *see* Rauschenberger, *supra* note 66, at 1181.

mater semper certa est ("the mother is always certain") because *mater is est quem gestatio demonstrant* ("the mother is the woman whom the pregnancy points out").[70] Numerous modern civil codes still use the Ancient Roman provision to establish maternal filiation, including Louisiana.[71]

Although, traditionally, motherhood has been generally easy to prove, the same cannot be said of paternity.[72] Maternal filiation flows from the visible fact of birth, while paternity has its roots in conception, which has no outward manifestation to prove its existence.[73] Therefore, in terms of establishing paternal filiation, the law resorts to a presumption.[74] Louisiana Civil Code article 185 includes such a presumption when it states that the "husband of the mother is presumed to be the father of a child born during the marriage."[75] This way of establishing paternal filiation, similar to the way of establishing maternal filiation, has its roots in Roman law.[76] The Roman jurisconsults stated the presumption of fatherhood as *pater is est quem nuptiae demonstrant* ("the father is whom the marriage points out").[77] Thus, marriage and filiation are often closely

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70. Duggan, *supra* note 57, at 4; Trahan, *supra* note 40, at 395; *see* Rauschenberger, *supra* note 66, 1181.

71. Trahan, *supra* note 40, at 395; Argentine CÓD. CIV. art. 242 ("Maternity will be established, even without acknowledgment, by proof of the birth and the identity of the child."); German BÜRGERLICHES GESETZBUCH (Civil Code) [BGB] § 1591 ("The mother of the child is the woman who gives birth to it."); LUXEMBOURGEOIS CODE CIV. art. 341 ¶¶ 1, 2 ("Maternity outside of marriage can be judicially declared. The child who exercises the action must prove, by any means whatsoever, that he was born from the supposed mother."); Mexican CÓDIGO CIVIL FEDERAL (Federal Civil Code) [CC] art. 360 ("Filiation of children born outside of marriage results, in relation to the mother, from the sole act of birth."); Portuguese CÓDIGO CIVIL [Civil Code] art. 1796(1) ("With respect to the mother, filiation results from the fact of birth and is established in the terms of [other articles]."); SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], Code Civil [CC] art. 252(1) ("In regard to the mother, filiation results from the birth."); Venezuelan CÓD. CIV. art. 197 ("Maternal filiation results from the birth and is proved by means of an act of declaration of birth inscribed in the books of the civil registry, with the identification of the mother."); *see* LA. CIV. CODE art. 184.

72. Trahan, *supra* note 40, at 400; *see* Rauschenberger, *supra* note 66, at 1182.

73. HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL: LA FAMILLE NOS. 82–824, 225–26 (Laurent Levenur rev., 7th ed. 1995).

74. *Id.*

75. LA. CIV. CODE art. 185.

76. Trahan, *supra* note 40, at 400.

77. *Id.*; *see* Rauschenberger, *supra* note 66, at 1182.

linked because traditionally, the husband—a word linked and associated with marriage—is used to establish parenthood.[78] Nearly every modern legal system recognizes that the husband in a marriage is the father of the children of that marriage, which article 185 codifies.[79]

The presumption of paternity traditionally served several functions.[80] First, the biological link was difficult to establish because of technological disadvantages; therefore, the presumption provided a "legal certainty for purposes such as inheritance and succession."[81] This presumption of paternity was necessary because DNA testing was not available until recent years, and a focus on the biological relationship was the only way to establish paternity.[82] Second, the presumption preserved the marital relationship between the couple in that it "protect[ed] the sanctity of the marriages by assuming the husband and wife [had] both remained true to their marriage vows."[83] Lastly, the presumption promoted the welfare of the child because it provided the child with a father, the lack of whom would produce a "devastating" result for the child in that the child could be labeled a "bastard" who would no longer be entitled to support or inheritance from his father.[84] Essentially, the presumption of paternity provides safeguards to the children of the relationship.[85] However, these safeguards can only be truly effective if both parents are legally recognized. If both are not recognized as legal parents, and if something were to happen to the sole legal parent of a child, a child could be deemed "parentless" in the eyes of the law.[86]

Finally, Louisiana Civil Code article 199 allows a parent to establish filiation through adoption wherein "the adopting parent becomes the legal parent of the child for all purposes."[87] This is only way in which the

78. LA. CIV. CODE art. 185; Trahan, *supra* note 40, at 400; *see* Rauschenberger, *supra* note 66, at 1182.

79. Trahan, *supra* note 40, at 400.

80. Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248–49 (2006).

81. *Id.*

82. *Id.* at 249.

83. *Id.* at 249 n.14.

84. *Id.*

85. Samantha Bei-wen Lee, *The Equal Right to Parent: Protecting Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 N.Y.U. REV. L. & SOC. CHANGE 631, 637 (2017).

86. *Id.*

87. LA. CIV. CODE art. 199 (2019).

Louisiana Civil Code allows for a non-biological connection as a basis for establishing parental rights.[88]

2. Disavowing Filiation

Just as the Louisiana Civil Code establishes a method to form the bond of filiation, it also provides a mechanism to sever the bond in limited circumstances.[89] Article 187 provides that the husband in a marriage can disavow paternity of a child with "clear and convincing evidence that he is not the father."[90] Disavowal actions exist to allow a husband in an opposite-sex relationship to challenge the parent-child relationship when the man could not possibly be the father of the child because of biological impossibilities.[91] A comment to article 187 shows the kind of "clear and convincing evidence" that is needed for a successful disavowal action.[92] The comment states that other kinds of evidence such as "scientific or medical evidence, including the results of blood tests or DNA prints, or medical evidence of sterility; evidence of physical impossibility due to location at the probable time of conception; or tangible evidence and testimony of lay witnesses" must corroborate the husband's testimony.[93] All of the appropriate evidence listed in the comment is linked to the point of the disavowal action: for the husband of an opposite-sex marriage to challenge paternity of the child by showing that it is impossible for him to be the biological father of the child in question.[94] In this instance as well, there is no counterpart that extends to same-sex couples in the Civil Code.[95]

B. Times Change, Codes Change

The Louisiana Legislature often revises the Civil Code to stay updated with advances in technology and social change.[96] Because of technological

88. Garrett M. Cain, *"Don't Talk to [Legal] Strangers": Louisiana's Parentage Policy and the Burdens It Places on Same-Sex Parents and Their Children*, 16 LOY. J. PUB. INT. L. 167, 170 (2014).

89. LA. CIV. CODE arts. 179, 187.

90. *Id.* art. 187.

91. *Id.*

92. *Id.* art. 187 cmt. b.

93. *Id.*

94. *Id.*

95. *Id.* art. 187.

96. John T. Hood Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18, 33 (1958).

advances, married couples no longer have to engage in sexual intercourse to conceive a child.[97] In response to modern technological advances, current Louisiana Civil Code article 188 provides another way to establish paternity through assisted conception.[98] The article states, "The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented," which is another way of establishing paternity.[99] Some married couples may not be able to conceive biological children due to infertility.[100] For opposite-sex couples, this is usually because of "functional infertility," which is the inability to have children for medical reasons.[101] If a person is single or in a same-sex relationship, he or she usually encounters "structural infertility," which is not because of the inability to conceive but instead requires another party's biological assistance in combination with his or her own in order to reproduce.[102] If the couple decides not to adopt, but still wants children, another alternative is to turn to assisted reproductive technologies such as surrogacy,[103] in vitro fertilization,[104] or artificial insemination.[105] As

97. Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 354 (2011).

98. LA. CIV. CODE art. 188.

99. *Id.* Louisiana Civil Code article 188 comment *a* defines assisted conception as "not just artificial insemination," but also "invitro fertilization and embryo transfer."

100. Elizabeth J. Levy, *Virgin Fathers: Paternity Law, Assisted Reproductive Technology, and the Legal Bias against Gay Dads*, 22 AM. U. J. GENDER & SOC. POL'Y & L. 893, 896 (2014); *see Reproductive Health: Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 16, 2019), http://www.cdc.gov/reproductivehealth/infertility/ [https://perma.cc/4GF2-TTJW]. Infertility refers to the inability to conceive biological children. *Id.*

101. Dana, *supra* note 97, at 359. Examples of functional infertility can involve a man "having a low sperm count" or a woman "having no viable eggs, or being unable to carry a baby to term." *Id*.

102. *Id.*

103. *Surrogate Mother*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/surrogate%20mother [https://perma.cc/42PF-CBG4] (last visited Nov. 14, 2019) ("[A] woman who becomes pregnant by artificial insemination or implantation of a fertilized egg . . . for the purpose of carrying the fetus to term for another person.").

104. *In Vitro Fertilization*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/in%20vitro%20fertilization [https://perma.cc/27SE-UZCU] (last visited Nov. 14, 2019) ("[F]ertilization by mixing sperm with eggs surgically removed from an ovary followed by uterine implantation of one or more of the resulting fertilized eggs.").

105. *Artificial Insemination*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/artificial%20insemination [https://perma.cc/C

technology advanced and developed more ways in which couples could have children, the law in Louisiana advanced as well in order to conform with the advances in society.[106]

*C. Louisiana's Treatment of Parental Rights of Same-Sex Couples Pre-*Obergefell*:* Black v. Simms

Before the U.S. Supreme Court's decision in *Obergefell*, Louisiana courts were reluctant to grant parental rights of a child to a non-biological parent involved in a same-sex relationship.[107] Courts required that the non-biological parent meet the "substantial harm" standard in order to gain custody. This standard requires the moving party to show that joint or sole custody to either parent would result in "substantial harm" to the child.[108] It is only upon proof of "substantial harm" that the court may consider an award of custody of the child "to another person with whom the child has been living in a wholesome and stable environment."[109]

In *Black v. Simms*, Kimberlee Black and Kimberly Simms were in an unmarried, same-sex relationship in Louisiana until 2004.[110] During their relationship, the couple conceived a child via artificial insemination, and Simms gave birth to Braelyn Simms on January 29, 2000.[111] Once the relationship ended in 2004, Black filed a petition seeking sole custody, and in the alternative, joint custody with visitation of Braelyn.[112] The trial court and appellate court denied Black's request, because it believed Black needed to meet the "substantial harm" standard, the standard necessary for nonparents to receive custody over children.[113] Therefore, to have a

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25U-H23T] (last visited Nov. 14, 2019) ("[I]ntroduction of semen into the uterus or oviduct by other than natural means"). *See generally* Dana, *supra* note 97, at 359.

106. *See* LA. CIV. CODE art. 188 (2019).

107. *In re* Melancon, 62 So. 3d 759, 764 (La. Ct. App. 1st Cir. 2010); Black v. Simms, 12 So. 3d 1140, 1145 (La. Ct. App. 3d Cir. 2009); Susan Donaldson James, *Louisiana Gay Dad Raises Child, but He's Powerless as Partner Skips Town with Boy*, ABC NEWS (July 16, 2012, 1:47 PM), https://abcnews.go.com/Health/sex-families-risk-patchwork-state-parenting-laws/story?id=16788341 [https://perma.cc/9QHC-UQ32].

108. LA. CIV. CODE art. 133 (2009).

109. *Id.*; *Black*, 12 So. 3d at 1144; *see* LA. CIV. CODE art.133 cmt. b (stating that the substantial harm standard can described using the term "detrimental" to the child).

110. *Black*, 12 So. 3d at 1141.

111. *Id.*

112. *Id.*

113. *Id.* at 1141–43.

custody right of Braelyn, Black had to show that Simms's maintaining sole custody of Braelyn would cause Braelyn substantial harm.[114]

Black claimed that she and Braelyn formed a parent-child relationship, despite her lack of a biological link to the child because Black raised her from birth and functioned as a parent during her relationship with Simms.[115] Because of this, Black argued that severing her relationship with Braelyn would cause Braelyn "substantial harm."[116] In addition, Black argued that she and Simms made a joint decision to have a child.[117] Nevertheless, the court denied Black's request because of the lack of evidence showing "substantial harm," which interfered with Simms's custody as a parent.[118] Despite the fact that Black raised Braelyn as her child and functioned as her parent, without marriage, the law did not give Black the opportunity to be considered as a "parent" in the eyes of the court when deciding custody rights of Braelyn.[119] Unfortunately for Black, no language in the Civil Code provided her a means to establish a parental link to the child, and the "best interest of the child" standard worked against her since the court viewed her as a non-parent.[120]

The Louisiana Civil Code mandates that in custody proceedings, the court should give primary consideration to the "best interest of the child."[121] This standard, first articulated in *Black*, is used throughout the Louisiana Civil Code regarding custody of children.[122] The Louisiana Legislature provides a detailed list of factors that the court must consider when determining which course of action is in the child's best interest.[123]

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114. *Id.* at 1144.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 1145.
119. *Id.*
120. *See* LA. CIV. CODE arts. 184, 185 (2019).
121. *Id.* art. 131.
122. *See id.* arts. 131–34.
123. The court is instructed to look at a detailed list of 14 enumerated factors to determine the best interest of the child, including:

> (1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration. (2) The love, affection, and other emotional ties between each party and the child. (3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.(4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs. (5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that

Only after the judge weighs these factors may he or she make a custody decision that is in line with the best interest of the child.[124] However, the best-interest-of-the-child factors are only used when there are two parents who are involved in a custody dispute.[125]

When the court is faced with a parent and a non-parent seeking custody, the court uses a substantial harm test rather than a best-interest-of-the-child test because parental rights are given primacy over non-parents seeking custody rights of the child.[126] In the event that a Louisiana court is faced with a case like *Black*, where the mother's long-time female partner is claiming custody over the child, the court must first look to Louisiana Civil Code article 133 to determine whether substantial harm would result if the biological parent retained custody of the child.[127] The court will only separate a child from his biological parent and give custody to a person the law deems a "non-parent" if the court finds that substantial harm would result from the biological parent retaining custody.[128] If the court finds no substantial harm to the child, then the court does not look to the best-interest-of-the-child factors because the courts will, by default,

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> environment. (6) The permanence, as a family unit, of the existing or proposed custodial home or homes. (7) The moral fitness of each party, insofar as it affects the welfare of the child. (8) The history of substance abuse, violence, or criminal activity of any party. (9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody. (10) The home, school, and community history of the child. (11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. (12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party. (13) The distance between the respective residences of the parties. (14) The responsibility for the care and rearing of the child previously exercised by each party.

Id. art. 134.

124. *Id.*

125. *Id.*

126. *Id.* arts. 132–34. This standard also relates to the fact that parents have the obligation to support, maintain, and educate under Louisiana Civil Code article 224. *See* Troxel v. Granville, 530 U.S. 57 (2000).

127. LA. CIV. CODE art. 133 (2019).

128. *Id.*

give custody of the child to the biological parent.[129] If two biological parents appear before the court in a custody dispute, then the court looks to the best-interest-of-the-child factors.[130] The best interest of the child is a vital consideration for Louisiana courts when determining child custody.[131] This is because the Louisiana Civil Code makes clear that it generally prefers parents in custody disputes, as evidenced by the way the burdens are constructed.[132] Laws already exist that automatically establish filiation for opposite-sex married couples, thereby allowing them to take advantage of the best-interest-of-the-child standard in custody disputes.[133] However, the law does not provide any way for a non-biological parent to establish filiation in the same way as opposite-sex parents, thereby depriving that parent of utilizing the best-interest-of-the-child standard in custody determinations.[134]

*D. Louisiana Law on Marriage as It Relates to Same-Sex Couples Pre-*Obergefell

Long before the Supreme Court held that same-sex couples may exercise their right to marry in *Obergefell*, Louisiana legislators made clear that they believed marriage should only exist between one man and one woman.[135] The Louisiana Civil Code first referenced marriage as between a man and a woman in 1975.[136] In 1987, the Louisiana Legislature amended the Civil Code to expressly prohibit same sex-marriage.[137] Again in 1999, the Louisiana Legislature amended the Civil Code to refuse acknowledgement of same-sex marriage performed in other states.[138] In

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129. *Id.*

130. *Id.* arts. 132, 134.

131. *See generally* Black v. Simms, 12 So. 3d 1140 (La. Ct. App. 3d Cir. 2009).

132. LA. CIV. CODE. arts. 132–34 (2019).

133. *See* discussion *supra* Part I.A.

134. *See* discussion *supra* Part I.A.

135. Obergefell v. Hodges, 576 U.S. 644, 675 (2015); PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA, GUIDE TO THE CONSTITUTIONAL AMENDMENT ON THE DEFENSE OF MARRIAGE ACT (2004), http://parlouisiana.org/wp-content/uploads/2016/03/Guide-to-the-Constitutional-Amendment-on-the-Defense-of-Marriage-Act.pdf [https://perma.cc/NC6N-YLZN]; H.B. 1717, 1987 Leg., Reg. Sess. (La. 1987).

136. PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA, *supra* note 135.

137. H.B. 1717, 1987 Leg., Reg. Sess. (La. 1987) ("Persons of the same sex may not contract marriage with each other.").

138. H.B. 1450, 1999 Leg., Reg. Sess. (La. 1999) ("A purported marriage between persons of the same sex violates a strong public policy of the state of

2003, Massachusetts recognized a right to same-sex marriage in *Goodridge v. Department of Public Health*.[139] Fearing that a Louisiana court might rule the same way as the *Goodridge* court, Louisiana, in addition to several other states, amended the state Constitution in 2004.[140] This amendment stated that:

> Marriage in the state of Louisiana shall consist *only of the union of one man and one woman*. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.[141]

The amendment made clear that same-sex couples were not entitled to a marriage right under any state law or the Constitution of Louisiana.[142] Cases like *Black* and the 2004 amendment to the Louisiana Constitution reflect Louisiana's traditional view, held by many other states, that marriage and parenthood should only be available to a union between a man and a woman.[143] Not only did the jurisprudence treat same-sex couples differently than opposite-sex couples, but the amendment to the Louisiana Constitution shows that even the Legislature explicitly treated same-sex couples differently as well.[144]

Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage."). The bill passed in 1999 and became law as part of the Louisiana Civil Code article 3520. *Id.*

139. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

140. LA. CONST. art. XII, § 15.

141. *Id.* (emphasis added).

142. PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA, *supra* note 135.

143. LA. CONST. art. XII, § 15; Black v. Simms, 12 So. 3d 1140, 1142–43 (La. Ct. App. 3d Cir. 2009).

144. LA. CONST. art. XII, § 15; *Black*, 12 So. 3d at 1142–43.

II. *OBERGEFELL* AND BEYOND

Throughout the end of the 19th and early 20th centuries, the Supreme Court acknowledged a variety of constitutionally protected, fundamental personal and privacy rights.[145] In addition, the Supreme Court extended several favorable decisions for same-sex rights.[146] At the same time as these Supreme Court decisions, Louisiana and other states continued to expressly prohibit same-sex marriage.[147] As a result, same-sex couples seeking the right to marry challenged such state laws.[148]

A. Obergefell *Turns the Country Upside Down*

In *Obergefell v. Hodges,* 14 same-sex couples and 2 men whose same-sex partners had died prior to the litigation challenged several state statutes that defined marriage as a union existing only between a man and a woman.[149] One of the petitioners, James Obergefell, and his partner, John Arthur, were in a relationship for two decades.[150] During the relationship, Arthur developed ALS, and the couple wished to marry before Arthur died.[151] They traveled from Ohio to Maryland because same-sex marriage

145. Roe v. Wade, 410 U.S. 113, 152–53 (1973) (recognizing the fundamental right to an abortion); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating Virginia's ban on interracial marriages); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the holding of *Griswold* to unmarried people); Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (invalidating state law prohibiting use of drugs or devices of contraception and the counseling, aiding, and abetting of the use of contraceptives).

146. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996) (holding that a law preventing anti-discriminatory measures against gays, lesbians, and bisexuals was unconstitutional); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (holding that consenting adults have the right to engage in public conduct in the privacy of their homes); United States v. Windsor, 570 U.S. 744, 774 (2013) (holding that sections of the Defense of Marriage Act that denied federal recognition of same-sex marriage were unconstitutional as a deprivation of liberty of the person protected by the Fifth Amendment).

147. *See generally* LA. CONST. art. XII, § 15.

148. *See* Obergefell v. Hodges, 576 U.S. 644 (2015); *Windsor*, 570 U.S. 744; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

149. *Obergefell*, 576 U.S. at 653–56.

150. *Id.* at 658.

151. *Id.*

was legal in Maryland.[152] Shortly after their marriage, Arthur died.[153] However, Ohio law did not recognize same-sex marriage and, accordingly, prohibited the state from listing Obergefell as the surviving spouse on Arthur's death certificate, which deprived Obergefell of any life insurance or other benefits that a spouse of a deceased person is entitled to.[154] The application of the Ohio law toward same-sex couples compelled Obergefell to file suit challenging the constitutionality of the Ohio statute.[155]

Obergefell first filed suit in Ohio.[156] Specifically, Obergefell challenged Ohio Statute § 3101.01(C)(1) and (2), which stated:

> (C)(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.[157]

The U.S. District Court for the Southern District of Ohio ruled in favor of Obergefell.[158] The court explained that the Ohio statute allowed for Arthur's death record to list his marital status at the time of death as "unmarried" and would not list Obergefell as Arthur's "surviving spouse."[159] The court stated that ruling against Obergefell would violate the Equal Protection Clause of the Fourteenth Amendment because Ohio would recognize an opposite-sex marriage performed out of state, and Ohio only refused to recognize Obergefell's marriage because it involved a same-sex relationship.[160] In a consolidated opinion involving other same-sex couples challenging similar laws of various states including

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013).
157. OHIO REV. CODE § 1301.01(C)(1)–(2) (2005) (invalidated by Obergefell v. Hodges, 576 U.S. 644 (2015)).
158. *Obergefell*, 2013 WL 3814262, at *7.
159. *Id.* at *2.
160. *Id.* at *3.

Michigan,[161] Kentucky,[162] and Tennessee,[163] the U.S. Sixth Circuit Court of Appeals reversed the Southern District Court of Ohio's ruling in Obergefell's case and held that "[a]ll Ohians must follow the State's definition of marriage."[164] The Sixth Circuit found that from the beginning of the nation until the present time, the states have always chosen to define marriage as a union between a man and a woman, and if a state chooses to change the definition, it should do so through the democratic process by a vote of the citizens.[165]

The Sixth Circuit's decision created a circuit split between the Fourth, Seventh, Ninth, and Tenth Circuits, which all found that state level bans against same-sex marriage were unconstitutional.[166] This circuit split compelled the U.S. Supreme Court to grant certiorari.[167] The Supreme Court considered two issues: (1) whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and (2) whether the Fourteenth Amendment requires a state to recognize a same-sex marriage licensed and performed in a state that does grant the right.[168] The Court noted the "transcendent importance of marriage" in that marriage "is essential to our most profound hopes and aspirations."[169]

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161. A same-sex couple from Michigan challenged the constitutionality of both the Michigan Constitution article 1 § 25 and Michigan Compiled Laws § 551.1, which denied them the issuance of a marriage license. DeBoer v. Snyder, 772 F.3d 388, 396–97 (6th Cir. 2014).

162. Two groups of same-sex couples challenged the constitutionality of Kentucky's marriage laws, including the Kentucky Constitution § 233A and Kentucky Revised Statutes § 402.005, which enabled the State to deny them marriage licenses and the ability to be listed as parents on their children's birth certificates. *Id.* at 397–98.

163. Three same-sex couples challenged Tennessee's failure to recognize their marriages from other states because of Tennessee's traditional definition of marriage. *Id.* at 399.

164. *Id.* at 420.

165. *Id.* at 404.

166. *Id.* at 428 n.3 ("[M]arriage licenses are currently being issued to same-sex couples throughout most—if not all—of the Fourth, Seventh, Ninth, and Tenth Circuits.").

167. Obergefell v. Hodges, 576 U.S. 644 (2015). The Supreme Court granted writ of certiorari to Obergefell's case in a consolidated case to include the other decisions which were overturned by the U.S. Sixth Circuit Court of Appeals. *Id.*

168. *Id.* at 656.

169. *Id.* at 659–60 (noting that the institution of marriage has changed from "an arrangement by the couple's parents" to a "voluntary contract between a man and a woman"; from a "male-dominated legal entity" under the doctrine of

Even though marriage is noted as an "ancient" institution, the Court acknowledged that it is not an institution that has stood "in isolation," but, instead, it maintains a history of "continuity and change."[170]

In its reasoning, the Court stated that the Fourteenth Amendment protects "fundamental liberties" and the Court's duty in interpreting the Constitution is to identify and protect individuals' fundamental rights.[171] In addition, the Court recognized past jurisprudence that established that the Constitution protects the right to marry.[172] The Court went on to say that as a result of the states denying same-sex couples the right to marry, the children of these families have grown up knowing that the country considered their families as lesser than conventional families.[173] In addition, these children bear the burden of being raised by unmarried parents.[174] Indeed, the Court noted that states have contributed to the fundamental nature of the right to marry by placing the institution of marriage at the center of both the legal and social order.[175] In many states, marriage is the basis for an expanding list of certain governmental "rights, benefits, and responsibilities," which include taxation, succession rights, inheritance rights, property rights, adoption rights, and child custody, to mention a few.[176]

The Supreme Court held that by excluding same-sex couples from the institution of marriage, states deny same-sex couples the "constellation of benefits that the States have linked to marriage."[177] These historical considerations of the changing nature of marriage led the Supreme Court to state that the "right to marry is a fundamental right inherent in the liberty of the person . . . under the Due Process and Equal Protection Clauses of the Fourteenth Amendment," and as such, the states cannot deprive same-sex couples of that right.[178] As a result, the Supreme Court held that same-sex couples have the freedom to exercise their fundamental right to marriage on the "same terms and conditions as opposite-sex couples."[179]

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coverture to a place of "equal dignity" for women in the abandonment of the doctrine of coverture).

170. *Id.* at 659.

171. *Id.* at 663–64.

172. *Id.* at 664 (referencing decisions such as *Loving v. Virginia* that invalidated bans on interracial marriages).

173. *Id.* at 668.

174. *Id.*

175. *Id.* at 669.

176. *Id.* at 670.

177. *Id.*

178. *Id.* at 675.

179. *Id.* at 676.

This allows same-sex couples to celebrate and advance their relationships and receive all the benefits that the states have attached to marriage.[180] Although the Supreme Court acknowledged that same-sex couples have the right to marry, it remains unclear and invariably difficult to apply *Obergefell* to the broad scope of laws implicated in the seminal decision.[181]

1. Equal Protection and Standards of Review

In *Obergefell*, the plaintiffs challenged the various state laws on the notion that they were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[182] This clause states, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[183] Under the Equal Protection Clause, the Supreme Court has developed standards of review under which to evaluate laws based on the class of persons affected by those laws.[184] There are three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review.[185] The more suspect or potentially discriminatory a law is, the higher the level of scrutiny the courts will use to determine if the law in question is valid.[186] Determining the standard of review for a particular issue is of extreme importance because the higher the level of scrutiny for a particular law, the higher the probability that a court will find the law unconstitutional.[187]

The highest level of review is strict scrutiny, which is triggered when the classification is constitutionally suspect or involves a fundamental right.[188] A classification is suspect when the classified group has historically been subjected to discrimination, is a minority group, or is a group inefficiently protected by the political process.[189] The Supreme Court has identified race, national origin, and alienage as suspect

180. *Id.* at 675–76.
181. *Id.*
182. *Id.* at 653–56.
183. U.S. CONST. amend. XIV, § 1.
184. Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL'Y 493, 500 (2015).
185. RODNEY M. PERRY, CONG. RSCH. SERV., R44143, OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED 1 (2015).
186. *Id.* at 1–2.
187. *Id.* at 7.
188. *Id.* at 1.
189. *Id.* at 1–2.

classes.[190] Under a strict scrutiny standard, the government bears the burden and must show that the law is "narrowly tailored" and serves a "compelling government interest" that the government cannot accomplish through less discriminatory methods.[191] The second standard, intermediate scrutiny, applies when there is a quasi-suspect classification, which usually involves classifications based on gender.[192] When applying the intermediate scrutiny test, the action must be "substantially related to achieving an important government interest."[193] Any other classification falls under the rational basis test.[194] In order for a law to survive a rational basis standard of review, the law must be "rationally" related to any conceivable "legitimate government interest."[195] Under the rational basis standard, the court presumes the governmental action is constitutional; therefore, the burden is on the party challenging a law's validity.[196]

Even though it is well accepted as a matter of law that these three levels of scrutiny exist, the Court sometimes uses different standards.[197] For example, the Court sometimes engages in what it indicates as a traditional rational basis review, but it is really a "heightened rational basis" or a rational basis with "bite."[198] In a heightened rational basis analysis, judicial deference to the legislature is not as favorable as it is

190. Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2771–73 (2005).

191. PERRY, *supra* note 185, at 2.

192. *Id.*; Sobel, *supra* note 184, at 500.

193. PERRY, *supra* note 185, at 2.

194. Sobel, *supra* note 184, at 501.

195. PERRY, *supra* note 185, at 2.

196. *Id.* at 2–3.

197. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 568 (Wolters Kluwer 5th ed. 2015). For example, the current standard for abortion is that the state must not place an "undue burden" on a woman's access to an abortion, a standard that is not one of the traditional levels of scrutiny. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

198. CHEMERINSKY, *supra* note 197, at 568; *see* Plyler v. Doe, 457 U.S. 202 (1982) (holding that Texas education statute violated Equal Protection of the Fourteenth Amendment because it provided free education to children of United States citizens but denied that education to children of undocumented immigrants); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance because it had irrational prejudice against the mentally disabled).

under the traditional rational basis review.[199] It could be said that there is a spectrum for rational basis.[200] On one side, great deference is given to the legislature under traditional rational basis review.[201] On the other side, heightened rational basis entails a more rigorous review.[202] Therefore, the Supreme Court articulates three rigid levels of review that a particular issue may fall into; however, in actuality, an issue may fall into a range of potential review standards.[203]

2. The Standard of Review the Supreme Court Applied in Obergefell

Although the Supreme Court in *Obergefell* identified marriage as a fundamental right, which would normally trigger a strict scrutiny review, the Supreme Court did not apply a strict scrutiny test and did not specify which standard of review was proper.[204] Because the Supreme Court did not specify a standard of review in *Obergefell*, states remain uncertain as to what standard applies to cases that involve laws based upon sexual orientation.[205] There are only two options for the states when determining the correct standard of review because the Court did not apply the strict security standard when it decided *Obergefell*.[206] This means the level of scrutiny is either intermediate or rational basis.[207] Justice Kennedy, who wrote the majority opinion in *Obergefell*, previously suggested in his majority opinions in *Romer v. Evans*[208] and *United States v. Windsor*[209] that a heightened rational basis standard is the appropriate standard of review for courts to apply in cases involving allegedly discriminatory laws

199. Nancy M. Reininger, City of Cleburne v. Cleburne Living Center*: Rational Basis with a Bite*, 20 U.S.F. L. REV. 927, 928 n.9 (1986).

200. CHEMERINSKY, *supra* note 197, at 708.

201. *Id.*

202. *Id.*

203. *Id.* at 568.

204. Obergefell v. Hodges, 576 U.S. 644, 675 (2015); PERRY, *supra* note 185, at 5.

205. *See* Pavan v. Smith, 137 S. Ct. 2075 (2017); *see* Boquet v. Boquet, 269 So. 3d 895 (La. Ct. App. 3d Cir. 2019).

206. PERRY, *supra* note 185, at 2–3.

207. *Id.*

208. Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that a Colorado amendment that repealed state and local laws that protected gays, lesbians, and bisexuals was unconstitutional because the amendment imposed a "broad and undifferentiated disability on a single named group").

209. United States v. Windsor, 570 U.S. 744, 770 (2013) (holding that Defense Against Marriage Act is unconstitutional because it interfered with the dignity of same-sex couples).

based on animus[210] against gays and lesbians.[211] In *Romer*, Kennedy said the only purpose behind the Colorado amendment was "animosity toward the class of persons affected," and because of that, it failed rational basis.[212] In *Windsor*, the Court overturned the Defense Against Marriage Act (DOMA) because "no legitimate purpose overc[ame] the purpose and effect to disparage" same-sex couples.[213] The heightened rational basis test, as articulated in *Romer* and *Windsor*, requires that a law bear a rational relationship to a legitimate government purpose and must not involve animus toward the class of persons affected.[214] In other words, for a law to be valid under heightened rational basis, it cannot involve an "impermissible desire to disadvantage" same-sex couples.[215] In *Obergefell*, Kennedy used language that mirrored the heightened rational basis test when he stated that "no lawful basis [exists] for a State to refuse to recognize a lawful same-sex marriage."[216] According to Kennedy, denying same-sex couples the right to marry had the purpose of demeaning such couples because of animus toward them.[217] This suggests that what Justice Kennedy has designated as the heightened rational basis standard of review is what the Supreme Court intended to be the standard of review for *Obergefell*.[218] Accordingly, this test is the standard courts should use when determining whether state presumption of paternity laws are discriminatory because of a classification regarding sexual orientation.[219]

B. Clarifying Obergefell*:* Pavan v. Smith

Obergefell held that same-sex couples have the fundamental right to marry that was traditionally limited to opposite-sex couples.[220] However, the Court failed to define what the same "constellation of benefits" meant or the scope and extent to which it apples.[221] This left many questions unanswered and created legal discrepancies as to how certain "effects" of

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210. Animus involves the "bare . . . desire to harm [the] group." *Id.* at 770 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).
211. *Windsor*, 570 U.S. at 770; *Romer*, 517 U.S. at 632.
212. *Romer*, 517 U.S. at 634.
213. *Windsor*, 570 U.S. at 775.
214. *Windsor*, 570 U.S. at 770; *Romer*, 517 U.S. at 632.
215. CHEMERINSKY, *supra* note 197, at 823.
216. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).
217. *Id.* at 646–47.
218. *Obergefell*, 576 U.S. at 681; *Windsor*, 570 U.S. at 770.
219. *See Windsor*, 570 U.S. at 770; *Romer*, 517 U.S. at 632.
220. *Obergefell*, 576 U.S. at 675–76.
221. *Id.*

marriage—traditionally linked to biology—might apply to same-sex couples.[222] Not long after the Court's seminal decision, another case made it all the way to the Supreme Court that clarified *Obergefell*'s holding.[223] *Pavan* is one of the first Supreme Court cases that clarified the holding in *Obergefell*.[224]

In *Pavan*, two married, same-sex couples, each of whom conceived a child through anonymous sperm donation, brought an action against the Arkansas Department of Health.[225] Leigh and Jana Jacobs were married in Iowa in 2010, and Terrah and Marisa Pavan were married in New Hampshire in 2011.[226] Leigh and Terrah each gave birth to a child in Arkansas in 2015.[227] When the couples applied for birth certificates for their children, each couple listed their respective spouses as parents of the children.[228] Under an Arkansas law, the Arkansas Department of Health removed the non-biological spouse's name from the birth certificates and listed only the birth mother's name.[229] Both couples challenged the constitutionality of Arkansas statute § 20–18–401, which required the name of the mother's male spouse to appear on the birth certificate when the mother conceived the child through artificial means.[230] The couples argued that the statute violated *Obergefell* because it allowed for the omission of a mother's female spouse on the child's birth certificate.[231]

Arkansas statute § 20–18–401 stated that "the mother is deemed to be the woman who gives birth to the child," and if "the mother was married at the time of either conception or birth . . . *the name of the husband* shall be entered on the certificate as the father of the child" even if the mother conceived the child by means of artificial insemination.[232] With respect to the two couples, the mother of the children did not have a husband, as contemplated by the statute, but instead a wife, thereby leaving the court to decide whether the Arkansas statute could apply under the given facts.[233] The Arkansas Supreme Court ruled that § 20–18–401 passed "constitutional muster" and reasoned that the statute focused on the child's

222. *Id.*
223. Pavan v. Smith, 137 S. Ct. 2075 (2017).
224. *Id.*
225. *Id.* at 2077.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*; ARK. CODE ANN. § 20-18-401 (2019).
231. *Pavan*, 137 S. Ct. at 2077.
232. *Id.*; ARK. CODE ANN. § 20-18-401 (emphasis added).
233. *Pavan*, 137 S. Ct. at 2077; ARK. CODE ANN. § 20–18–401.

relationship with the biological mother and biological father, and not on the marital relationship of husband and wife, which *Obergefell* stated required Equal Protection under the Fourteenth Amendment.[234] Under the Arkansas Supreme Court's reasoning, a parent's name on the birth certificate is a right that emanates from being a biological parent of a child, as opposed to a person being a spouse of a mother.[235]

The U.S. Supreme Court reversed the Arkansas Supreme Court's decision, finding that the birth certificates are more than a "mere marker of biological relationships," because birth certificates give married parents a "form of legal recognition" that is not available to unmarried parents.[236] The Court held that not putting the mother's female spouse's name on the birth certificate in cases of artificial insemination denied same-sex couples the same "constellation of benefits" of marriage as opposite-sex couples and offended the holding in *Obergefell*.[237] Therefore, *Pavan* helped to show that *Obergefell* applies fully to more than just the right to marry and extends to rights that the law traditionally associates with marriage, namely parental rights.[238]

III: THE LOUISIANA CIVIL CODE POST-*OBERGEFELL*

Pavan reached the U.S. Supreme Court only two years after *Obergefell*, which shows how quickly states were already struggling to apply the "constellation of benefits" and rights afforded to same-sex couples in the context of parental rights and duties.[239] In Louisiana, *Boquet*, like *Pavan*, shows that Louisiana faces a similar problem of applying *Obergefell* in the context of the paternal presumption to same-sex couples.[240] The biological presumption of paternity in Louisiana leaves same-sex couples without the constellation of benefits and at an unfair and unwarranted disadvantage when seeking to show a parental link to the child for the purpose of establishing parental right and duties.[241]

234. *Pavan*, 137 S. Ct. at 2077 (quoting Smith v. Pavan, 505 S.W.3d 169, 177 (Ark. 2016)).
235. *Id.*
236. *Id.* at 2078.
237. *Id.*
238. Obergefell v. Hodges, 576 U.S. 644, 670–71, 675–76 (2015).
239. *Pavan*, 137 S. Ct. at 2078; *Obergefell*, 576 U.S. at 670.
240. Boquet v. Boquet, 269 So. 3d 895, 900 (La. Ct. App. 3d Cir. 2019).
241. *See* LA. CIV. CODE art. 185 (2019).

A. New Ruling, New Problems

Although the Supreme Court recognized a fundamental right to marry for same-sex couples in *Obergefell*, the ruling left a major area of family law unclear: parenthood, which the law has based off of a biological, filiation linkage since Roman law.[242] In Louisiana post-*Obergefell*, awarding same-sex married couples the same benefits opposite-sex couples enjoy is legally problematic because the Louisiana Legislature refuses to amend the Civil Code articles relating to marriage and parenthood despite the Louisiana Law Institute's consistent attempts to propose such changes.[243] In addition, the problem is further complicated because the simple solution of equitable application of the presumption, as done in *Boquet*, does not fix the underlying issues.[244]

1. The Workaround and Its Limitations

Since the Supreme Court's ruling in *Obergefell*, the Louisiana Legislature has not revised the Louisiana Civil Code articles relating to

242. June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post*-Obergefell, 84 UMKC L. REV. 663 (2016).

243. LA. STATE L. INST.: MARRIAGE-PERSONS COMM., SAME-SEX MARRIAGE REPORT TO THE LEGISLATURE, 2016 Leg., Reg. Sess. (2016), https://lsli.org/files/reports/2016/2016%20Same-Sex%20Marriage%20Report.pdf [https://perma.cc/8T9L-64BK]; LA. STATE L. INST.: MARRIAGE-PERSONS COMM., INTERIM REPORT TO THE LEGISLATURE IN RESPONSE TO SR 143 OF THE 2016 REGULAR SESSION, 2017 Leg., Reg. Sess. (2017), https://lsli.org/files/reports/2017/2016%20SR%20143%20Obergefell%20Same-Sex%20Marriage%20Interim%20Report.pdf [https://perma.cc/J44G-YX6C]; LA. STATE L. INST.: MARRIAGE-PERSONS COMM., REPORT TO THE LEGISLATURE IN RESPONSE TO SR 143 OF THE 2016 REGULAR SESSION, 2018 Leg., Reg. Sess. (2018), https://lsli.org/files/reports/2018/2016%20SR%20143%20Same-Sex%20Marriage%20Report.pdf [https://perma.cc/68KX-9ANW]; LA. STATE L. INST.: MARRIAGE-PERSONS COMM., ANNUAL REPORT TO THE LEGISLATURE IN RESPONSE TO SR NO.143 OF THE 2016 REGULAR SESSION, 2019 Leg., Reg. Sess. (2019), https://lsli.org/files/reports/2019/2016%20SR%20143%20Same-Sex%20Marriage%20Annual%20Report.pdf [https://perma.cc/F8DQ-F7S2]; Julia O'Donoghue, *Louisiana Senate Committee Rejects Use of LGBT-Friendly Language in Marriage Laws*, TIMES-PICAYUNE (Mar. 26, 2018), https://www.nola.com/news/politics/article_360fecca-3945-525a-b918-0ffa8e460080.html [https://perma.cc/R79S-RVQ9] (noting how the legislature has rejected modest revisions for gender neutral language in marriage code articles with only one senator of the committee voting for the legislation).

244. *Obergefell*, 576 U.S. at 670; *Boquet*, 269 So. 3d at 900.

marriage and filiation to reflect the change in the law.[245] In certain instances, the Louisiana Civil Code articles can still function by removing the gender-specific language.[246] For example, Louisiana Civil Code article 86 defines marriage as "a legal relationship between a man and a woman that is created by civil contract."[247] The meaning of article 86 can easily conform to *Obergefell* by simply removing the "man and woman" language and replacing it with "between two persons" to have the article read: "marriage is a legal relationship *between two persons* that is created by civil contract."[248] In addition, other Louisiana Civil Code articles, such as article 89, which states that "persons of the same sex may not contract marriage with each other," are wholly unconstitutional following *Obergefell* because they violate *Obergefell*'s holding that "same-sex couples may exercise the fundamental right to marry."[249]

However, the problem in applying certain Louisiana Civil Code articles to same-sex couples cannot be solved where the gender-specific language in the article is the premise of the rule. One example is Louisiana Civil code article 185, the code article at issue in *Boquet*, which states that the "*husband* of the *mother* is presumed to be the father of a child born during the marriage."[250] Article 185 presumes that marriage exists only between a man and a woman, thereby justifying the traditional biological presumption of filiation.[251] Nonetheless, the presumption as applied to an opposite-sex couple does make rational, policy-based sense in light of the history of the biological presumption.[252] Article 185 presumes that if a husband and wife are married, and the wife becomes pregnant, the child is her husband's *biological* child as a result of sexual relations between the

245. *See generally* LA. CIV. CODE arts. 86, 89 (2019).
246. *See generally id.* arts. 86, 185.
247. *Id.* art. 86.
248. *See id.*
249. *Id.* art. 89 ("Persons of the same sex may not contract marriage with each other."); *id.* art. 96 ("A purported marriage between parties of the same sex does not produce any civil effects."); *Obergefell*, 135 U.S. at 2605; *see* Robicheaux v. Caldwell, No. 13-5090, 2015 WL 4090353 (E.D. La. July 2, 2015) (noting how the federal district court for the Eastern District of Louisiana ruled that "Article XII § 15 of the Louisiana Constitution, Article 89 of the Louisiana Civil Code, and laws enacted pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and may not be enforced against the Plaintiffs or any other same-sex couple").
250. LA. CIV. CODE art. 185 (emphasis added).
251. Trahan, *supra* note 40, at 400.
252. *Id.*

couple that produced the child.[253] However, this biological presumption can never apply in same-sex relationships because one of the spouses can *never* be the biological parent of the child. Although a woman's husband gets this presumption, it simply does not make sense to extend such a biological presumption to a woman's wife.[254] The presumption in article 185 was the main controversy in *Boquet*.[255] If established, the presumption in article 185 bestows certain rights and duties upon a person, such as custody and child support, respectively.[256]

2. Battle within the Louisiana Legislature

Obergefell represented a very drastic change in the law, and as such, the Civil Code articles relating to marriage and filiation need legislative redrafting to reflect the country's evolving views on marriage. In 2018, Senator J.P. Morell introduced Senate Bill 98, which would have changed the language in certain Louisiana Civil Code articles "to be gender neutral" and inclusive of same-sex couples.[257] For example, the proposed bill changed references of "husband" and "wife" to "spouse," and instances of "mother," "father," "grandmother," and "grandfather" to "parent" and "grandparent."[258] Gene Mills, the head of the Louisiana Family Forum, testified against the senator's proposed legislation, saying that "often Louisiana offers a different opinion than the U.S. Supreme Court, which has been reversed in over 200 occasions."[259] In other words, Mills' main argument rested on a notion that Louisiana should not update the Civil Code to be in line with *Obergefell*, on the off chance that the Supreme Court overturns *Obergefell* and makes same-sex marriage illegal again.[260] This opinion goes against the principles of Louisiana law as a civilian jurisdiction because, if left unrevised, Louisiana courts will be left interpreting now unconstitutional articles, and in some instances, the

253. LA. CIV. CODE art. 98 (supporting the notion that the biological presumption in article 185 also stems from the duty spouses owe each other in article 98, specifically the duty of fidelity).

254. *Id.* art. 185; *see* Trahan, *supra* note 40, at 400.

255. Boquet v. Boquet, 269 So. 3d 895, 897, 900 (La. Ct. App. 3d Cir. 2019).

256. *See* discussion *supra* Part I.A.

257. O'Donoghue, *supra* note 243; S.B. 98, 2018 Leg., Reg. Sess. (La. 2018).

258. S.B. 98, 2018 Leg., Reg. Sess. (La. 2018).

259. O'Donoghue, *supra* note 243.

260. *Id.*

current state of the law may force courts to "make" new law, which is the job of the legislature, not the courts.[261]

B. The Basic Function of Presumptions in the Law

A "presumption" is a legal term defined as a "legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts."[262] Louisiana Civil Code article 185 establishes a presumption that a husband is the father of children born during the marriage.[263] This marital presumption of paternity in Louisiana is regarded as the "strongest presumption in the law."[264] It is also a presumption that is both legal and evidentiary.[265]

The legislature establishes legal presumptions through specific language in the law.[266] If a presumption exists in the Louisiana Civil Code, then it has a function as a legal presumption, and the Louisiana Civil Code has many examples of such presumptions.[267] The Louisiana Civil Code gives "probative force" to legal presumptions, which removes the burden from the party in whose favor the presumption exists.[268] In other words, legal presumptions shift the burden of proof onto the party who claims the presumption is not true.[269] In certain instances, a person may rebut a presumption by using evidence to contradict it; however, in some instances a presumption is conclusive, which means a person cannot contradict it.[270]

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261. *See* LA. CIV. CODE art. 1 (2019) ("The sources of law are legislation and custom."); *see id.* art. 2 ("Legislation is a solemn expression of legislative will."); *id.* art. 1 cmt. b ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law such as *jurisprudence*, doctrine, conventional usages, and equity, that may guide the court in the absence of legislation and custom.") (emphasis added).

262. *Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019).

263. LA. CIV. CODE art. 185.

264. *Id.* art. 185 cmt. b.

265. Trahan, *supra* note 40, at 400.

266. Geoffrey J. Orr, *Toward a Workable Civil Presumptions Rule in Louisiana*, 53 LA. L. REV. 1625, 1628 (1993).

267. *See* LA. CIV. CODE art. 2340 ("Things in the possession of a spouse during the existence of a regime of community of acquets and gains are *presumed* to be community.") (emphasis added); *see id.* art. 2480 ("When the thing sold remains in the corporeal possession of the seller the sale is *presumed* to be a simulation.") (emphasis added).

268. Orr, *supra* note 266, at 1629.

269. *Id.*

270. *Id.*

A conclusive presumption can be viewed as more of a presumption in disguise because it is really a substantive rule of law.[271]

The presumption in article 185 is rebuttable because of the existence of the disavowal action in article 187.[272] Article 187 states that the "husband may disavow paternity of the child by clear and convincing evidence that he is not the father."[273] Therefore, the existence of the disavowal action serves to rebut the presumption of paternity that exists in article 185.[274] In addition, the responsibility is on the husband to bring the disavowal action for proper relief to defeat the presumption of article 185.[275]

The Louisiana Code of Evidence defines an evidentiary presumption as an inference the legislature creates that the fact finder must draw if it finds that the predicate fact exists unless the fact finder decides it is not persuaded that the inferred fact exists.[276] A "predicate fact" is a fact that a party establishes to receive the benefit of the presumption.[277] For example, if a mother proves that a man was her husband during the time the child was conceived—the predicate fact—the fact finder must infer that the man is the father—the required inference—even if no actual evidence is presented of the child's paternity.[278]

The purpose of such a presumption in the law is that the presumption tends to "coincide with what probably is true."[279] In the context of Louisiana Civil Code article 185, the presumption that the husband of the mother is the father of the child "probably is true."[280] To overcome an evidentiary presumption, the challenging party must do two things.[281] First, the party that challenges the presumption must show evidence to rebut the inference the presumption gives.[282] Second, the evidence that the contesting party shows must convince the fact finder that the presumed fact is untrue.[283] Presumptions in the law provide a great advantage for

271. Keith B. Hall, *Evidentiary Presumptions*, 72 TUL. L. REV. 1321, 1322 (1998).
272. LA. CIV. CODE art. 187.
273. *Id.*; *Disavow*, BLACK'S LAW DICTIONARY (11th ed. 2019) (disavowal is to "disclaim knowledge or responsibility for").
274. *See generally* LA. CIV. CODE art. 187.
275. *Id.*
276. LA. CODE EVID. art. 302(3) (2019).
277. *Id.* art. 302(2).
278. Hall, *supra* note 271, at 1322.
279. *Id.* at 1326.
280. LA. CIV. CODE art.185; Hall, *supra* note 271, at 1326.
281. Hall, *supra* note 271, at 1323.
282. *Id.*
283. *Id.*

those in whose favor they work. This is especially true of the paternal presumption included in article 185 because it is often extremely difficult to overcome the presumption since the burden is so high.[284]

C. With the Right to Marry Comes the Right to Divorce

A gender-specific presumption, such as the one contained in article 185, is problematic because same-sex couples are raising more than two million children nationwide, and in Louisiana, 20% of same-sex couples are raising children.[285] Louisiana is not alone—paternal filiation in almost every other state uses similar language that the "husband or man" is "presumed" to be the father to establish the parent-child relationship.[286] In

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284. *See* LA. CIV. CODE art. 185.

285. *Population Density of Same-sex Couples: Louisiana*, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE, https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS&area=22#density [https://perma.cc/HM7C-2DSR] (last visited Sept. 25, 2019); Cain, *supra* note 88, at 180; LA. CIV. CODE art. 1852.

286. ALA. CODE § 26–17–204(a)(1) (2019) ("A man is *presumed* to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage.") (emphasis added); ARIZ. REV. STAT. §25–814(A) (2019) ("A *man* is *presumed* to be the father of the child if . . . [h]e and the mother of the child were married at any time in the ten months immediately preceding the birth . . . .") (emphasis added); DEL. CODE tit. 13, § 8–204(a)(1) (2019) ("A *man* is *presumed* to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage . . . .") (emphasis added); KAN. STAT. § 23–2208(a)(1) (2019) ("A man is *presumed* to be the father of a child if . . . [t]he man and the child's mother are, or have been, married to each other and the child is born during the marriage . . . .") (emphasis added); MASS. GEN. LAWS ch. 209C, § 6(a)(1) (2019) ("[A] *man* is *presumed* to be the father of a child . . . if . . . he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce . . . .") (emphasis added); N.M. STAT. ANN. § 40–11A–204(A)(1) (2019) ("A *man* is *presumed* to be the father of a child if . . . he and the mother of the child are married to each other and the child is born during the marriage . . . .") (emphasis added); N.D. CENT. CODE § 14–20–10(1)(a) (2019) ("A *man* is *presumed* to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage.") (emphasis added); OKLA. STAT. tit. 10, § 7700–204(A)(1) (2019) ("A man is *presumed* to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage . . . .") (emphasis added); TENN. CODE § 36–2–304(a)(1) (2019) ("A *man* is rebuttably *presumed* to be the father of a child if . . . [t]he man and the child's mother are married or have been married to each other and the child is born during the marriage . . . .") (emphasis

addition, in 2017, there were a total of 787,251 divorces in the United States.[287] Because the Supreme Court has recognized same-sex couples' right to marry, it follows that same-sex couples also have the right to divorce.[288] As seen in *Boquet*, during same-sex couple divorce proceedings, courts must determine custody and support of children.[289] Additionally, as seen in *Black*, the courts give preference to legally established parents in determination of custody.[290] Children of same-sex couples are at a greater risk of being legally parentless because there is not a presumption in the Civil Code that allows both of their parents to be immediately recognized as legal parents.[291]After *Obergefell*, there have been varying attempts to try to "fix" the situation of applying the paternal presumption to same-sex couples.[292]

D. An Inequitable "Equitable" Fix

In *Boquet*, the Louisiana Third Circuit applied the presumption of paternity in article 185 equitably to same-sex couples.[293] The *Boquet* court acknowledged that the application of article 185 proved consequential considering the article used the word "husband" and the issue for the court involved a "wife."[294] In order to satisfy *Obergefell*'s same "constellation of benefits," the court applied the presumption of paternity to the female spouse to ensure it treated her the same way a court would treat a male spouse in this situation.[295]

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added); TEX. FAM. CODE § 160.204(a)(1) (201) ("A *man* is *presumed* to be the father of a child if . . . he is married to the mother of the child and the child is born during the marriage . . . ."") (emphasis added); WYO. STAT. § 14–2–504(a)(i) (2019) ("A *man* is *presumed* to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage . . . .") (emphasis added).

287. *National Center for Health Statistics: Marriage and Divorce*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/fastats/marriage-divorce.htm [https://perma.cc/72T8-C2YC] (lasted visited May 5, 2020).

288. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

289. Boquet v. Boquet, 269 So. 3d 895, 900 (La. Ct. App. 3d Cir. 2019).

290. Black v. Simms, 12 So. 3d 1140, 1142–43 (La. Ct. App. 3d Cir. 2009); LA. CIV. CODE art. 132 (2019); *id.* arts. 133–34.

291. LA. CIV. CODE art. 185.

292. *Id.*; *Boquet*, 269 So. 3d at 900.

293. *Obergefell*, 576 U.S. at 670; *Boquet*, 269 So. 3d at 900.

294. LA. CIV. CODE art. 185; *Boquet*, 269 So. 3d at 900.

295. *Boquet*, 269 So. 3d at 900. Other states have applied this method of reasoning as well in extending the biological presumption equitably. *See* LC v.

The Uniform Parentage Act similarly applies the presumption of paternity equitably in its version of the filiation statute, which the Uniform Law Commission redrafted to conform with *Obergefell*.[296] The Uniform Parentage Act is a proposed legislative act drafted by the National Conference of Commissioners of Uniform State Laws to provide states with a legal framework for establishing parent-child relationships.[297]

At first glance, an equitable application of the presumption is already in accordance with article 4, which makes it appear to be the perfect solution to applying the presumption of paternity in article 185 to same-sex couples.[298] Therefore, this equitable solution would not require a redraft of the Louisiana Civil Code, but this solution puts the burden on the courts to apply this remedy.[299] This equitable application would also protect and provide a safeguard for the child of same-sex parents to ensure that he has the support and care of two legal parents instead of only one.[300] Applying the presumption of paternity equitably to same-sex couples would seemingly satisfy the holding in *Obergefell* because it would extend the same "constellations of benefits" of the laws relating to marriage, and provide safeguards to children of those unions.[301] Although this equitable remedy seemingly applies to laws on marriage, it does not apply to laws on filiation as easily.[302]

MG & Child Support Enf't Agency, 430 P.3d 400 (Haw. 2018); Mclaughlin v. Jones, 401 P.3d 492 (Ariz. 2017); *In re* Guardianship of Madelyn B., 98 A.3d 494 (N.H. 2014).

296. UNIF. PARENTAGE ACT § 204 (2017) ("[A]n *individual* is *presumed* to be a parent of a child if . . . the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage . . . .") (emphasis added).

297. *Parentage Act*, UNIFORM LAW COMMISSION (2017), https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f [https://perma.cc/4U8Q-E88F].

298. LA. CIV. CODE art. 4 (2019).

299. *Id.*

300. *Boquet*, 269 So. 3d at 900.

301. Obergefell v. Hodges, 576 U.S. 644, 670 (2015); *see* LA. CIV. CODE art. 185.

302. *Obergefell*, 576 U.S. at 670; *see* LA. CIV. CODE art. 185.

1. Filling the Lacuna,[303] Loyacano *Style*

Boquet is not the first time that a Louisiana court has considered an equitable solution to a statutory problem.[304] In *Loyacano v. Loyacano*, the Louisiana Supreme Court decided whether an award of alimony applied equally to men as it did to women.[305] The then-existing article 160 stated that "[w]hen the wife has not been at fault, and she has no sufficient means for her support, the Court may allow her, out of the property and earning of her husband, alimony which shall not exceed one-third of his income."[306] The husband in *Loyacano* argued that article 160 was unconstitutional and violated the Fourteenth Amendment because the law stated that the court could only award wives alimony.[307] In *Loyacano*, there was no positive law that allowed the court to grant the husband alimony; therefore, a gap existed in the law.[308] However, the court recognized that the absence of such law does not mean that the court cannot grant relief.[309] On the contrary, once the gap in the law has been identified, the judge can fill the gap equitably under Louisiana Civil Code article 4.[310] Namely, when the court derives no solution to a particular situation using legislation or custom, "the court is bound to proceed equitably."[311] The Court held

303. *Lacuna*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/lacuna [https://perma.cc/LRT2-YDP7] (last visited Nov. 3, 2019) ("a blank space or a missing part: GAP").

304. *Boquet*, 269 So. 3d at 900; *see* Loyacano v. Loyacano 358 So. 2d 304 (La. 1978), *judgement vacated*, 440 U.S. 952 (1979), *on remand*, 375 So. 2d 1314 (La. 1980).

305. *Loyacano*, 358 So. 2d at 306.

306. LA. CIV. CODE art. 160 (1978). This article has since been changed to be gender neutral: "When a spouse has not been at fault prior to the filing of a petition for divorce and is in need of support, based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support . . . ." *Id*. art. 112 (2019).

307. *Loyacano*, 358 So. 2d at 307.

308. *Id.* The gap is that article 160 only stated that a wife could receive alimony but did not mention a husband, thereby creating a gap in the law. *See* LA. CIV. CODE art. 160 (1978).

309. *Loyacano*, 358 So. 2d at 307.

310. LA. CIV. CODE art. 4 (2019); Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 10 (1994).

311. LA. CIV. CODE art. 4 (2019); Palmer, *supra* note 309, at 10 ("This role of judge as 'gap' or 'lacuna' filler derives from the classic civilian concept which views the judge as a 'legislator of last resort' who fills the 'lacunas' when the

that looking to legislative intent identified the legislature's policy considerations in enacting a law to award alimony to wives.[312] The court found that the law was rooted in the idea that an ex-spouse might need support, and therefore, an ex-husband in need of support satisfied the policy rationale.[313] This led the court to determine that husbands, just like wives, could receive alimony.[314]

The equitable approach under Louisiana Civil Code article 4 that the Court applied to the paternal presumption under article 185 in *Loyacano* and *Boquet* simply does not apply in the context of a same-sex couple because the presumption rests on the biological assumption related to filiation.[315] Extending the presumption equitably to same-sex couples to fix the problem is fundamentally unsound because it upsets the traditional foundation and reason for the existence of the presumption in the first place.[316] In addition, if the court extends the presumption to a same-sex spouse, as it did in *Boquet*, a disavowal action in that context would make no sense.[317] In *Boquet*, after the court applied the presumption equitably, it stated that Brittany's time to file a disavowal action had prescribed.[318] Under the same equity principle, the court extended the same right to seek a disavowal action that a husband of a marriage has to Brittany—a same-sex spouse.[319] In a typical disavowal action, the husband must present clear and convincing evidence that he is not the biological father of the child.[320] The fact that the *Boquet* court contemplated a disavowal action makes little sense, because the only evidence Brittany, or any same-sex spouse, would be able to offer in a disavowal action is evidence that he or she is not the biological parent—a fact that is already known.[321] Therefore, simply applying an equitable fix does not remedy the problem of extending parental rights to same-sex couples.[322]

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positive law on the matter is silent."). *See generally* Mitchell Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485 (1935).

312. *Loyacano*, 358 So. 2d at 309.
313. *Id.*
314. *Id.*
315. Singer, *supra* note 80, at 249.
316. Trahan, *supra* note 40, at 400.
317. *See* discussion *supra* Part I.A.2.
318. Boquet v. Boquet, 269 So. 3d 895, 900 (La. Ct. App. 3d Cir. 2019).
319. LA. CIV. CODE art. 187 (2019); *see* discussion *supra* Part I.B.2.
320. *Boquet*, 269 So. 3d at 900; *see* discussion *supra* Part I.B.
321. *See generally Boquet*, 269 So. 3d at 900.
322. *See generally id. See* discussion *supra* Part I.B.

2. Adopt the Child, Adopt the Presumption?

One apparent solution in cases where one spouse in a same-sex marriage has a biological child through artificial means is for the non-birthing spouse to simply adopt the child and establish the parent-child relationship under article 179 and article 199.[323] However, this solution is unconstitutional under *Obergefell* because the husband of a marriage would never have to adopt a child born during the marriage, thus violating the Equal Protection Clause of the Fourteenth Amendment.[324] The husband is always entitled to the presumption that makes him the presumed father.[325] Adoption can devolve into a potentially expensive and lengthy process for the same-sex spouse to whom the law does not afford the presumption.[326] Therefore, because the wife of a same-sex couple would have to adopt as the only way to establish a parent-child relationship, this gap in the law violates the "constellation of benefits" requirement from *Obergefell*.[327] This proposed solution is unsatisfactory as it would impose additional burdens on same-sex couples simply because they cannot rely upon the "presumption of paternity" to establish parental rights and duties.[328] These two potential solutions of equity and adoption are wholly inadequate, and thus the Louisiana Legislature must develop a better solution to uphold the filiation rights of same-sex spouses—and in turn, preserve the best interest of the children of same-sex couples.[329]

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323. LA. CIV. CODE art. 179; *id.* art. 199.

324. *Id.* art. 185. *See generally* Obergefell v. Hodges, 576 U.S. 644, 672, 675 (2015).

325. LA. CIV. CODE art. 185.

326. When a stepparent attempts to adopt their spouse's child it is often referred to as "intrafamily adoption." KATHERINE SHAW SPAHT & JOHN RANDALL TRAHAN, FAMILY LAW IN LOUISIANA 581 (2009); *Louisiana Adoption Requirements*, AMERICAN ADOPTIONS, https://www.americanadoptions.com/louisiana-adoption/louisiana-adoption-requirements [https://perma.cc/PLF6-KEN7] (last visited Oct. 20, 2019).

327. *Obergefell*, 576 U.S. at 670.

328. Sophia Makris, *Adam & Eve, Adam & Steve, and Ada & Eve: Gender Neutrality in Defining Parental Status in Assisted Reproduction*, 36 REVIEW OF LITIGATION 743, 766 (2018).

329. *See* LA. CIV. CODE art. 179, 199.

IV. THE TIME TO ACT IS NOW: REVISING FILIATION ARTICLES TO ACCORD WITH *OBERGEFELL*

In Louisiana, the *Boquet* approach, which applies the principles of equity, only applies to courts under the Third Circuit's jurisdiction and is not binding on other Louisiana courts dealing with the paternal presumption in the context of a same-sex marriage.[330] Therefore, a uniform solution is necessary to protect the children and spouses of same-sex relationships.[331] Consistent standards across the state will reduce the potential adverse effects upon these parties—such as a lack of child support, custody rights, and inheritance rights.[332] To ensure the law affords the same "constellation of benefits" to same-sex couples as it does to opposite-sex couples, a legislative redraft of article 185 is imperative.[333]

In an ideal world, the Louisiana Legislature would update all of the Civil Code articles relating to marriage and filiation in accordance with *Obergefell*.[334] Unfortunately, the chance that the Louisiana Legislature will redraft all of the relevant articles to reflect the change in *Obergefell* is unlikely because Louisiana has a history of not redrafting Civil Code articles when Supreme Court decisions conflict with traditional moral beliefs of the state.[335] In addition, the Louisiana Legislature has explicitly refused to make even modest changes to the filiation articles, although the Louisiana Law Institute presented the legislature with many language-proposal changes and a bill in 2018.[336] Although the Louisiana Legislature may not entirely redraft the articles related to marriage and filiation in the near future, the Louisiana Legislature should at least redraft the most

330. Boquet v. Boquet, 269 So. 3d 895, 897 (La. Ct. App. 3d Cir. 2019).

331. *See* discussion *supra* Part I.A.

332. *See* LA. CIV. CODE arts. 223, 224, 228, 2315.1–.2.

333. Obergefell v. Hodges, 576 U.S. 644, 670 (2015); LA. CIV. CODE art. 185.

334. *Obergefell*, 576 U.S. at 670.

335. The Louisiana Legislature did not update the abortion statutes until 1991 despite the U.S. Supreme Court ruling on a woman's legal right to an abortion in its decision in *Roe v. Wade* in in 1973. Roe v. Wade, 410 U.S. 113 (1973); LA REV. STAT. § 14: 89 (2019). In this instance, the Louisiana Legislature was almost 20 years late in conforming with a landmark Supreme Court case that decriminalized abortion. *Id.* In addition, Louisiana still criminalizes sodomy in its "crime against nature" law despite the Supreme Court's 2003 decision in *Lawrence v. Texas*. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

336. LOUISIANA STATE LAW INSTITUTE: MARRIAGE-PERSONS COMMITTEE REPORTS, *supra* note 243; O'Donoghue, *supra* note 243; *see* LA REV. STAT. § 14:87.

pertinent articles to make them functional, so Louisiana courts can make consistent decisions when presented with more cases like *Boquet*.[337]

A. Presumption Junction, Time to End That Function

Article 185 presents the biggest issue for the courts—granting parental rights to same-sex couples—and, therefore, the Louisiana Legislature should begin with article 185 when redrafting Civil Code articles relating to marriage and filiation to be in accordance with *Obergefell*.[338] The Louisiana Legislature should amend article 185 to read: "The *spouse* of the mother *is deemed to be* the *parent* of a child born during the marriage." Amending the article's language would give parental rights to the non-biological spouse in a same-sex relationship and effectively remove the biological presumption that currently exists in article 185.[339] Article 185's current gender-specific language, which only references husbands, prohibits its equitable application to same-sex couples as done by the court in *Boquet*.[340] The addition of the word "deemed" means that the law would consider the other spouse in the marriage as the parent of the child.[341] "Deemed" is a stronger word choice than "presumed" for a same-sex parent because a presumption assumes something that is true, but a same-sex spouse married to a biological parent is not the child's other biological parent.[342] The use of the word "deem" would also satisfy the requirements of *Obergefell* because same-sex couples and opposite-sex couples alike would both be "considered parents" under the law without different treatment. This makes a redraft of article 185 the best, most practical solution to the problem of applying the paternal presumption in article 185 to same-sex couples. This amendment would fix the functional problem that currently exists in article 185 and would eliminate the biology-based presumption of paternity.[343] In addition, the Louisiana Legislature has made similar changes to traditional presumption language to "deemed" language in different parts of the Civil Code. [344]

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337. *See generally* LA. CIV. CODE arts. 185, 188. *See* Boquet v. Boquet, 269 So. 3d 895, 897 (La. Ct. App. 3d Cir. 2019).

338. *Obergefell*, 576 U.S. at 675; LA. CIV. CODE art. 185.

339. LA. CIV. CODE art. 185.

340. *Boquet*, 269 So. 3d at 900.

341. *Deem*, BLACK'S LAW DICTIONARY (11th ed. 2019). The word "deemed" is defined as "to consider, think, or judge." *Id.*

342. *See* discussion *supra* Part III.A.1.

343. LA. CIV. CODE art. 185.

344. As a proposed redraft to Louisiana Civil Code article 185, the legislature has previously changed a traditional presumption to "deemed." *See id.* art. 2545

Redrafting article 185 to change the "presumed" language to "deemed" language would align the article with *Obergefell*, but it could create problems in other paternal-filiation-related articles, namely articles regarding disavowal actions.[345] The disavowal action contained in article 187 is also linked to biology; thus, it becomes difficult to apply the same "constellation of benefits" to a non-biological mother.[346] Indeed, the female spouse who did not give birth to the child is obviously not the biological parent of the child.[347] It is not necessary or rational to offer a woman an opportunity to bring a disavowal action when she already knows that the child will not be hers biologically. However, if the disavowal action is unavailable to the non-biological mother, opposite-sex couples and same-sex couples would not be treated equally. Such an outcome would offend *Obergefell* because the non-biological mother in a same-sex marriage would not be awarded the "same constellation of benefits" that are awarded to a husband in an opposite-sex marriage.[348] However, in this instance, a challenge of this redraft would survive Justice Kennedy's heightened rational basis standard of review under the Equal Protection Clause of the Fourteenth Amendment.[349]

The difference in treatment of offering a husband of an opposite-sex relationship a disavowal action but not a female spouse in a same-sex relationship is not based on any "animus" against the female spouse that would make the law fail the heightened rational basis standard.[350] On the contrary, this treatment actually prevents giving the female spouse an additional right that a male spouse in an opposite-sex relationship would not have.[351] A disavowal action exists because there is a biological

("[a] seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing."); The title of and the comments to article 2545 "presumption of knowledge" further show how the words "deem" and "presume" are used almost interchangeably, which supports that notion that "deems" would be a proper substitute for "presumes." *Id.*; *id* cmt. b ("a manufacturer is *presumed* to know of the defects in the things it manufactures.") (emphasis added); *id.* cmt. h ("[t]he developer of a subdivision is a 'manufacturer' of the lots therein, and thus is *presumed* to know the defects of the thing sold.") (emphasis added).

345. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

346. LA. CIV. CODE art. 187.

347. *See* discussion *supra* Part III.A.1.

348. *Obergefell*, 576 U.S. at 670.

349. *See* discussion *supra* Part II.A.2.

350. United States v. Windsor, 570 U.S. 744, 770 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)); *see* discussion *supra* Part I.A.2.

351. *See* discussion *supra* Part I.A.2.

possibility that the child belongs to the husband.[352] This biological possibility does not exist within a same-sex marriage.[353] The only reason a same-sex spouse would wish to file a disavowal action to eliminate filiation with the child is because the spouse's marriage to the biological parent of the child has ended, and the non-biological spouse simply does not want parental obligations associated with the child.[354] In certain instances of assisted conception, where the husband in an opposite-sex relationship knows from the beginning that the child is not his, he is not entitled to disavow; therefore, the law should not allow a same-sex spouse in that situation the opportunity to disavow the child.[355] Finally, a disavowal action only available to a husband in an opposite-sex relationship serves a rational government interest—it allows a man who can prove that he is not the biological father to overcome the presumption of paternity, so he does not incur an obligation of child support for a child that is not his.[356] This would also survive Justice Kennedy's heightened rational basis standard of review from *Obergefell* because the proposed redraft does not involve animus towards the same-sex spouse.[357]

The proposed revision to article 185 fixes the most pressing issue of granting parental rights to same-sex couples after *Obergefell* and replaces "presume" with "deem," thereby allowing the article to properly provide parental rights to married same-sex couples.[358] Consider if a Louisiana court is presented with a fact pattern similar to that of *Boquet* where a female who is pregnant from a previous relationship marries her female partner and then gives birth during the marriage.[359] The court's application of the proposed redraft to article 185 would be simple because the law would "deem" the non-biological mother the parent of the child born during the marriage. In the same fact pattern, if the biological mother had a husband, instead of a wife, the law would also "deem" him a parent; therefore, this redraft would grant same-sex couples the same "constellation of benefits" as opposite-sex couples in establishing parental rights.[360]

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352. *See* discussion *supra* Part I.A.2.

353. Boquet v. Boquet, 269 So. 3d 895, 897 (La. Ct. App. 3d Cir. 2019); *see* discussion *supra* Part I.A.2 & Part III.D.1.

354. *See Boquet*, 269 So. 3d at 897.

355. LA. CIV. CODE art. 188 (2019).

356. *See* discussion *supra* Part I.A.2.

357. *See* discussion *supra* Part II.A.2.

358. *Id.* art. 185.

359. *Boquet*, 269 So. 3d at 897.

360. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

B. A Solution for the Stubborn

The Louisiana Legislature's resistance to redrafting the marriage and filiation code articles makes removing the presumption of paternity unlikely, so in the alternative, the Louisiana Legislature should redraft article 188.[361] Article 188 is another logical starting point for a redraft because same-sex couples can only produce children through assisted reproductive technologies such as surrogacy, IVF, or AI.[362] Article 188 specifically deals with assisted reproductive technologies.[363] Such a revision would remove all gender-specific language from article 188, which currently reads, "The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented."[364] Article 188 should instead read, "The *spouse* of a woman who gives birth as a result of assisted conception *is* the other parent of the child provided that he or she consented to the procedure." In application, this new language functions as a conclusive presumption that in reality is a rule of law because it states a fact, which is the function of a rebuttable presumption.[365] The new language creates a conclusive presumption in that a spouse *is* the parent if he or she consents to the procedure. In addition, no disavowal action is allowed to sever the legally established parent-child bond, which further strengthens the argument that the new language creates a conclusive presumption, which means it is irrebuttable.[366] The proposed amendment removes the gendered language to invariably apply to any couple, which makes it constitutional post-*Obergefell*.[367]

However, Article 188 relies on consent as a prerequisite for the "bestowing" of the rights and duties of parenthood even in the proposed redraft.[368] Consider a scenario where there are two females who are a married couple in Louisiana. One of the spouses conceives a child either by artificial means or by sexual intercourse with a man without the consent of her female spouse. In this fact pattern, article 188 would not grant parental rights to the non-biological female spouse because the conception

361. *Id.* art. 188.
362. *Id. See generally* Dana, *supra* note 97, at 359. *See* discussion *supra* Part I.B.
363. *Id.* art. 188.
364. *Id.*
365. Hall, *supra* note 271, at 1322; *see* discussion *supra* Part III.B.
366. Hall, *supra* note 271, at 1322; *see* discussion *supra* Part III.B.
367. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).
368. *Id.* art. 188.

of the child lacks her consent as required under article 188.[369] Thus, a difference in treatment would exist between same-sex and opposite-sex couples, because a husband of the woman would still be presumed to be the father under article 185. Not applying the presumption to the non-mother female spouse arguably would offend *Obergefell* by not extending the same "constellation of benefits" to the female spouse that the husband of a woman is entitled to under article 185.[370]

Under this scenario, a constitutional challenge is unlikely because rationally, the same-sex spouse would not want this benefit. In this type of scenario, it would be unlikely that the non-biological mother would contest "unequal" treatment between same-sex and opposite-sex couples. On the contrary, a same-sex spouse would be relieved to learn that he or she would not be "presumed" or "deemed" to be the parent of the child under the law according to this redraft of article 188 because of the lack of consent. While the redraft of article 188 is a feasible solution to extend the benefits of marriage as required by *Obergefell*, a redraft of article 185, as described above, is still the best solution.[371]

CONCLUSION

The *Obergefell* decision upset many foundational principles of Louisiana's marriage and filiation law.[372] However, cases like *Pavan* and *Boquet* show that not long after the *Obergefell* decision, states are running into legal barriers to correctly implement *Obergefell*'s holding.[373] This confusion exists because many state filiation laws across the country assume a genetic link between parent and child, which justifies such laws containing a biological presumption.[374] Therefore, the Louisiana Legislature must revise Louisiana's existing Civil Code articles relating to marriage and parenthood, specifically article 185, to ensure that they comply with *Obergefell*.[375] Amending "presumed" to "deemed" in article 185 eliminates the biological presumption that complicates the application

369. *Id.*; *Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (consent is a legal term that is a "voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose . . .").

370. *Id.* art. 185; *Obergefell*, 576 U.S. at 670; *see* discussion *supra* Part I.A.

371. *Obergefell*, 576 U.S. at 670.

372. *Id.* at 672, 675.

373. Pavan v. Smith, 137 S. Ct. 2075 (2017); Boquet v. Boquet, 269 So. 3d 895 (La. Ct. App. 3d Cir. 2019).

374. *See* discussion *supra* Part I.A.

375. *See* discussion *supra* Part IV.A.

of the article to same-sex couples.[376] Most importantly, the recommended redraft of article 185 ensures that same-sex parents are extended the same benefits that are given to opposite-sex parents with respect to marriage.

Eventually the Louisiana Legislature must make major revisions to large portions of the Louisiana Civil Code that regulate marriage and the establishment of the parent-child relationship in order to be constitutional after *Obergefell*. The proposed amendments in this Comment would be the best place for the Louisiana Legislature to start. It is time for Louisiana to extend the fundamental right of marriage and the benefits of parenthood to same-sex couples.

376. *See* discussion *supra* Part IV.A