# *OBERGEFELL*'S MISSED OPPORTUNITY

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## INTRODUCTION

*Obergefell v. Hodges*[1] will take its rightful place among landmark civil rights cases. The blockbuster gay-rights decision, however, also represents the Supreme Court's missed opportunity to balance the scales of justice in favor of another group—children.

The *Obergefell* Court was presented with the necessary components—injury-in-fact and well-established legal precedent—to place the interests of children at the center of its analysis, instead of at the margins.[2] It was a disappointing, albeit expected, omission, because children's legal interests are usually sidelined by an unyielding obsession with the interests of adults in our society.[3]

Yet, there is hope for children's rights advocates. With existing equal protection law precedent and *Obergefell*'s legitimate concern for addressing the social, economic, and psychological harm to children, there is a window of opportunity to advance children's equal protection rights in future cases.

This article is not advocating only for the interests of children of same-sex couples; it is advancing an argument that the legal precedent (the child-centered cases) that *Obergefell* omitted is part of a larger civil rights platform. Often, as the cases herein will document, the children of parents who are members of

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. *See generally* Plyler v. Doe, 457 U.S. 202, 220, 230 (1982) (finding the denial of education to children of undocumented children violated equal protection); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding state law that denied wrongful death recovery to children because mother was not married violated equal protection). For a list of injuries to children of same-sex parents, see Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1088972.

3. The Supreme Court has recognized children's constitutional protections in a number of contexts, including due process rights in juvenile proceedings, reproductive freedoms, the freedom of expression, and equal protection law. *See* Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1577 (2009). Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, MOD Am., Summer–Fall 2007, at 7–8 ("To the extent that the plight of the children of same-sex couples is addressed, it is done as a secondary matter.").

marginalized groups—children of color, children of undocumented parents, children of gays and lesbians, and children of poor parents—bear the brunt of state practices that seek to penalize kids in order to regulate adult behavior.

Part I of this article delineates the harms to children from marriage bans, harms that the *Obergefell* Court relied upon to recognize the fundamental right to marry for same-sex couples. Part II explains how *Obergefell* missed an opportunity to advance the constitutional rights of children by failing to invoke well-established equal protection law.[4] This discussion briefly catalogues the omitted child-centered cases that warranted a more robust analysis of children's rights. This series of cases begins with the *Brown v. Board of Education* decision, and then turns to a number of post-*Brown* equal protection cases that explicitly prohibited state practices that penalized nonmarital children and children of undocumented parents because of the conduct of their parents. With this historical backdrop, it is easier to understand that the same-sex marriage bans were another iteration of government practices that punish children—this time, children of gays and lesbians seeking to marry.[5] Part III explains that despite the *Obergefell* Court's failure to advance the equal protection rights of children of same-sex parents, there is reason to be optimistic.[6] The opinion, by acknowledging the harms to children as relevant to their parents' constitutional claims, indirectly bolsters some of the central themes from these earlier cases. It also demonstrates at least some empathy for the plight of kids. To conclude, the article briefly offers three central themes from this collection of cases that are important to a renewed discussion on the rights of children.

## I
## THE HARMS TO CHILDREN OF GAY AND LESBIAN PARENTS SEEKING TO MARRY

*Obergefell v. Hodges* made same-sex marriage the law of the land, striking down marriage bans and nonrecognition laws as infringements on the fundamental right of gays and lesbians under the Due Process Clause of the Fourteenth Amendment.[7] The Supreme Court, however, missed a rare

4. Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual Gender Parenting, and Biology*, 28 LAW & INEQ. 307 319 (2010) ("It is rare for advocates to advance—and for courts to consider—the potential rights and remedies of actual children of gay and lesbian couples. . . ."). This was true for same-sex marriage wars and it is in fact true across the board when it comes to children.

5. *See* Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013).

6. *See Obergefell*, 135 S. Ct. 2584 (containing no citation to the equal protection children's rights cases). But the majority in *Obergefell* hinted at the precedent by recognizing that the children's injuries were through "no fault" of their own. *Id.* at 2600. *See generally* Catherine E. Smith and Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons From the Child-Centered Cases*, 48 U.C. DAVIS L. REV. 655, 659 (2014) ("[W]hile courts have recognized the significance of harm to children as a *factual* matter, they have yet to address its significant as a *legal* matter.").

7. *Obergefell*, 135 S. Ct. at 2608–09.

opportunity to recognize the equal protection rights of children as a separate and distinct constitutional claim based on injury-in fact and legal precedent[8] First, the harms.

State marriage bans harmed children of same-sex couples in four ways.[9] First, they foreclosed the main route to family formation for children of same-sex couples. In most jurisdictions children born into heterosexual marriages are presumed to be the child of the marriage and this presumption establishes a legal relationship with both parents, even if the child is not biologically related to them. For same-sex couples in marriage ban states, biology (or a legal adoption) established a legal relationship between the child and one of its same-sex parents;[10] however, the bans precluded the formation of a legal relationship between the child and her other, non-biological (or non-adoptive) parent. In many marriage ban states, it was impossible for a child of same-sex parents to establish a legal relationship with her non-biological (or non-adoptive) parent; they were permanent legal strangers.[11] As the *Obergefell* majority recognized in describing the legal conundrum of Michigan co-plaintiffs, April DeBoer and Jayne Rowse, who were raising three adopted children, "Michigan . . . permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent."[12]

Second, marriage bans coupled with nonrecognition laws voided existing legal parent-child relationships. Non-recognition laws—state laws that refused to recognize married same-sex couples from other states—created uncertainty for children of same-sex parents when their families moved from one state to another. In a marriage equality state, the child's relationship to both her parents would be legally recognized; in a non-recognition state, like Michigan, the child's relationship with her non-biological (non-adoptive) parent would be void.[13]

Third, marriage bans denied children of same-sex couples' economic rights and benefits that would stem from a legal relationship with their non-biological parent, including workers' compensation benefits, social security benefits, and wrongful death proceeds.[14] They also deprived the child and her parents of

8. *See* Smith, supra note 5 ("A child of same-sex parents denied a government benefit has a cognizable equal protection challenge – a legal claim that is separate and distinct from that of the child's gay and lesbian parents."); Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, *supra* note 2 ([A]mici's analysis, focusing on the equal protection rights of children, provides an independent basis for evaluating the constitutionality of the state marriage bans.").

9. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, *supra* note 2.

10 The term "parent" is used here in its social and informal connotation, not as a legal term.

11. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, *supra* note 2, at 27.

12. Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).

13. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, *supra* note 2, at 22–27.

14. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, *supra* note 2, at 27. For a more in-depth discussion of the range of economic benefits, see

certainty or consistency in treatment when unexpected events or crises occurred. The *Obergefell* majority, once again, explained the conundrum for children of same-sex couples seeking to marry: "if an emergency were to arise, schools and hospitals may treat the children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the child she had not been permitted to adopt."[15] In addition, the lack of a legal relationship to the non-biological parent also placed the child at risk in the event her parents separated or divorced because of the lack of access to child support or a custody arrangement.[16]

Fourth, marriage bans inflicted psychological and stigmatic harm to children of same-sex parents by "symbolically expressing the inferiority of families headed by same-sex couples and the children in those families."[17]

The Supreme Court recognized these harms for the first time in *United States v. Windsor*.[18] In striking down the Defense of Marriage Act (DOMA), the Court explained that "[t]he differentiation [between same-sex couples and opposite-sex couples] brings financial harm to children of same-sex couples" and "it humiliates tens of thousands of children now being raised by same-sex couples"[19] The Court also acknowledged the financial injury that the federal marriage ban inflicted on children.

> DOMA . . . brings financial harm to children of same-sex couples. It raises the costs of health care to families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are integral to family security.[20]

Consistent with *Windsor*, the *Obergefell* majority also recognized the psychological and material harms to children of same-sex parents as an important consideration in extending the fundamental right to marry to same-sex couples.[21] The *Obergefell* Court recognized that the right to marry has long been considered a fundamental right and that the previous cases establishing the right dealt only with opposite-sex couples. In response to the states' arguments that gays and lesbians were claiming a new and nonexistent right to "same-sex marriage," the Court made clear that the relevant inquiry required a more comprehensive approach to determine if there is a sufficient reason to exclude a class of people from the right to marry. The Court offered four principles for why the right to marry has been protected: (1) To allow for

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Smith, *supra*, note 5 at 1603–1606.

15. *Obergefell*, 135 S.Ct. at 2595.

16. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners, *supra* note 2, at 27; Smith, *supra* note 5, at 1604.

17. *Id.* at 29.

18. *United States v. Windsor*, 133 S.Ct. 2675 (2013). *See* Brief for the Scholars of the Constitutional Rights of Children In Support of Respondent Edith Windsor Addressing The Merits and Supporting Affirmance (2013)

19. *Id.* at 2694.

20. *Id.* at 2695 (internal citation omitted)

21. The *Obergefell* dissent made no reference to the injuries or rights of children of same-sex couples.

individual autonomy in areas of intimate life; (2) to support a unique "two-person union" through which to find expression, intimacy, and spirituality; (3) *to offer safeguards for children*; and (4) to maintain the country's democratic social order.[22] The majority found that same-sex couples and their children were no different than opposite-sex couples when it came to these abiding principles.[23]

The *Obergefell* Court's recognition of the harms and interests of children is noteworthy; however, it did fall short of a transformative or pivotal paradigm shift on behalf of children and their rights to equal protection. The marriage bans enacted as part of a state campaign to stem the gay rights movement's push for marriage equality provided an example of state actors penalizing children to regulate adult conduct.[24] Through these bans, governments treated similarly situated children differently because they did not agree with their parents' conduct or status as gays and lesbians. As the next part explains, such government conduct defies well-established equal protection precedent; law that the *Obergefell* Court failed to invoke.

## II
## THE LEGAL PRECEDENT *OBERGEFELL* OMITTED: THE CHILD-CENTERED CASES

The *Obergefell* Court recognized the harms to children of same-sex parents as a factual matter, yet it ignored precedent. Well-established equal protection law establishes that it is impermissible for the government to treat some children differently than other children because of the moral disdain of their parents' conduct. This precedent begins with *Brown v. Board of Education*, a case also about children.

### A. *Brown v. Board of Education*: A Turning Point for Children's Rights

As observed by Professor Homer H. Clarke, Jr., "[T]here is nothing in the Constitution about children, minors or infants, or parents for that matter."[25] He also observed that the interests of children were not present in the Civil War Amendments to the Constitution.[26] Further, as Professor Barbara Woodhouse explains, "Historically, children were objects, and not subjects of the law, functioning more in the role of parental property than as persons. They were rarely seen as bearers of due process and equal protection rights."[27] After *Brown v. Board of Education*, the view of children as property shifted.[28]

22. *Id.* at 2599–2602.
23. *Id.*
24. *See supra* Part I.
25. Homer H. Clarke, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 1 (1992).
26. *Id.*
27. Woodhouse, *supra* note 3, at 1577. The Supreme Court has recognized children's constitutional protections in a number of contexts, including due process rights in juvenile proceedings, reproductive freedoms, the freedom of expression, and equal protection law.
28. Brown v. Board of Education, 347 U.S. 483 (1954).

In *Brown,* the Supreme Court struck down "separate but equal" racially segregated schools.[29] The Court declared that state-mandated segregation denied black children educational opportunities and symbolized their inferiority.

*Brown* was a turning point for the basic civil rights of African Americans, African-American children, and children in general.[30] A few years later, in *In re Gault*,[31] the Court recognized that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[32] And while this "promising bit of dicta has never been fully realized,"[33] the constitutional foothold for children recognized in *Brown* and *Gault* has been critical to the minimal constitutional rights that children have garnered to date.[34]

*Brown* played a key role in subsequent cases addressing the plight of children who faced social, legal and economic exclusion, including the historical unequal treatment of nonmarital children.

### B. *Levy v. Louisiana* and its Progeny—Children and Their Unwed Parents

Once viewed as *filius nullius* or the "child of no one,"[35] children born to unmarried parents were considered "nonpersons" and denied social and legal benefits that the federal government offered to marital children as a matter of course. For example, in 1944, the Virginia Supreme Court denied Jacqueline Brown's request for child support from her father, because, consistent with common law, "a bastard was considered as kin to no one . . . [n]o inheritable blood flowed through [her] veins."[36] Nonmarital children were socially ostracized, and denied inheritance, parental support, social security, and other benefits simply because the state morally disagreed with their parents' behavior.[37]

The exclusion of nonmarital children fell more harshly on African-American and poor children, yet attempts to gain traction by incorporating

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29. *Id.* at 483 (holding that segregated schools deprived black children of equal educational opportunities in violation of the Equal Protection Clause).

30. *See* Clarke, *supra* note 25, at 3 ("Another case not generally considered a children's rights case, but one which promised great potential benefits for children, was Brown v. Board of Education."); Barbara Bennett Woodhouse and Sarah Rebecca Katz, *Martyrs, the Media and the Web: Examining a Grassroots Children's Rights Movement Through the Lens of Social Movement Theory*, 5 WHITTIER J. OF CHILD AND FAM. ADVOC. 121 (2005).

31. In re Gault, 387 U.S. 1 (1967).

32. *Id.* at 13.

33. Woodhouse, *supra* note 3, at 1578.

34. *Id.*

35. 1 WILLIAM BLACKSTONE, COMMENTARIES *447 ("[R]ights [of a nonmarital child] are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody."); Gareth W. Cook, Bastards, 47 TEX. L. REV. 326, 327 n.11 (1969); Benjamin G. Ledsham, Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination, 28 CARDOZO L. REV. 2373, 2373 (2007).

36. Brown v. Brown, 32 S.E.2d 79, 80 (1944).

37. See Solangel Maldonado, Illegitimate Harm: Law, Stigma and Discrimination Against Nonmarital Children, 63 FLA. L. REV. 345, 346–47 (2011).

their disparate treatment into the larger civil rights movement were unsuccessful.[38] So, advocates chose to try to remedy the disparate impact of "illegitimacy" laws by arguing that the exclusion of nonmarital children was an equal protection violation itself.

Decided in 1968, *Levy v. Louisiana*[39] was the first nonmarital status case to make its way to the Supreme Court; it changed the social and legal landscape for nonmarital children. Louise Levy, an unmarried African-American mother died due to medical malpractice.[40] Levy's five children were prohibited from a "right to recover" because they were born outside of marriage.[41] The Louisiana Court of Appeals upheld the dismissal of the children's claim because "morals and general welfare . . . discourage[] bringing children into the world out of wedlock."[42]

The Supreme Court struck down the Louisiana law.[43] The Court found that the children's "illegitimate" status was unrelated to the mother's injury.[44] Thus, *Levy* found that it was "invidious" discrimination to deny them recovery.[45] *Brown w*as highlighted as an example of the Court being "extremely sensitive when it comes to basic civil rights," and not "hesitat[ing] to strike down [an] invidious classification[] even though it had history and tradition on its side."[46] *Levy*, in reliance on the tenets of *Brown*, changed the social and legal landscape for nonmarital children.[47]

A few years later the Supreme Court again held that a state may not place its moral objection of parental conduct at the feet of the child by withholding government benefits. In *Weber v. Aetna Casualty & Surety Co.*,[48] the Court overturned another Louisiana law that denied workers' compensation benefits to a deceased worker's children born outside of the marriage.[49]

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38. See Smith, *supra* note 5, at 1609; Martha Davis, *Male Coverture and the Illegitimate Family*, 56 Rutgers L. Rev. 73, 90 (2003).

39. Levy v. Louisiana, 391 U.S. 68 (1968).

40. *Id.*

41. John C. Gray & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. PA. L. REV. 1, 2–3 (1969).

42. *Levy*, 391 U.S. at 70 (quoting Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1967)); Gray & Rudovsky, *supra* note 41, at 3.

43. *Levy*, 391 U.S. at 72.

44. *Id.*; *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (finding the denial of education to children of undocumented children violated equal protection); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (invalidating a Louisiana statute that barred recovery for damages to the mother of an illegitimate child, while allowing recovery to the parents of a "legitimate" child under the Fourteenth Amendment's Equal Protection Clause).

45. *Levy*, 391 U.S. at 72.

46. Levy v. Louisiana, 391 U.S. 68, 72 (1968).

47. Brief for Appellee at 15, Levy v. Louisiana, 391 U.S. 68 (1968) (No. 508), 1968 WL 112826 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 93–94, 96 (2003).

48. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

49. *Id.* at 175–76.

Henry Clyde Stokes died from work-related injuries. Stokes's marital and nonmarital children, all of whom lived in the same household with him, filed workers' compensation claims for their father's death.[50] Under Louisiana workers' compensation law, however, "unacknowledged"[51] that nonmarital children" were not treated the same as children born to married parents.[52] They could not recover if the surviving dependents in line before them exhausted the maximum benefits.[53] As expected, the four marital children were awarded the maximum allowable amount, leaving the two nonmarital children with nothing.[54] The U.S. Supreme Court found the law treated nonmarital children differently than marital ones and was "impermissible discrimination."[55] The Court reasoned, "An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[56] To penalize the child would place the child at an economic disadvantage for the parents' acts over which the child has no control. This kind of punishment bespeaks an invidious animus not a legitimate governmental purpose.

From 1968 to 1986, the Supreme Court heard more than a dozen cases on the rights of nonmarital children, ultimately extending intermediate scrutiny to classifications that treated them differently than those born to married couples.[57] These cases also influenced the equal protection law on the rights of children of undocumented persons.[58]

### C. *Plyler v. Doe*—Children and Their Undocumented Parents

In *Plyler v. Doe*,[59] school-aged children of Mexican origin challenged on equal protection grounds a Texas statute that withheld state funds from local

50. *Id.* at 165–66.

51. *Id.* at 167–68. It was not possible for Stokes, the father in *Weber*, to acknowledge his two children because Louisiana law prohibited acknowledgment of children whose parents were incapable of marrying at the time of conception. At the time of conception Stokes remained married to Jones, thus making it impossible for him to marry Weber. *Id.* at 171 n.9.

52. *Id.* at 167–68 (noting that the Louisiana law allowed "legitimate children and acknowledged illegitimates" equal recovery, while relegating "unacknowledged illegitimate children" to a lesser status).

53. *Id.* at 168.

54. *Id.* at 167.

55. *Id.* at 169.

56. *Id.*

57. *See* Clark v. Jeter, 486 U.S. 456, 465 (1988) (holding that Pennsylvania statute was unconstitutional under intermediate scrutiny); Trimble v. Gordon, 430 U.S. 762, 770 (1977); Gomez v. Perez, 409 U.S. 535, 538 (1973); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam). For further discussion of the nonmarital status cases, see Smith, *supra* note 5, at 1608–15.

58. I am tracking the court's language here; however, I believe that there is more to explore in this idea that children are targeted because of the moral disdain of their parents' conduct. After reviewing a number of cases, this could also be characterized in different ways. In fact, it could be that children are targeted because of the political unpopularity of their parents and that unpopularity could stem from a number of things—behavior viewed as immoral, racial or ethnic identity, immigration status, sexual orientation, and other reasons.

59. Plyler v. Doe, 457 U.S. 202 (1982).

school districts that chose to enroll and educate children not "legally admitted" to the United States.[60] The Supreme Court held that excluding children from a public education because of their undocumented status was unconstitutional.[61]

Relying on the nonmarital status cases, the Court made a distinction between adults who were undocumented in the United States as a result of their own conduct and their children.[62] The Court explained that the children "can neither affect their parents' conduct nor their own status,"[63] and to legislate against them would not be consistent with basic notions of justice.[64]

The Court went on to say,

> [M]ore is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.[65]

The *Plyler* Court was intensely aware of the ills of imposing a discriminating burden on a child who has no control over his or her undocumented status.[66] *Brown*, *Levy*, *Weber*, and *Plyler* offer significant insights into the rights of children. Further, despite omitting this legal precedent, *Obergefell* does express concern for the social, psychological, and economic harms to the children of same-sex couples in its decision to extend constitutional protections to same-sex couples seeking to marry. In fact, *Obergefell* itself hinted at this line of precedent, without citation, by recognizing that children of same-sex parents were denied the benefits of marriage "through no fault of their own."

## III

## IMPORTANT EQUAL PROTECTION VALUES DERIVED FROM THE CHILD-CENTERED CASES

The child-centered cases challenge the notion that some children are worthy of economic, and social safeguards, while others are not because of what boils down to their status as children of adults who are characterized by government actors as "immoral."

These cases have been viewed as "unique," limited to their factual circumstances, or unrelated to each other in equal protection lore, but they need not be. When viewed collectively, they offer important themes or guiding principles about on the rights of children and equal protection law in general.

60. *Id.* at 205–06, 209.

61. *Id.* at 230. Of note, the Court first found that undocumented children are "persons" within the meaning of Fourteenth Amendment. *Id.* at 210.

62. *Id.* at 220.

63. *Id.* (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

64. *Id.*

65. *Id.* at 223.

66. *Id.* at 219–220.

*Obergefell* (and *Windsor*) also indirectly bolsters a number of the themes. The last part briefly explores some of the themes that can be drawn from this collection of cases.[67]

### A. Protecting Children from Economic Harm

A key theme in the child-centered cases (and indirectly in *Windsor* and *Obergefell*) is that government actors may not impede economic support to children simply because of their status at birth.[68] They reiterate that the government cannot deny children access to basic economic building blocks—access to benefits, access to routes to a legal parent–child relationship or access to an education. These cases challenged the idea that some children are worthy of economic safety nets and others are not simply because of they are the children of adults who are characterized by government actors as "immoral."[69]

In fact, the *Levy* Court acknowledged that when dealing with social and economic legislation, latitude was necessary. The Court then exercised its latitude and struck the law withholding financial resources down because the children "though illegitimate, were dependent on [the mother] . . . in her death they suffered wrong in the sense that any dependent would."[70]

Similarly, in a later nonmarital child case, *New Jersey Welfare Rights Organization v. Cahill*,[71] the Supreme Court again demonstrated a concern for economic injury to children and found New Jersey's Assistance to Families and Working Poor program to be unconstitutional because it limited benefits only to households comprised of opposite-sex married couples with "legitimate" children.[72] The Court found that the benefits under the welfare program were as "indispensable to the health and well-being of illegitimate children as to the health and well-being of those who are legitimate."[73] As explained in another nonmarital status case, even when it comes to economic legislation, "[O]nce a

67. There are certainly other themes that are present as well. For example, Susannah Pollvogt and I argued that this line of cases offers greater meaning to the equal protection guarantee of citizenship. *See* Smith & Pollvogt, *supra* note 6, at 659.

68. As Professor Laurence Nolan stated in explaining the nonmarital status cases, "[E]qual opportunity of economic support was impeded because of discrimination based on birth status." Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U.L. REV. 1, 66 (1999).

69. *See* Nolan, *supra* note 68, at 25 ("Clearly, the result of these cases on behalf of children born to unwed parents has been the transformation of law and policy regarding legitimacy and illegitimacy as to economic rights, nationally. That is, the cases set a floor, which all states are constitutionally bound to follow in regard to these children."); *see also* Pickett v. Brown, 462 U.S. 1, 8–9 (1983) (quoting Gomez v. Perez, 409 U.S. 535, 538 (1973)) ("[A] state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.").

70. *Id.* at 72.

71. N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam).

72. *Id.* at 619 (quoting N.J. STAT. § 44:13-3(a) (West 1971)) (noting that New Jersey's program limited benefits to households "composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both . . .").

73. *Cahill*, 411 U.S. at 621.

state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutional justification for denying such an essential right to a child simply because is natural father had not married its mother."[74]

Professor Laurence Nolan accurately explains that "the result of these cases on behalf of children born to unwed parents has been the transformation of law and policy regarding legitimacy and illegitimacy as to economic rights, nationally. That is, the cases set a floor, which all states are constitutionally bound to follow in regard to these children."[75] Importantly, the nonmarital cases were not alone in raising the concern for unequal treatment for access to economic resources.

While *Levy* and *Weber* focused on children denied access to economic benefits, *Plyler* highlighted education's link to economic sufficiency as a concern on behalf of children of undocumented parents denied access to public schools. *Plyler* explained that education is important for a number of reasons, including that it provides the "basic tools by which individuals might lead economically productive lives to benefit us all."[76]

Finally, in both *Windsor* and *Obergefell*, although failing to cite any legal precedent on the treatment of children, the Supreme Court was especially concerned with the economic impact that marriage bans had on children of same-sex parents. In *Windsor*, the Court explained the financial injury the federal marriage ban inflicted on children:

> DOMA . . . brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse or parent, benefits that are an integral part of family security.[77]

*Obergefell* did the same, noting that children experience "material" and psychological harm from marriage bans and nonrecognition laws.[78]

The children's rights cases offer much to explore for scholars and activists seeking to understand the role of economic injury in the equal protection guarantee.

### B. Protecting Children from Stigmatic or Psychological Harms

In addition to an important consideration of economic harm, the child-centered cases have another persistent theme: seeking to guard against

74. *Gomez*, 409 U.S. at 538.

75. *See* Nolan, *supra* note 68, at 25 ("Clearly, the result of these cases on behalf of children born to unwed parents has been the transformation of law and policy regarding legitimacy and illegitimacy as to economic rights, nationally. That is, the cases set a floor, which all states are constitutionally bound to follow in regard to these children."); *see also* Pickett v. Brown, 462 U.S. 1, 8–9 (1983) (quoting Gomez v. Perez, 409 U.S. 535, 538 (1973) ("[A] state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.")).

76. Plyler v. Doe, 457 U.S. 202, 221 (1982).

77. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

78. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

psychological harm to children. This theme is influenced heavily by *Brown*, which highlighted the adverse psychological effects of de jure segregation on black children.

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.[79]

Similarly, in *Plyler*, the Court described the effect of the law denying children of undocumented parents access to an education as having an "inestimable toll . . . on the social[,] economic, intellectual, and *psychological well-being* of the individual."[80] Further, *Windsor* recognized DOMA's psychic and stigmatic harm to children of same-sex couples and the Court there explained,

> [I]t humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives . . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.[81]

*Obergefell* reinforced this notion by viewing the psychological benefits of marriage as even more profound than its material ones.[82] These cases demonstrate that both economic and psychological harms to children raise equal protection concerns.

### C. Protecting Children from Punishment for Matters beyond Their Control

A central tenet of equal protection law is that it is unfair to discriminate against an individual because of a trait or characteristic derived at birth that cannot be changed.[83] Most lawyers think of the concept of immutability as relevant to race-based equal protection cases; however, a persistent strand of immutability stems from the child-centered cases. The *Weber* Court, citing a number of cases including *Brown*, explained that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or

79. *Id.* at 494 (internal quotation marks omitted).

80. *Plyler*, 457 U.S. at 222.

81. *Windsor*, 133 S. Ct. at 2694–96.

82. *Obergefell*, 135 S. Ct. at 2600.

83. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972) (citing a number of cases including Mathews v. Lucas, 427 U.S. 495, 505 (1976) ("the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society"); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Brown v. Board of Education, 347 U.S. 483 (1954)).

wrongdoing."[84] The Court was clear that it could not prevent the social disapproval of children born outside of marriage; it could, however, "strike down discriminatory laws relating to the status of birth."[85]

The early immutability concepts in the nonmarital status cases played an important role in subsequent equal protection law. The Supreme Court eventually relied on *Weber*'s immutability rationales to extend heightened scrutiny for gender classifications.[86]

Furthermore, the core principle against discrimination based on birth characteristics was also prevalent in *Plyler*. These important themes from the child-centered cases and *Obergefell* are worthy of further attention from lawyers, jurists and legal scholars.

## IV
## CONCLUSION

*Obergefell* missed an opportunity to place children's' legal interests at the center of an equal protection law claim. The government exclusion of children of same-sex parents from the social, legal and economic benefits of marriage because of the moral disdain of their parents' relationships (and to incentivize adult behavior) violated well-established equal protection law. Yet, there is reason for optimism. *Obergefell*, when read in tandem with the omitted legal precedent or the child-centered cases, could serve as an additional legal building block to erect a more comprehensive children's rights agenda. Children's interests should not be the collateral damage of their parents' legal and political losses, nor should children simply be the fortunate beneficiaries of their parents' wins.[87] Rather, they should be able to vindicate their injuries within the ambit of the Equal Protection Clause in their own right.

84. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) ("Because illegitimacy is beyond the individual's control and bears 'no relationship to the individual's ability to participate in and contribute to society,' . . . official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.'"); *Mathews*, 427 U.S. at 505 (stating that status of illegitimacy "is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual"); *Weber*, 406 U.S. at 175–76.

85. *Weber*, 406 U.S. at 176 n. 14 (citing Graham v. Richardson, 403 U.S. 365 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); *Brown*, 347 U.S. 483; Hirabayashi v. United States, 320 U.S. 81 (1943)).

86. *Frontiero*, 411 U.S. 677 (quoting *Weber*, for the proposition that "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility"). (internal quotations omitted).

87. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).