CURBING ITS ENTHUSIASM: U.S. FEDERAL POLICY AND THE UNITARY FAMILY

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by Helen M. Alvaré

I. Introduction

Lawmaking about parenting is ordinarily within the province of the states. Without any fanfare, however, the federal government’s voice on the subject of parenting has become much more audible over the past several decades. That voice is also influential, given not only the federal executive’s bully pulpit and his authority over the actions of myriad agencies, but also the Supreme Court’s constitutional authority and Congress’ spending power. Furthermore the federal government has undertaken to speak about essential aspects of parenting. In order to understand the family law of parenting today, therefore, it is important to consider the federal dimension.

One important reason for the federal government’s involvement is its large expenditure for the support of families not containing a married mother and father. Federal expenditures for family assistance have grown from approximately 2.3 billion dollars in 1962 to 46 billion dollars in 2010. More than 30% of families headed by a mother without a spouse present were below the poverty line in 2009 (16% of those headed by a man without a spouse present), as contrasted with fewer than 6% of families headed by a married couple, according to the most recent census figures. According to an estimate published by the National Fatherhood Initiative—a private organization seeking to increase the number of children growing up with

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1 Associate Professor of Law, George Mason University School of Law. The author is grateful to Iva Futrell for her constant and expert assistance as research librarian, and to Sophie Coy and Ariel Baniowski for their research assistance. I would also like to thank Professors Scott FitzGibbon, Lynn Wardle, and Ursula Bassett for convening the conference on the Jurisprudence of Parenting and the Influence of Culture, at which this paper was first presented. Thanks always to my husband for sharpening and expanding my thinking.


involved fathers—the federal government alone spends nearly one hundred billion dollars annually as a consequence of fathers’ absence from their children’s households.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), also known as welfare reform, explicitly predicated new federal interventions respecting family stability upon the rising rates of childbirth outside of marriage. At the time that law was adopted, scholars were suggesting causal connections between the absence of married parents from their children’s lives and the poverty of families and communities. The chorus of scholars making this connection has since grown. Today’s commentators are also more likely to worry about the possibility that the gaps in rates of marriage and marital parenting between various races and socioeconomic classes in the United States could lead to entrenched underclasses and unpleasant social divisions.

Another reason for increased federal involvement may be lobbying by various interest groups involved with family matters, such as assisted reproductive techniques (ART) or same-sex marriage. In some cases, one or more federal branches has responded; in other cases, there has been more silence than action. But even silence can speak of a federal preference, especially in cases where a federal branch possesses the jurisdiction to act, but chooses instead to leave a particular parenting outcome alone.

Federal laws and policies today are affecting essential aspects of parenting. By “essential aspects” I mean to include matters such as: the decision whether or not to parent; the conditions for entering into parenthood—particularly age or economic conditions; the nature of the legal and personal bonds between persons who would become parents (e.g., marriage or

7 Id. § 101(5).
8 See, e.g., SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS (1997).
some other relationship); the presence or absence of biological kinship between parents and the children they are rearing; and the roles and importance of both mothers and fathers. All of these aspects of parenting are in flux today. It seems clear that in legal discourse and in significant segments of society, there is no longer a robust consensus on the normative good of the unitary family, that is, the family composed of adults related to one another by marriage and related biologically to each of their children. Consequently, the federal voice might play a significant role in setting future directions.

In this paper, I will focus on those federal laws and policies that on their face are meant to, or logically are very likely to affect parenting directly in its essential aspects. I exclude consideration of state laws and policies, as well as federal policies that may affect parenting more remotely. I believe tax policy falls into the latter category. Federal laws and policies I will address include sex education, birth control, abortion, ART, child support, and fatherhood. I will also treat laws and policies about marriage and same-sex partnerships.

Before I describe this paper’s plan for exploring federal parenting policy, several preliminary observations are in order. First, not all federal laws and policies affecting parenting explicitly so advertise or label themselves. They may proceed under banners as diverse as healthcare, education, or civil rights. Some policies are highly publicized (e.g., marriage and fatherhood initiatives) while others are more or less hidden in the details of legislation or regulations (e.g., the extent of Medicaid reimbursement for contraception for poor women). Second, sometimes federal silence or inaction can be quite revealing as well, especially with respect to developments representing dramatic changes from the past. Third, parenting policies come from the federal hand in stronger and weaker forms.

What then is the overall thrust of federal parenting policy today? Casual consumers of political speech about the family may have concluded through most of the 1990s and into the first decade of the twenty-first century that the legislative and executive branches of the U.S. government meant to strengthen the unitary family. This impression might be gleaned from these branches’ constant references to the crisis of teen pregnancy and from the dramatic rhetoric about the importance of marriage and fatherhood accompanying passage of the 1996 welfare reform law and later hearings on its

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10 Furthermore, it is notoriously difficult to draw firm conclusions about how tax policy affects parenting decisions. See, e.g., Nada Eissa & Hilary Hoynes, Tax and Transfer Policy, and Family Formation: Marriage and Cohabitation (unpublished paper, University of California, Berkeley, 2000). Available at http://www.econ.ucdavis.edu/faculty/hoynes/working_papers/cohabitation_paper.pdf
The truly attentive consumer of political rhetoric might even have heard a thing or two about the federal Healthy Marriage Initiative.

This paper claims, however, that it would be incorrect to conclude that the federal government’s policies, programs, and rhetoric exhibit a robust preference for the unitary family. In the past few decades, in fact, while federal policy has remained firm in its preference for economically self-sufficient parenting, it has shifted noticeably toward the following combination of messages: a weak preference for parenting within marriage; a stronger preference for involved fathers; and the discounting or dismissal of the need for biological parent-child ties in favor of individual adults’ choices about parenting (both about the form of their intimate association and whether or not there will be a biological relationship with the children they rear). Part II of this paper will describe the ways in which the federal government displays these preferences.

Part III will critique these preferences and their implementation along two general lines. First, it will suggest that even when federal preferences comport with the evidence about what serves children’s well-being, the associated policy prescriptions are not well-suited to accomplish federal goals. (This is the case with federal birth control and sex-education programs, for example, which are implemented without due attention to their effects upon the sex, mating, and marriage markets caused by separating sexual intimacy from procreation.) Next, Part III will argue that there is room for considerable doubt that some federal positions are even logically related to promoting children’s welfare. This latter argument applies to federal messages that ignore the connection between good fathering and stable marriage and that undervalue the possible importance to children of biological kinship and opposite-sex parenting.

Finally, in the Conclusion, I will ask why—given the acknowledged importance of good parenting—federal policy is in its current state. I will suggest the possibility that matters other than children’s flourishing might be shaping some federal parenting policy. Political partisanship is one

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12 Administration for Children & Families (ACF), U.S. Department of Health and Human Services (HHS), Healthy Marriage Initiative. This initiative is described at an HHS website, What is HMI, available at http://www.acf.hhs.gov/healthymarriage/about/mission.html
possibility. An ideology about human sexuality is another. Regarding the latter, I will suggest in a preliminary manner that that all three branches of the federal government have (from time to time) exhibited an attraction to an ideology or philosophy about human sexuality called by one development economist *sexualityism*.¹³ Sexualityism strongly affirms any form of sexual expression as inherently good simply on the grounds that the expressive subject has chosen it. This position contrasts with one in which sexual expression is evaluated, at least in part, according to its relationship with procreation. Sexualityism has obvious implications for parenting policy, therefore, because it introduces the hazard of prioritizing adults’ sexual interests over children’s welfare, as a consequence of maintaining the primary focus upon allowing whatever sexual expression is sought. Because sexualityism is too vast a subject to take up and complete within the confines of this article, I can here only indicate some evidence that branches of the federal government seem inclined today to accept it, and promise in a later piece to explore the subject more fully.

II. Federal Parenting Policy

This section will characterize, in three subsections, four federal messages or preferences regarding parenting. Within each, I will describe how a variety of federal programs and policies work to promote the identified message, even if each one does not self-identify as a parenting program or policy. I will also characterize the federal message as strong or weak.

**A. Parenting Should Be Avoided in the Absence of Financial Self-Sufficiency, Including in Circumstances Involving Youth or Poverty**

The federal policy that parenting should be avoided in the absence of financial self-sufficiency, including in circumstances involving youth or poverty, is very strong. It is important to take it up first as it is sometimes mistaken for a policy favoring the unitary family. This mistaken impression can be corrected, however, by considering that the federal government, while acting vigorously to prevent parenting by the young and the poor, does not act at all to discourage parenting by persons outside of a unitary family so long as they

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are older or more likely to be financially self-sufficient, a subject which will be taken up, below, in section II.A.5.

The federal message that parenting responsibilities are better taken up by the more mature and economically self-sufficient is manifested in the laws and programs addressing teen pregnancy, including sex education and birth control programs, programs providing free or low-cost birth control to the poor, and child support laws. In what follows, I will describe the leading federal programs and policies that, together, send the message to bear only those children you can support.

1. Teen Pregnancy Prevention Programs

The federal government has placed an extremely high priority upon reducing the number of teen pregnancies, repeatedly emphasizing the relationship between teen pregnancy and poverty. It places less, albeit some, emphasis on other concerns related to teen parenting such as parental immaturity or the regular absence of marriage and fathers from the lives of the children born to teen parents. A recent Congressional Research Service report on teen pregnancy prevention,\textsuperscript{14} when describing the long-term consequences of teen childbearing, put the poverty correlation front and center:

An October 2006 study by the National Campaign to Prevent Teen Pregnancy estimated that, in 2004, adolescent childbearing cost U.S. taxpayers about $9 billion per year: in child welfare benefits, $2.3 billion; in health care expenses, $1.9 billion; in spending on incarceration (for the sons of women who had children as adolescents), $2.1 billion; in lost tax revenue because of lower earnings of the mothers, fathers, and children (when they were adults), $6.3 billion; and in offsetting public assistance savings (younger teens receive less annually over a 15-year period than those who give birth at age 20–21), $3.6 billion. Research indicates that teens who give birth are less likely to complete high school and go on to college, thereby reducing their potential for economic self-sufficiency. The research also indicates that the children of teens are more likely than children of older parents to experience problems in school and drop out of high school, and as adults are more likely to repeat the cycle of teenage pregnancy and poverty.\textsuperscript{15}


Congress has created a wide variety of federal programs to address teen pregnancy over the last forty years. In 1970, it created the most significant birth control program currently directed to teens, the National Family Planning Program, known as Title X of the Public Health Service Act. While program funds are available for low-income men and women of all ages, respecting teenagers, this program focuses on providing, inter alia, birth control, sexually transmitted infection (STI) screenings, and reproductive health counseling and referrals. In 2010, Title X–funded sites served more than five million patients, 69% of whom were at or below the poverty level, via eighty-nine public and private grantees who in turn supported 4,389 individual service sites in all fifty states and the District of Columbia. Teenagers represented one in four contraceptive clients served by publicly funded family planning centers in 2006, when they served nearly two million women younger than age twenty. In fiscal year 2010, 317 million federal dollars were allocated for Title X family planning programs. Likewise, both Title XIX of the Social Security Act (Medicaid) and Title XX of the Social Security Act provide federal funds to states for use in supporting pregnancy prevention services among both adolescents and older patients.

In 1981, Congress passed the Adolescent Family Life Act. Unlike the above-described programs, this federal initiative—the smallest program directed at teen pregnancy—also addresses the relationship between children’s well-being and parenting by very young women. In fiscal year 2009 it received thirteen million dollars in order to promote abstinence from premarital sexual relations and to “evaluate pregnancy prevention interventions designed to encourage adolescents to postpone sexual activity.” In fiscal years 2010 and 2011, no funding was provided for the AFLA’s prevention

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19 See Fowler et al., supra note 17, at 1.
22 Title XX of the Public Health Services Act, 42 U.S.C. § 300z (2010).
The U.S. Department of Health and Human Services (HHS) did not request funds for this program for fiscal year 2012, asserting that the program was duplicative of programs under the Pregnancy Assistance Fund. The Pregnancy Assistance Fund, however, does what its name suggests and does not promote abstinence from nonmarital sexual relations.

Federally sponsored sex education is another strategy to reduce teen pregnancy. In fiscal year 2010, the federal budget allocated 110 million dollars for “medically accurate and age appropriate” programs that are “proved through rigorous evaluation to be effective in reducing teenage pregnancy.” A new Office of Adolescent Health was created in the office of the Secretary of HHS in order to carry out such programs. Elsewhere, I have characterized the most prominent ideas conveyed in some of the leading government-provided sex education programs. They tend to embrace instrumentalist and utilitarian approaches to sex, emphasizing the relationship between youthful parenting and harm to teens’ prospects for obtaining more advanced education and self-sufficiency.

Additional grants to states to prevent teen pregnancy have been authorized and funded by the new health care law, the Patient Protection and Affordable Care Act (PPACA). These grants will allow states to operate the Personal Responsibility Education Program (PREP), a “comprehensive approach to teen pregnancy prevention,” including information about both abstinence and contraception. Within this program, marriage is mentioned quite briefly, as one of many possible relationships a young person might experience, and not as an important context for rearing children. PREP also provides teens with information on “adult preparation” subjects including “healthy relationships, positive self-esteem and relationship dynamics, friendships, dating, romantic involvement, marriage, and family interactions, ... the development of

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23 Solomon-Fears, supra note 14, at 11.
25 Consolidated Appropriations Act, P.L. 111-117, 123 Stat. 3034 (2010). An additional 4.5 million dollars was appropriated to carry out evaluations of approved programs. Id.
28 Id. at 205–212.
healthy attitudes and values about adolescent growth and development, ... body image, racial and ethnic diversity, ... financial literacy, ..." and "financial self-sufficiency." Nonetheless, the ultimate aim of the program is the prevention of teen pregnancy.

The federal Maternal and Child Health Block Grant also funds 610 school-based or “school-linked” health clinics. These clinics provide “family planning” advice to adolescents. Among the “performance measures” required to be reported by grant recipients are “the birth rate (per 1000) for teenagers age 15–17 years.”

In sum, federal sex education programs directed towards teenagers are primarily aimed at avoiding childbearing on the grounds of the financial and other opportunity costs to teens of early parenting, as well as on the grounds of the likely difficulties their children could face.

2. Speaking to the Poor: Medicaid and Beyond

The federal Medicaid program gives evidence of the high priority the federal government assigns to helping poor Americans avoid parenting. Federal Medicaid policies about contraceptive availability among the poor are extraordinarily proactive. For example, while states retain some discretion regarding whether they will provide particular medical services within their Medicaid administration, they have no discretion regarding contraception: They must provide it in order to participate in the program. Furthermore, contraception is the only service for which the federal government reimburses the states at the rate of 90%. Reimbursement rates for other services range

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33 While Medicaid is administered by the states, it is funded by both the federal and state governments.
from approximately 50% to 70%. In many cases, contraceptives are actually provided free to poor women by means of a supplementary state subsidy. Finally, federal law makes contraception even easier to obtain by allowing Medicaid beneficiaries—only for contraception—to go outside of their designated Medicaid plan to other providers who accept Medicaid patients.

In a further move to extend the use of birth control to lower income Americans, HHS issued an interim final rule on August 3, 2011, mandating that virtually all health plans in the United States cover “all FDA-approved contraceptives” as a “preventive service,” and without a copay or any deductible. This rule was issued in response to an HHS-solicited report from the Institute of Medicine, which concluded that “cost-sharing requirements … can pose barriers to care … particularly for low-income populations. … The elimination of cost sharing for contraception therefore could greatly increase its use, including use of the more effective and longer-acting methods, especially among poor and low-income women most at risk for unintended pregnancy.” The mandate is strict and allows no exemption for even the largest conscientiously objecting religious healthcare providers unless they cease employing and serving people other than co-believers. At the time of this writing, HHS is considering the thousands of comments submitted to

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38 Title XIX of the Social Security Act, 42 U.S.C. ch. 7, at Sections 1902(a)(23) and 1915(b) (1965) (2010).


them concerning this interim rule; if the rule becomes final its the current form, it will represent a strengthening of the federal message about preventing births among the poor; it likely also reflects an interest in facilitating the avoidance of births among the currently financially stressed middle class.42

3. Abortion

The argument regarding federal funding for abortions in programs serving the poor rages annually in both houses of the U.S. Congress. Presently, under a provision usually called the Hyde Amendment (after its original sponsor), abortions may not be funded via monies appropriated by the annual Labor/HHS Appropriations Act, except those abortions sought for reasons involving rape, incest, or a threat to the life of the mother.43 On the other hand, federal money authorized and appropriated directly to Community Health Centers (CHCs) by the new PPACA is not so limited. CHCs are federally supported health providers mandated to provide to the poor and underserved, among many other services, gynecologic and reproductive health care,44 which categories are generally interpreted by courts to include abortion.45 A recent article in the New England Journal of Medicine estimated that under PPACA, up to 40 million lower income Americans might turn to CHCs for their regular care.46 This raises the possibility that abortions might be performed on poor women without Hyde-type limits, with a new pot of federal money.47

47 An attempt to enact a “permanent Hyde amendment” into federal law has just passed the U.S. House of Representatives at the time of this writing, but is not likely to pass in the Senate. It would limit federal funding for abortions for reasons other than rape, incest, and protection of the life of the mother, and would do so not only in PPACA but also in all other relevant federal laws. See No Taxpayer Funding for Abortion Act, H.R. 3 (2011).
The judicial branch of the federal government has also played a dispositive role on the abortion issue in connection with its availability both to the young and to the poor. In *Roe v. Wade*, in that part of its opinion just prior to announcing a constitutional right of privacy sufficient to encompass abortion, the U.S. Supreme Court expressed solicitude for women for whom a birth would portend a “distressful life and future,” and for women “unable to care for” a child, and appeared to ground the existence of the right, in part, upon such scenarios. As for minors, the Supreme Court has significantly trimmed states’ powers to require minors to obtain parental consent before an abortion or to provide advance notice to parents.

In short, federal laws and policies concerning both family planning and abortion place a high priority upon preventing pregnancy, or allowing abortion, among women who are young or poor or both.

4. Child Support

Federal laws promoting the establishment and enforcement of child support orders are perhaps the best-known federal parenting policies. Congress mandated during the 1980s that states pass laws containing numerical support guidelines. In 1992, Congress passed the Child Support Recovery Act, making it a federal crime to fail to pay child support to a child living in another state. In 1996, it passed PRWORA, requiring each state to adopt specific and onerous policies for establishing and enforcing child support awards as a condition to the state’s receipt of federal welfare dollars. Federal involvement in child support law both affirms and complements federal birth control and abortion laws: It sends the message that if you do have children (whether or not they are born and reared within a unitary family), you will be expected to support them.

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48 410 U.S. 113, 153 (1973). In a later opinion, however, the Court held that the right to abortion did not entail a right to federal funding for the procedure. See Harris v. McCrae, 448 U.S. 297 (1980).
5. No Federal Opinion on Childbearing Outside the Unitary Family by Presumably Self-Sufficient Persons

In the introduction to part II.A, I suggested that the federal policy to prevent parenting by the young and the poor is underscored by the absence of federal activity aimed at discouraging parenting by older and presumably more financially self-sufficient persons, although it is women past their teenage years who account for the largest percentage of nonmarital births by quite a margin (79% to 21%). In this subsection, I review several federal choices indicating the federal disposition toward persons who are older than adolescents and more economically self-sufficient.

First, federal education programs do not direct pregnancy-prevention messages to women who are past their teenage years or who are not counted among the poor. While several of the federal programs mentioned in section II.A.1 provide free or more easily available contraception to all women over age 20, these programs do not proactively seek the attention and compliance of older, economically self-sufficient single women in the same way they seek these from teenagers and the poor. For a brief time between about 2006 and 2008, HHS targeted abstinence messages to persons in their twenties as well as teens. The effort was greeted with derision by the leadership of the National Campaign to Prevent Teen Pregnancy and groups advocating sexual freedom for adults on the grounds that it was doomed to failure, or that matters concerning adults’ sex lives were a matter of privacy, or that birth control was the better message and solution.

Another indication of the federal laissez-faire attitude toward older (than adolescents) women’s nonmarital births can be found in the way the White House Council on Women and Girls treated the data about nonmarital births in its March 2011 report on the situation of women in America, titled *Women in America, Indicators of Social and Economic Well-being.* When speaking

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about adult women’s “well-being and progress,” the report referred to college attendance and completion numbers, percentages of advanced degrees, numbers of women in the work force, and women’s earnings as a share of family income. Under the heading of continuing “problems” for women, one could find the subjects of wage and income equity, poverty, unique health challenges, and intimate partner violence. When it came to the report’s assertions, however, that “[f]ewer women are married,” or “single-mother households are more common than single-father” households, or that there are “reshaped patterns in marriage and divorce,” the report says only that these phenomena “affect women and men differently.”56 The normative language of “progress” or “problems” was absent, and only neutral descriptive language was used.

A third possible indication of the lack of federal alarm over nonmarital but financially self-sufficient parenting is its hands-off approach to ART. The ART industry regularly assists in the creation of families in which children are not biologically related to one or either of the parents who will rear them, families in which children do not have parents of opposite sexes, and single-parent families.57 If the federal government had wished to insert itself into this situation, it might have done so by means of one or more of the “tools” it used to affect child support and parenting by the poor and the young: the Commerce Clause, broadly sweeping health-care policies, and federal grants to states alongside mandatory quid pro quos.

But the federal government is nearly completely absent from the arena of ART. Federal laws in this area are limited to assuring that clinics advertise their success rates in a standardized form that avoids deception,58 and to regulating sperm banks with the intention of “keep[ing] infectious diseases out of circulation.”59 A congressional promise to propose a model program for the inspection and certification of facilities handling embryos was never realized.60 The U.S. Supreme Court has also demurred from lawmaking regarding ART. It refused, for example, to grant certiorari in the Seventh

56 Id. at iii, 5, 9, 10, 13.
Circuit case, \textit{Lifchez v. Hartigan},\textsuperscript{61} on the question of the constitutionality of a state law requiring care for artificially created human embryos. It is quite likely that there are more than a few reasons for federal silence here. In an earlier piece, I have suggested that these likely include, \textit{inter alia}, the intrinsic difficulty of making rules for so complex an area, the intersection between ART and the abortion issue because of shared questions about the status of the human embryo, and legal and personal “privacy” concerns.\textsuperscript{62} Further, several of the legal issues associated with ART are more susceptible to state than to federal regulation: parentage determination and health-care practices are typically addressed by state lawmakers. Notably, however, older and wealthier Americans tend to make use of ART,\textsuperscript{63} by virtue of which it has become a billion dollar industry,\textsuperscript{64} and this, too, may be why the industry eludes active intervention by federal regulators.

6. Conclusion to Section II.A

In sum, section II.A indicates that the federal government has proactively sought to discourage childbearing among those least likely to sustain families on an economically self-sufficient basis. At the same time, the federal government has declined to interfere with those older and likely better off men and women who choose to form families without marriage, or to raise children to whom they are not biologically related, or to raise children without two opposite-sex parents.

\textbf{B. Encourage Involved Fathering—Although Not Necessarily in the Context of Marriage—and Encourage Stable Marriages, Too}

Two federal policies—encouraging involved fathering (although not necessarily in the context of marriage) and encouraging stable marriages—often appear together in laws and in sociological treatments of the family, with more or less emphasis on one or the other. Therefore, it is helpful to treat

\textsuperscript{61} 914 F.2d 260 (7th Cir. 1990), \textit{cert. den. sub nom.} Scholberg v. Lifchez, 498 U.S. 1069 (1991).
these policies together. In some sense, both of these policies are an extension of the federal concern that parents take care of their own children financially; involved fathers and marriage both predict improved family financial circumstances. Yet, both policies also hold the potential for sending other messages about parenting, for example, that children benefit—not just financially—when their fathers are involved in their lives, and when their parents are married. An evaluation of policy messages is best done by considering their origins, their accompanying rhetoric, and changes in their balance and composition over time.

Federal marriage promotion efforts originated in 1996, during the Clinton administration, when Congress passed PRWORA. Prominent among PRWORA’s legislative findings were the statements: “Marriage is the foundation of a successful society” and “Marriage is an essential institution of a successful society which promotes the interests of children.” Marriage efforts later received significant federal money when President George H. W. Bush created the National Healthy Marriage Initiative and in 2002 devoted 90 million dollars to marriage promotion via HHS.

In 2002, federal funding totaling fifty-nine million dollars was allocated to the Administration for Children and Families (ACF) within HHS for “healthy marriage demonstration products” in pursuit of the marriage goals of PRWORA. In 2005, Congress initiated a “Healthy Marriage and Responsible Fatherhood Program” in which 150 million dollars per year for five years would be allocated to strengthening marriage and fatherhood. Marriage itself, and its relationship to good parenting, were the driving ideas behind this funding. According to HHS, the goals of the Healthy Marriage

65 See DeNavas-Walt et al., supra note 3 (showing that in 2010, about 6% of married households, nearly 32% of single female–headed households, and 16% of single male–headed households were living at or below the poverty line). See generally Sara McLanahan, Father Absence and the Welfare of Children 127–145, in HANDBOOK OF THE SOCIOLOGY OF GENDER (J. Chafetz ed., 1999), available at http://apps.olin.wustl.edu/macarthur/working%/0papers/wp-mclanahan2.htm
67 See Marguerite Roulet, Fatherhood Programs and Healthy Marriage Funding 17 (Center for Family Policy and Practice, 2009), available at www.cfipp.org/publications/policy_marriage.pdf
69 This program was intended to assist all Americans, not just those with low incomes, though it promised to focus especially upon groups particularly hard hit by declines in marriage, including the poor and minority communities. What is HMI, supra note 12.
The program included: “increas[ing] the percentage of children who are raised by parents in a healthy marriage” and “increas[ing] the percentage of married couples who are in a healthy marriage.” It also aimed to help couples contemplating marriage and to support marriage preparation awareness among youth and the public generally, as well as to support relevant research and to help avoid domestic violence. The HHS office administering the marriage initiative stated on its website that children “who grow up in healthy, married, two-parent families do better on a host of outcomes than those who do not,” and that marriage is associated with “more wealth,” “better physical health of children,” and reduced domestic violence. Of its total annual funds, 100 million dollars per year were allocated to programs addressing healthy marriages directly; the remaining fifty million dollars were allocated to responsible fatherhood grants. The former might include, *inter alia,* public advertising campaigns on the value of marriage, high school marriage education classes, premarital education and marriage skills training, divorce reduction activities, and marriage mentoring. The responsible fatherhood grants were available for activities promoting “counseling, mentoring, marriage education, enhancing relationships skills, parenting, and activities to foster economic stability.”

In his proposed 2011 budget, President Obama recommended that this program and its accompanying funding should be permitted to lapse, and be replaced it with the “Fatherhood, Marriage and Families Innovation Fund,” to receive a one-time $500 million grant. The new program would offer competitive grants to states to conduct and rigorously evaluate comprehensive responsible fatherhood programs, “including those with relationship and marriage components,” as well as programs aimed at improving outcomes for custodial parents with serious barriers to self-sufficiency, in order to improve outcomes for their children. This would have represented a

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70 *Id.*
71 *Id.*
73 What is HMI, supra note 12.
noticeably reduced focus upon marriage and parenting within marriage, an increased focus upon poverty reduction among men and families, and an increased focus upon connecting fathers with their children, whether inside or outside of marriage to those children’s mothers. The executive director of the Alternatives to Marriage Project greeted this budget proposal as great good news, claiming: “This amounts to a permanent 25% reduction in marriage promotion and 33% increase in fatherhood funding.”

According to an HHS press release, proposed projects would be evaluated according to their ability to achieve better economic outcomes for parents and children. Marriage per se would not be a part of the evaluation.  

The federal Office of Child Support Enforcement also weighed in on the proposed initiative, concluding that a “key goal of the Fund” would be to “coordinate ... efforts to assist parents with employment, child support payment, and parenting and relationship skills.” A White House press release describing this initiative mentioned “mentoring” and “personal responsibility” but not marriage. It stated that the President “recognize[s]” that “the best leg up for any family is a good job.”

In the end, however, Congress and the White House agreed upon a somewhat different arrangement. In December, 2010 the Claims Resolution Act of 2010 authorized seventy-five million dollars each for Healthy Marriage and Responsible Fatherhood programs and “Community-Centered Healthy Marriage and Relationship” demonstration grants. Grants for the former programs are intended to “fund comprehensive programs that help fathers succeed as parents and as providers.” According to the application

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78 News Release, supra note 76. The same press release mentions that 2.5 billion additional federal dollars would be set aside to “strengthen ... States’ efforts to enhance employment related assistance to low-income families.”
79 Id.
80 White House Office of the Press Secretary, President Obama Launches Next Phase in Fatherhood Efforts with the President’s Fatherhood and Mentoring Initiative (June 21, 2010), available at http://m.whitehouse.gov/the-press-office/president-obama-launches-next-phase-fatherhood-efforts-with-presidents-fatherhood-a
84 Id.
guidelines, under “Program Purpose and Scope,” successful applicants will be “comprehensive fatherhood programs that integrate robust economic stability services, healthy marriage activities, and activities designed to foster responsible parenting. ACF strongly encourages applicants to include in their program design case management and support services that can facilitate program participation and improved effectiveness. Organizations that have the experience providing comprehensive and effective employment services are strongly encouraged to apply.” Grants are available for one year, but the agency may extend projects to three years, so long as adequate appropriations are forthcoming.

The marriage and relationship demonstration grants are intended to promote healthy marriages. According to the application guidelines, successful grantees will offer programs containing a “broad array” of services or even “comprehensive services,” including both those designed to “improve ... marriage and relationship skills, as well as job and career advancement activities to promote economic stability and self-sufficiency.” Like the fatherhood grants, these will be provided initially for one year, but may be extended to three years “if subsequent funding is appropriated.”

The tone and substance of both the President’s original proposal and the final legislation and agency action largely accord with President Obama’s consistent rhetoric on the subject of fatherhood—emphasizing the importance of preparing men to be fathers and insisting upon their involvement, but not regularly connecting fatherhood with marriage. It is appropriate to consider this rhetoric alongside laws and agency programs, given its potential impact on Americans. Owing to his fatherless upbringing, President Obama may have unique powers of persuasion where the subjects of marriage and father involvement are concerned; experienced political observers agree, “The president and the first lady have a unique opportunity to be role models.”

In his 2010 Father’s Day speech—his longest discourse on fatherhood—President Obama never linked marriage with the strengthening of fatherhood. Likewise, in a June 2009 speech, “kick[ing] off a national conversation on fatherhood and personal responsibility,” he never spoke about

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85 HHS, supra note 82.
86 HHS, supra note 83.
88 See White House Office of the Press Secretary, Remarks by the President at a Father’s Day Event (June 21, 2010), available at http://www.whitehouse.gov/the-press-office/remarks-president-a-fathers-day-event
fatherhood and marriage together, but rather about education, employment, job training, parenting skills training, striking the right work-family balance, avoiding domestic violence, and the stresses on military families and fathers in prison. The President sounded the same themes in a series of June 2011 events to encourage responsible fatherhood. Kicking off a year of “Strong Fathers, Strong Families” on Father’s Day 2011, he invited groups in civil society to provide opportunities for fathers and their children to do things together. He also penned an essay for the popular People magazine, gave television interviews, issued a presidential proclamation, and devoted his weekly address to the subject of fatherhood. In each of these instances, he spoke about good fatherhood without mentioning its association with marriage. Rhetorically, President Obama has also relativized the importance of biological kinship. In his 2011 Father’s Day proclamation he stated that “a father figure may be a biological father, or a surrogate father who raises, mentors, or cares for another’s child. Every family is different,” he wrote, “but what matters is the unconditional support, guidance, and love fathers and mentors give us throughout life.”

This presidentially initiated conversation will continue, at least in part, via a new program that has emerged from the White House’s Office of Faith-Based and Community Partnerships. This program involves a series of community forums on fatherhood and personal responsibility around the country. It will also sponsor e-newsletters including tips from experts and promote community training by the National Fatherhood Leadership Group.

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93 White House Office of the Press Secretary, supra note 89.

94 See White House Office of the Press Secretary, supra note 89.

95 Id.
The “take-away” message about fatherhood and parenting from the current combination of legislative and executive policies, programs, speeches, and writings is decidedly more about building up fatherhood than it is about marriage, although marriage is still included. Current policies also more strongly emphasize the relationship between economic and educational capital and the exercise of sound, stable fathering than have prior programs. Messages regarding marriage and marital parenting are not completely absent in the current executive and legislative initiatives. They are simply not front and center.

C. A Biological Connection Between Parent and Child Is Not Essential

One of the elements of the unitary family model is the biological relationship between parents and the children they are rearing. Furthermore, the matter of biological parenting obviously overlaps with the question of opposite-sex parenting. This subsection will deal with both.

Thinking broadly, one might say that a child’s opportunity to be reared by his or her biological parents may be affected or attenuated as a result of many different laws, including laws concerning fornication, cohabitation, divorce, remarriage, and ART. Most of these laws are within the province of the states, such as the laws of divorce and remarriage and laws regarding cohabitation or fornication. That the federal government has not spoken on these matters is no surprise.

Slightly more surprising, as discussed above, is that the federal government has not entered into the arena of ART, given the numbers of children created via ART and the fact that many of them are reared by one or more persons who are not their biological parents. This is a function of the existence of many ART clinics that make their services available to the unmarried or to persons who identify as gay and lesbian. It is also a function

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96 See supra subsection II.A.5.
97 See Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, HHS, 2008 Assisted Reproductive Technology Report 91 § 5 (2009), available at http://www.cdc.gov/art/ART2008/index.htm (“The number of ART cycles performed in the United States has nearly doubled, from 87,636 cycles in 1999 to 148,055 in 2008. The number of live-birth deliveries in 2008 (46,326) was more than two times higher than in 1999 (21,746). The number of infants born who were conceived using ART also increased steadily between 1999 and 2008. In 2008, 61,426 infants were born, which was more than two times higher than the 30,629 born in 1999.”)
98 See Brette McWhorter Sember, INFERTILITY ANSWER BOOK, Chapter 5, Gay and Lesbian Assisted Reproduction 31 (2005) (citing websites listing gay- and lesbian-friendly clinics, e.g., gayfamilyoptions.com; gayspermbank.com; queerparents.org);
of clinics and gamete “banks” that facilitate “collaborative reproduction” (the use of donor eggs, sperm or embryos) by single or married persons. Collaborative reproduction is a large industry. In 2008, nearly 18,000 ART cycles were attempted using donor eggs. A list of more than 25 sperm banks located across the United States and regularly available to make interstate shipments is provided online courtesy of a company called California Cryobank. Yet no branch of the federal government has addressed the regulation of ART in any significant way.

The executive branch of federal government has further indicated its disinterest in promoting biological kinship within parenting by its support for a new form of legally recognized union in which any children reared would necessarily be genetically unrelated to one or both of their parents. By this I am referring to same-sex marriage. President Obama has been extending protection to same-sex partnerships in an incremental fashion over the course of his term. He has declared his support for civil unions, which include all the rights and obligations of marriage; offered federal benefits to the partners of federal workers; supported repeal of the military’s “don’t ask, don’t tell” policy; and most significantly, refused to defend the Defense of Marriage Act (DOMA) in court. Attorney General Eric Holder’s stated concerning this matter:


The President has concluded that... classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. ... Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional.104

This is tantamount to a statement that the state does not have an important interest in the kind of linking of husband to wife to child made possible only in an opposite-sex marriage. In one lawsuit challenging DOMA, the Obama administration seems to have conceded specifically that the state has no interest in protecting the importance of the relationship between children and their married, biological parents.105

Supporters of same-sex marriage intend to pave the way for parenting by same-sex couples; in fact, the current extensions of marital status to same-sex unions are stirring greater interest in same-sex parenting.106 Further, it is likely that, legally speaking, the arguments favoring parenting by same-sex couples—via adoption or ART—would be further strengthened by wider recognition of same-sex marriage.107 Regarding adoption, some states that have recognized same-sex unions, or civil unions between same-sex couples, have already made it clear that adoption agencies are forbidden from

NEW YORK TIMES, June 29, 2011, available at http://www.nytimes.com/2011/06/30/us/30immig.html (“immigration officials put into effect new, more flexible guidelines governing the deferral and cancellation of deportation ... . Immigration lawyers and gay rights advocates said the decision represented a significant shift in policy and could open the door to the cancellation of deportations for other immigrants in same-sex marriages”).

105 See Smelt v. United States, No. 09-286 (C.D. Cal.) (Reply Brief of the United States at 6–7). (“[T]he United States does not believe that DOMA is rationally related to any legitimate interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA’s constitutionality.”)
discriminating against same-sex couples. Some religious adoption agencies have closed as a consequence.\(^{108}\)

In sum, the support by federal authorities for granting marital or marriage-like status to same-sex unions, and the associated omission on the part of federal authorities to emphasize any significant state interest in linking marriage with procreation and childrearing, tend to send the message that neither biological kinship nor opposite sex parenting is important in rearing children.

**III. CRITIQUE**

While some federal policies on parenting are logical and potentially effective, others are misdirected or even contradictory. The executive and legislative campaigns to promote fatherhood, for example, respond to a current crisis with empirically defensible messages encouraging father involvement and promoting fathers’ education and employment; it is fathers who are largely absent from single-parent homes, and research demonstrates that men with superior economic and educational capital are more likely to get married and remain married.\(^{109}\) Furthermore, President Obama is personally extremely well-suited to the task of encouraging men to assume their fathering responsibilities.

Federal support for healthy marriages is also encouraging. The decline of marriage is a national phenomenon: the poor, the less educated, and the less employed are suffering the most. Racial and ethnic gaps are becoming alarming, while marriage remains one of the surest predictors of financially stable parenting.\(^{110}\) Federally funded marriage and relationship education programs are a hopeful remedy; some recent studies find them to be


\(^{109}\) See, e.g., *Unmarried Couples with Children* 96–97 (Paula England & Kathryn Edin eds., 2007).

moderately effective. On the other hand, a 2011 evaluation of programs directed specifically to low-income, unwed parents found disappointing results associated with all but one program, yet it also provided clues as to some means for boosting results in the future.

The federal message that adolescents and the poor would do better to wait until they are financially and developmentally capable of rearing a child also makes sense, as do programs delivering information and skills for succeeding in education, employment, and family life. Some interest groups would surely prefer that private groups and institutions—families and churches for example—transmit these lessons. And no doubt there are advantages associated with having trusted figures deliver help that is more precisely tailored to a recipient’s individual needs. But for various reasons—intergenerational poverty, father absence, declining church attendance, and ignorance and confusion about the preconditions for sound parenting, to name just a few—a large swath of Americans are not getting this kind of private assistance, and the state is understandably stepping in as a service to the common good.

At the same time, however, the federal response to parenting by the very young and the poor does not comport with the evidence of what works. And its policies about marriage, fatherhood, and preserving biological parents’ relationships with children are insufficiently attentive to research findings about the essential attributes of good parenting and the effective means of promoting it. This is not to say that genuine concern for children is not apparent in many of the federal efforts discussed in Part II, but rather that some efforts appear tainted or even driven by politics and ideology, rather than grounded in relevant research and experience about which parenting practices help children flourish. In this section, I will treat the major shortcomings of extant federal parenting policies in three points. The conclusion will suggest what might be driving federal policy—outside of concern for children’s flourishing.

A. Federal Policy Unduly Discounts or Even Dismisses the Possible Importance of the Role of the Biological Connection and Parents of Both Sexes to Children’s Flourishing

As described in II.C, current federal approaches to fathering, to same-sex unions, and to collaborative reproduction via ART do not appear to value adequately the preservation of biological kinship or opposite-sex contributions as a part of the parenting enterprise. Yet there is already sufficient data to indicate that, on average, advantages inure to children who are reared by their own biological parents in an intact marriage. Researchers are also suggesting that there may be unique, overlapping, and complementary contributions made to children, by parents of both sexes, as described below. At the very least, it is quite premature to discount, let alone dismiss, the importance of kinship and opposite-sex parenting. Quite recently, the Grand Chamber of the European Court of Human Rights exhibited the type of exemplary caution I am recommending on behalf of preserving children’s kinship interests in the Case of S.H. and Others v. Austria. There, the Court refused to strike down as a violation of privacy or family life (Article 8 of the European Convention on Human Rights), Austria’s ban on the use of donor


eggs or sperm other than from a spouse, in part on the grounds that it is too soon to assess the long-term consequences for children of divorcing biological from social parenting.

Spurring on this research about the relevance of kinship are public appeals and Internet searches for parents by children conceived via ART using gamete donors. For example, an emotional editorial in the New York Times on the most recent Father’s Day, titled “A Father’s Day Plea to Sperm Donors,” concluded: “I am sometimes overwhelmed by the infinite possibilities, by the reality that my father could be anywhere in the neighboring lane of traffic on a Friday during rush hour, behind me in line at the bank or the pharmacy, or even changing the oil in my car…. I am sometimes at such a petrifying loss for words or emotions that make sense that I can only feel astonished by the fact that he could be anyone.”

In Canada, a reporter conceived via sperm donation brought a lawsuit challenging anonymous donation in British Columbia. The highest court there held in May 2011 that children conceived with donor sperm are a “vulnerable group,” whose well-being is “too important to leave unregulated.” Relying explicitly, inter alia, upon a report titled My Daddy’s Name is Donor issued in 2010 by the Institute for American Values, the court concluded that “donor offspring feel a very deep, painful, and personal loss.” It banned donor anonymity for both egg and sperm donation in its jurisdiction in the future. In the United States, Washington State has recently adopted a law requiring fertility clinics there to preserve certain identifying information about donors, to be revealed upon application by their offspring when they reach majority age, subject, however, to a donor veto.

A meta-analysis published in 2001 of the research regarding the well-being of children conceived via sperm donation found that the children appear to be psychosocially sound up to ages 8–10, but that matters are “unknown” after that time. It recommended “larger and longer studies.” However, the more recent, albeit smaller investigation of the experience of young adults con-

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116 Colton Wooten, A Father’s Day Plea to Sperm Donors, NEW YORK TIMES (June 19, 2011), at WK9, available at www.nytimes.com/2011/06/19/opinion/19wooten.html
118 Elizabeth Marquardt, Norval D. Glenn & Karen Clark, My Daddy’s Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation (Institute for American Values, 2010) available at http://www.familyscholars.org/assets/Donor_FINAL.pdf
120 Uniform Parenting Act, Chapter 283 (2011).
ceived via sperm donation, My Daddy's Name is Donor,\textsuperscript{122} revealed several areas of particular difficulty suffered by the children of anonymous donors. The authors’ summary concluded that “on average, young adults conceived through sperm donation are hurting more, are more confused, and felt more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency, and substance abuse.”\textsuperscript{123}

Another aspect of the biological-kinship aspect of parenting concerns the nature of the contributions that parents of different sexes may make to their children.\textsuperscript{124} The absence from a child’s life of a parent of one or the other sex might occur as a result of ART, nonmarital parenting, divorce, or as a result of a same-sex couple’s adoption. In response to these situations, researchers are asking: Are parents’ contributions unique, overlapping, or even complementary and interacting?\textsuperscript{125}

A complete review of this research is beyond the scope of this article. (I have addressed the subject at greater length in a separate paper.)\textsuperscript{126} Summarizing matters very briefly, it appears that there is evidence of all three types of parental contributions. Regarding fathers, and again speaking generally, the evidence appears to show that their active presence has “long-term benefits [for children] ... independent of those linked to good mothering.”\textsuperscript{127} The sources of fathers’ and mothers’ differing contributions are not yet certain. Some have suggested that this might be due to neurological differences in brain wiring. Cornell University research psychologist Peggy Drexler’s Our Fathers, Ourselves also reports on the possibility that father absence can have inhibiting effects on the brain development of

\textsuperscript{122} Marquardt et al., supra note 118, at 37–50.
\textsuperscript{123} Id. at 5–6.
\textsuperscript{125} See all sources cited in note 124.
children, based upon studies of animals whose fathers typically help mothers to rear their offspring. It is well known that single parenting—involving by far the largest number of children reared without the regular presence of fathers in their lives—is associated, on average, with diminished emotional and academic outcomes for children as compared with those achieved within an intact marriage. (These studies control for potentially confounding factors, such as poverty.) A recent federal study also concluded that children living with their married biological parents have the best chance of avoiding family maltreatment and abuse. These children suffer relatively low rates of maltreatment (6.8 per 1,000) and abuse (2.9 of 1,000), especially as compared to children living with a single parent and his or her partner (respectively 57.2 per 1,000 and 33.6 per 1,000).

Research demonstrating the detrimental effects of mother absence is somewhat older. Today, newer research is suggesting that mother absence has not only psychological, but also neuropsychological aspects, involving brain development. According to the National Institute of Child Health and Human Development, maternal sensitivity and bonding is the most consistent predictor of a child’s cognitive, social, and emotional development. Furthermore, it appears that a father’s care for a mother strengthens her maternal sensitivity and reduces her maternal stress, enabling her to nurture more.

There is emerging but contested evidence about the effects on children of being reared by two parents of the same sex. There is a dearth of research

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concerning male couples, as well as heated controversy about the quality of studies about female couples. Studies suffer from various problems including, to name just a few, short timeframes, self-selection by couples into the studies, prior ideological and personal commitments by the researchers, and the fact that the children studied have often been reared for some part of their lives in opposite-sex households.\(^{135}\)

Certainly, further research is very much needed in all of these areas. It is difficult to determine whether particular child outcomes are related to a father’s behaviors, a mother’s behaviors, or their joint or complementary behaviors. At the same time, there is strong support for the view that children are most likely to thrive when reared by their married biological parents.\(^{136}\) Perhaps the most one can conclude without much controversy at this time is that it is far too soon to claim that biological parenting is irrelevant to children’s flourishing, and quite likely that the stable presence of two opposite-sex parents contributes to positive outcomes for children. Consequently the federal government’s positions on these matters, particularly its current de-emphasis on marriage and its claim that there is no important reason for the state to prefer opposite-sex to same-sex parenting, lack firm support.


\(^{136}\)See Mary Parke, Are Married Parents Really Better for Children?: What the Research Says About the Effects of Family Structure on Child Well-Being (Center for Law and Social Policy, 2003) available at http://www.clasp.org/admin/site/publications_states/files/0086.pdf. See also Kristin Anderson Moore, Susan M Jekielek & Carol Emig, Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It? 1–2 (Child Trends, 2002), available at http://www.childtrends.org/files/MarriageRB602.pdf (“Thus, it is not simply the presence of two parents, as some have assumed, but the presence of two biological parents that seems to support children’s development” [emphasis in original]). See also American College of Pediatrists, Homosexual Parenting: Is It Time for Change? (rev’d Mar. 26, 2009), available at http://www.acpeds.org/Homosexual-Parenting-Is-It-Time-For-Change.html (“the American College of Pediatricians believes it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster care, or reproductive manipulation”).
B. Federal Policy Naively Assumes that Fathers Might Stay Connected to Their Children in the Absence of a Stable Connection with the Children’s Mothers, Such as Marriage

Current federal parenting policy also tends to gloss over the close relationship between marriage and fathers’ involvement with children. In particular, it overlooks the fact that fathers married to the mothers of their children are the most involved with their children.137 A variety of factors accounts for this. One is certainly practical. Roland Warren, the president of the National Fatherhood Initiative, has stated, “Fatherhood is about location, location, location,” and has maintained that “a man who … actually lives in the home with [the mother and child] will have the best chance to be an involved father.”138 Other factors might be evolutionary, as married fathers are more certain of their paternity and of the long continuance of their exclusive relationship with the mother.139 Others might be related to the phenomenon labeled “gatekeeping,” whereby single mothers control and restrict fathers’ involvement with the child based upon his behavior, his disposition towards her, and his conduct with other women.140 A 2007 study reported that fewer than 30% of non-resident, divorced fathers generally have weekly contact with their children.141 Never-married, nonresidential fathers see their children even less often.142

Furthermore, several other studies indicate that fatherhood programs that are couple-oriented143 or that offer co-parenting or relationships skills pro-

138 Quoted in Cheryl Wetzstein, The Family Funds Breakup, WASHINGTON TIMES, March 12, 2010, available at www.washingtontimes.com/news/2010/mar/12/the-family-funds-breakup (The first quoted phrase in the text is a direct quote from Mr. Warren; the second is an indirect quote.)
140 See generally Alvaré, supra note 126.
142 See id. See also William Marsiglio, Paul Amato, Randal D. Day & Michael E. Lamb, Scholarship on Fatherhood in the 1990s and Beyond, 62 J. MARRIAGE & FAM. 1173, 1184 (2000).
grams are more likely to positively affect father involvement than programs without such components. Both indicate a link between the stability or success of the parents’ relationship and good fathering. Marriage is an important aspect of this. Federal policy on fathers should reflect this reality. At present, government programs aim to strengthen fatherhood principally through education and economics. Strengthening fatherhood through marriage should be more assiduously emphasized.

C. The Chief Federal Approach to Reducing Births to Unmarried Adolescents and the Poor Appears to Have Produced the Opposite Results Among These Very Same Groups

The federal government’s largest, loudest, and most expensive approach to parenting is to discourage it among the young and the poor via sex education and health care programs involving the distribution of large quantities of (often) free birth control. During the period in which these programs have been in full swing, rates of nonmarital childbearing have soared, particularly among the least educated and poorest Americans.

Regarding women with different educational levels, the nonmarital birth rate of college-educated women is thirty-five percentage points lower than the rate among women with only a high school education or less.

Among African Americans, more than 72% of all births are nonmarital, while among Hispanic Americans the rate is above 53%. The most recent census shows that for the first time in U.S. history, for any race, there are more African American households headed by single parents (usually women) than African American households headed by married couples. Among Hispanics, the rate is 19%, while among Whites and Asians, it is only 9%.

146 Hamilton et al., supra note 53, at Table 1: Total Births, and Birth, Fertility, and Total Fertility Rates and Nonmarital Births, by Race and Hispanic Origin of Mother: United States, Final 2008 and Preliminary 2009.
147 Rose M. Kreider & Renee Ellis, Living Arrangements of Children: 2009 (U.S. Census Bureau, 2011), Table 1: Children by Presence and Type of Parent(s) and Race and
Overall, HHS has summarized the data between 1960 and 2000—a period during which the federal government poured funding into sex-education and birth control programs for the young and the poor—as follows: “Nonmarital childbearing increased among women of all age groups between 1960 and 1994 before dropping off modestly in 1995. ... However data for 1996 through 1999 show continued increases for women age 15 through 19, 20 through 24, and 25 through 30.” The report continued: “Nonmarital births as a percent of all births have increased among teens of all ages and across all racial and ethnic groups since 1960. ... and among women of all ages.” 148

The report showed that nonmarital births as a percentage of all births were 5.3% in 1960, 11% in 1970, 18% in 1980, 28% in 1990, and 33% in 1999.149 In 2009, the percentage of nonmarital births was at an all time high of 41%.150 Yet the federal government’s plans to address nonmarital pregnancy among the poor and the young in the future are more of the same.151

Birth control is already widely available in the United States, however, and it is difficult to imagine how the federal government could significantly increase either its profile or its availability. A 2004 study reported that 89% of sexually active women of reproductive age and “at risk” of becoming pregnant used contraception; 98% had used it at some time.152 Even among teenagers who are sexually active and do not want to become pregnant, all but 7% use contraception.153 Capturing this statistic anecdotally, the authors of a highly regarded book about poor, single mothers, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage, report that the location of the Planned Parenthood facilities in poor neighborhoods is so well known that

149 Id. at Table PF1.7.A.
150 Hamilton et al., supra note 53.
151 Although it proposes to multiply the number of “evidence-based” programs it supports. HHS, FY10 Teenage Pregnancy Prevention: Replication of Evidence-Based Programs (Tier 1) (2010), available at http://www.grants.gov/search/search.do?mode=VIEW&oppld=53449
few have to consult the yellow pages to find them.\textsuperscript{154} Furthermore, while most existing federal programs directed to reducing nonmarital pregnancies among the young and the poor involve birth control information or distribution, or both, relatively few have shown even modest results in reducing sexual involvement or nonmarital pregnancy outcomes temporarily, and only to levels that are still alarming and much higher than those from decades prior to heightened federal activity.\textsuperscript{155}

Experts concede that birth control will always fail a certain percentage of the time. A 1999 study reports that during the first twelve months of contraceptive use, 16.4\% teens will become pregnant.\textsuperscript{156} Contraception expert James Trussell of Princeton University has concluded that even “[t]he Pill is an outdated method because it does not work well enough. It is very difficult for ordinary women to take a pill every single day.”\textsuperscript{157} Pregnancy is so likely from even slightly delayed use of the progestin pill that, according to both UK obstetrical practice guidelines and one of the most popular online sources for medical information, women should resort to “emergency contraception” if they had unprotected intercourse within two days after taking a pill only three hours late.\textsuperscript{158}

Not surprisingly, given the failures of ordinary birth control, governments are beginning to promote the greater availability of emergency contraception, also known as the “morning-after pill.” Yet of twenty-three studies published between 1998 and 2006, and analyzed by James Trussell and his team at Princeton University, not a single study found a reduction in unintended


\textsuperscript{157} Quoted in D. Rose, The Pill “Has Had Its Day as an Effective Contraceptive,” The Times (London) (June 26, 2008), available at timesonline.co.uk/tol/news/uk/health/article4215441.ece?articleid=4215441

pregnancies or abortions following increased access to emergency contraception.\textsuperscript{159} Instead, many studies have found “risk compensation” behavior—that is, a greater willingness to engage in potentially risky behavior when one believes risk has been reduced through technology\textsuperscript{160}—resulting in more versus less problematic behavior and outcomes after the introduction of a technological intervention directed to reducing conception.\textsuperscript{161} Economist Peter Arcidiacono and a team at Duke University proposed that “increasing access to contraception (generally, not just emergency contraception) may actually increase long run pregnancy rates even though short run pregnancy rates fall. On the other hand, policies that decrease access to contraception, and hence sexual activity, may lower pregnancy rates in the long run.”\textsuperscript{162} The comprehensive study of governmental population control strategies, \textit{Fatal Misconception}, concluded that “[c]ontraceptives like the pill, initially developed as a ‘foolproof’ means to reduce fertility, helped spark a sexual


\textsuperscript{161} Emergency contraception induced “behavior changes such that risk taking ... increases.” Sourafel Girma \& David Paton, \textit{Impact of Emergency Birth Control on Teen Pregnancy and STIs}, \textit{30 J. Health Econ.} 373 (2011).

revolution that swept the globe.\textsuperscript{163} It does not appear that even large-scale birth control programs are a sufficient response to this “revolution.”

There is also data indicating that more widespread access to abortion has similar unanticipated social effects. A now-famous study by Nobel Prize–winning economist George Akerlof and his co-authors,\textsuperscript{164} as well as studies authored by other economists and sociologists,\textsuperscript{165} indicate how more easily available abortion could lead to more nonmarital sexual encounters, more nonmarital pregnancies and births, and more abortions. One economist even links more widely available contraception and abortion technology to more divorces.\textsuperscript{166}

### III. CONCLUSION

Considering the evidence presented above, that these federal parenting policies and preferences are either contradicted or called into question by the relevant literature, why does the government continue to pursue them? I will attempt to answer this question even more fully in a later essay, and here will only indicate some possible responses. The evidence points to politics and possibly an underlying ideology.

First, it is likely that the political cash and the pressure coming from the same-sex marriage movement is influencing current federal messages regarding biological and opposite-sex parenting. The most prominent messages in the past few years are coming from the executive branch; it is public knowledge that President Obama’s campaigns—particularly his


\textsuperscript{166} Reichert, supra note 165, at 25.
current 2012 presidential campaign—receive generous funding from groups working assiduously at both the state and federal levels to gain acceptance of same-sex marriage.\textsuperscript{167}

It is also conceivable that leading federal actors have subscribed to an ideology about human sexuality that is influencing their policy preferences. This is an ideology making it literally unthinkable to uncouple ideas about “privacy” or “freedom” in the area of human sexuality from the notion of easily available birth control (and maybe even abortion), which makes possible the illusion, at least, of sexual expression without procreation and even without any commitment to a longer term union between the partners. Such a notion might simply represent excessive faith in technology. But it might also represent the ideology that Harvard economist Lant Pritchett has termed sexualityism. This is the position that the “expression of human sexuality is in and of itself a positive good and limitations on that expression are in and of themselves bad.”\textsuperscript{168}

Traces of sexualityism can be detected in the inability of the executive office to see any important difference between sexual partnerships possessing the capacity to produce children and those that do not, as exemplified in the current administration’s position on DOMA. It might be glimpsed in one or more of the sex education programs supported by the federal government. For example, the federal government funds the prolific sexual education entity known as SIECUS (Sexuality Information and Education Council of the United States), whose flagship manual for teens propounds a notably individualistic, self-expressive view of sex: “Sexuality is a part of who you

\footnotesize{\textsuperscript{167} A recent article on \textit{Politico} discloses that the Obama administration is “banking on gay donors to make up the cash it’s losing from other groups of wealthy supporters who have been alienated and disappointed by elements of Obama’s first term.” Ben Smith & Maggie Haberman, \textit{Gay Donors Fuel Obama’s 2012 Campaign} (May 9, 2011), available at http://www.politico.com/news/stories/0511/54539.html. Other groups supporting a change in the law’s traditional linking of marriage with procreation characterize themselves as feminist or “women’s issue” groups. From what the Center for Responsive Politics calls the “women’s issue” industry, President Obama received nearly seven million dollars in campaign contributions in 2008. \textit{Women’s Issues: Top Recipients} (OpenSecrets.org, 2008), available at http://www.opensecrets.org/industries/recips.php?Ind=Q08&cycle=2008&recipdetail=S&Mem=Y&sortorder=. I have previously written at some length about the anthropology of the strand of feminism which is deeply suspicious about opposite-sex marriage. \textit{See Helen M. Alvaré, Communion or Suspicion: Which Way for Woman and Man?} 8 \textit{Ave Maria L. Rev.} 167 (2009).}

\footnotesize{\textsuperscript{168} Pritchett, \textit{supra} note 13 (italics in original).}
are as an individual,” and “At every point in your life, you can choose if and how to express your sexuality.”

The theory of sexualityism is reflected in the language of several Supreme Court opinions relating to women’s reproductive rights and to sodomy. This is true in particular of the Court’s statement in Planned Parenthood v. Casey that matters associated with sex and procreation:

involve … the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] …are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

Note how this language suggests that sexual decision making is essentially about individuals creating their own meaning, rather than about individuals having a relationship, let alone a relationship tied up with procreation. Sexual expression was also placed at the core of the right of privacy in Lawrence v. Texas, in which the Court, holding a Texas sodomy statute unconstitutional, relied in part upon the above-quoted passage from Casey.

If this is the constitutional definition of freedom where sex is concerned, then children and children’s interests in their parenting situation have little place within it. It is a definition that makes it unthinkable to suggest that access to, or even government funding for, birth control or even abortion could be reduced or eliminated without violating an essential freedom. For birth control (in theory if not always in practice) allows a person to express herself sexually, theoretically free even of the most common consequences of sex—procreation or an ongoing sense of union with the sexual partner. Contraception is the symbol, and sometimes the substance too, of sexual expression without babies. Abortion is its insurance.

It is extremely difficult to imagine a government willing to respond to nonmarital births among the young and the poor today without resorting to birth control programs. A wide array of both private and public voices asserts the necessity of government birth control programs. It is the internationally preferred way to address population questions. Entrenched public and public-

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170 Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992). In another interesting passage, the opinion commends the legal availability of birth control and abortion in order to allow women to “define their view of themselves and their places in society.” Id. at 856.
private bureaucracies (for example, Planned Parenthood Federation and the National Campaign to Prevent Teen and Unplanned Pregnancy) completely depend upon it. But it has failed, not just for a brief period, but for half a century. At the very least, it is time for federal authorities to acknowledge this much, and to explain what they might do to respond to the evidence in the future. Almost no one would begrudge the federal government its interest in promoting family self-sufficiency, but the government’s current policy appears to be a rather expensive failure, and even a possible contributor toward entrenching fatherlessness and poverty among groups of women already seriously disadvantaged—minorities, the poor, and the less educated.

Having thus far summarized the major elements of federal policy on parenting and identified their shortcomings and possible underlying philosophy, I now offer just a few concluding observations. First, I join the growing chorus of those who recognize that we have to do better not only for children, but in particular for the most vulnerable children in America, or risk entrenching poverty within certain races and socioeconomic groups and among our most recent immigrants. On an even larger scale, economists and other social scientists are increasingly convinced that the decline of the unitary family will impair our nation’s economic progress. Commenting on the most recent figures about nonmarital births, the Annie E. Casey Foundation (a leading charitable organization addressing nonmarital pregnancy and births) commented: “It’s critical that children are able to grow to compete internationally and keep state economies rolling.”

Demographer William H. Frey of the Brookings Institution cautioned that “our future labor force is absolutely dependent on our ability to integrate and educate a new diverse child population.” Neither institution would label itself “conservative” on family issues. Both understand the connection between parenting environments and community and national prosperity, particularly for our most vulnerable citizens.

Second, it appears that women in particular—owing, perhaps, to the combination of their physical and intellectual make-up, including their fertility constraints—are most disadvantaged by policies that appear to normalize nonmarital sex and identify non-procreative and uncommitted sex with freedom. When sex becomes a condition for having a nonmarital relationship,

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it is women who are the more likely to suffer, and to suffer alone, the range of associated consequences.

Third, the federal government should not demur from frank conversation about the meaning and consequences of human sexual intimacy and its relationship to parenting on the grounds of privacy or even decorum. Teens and young adults live in a world of 24/7 sexual references. They are acutely aware that they live in a sexual marketplace. Interviews with older adolescents and young adults indicate that sexual intimacy has become far from special, sacred, or intimate in their minds or in their experience. Two leading books report the following comments, largely from among 18–23-year-olds (many in college): Quoting a young man: “The fact that I let myself have sex with her, ... without having any sort of regard for her. I mean I like her.... But ... that could’ve been anybody....” Quoting a young woman: “Yeah, well, you know you still have to give an occasion blow job. ... I avoid the situation at all costs [laughs]. But once it gets to be like, ‘Come on, please?’ ‘Okay. Fine.’”

The federal government has no hesitancy today to speak about other matters previously imagined to be quite private. It is currently rolling out a sweeping campaign to influence what Americans eat. On behalf of this effort, federal agencies are regularly offering observations about food of the kind this paper has been making about parenting and sex. They are speaking food’s health effects and about disproportionate harms within the African American and Hispanic communities. An interagency working group has proposed “sweeping” guidelines that, while they are “voluntary,” are accompanied by pressure. These guidelines would cover myriad forms of food marketing to kids. In some cases, new and even intrusive methods are proposed. The U.S. Department of Agriculture just awarded a grant to a Texas school district to install cameras on children’s lunch trays that can “read” their food.

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174 The concept of a sexual marketplace is developed in Baumeister & Vohs, supra note 165. See generally Mark Regnerus & Jeremy Uecker, Premarital Sex in America: How Young Americans Meet, Mate, and Think About Marrying 51–61 (2010).

175 Id. at 165.

176 Id. at 87.

There are plans to move beyond influencing the schools to improving the home dietary environment as well. What we eat is no doubt important, but how we “do” family is central to the meaning of life. The amount of federal money and the extent of federal programming associated with parenting policy are staggering. Some current efforts move in obvious and necessary directions. Others march forward in spite of the objective evidence. There is no reason that the federal government cannot bring to the parenting enterprise the same spirit it is currently displaying regarding other aspects of child welfare such as nutrition—a spirit of innovation, urgency, practicality, attention to research, and concern for women and for minority and other vulnerable communities.

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178 Meredith Melnick, Cafeteria Cams Track Students’ Calorie Consumption at School, TIME (May 12, 2011), available at http://healthland.time.com/2011/05/12/cafeteria-cams-track-students-calorie-consumption-at-school/

179 Id.