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# For the Sake of the Children

## A NEW APPROACH TO SECURING SAME-SEX MARRIAGE RIGHTS?

### I. INTRODUCTION

On October 25, 2006, the Supreme Court of New Jersey effectively ruled that any law denying homosexual couples marriage rights granted to heterosexual couples violates the Equal Protection Clause of the New Jersey State Constitution.<sup>1</sup> The court left the legislature with the semantic task of naming such a legal contract either a “marriage” or a “civil union,”<sup>2</sup> but made clear in a unanimous decision that “committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.”<sup>3</sup> Despite stopping short of mandating the title of “marriage” for homosexual unions,<sup>4</sup> the court in *Lewis v. Harris* forever altered the landscape of the gay marriage debate by handing down the first ever unanimous decision for the plaintiff in a gay marriage case.<sup>5</sup> While the court’s resounding unanimity

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<sup>1</sup> *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

<sup>2</sup> See Tina Kelly, *For Gay Couples, Ruling Has a Cash Value*, N.Y. TIMES, October 28, 2006, at B5 (“Gay couples’ rights are less in dispute than a word for them.”).

<sup>3</sup> *Lewis*, 908 A.2d. at 221.

<sup>4</sup> The New Jersey Legislature ultimately chose to implement civil unions, rather than gay marriage. The new law, effective February 19, 2007, states in part:

The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples. In doing so, the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry.

N.J. STAT. ANN. § 37:1-28(f) (2006).

<sup>5</sup> All seven justices agreed as to the violation of Equal Protection rights. The three dissenting justices did not disagree with the majority as to such a violation, but instead would have gone further, holding that only a state sanctioned institution termed “marriage” would be sufficient to ensure the fundamental right to marry for homosexual couples. See *Lewis*, 908 A.2d at 224-31 (Poritz, J., concurring in the holding). Not even the Massachusetts court was as definitive, with only a plurality of that court holding that gay marriage was required under the Massachusetts Constitution. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

was remarkable, perhaps the most fascinating aspect of the New Jersey decision was the dicta employed by the court in reaching its landmark decision. Like no other prior case, the New Jersey Supreme Court focused extensively on the burdens faced by the children of homosexual couples denied the right to marry, rather than restricting its analysis to an examination of the rights withheld from the couples themselves.<sup>6</sup>

Just three months prior to the *Lewis* decision, on July 6, 2006, the State of New York's highest court decided a gay marriage case of its own and, like its neighbor New Jersey, spent a considerable amount of time probing the marital benefits conferred upon children by the institution of marriage.<sup>7</sup> However, New York's judges undertook this inquiry with an eye toward an entirely opposite result and held that "the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex [rather] than in same-sex relationships."<sup>8</sup> Armed with this analysis, the court ruled that a law forbidding homosexuals to marry would not offend the Equal Protection Clause of the New York Constitution when held up against a rational review standard.<sup>9</sup>

The significance of these two cases, this Note will contend, does not lie in their contrasting results, but in their similar focus—the effects of marriage upon any child potentially living with homosexual parents. While the legal debate over gay marriage has been raging for over ten years,<sup>10</sup> this Note will argue that only recently has the debate over gay marriage evolved into a balancing act that considers not only the rights of same-sex couples, but also the rights of these couples' children. More significantly, this Note will advance the possibility that this repeated deference to marriage's third party, the child, will open up a challenge to anti-gay marriage laws and constitutional amendments that has not previously

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<sup>6</sup> See, e.g., *Lewis*, 908 A.2d at 217 ("[U]nder our current laws, committed same-sex couples and their children, are not afforded the benefits and protections available to similar heterosexual households." (emphasis added)).

<sup>7</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.*

<sup>10</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. 1, § 23 (deciding the first significant gay marriage case in U.S. history over fourteen years ago).

been considered: an Equal Protection challenge based on a child's right to presumed legitimacy at birth.<sup>11</sup>

Part II of this Note will review the history of the gay marriage debate in the courts, from its Hawaiian beginnings in 1993 up to the New Jersey court's decision in 2006. Special attention will be paid to the evolution of judicial concerns with child rearing and the effect of marriage on children. Part III will briefly survey the history of Equal Protection jurisprudence related to distinctions drawn on the basis of illegitimacy. The benefits of presumed legitimacy granted to children born into wedlock will also be examined. Part IV will then argue that a child born into a household with same-sex, unwed parents could contend that laws barring her parents from marrying are an affront to her Equal Protection rights. New York will be used as a convenient model for this examination due to its recent decision upholding an interpretation of the marriage code as precluding homosexual marriage. By narrowly focusing on a single state and its laws, the potential of such a claim by a child may be accurately assessed. Finally, Part V of this Note will survey the current landscape of gay marriage nationwide (considering the relevant legislation and constitutional amendments) to argue that the New York model proposed in Part IV might be used as a nationwide attack on gay marriage bans—an attack no longer waged by the couples, but by their children.

## II. THE GAY MARRIAGE DEBATE—FOURTEEN YEARS AND COUNTING

Over the years, the judicial focus in gay marriage cases has slowly begun to turn away from notions of individual liberty and toward the collective concerns of the family unit.<sup>12</sup>

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<sup>11</sup> Presumably, a child of gay parents could base an Equal Protection claim on any of the benefits afforded to children through the marital status of their parents. The New Jersey court noted, for example, that a child of a non-biological same-sex parent could not receive survivor benefits under the Worker's Compensation Act if their parent was killed at work. *Lewis*, 908 A.2d at 218. However, this Note will pay special attention to the benefit of presumed legitimacy because the Supreme Court of the United States has expressly stated that Equal Protection claims based on legitimacy distinctions should be afforded intermediate review. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>12</sup> *Compare Baehr*, 852 P.2d at 67 (holding that "marriage is a basic civil right"), *with Lewis*, 908 A.2d at 216 ("[New Jersey's Domestic Partnership Act] does not provide to committed same-sex couples the family law protections available to married couples. The Act provides no comparable presumption of dual parentage to the non-biological parent of a child born to a domestic partner.").

This section tracks that progression to show the ever-increasing role children have in the gay marriage conversation.

A. *The Early Murmurs—Hawaii (1993), Alaska (1998), and Vermont (1999)*

In May of 1993, the first truly significant legal battle over gay marriage<sup>13</sup> was decided by the Supreme Court of Hawaii in *Baehr v. Lewin*.<sup>14</sup> The plaintiffs, a collection of homosexual couples, filed suit alleging that the Director of the Department of Health unfairly denied their applications for marriage licenses based on the Department's stance that the gendered nouns used in the marriage and consanguinity statutes of Hawaii proscribed such a license issuance.<sup>15</sup> The plaintiffs alleged that this application of the marriage law violated their rights to privacy as well as the equal protection and due process clauses of the Hawaii Constitution.<sup>16</sup> The court gave little credence to the right to privacy and Due Process claims brought by the plaintiffs based on a finding that the right to gay marriage was not a fundamental right warranting protection.<sup>17</sup> Importantly, however, the court ruled that the denial of marriage licenses to same-sex couples violated the equal protection clause of the Hawaii Constitution because the practice of denying same-sex couples marriage licenses drew distinctions based on gender.<sup>18</sup>

This ruling of the Supreme Court of Hawaii marked the first significant judicial challenge to the traditional interpretation of marriage law in the United States.<sup>19</sup> When

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<sup>13</sup> In January of 1993, *Dean v. District of Columbia*, Civil Act No. 90-13892, 1992 WL 685364, at \*1 (D.C. Super. Ct. June 2, 1992), *aff'd* 653 A.2d 307 (1995), was decided, holding that any claims to gay marriage rights were not protected under the Federal Constitution. While this is significant, the Hawaii decision showed that a state constitutional challenge could prove successful. As such the bulk of cases dealing with gay marriage has been, and continues to be, fought in the state courts.

<sup>14</sup> 852 P.2d 44.

<sup>15</sup> *Id.* at 48-49.

<sup>16</sup> *Id.* at 50.

<sup>17</sup> *Id.* at 57.

<sup>18</sup> *Id.* at 67. The court also held that the sex based classifications would be held to a strict scrutiny standard in the state of Hawaii, meaning that the marriage law in question necessitated a compelling state interest and a narrow tailoring of the law to meet that interest. *Id.*

<sup>19</sup> LOWELL TONG, *Comparing Mixed-Race and Same-Sex Marriage*, in ON THE ROAD TO SAME SEX MARRIAGE 109, 119 (Robert P. Cabaj & David W. Purcell eds., 1998) ("Although there were previous attempts to recognize same-sex unions legally, a case heard by the Hawaii State Supreme Court, *Baehr v. Lewin* in 1993, is considered to be a landmark case.").

assessing the plaintiffs' equal protection claim, the Hawaii court noted the various disadvantages facing homosexual couples who are denied marriage rights granted to married heterosexual couples: tax advantages, public assistance from the Department of Human Services, control of community property, inheritance rights, the right to spousal support, the right to name change, post-divorce rights, the spousal privilege granted pursuant to the Rule of Evidence, and the right to bring a wrongful death action.<sup>20</sup> While this list was presumably not meant to be exhaustive, it curiously makes mention of only one right related to child rearing, the right to an "award of child custody and support payments in divorce proceedings."<sup>21</sup> In fact, the only other mentions of children in the court's opinion were made when the court discussed case law regarding the right to privacy<sup>22</sup> (not the claim upon which the court rested its opinion) and when the court restated the Department of Health's opinion that the denial of gay marriage rights protects the type of family unit that provides "a nurturing environment to children born to married persons," a claim to which the court did not respond.<sup>23</sup> Based on this paltry reference to the role of children in the same-sex marriage equation, it is fair to say that in May of 1993, this court's attention was not keenly focused on the rights of children reared by homosexual parents.<sup>24</sup>

In 1998, Alaska became the second state to tackle the issue of gay marriage in the courts.<sup>25</sup> In *Brause v. Bureau of Vital Statistics*, the Superior Court of Alaska faced an even stronger challenge than the Supreme Court of Hawaii.<sup>26</sup> Where the Hawaii court in *Baehr* ruled on a statute that implicitly forbade gay marriage by use of gender specific terms, the

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<sup>20</sup> *Baehr*, 852 P.2d at 59.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 56.

<sup>23</sup> *Id.* at 52.

<sup>24</sup> Of course, the reason may be that gay parents were either marginally existent or existed outside of the public consciousness. However, the reason for this omission is insignificant; the fact remains that in the earliest case in the gay marriage debate, the children affected stood by in the shadows.

<sup>25</sup> See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. 1, § 25.

<sup>26</sup> Compare *Baehr*, 852 P.2d at 67 ("[W]e have *not* held . . . the appellants have a civil right to a same sex marriage." (internal quotation marks omitted)), with *Brause*, 1998 WL 88743, at \*1 ("The court finds that marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right.").

*Brause* court was faced with a statute that expressly forbade gay marriage.<sup>27</sup> The plaintiffs in *Brause* contested an Alaskan law that defined marriage as between a man and a woman.<sup>28</sup> With the stronger prohibition came a stronger ruling from the court, and the Alaska judiciary struck down the Marriage Code at issue when it held that “marriage, i.e., the recognition of one’s choice of a life partner, is a fundamental right.”<sup>29</sup> The *Brause* court saw the gay marriage issue primarily as an issue of personal liberty;<sup>30</sup> as such, the court never considered the benefits that a recognized marriage affords to any of the affected parties—partners and children alike.<sup>31</sup>

Finally, in 1999, the first gay marriage case to ever significantly deal with the rights and securities granted to children through marriage was decided in Vermont.<sup>32</sup> In *Baker v. Vermont*, three homosexual couples brought suit against the state after each couple had been denied a marriage license from their town clerk.<sup>33</sup> The State contended that “the Legislature [was] justified . . . ‘in using the marriage statutes to send a public message that procreation and child rearing are intertwined.’”<sup>34</sup> Plaintiffs offered numerous theories of recovery, including an assertion that the plain language of the Vermont marriage statute allowed for gay marriage.<sup>35</sup> However, the holding, which ultimately granted marriage rights, was not grounded in the right to privacy, the Federal Equal Protection Clause or the due process clause of the Vermont Constitution, but rather in the novel common benefits clause<sup>36</sup> that is unique

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<sup>27</sup> *Brause*, 1998 WL 88743, at \*1 (citing ALASKA MARRIAGE CODE § 25.05.011(a)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*3. In fact, the precedent upon which the *Brause* court premised its decision was a ruling 30 years prior, holding it unconstitutional for public schools to set hair length limitations on its students. *See Breese v. Smith*, 501 P.2d 159, 175 (Alaska 1972).

<sup>31</sup> The *Brause* decision is decidedly the shortest gay marriage decision in American jurisprudence. The court quickly held that marriage is a fundamental right and therefore did not address any of the other arguments that are hallmarks of other major gay marriage cases. *See Brause*, 1998 WL 88743, at \*4.

<sup>32</sup> *See Baker v. Vermont*, 744 A.2d 864, 884-85 (Vt. 1999).

<sup>33</sup> *Id.* at 867.

<sup>34</sup> *Id.* at 881.

<sup>35</sup> *Id.* at 868-70.

<sup>36</sup> The common benefits clause reads:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of

to the State of Vermont.<sup>37</sup> Regardless of this anomalous posturing, it is nonetheless significant that Vermont became the first state to recognize that the concerns expressed by homosexual couples included protection of their children's rights:

They [plaintiff-couples] argue that the large number of married couples without children, and the increasing incidence of same-sex couples with children, undermines the State's rationale [for denying gay marriage]. They note that Vermont law affirmatively guarantees the right to adopt and raise children regardless of the sex of the parents, see 15A V.S.A. § 1-102, and challenge the logic of a legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them—and *their children*—the same security as spouses.<sup>38</sup>

The court adopted the plaintiffs' argument regarding the rights of children in making its ruling and noted that "the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against."<sup>39</sup>

Ultimately, the court held that same-sex couples were entitled to "the same benefits and protections afforded by Vermont law to married opposite-sex couples,"<sup>40</sup> but reserved to the legislature the right to craft laws facilitating this mandate. However, the true seismic shift in this case was the court's willingness to turn the State's interest in protecting children into an argument favoring same-sex marriage.<sup>41</sup> The court

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persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

VT. CONST. art. 7.

<sup>37</sup> *Baker*, 744 A.2d at 870, 880-86 ("[I]t is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. . . . [T]he Common Benefits Clause . . . differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development.").

<sup>38</sup> *Id.* at 870 (emphasis added).

<sup>39</sup> *Id.* at 882 (emphasis omitted).

<sup>40</sup> *Id.* at 886. Ultimately, the Vermont Legislature rejected gay marriage in favor of civil unions. See VT. STAT. ANN. tit. 15, § 1202 (2002).

<sup>41</sup> The court stated:

The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the

recognized that “a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents” and refused to accept the State’s argument that its interest in promoting procreation was a compelling justification for denying same-sex marriage rights.<sup>42</sup> Instead, the court clearly drew the opposite conclusion and stated that “to the extent that the state’s purpose in licensing civil marriage was, and is, *to legitimize children* and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives.”<sup>43</sup> It was this logic, adopted by the *Baker* court on December 20, 1999, that truly gave force to the gay marriage debate.<sup>44</sup>

*B. The Exclamation—The Massachusetts Supreme Judicial Court (2003)*

With Vermont’s historic adoption of civil unions, the momentum seemed to be building toward a possible recognition of full same-sex marriage rights within the United States. And then, in 2003, along came Massachusetts.<sup>45</sup> The Massachusetts

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extreme logical disjunction between the classification and the stated purposes of the law—protecting children and ‘furthering the link between procreation and child rearing’—the exclusion falls substantially short of this standard. The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts.

*Baker*, 744 A.2d at 884 (emphasis omitted).

<sup>42</sup> *Id.* at 881, 884.

<sup>43</sup> *Id.* at 882 (emphasis added).

<sup>44</sup> In 1998, both Alaska and Hawaii passed constitutional amendments, essentially erasing each state’s holdings with regard to gay marriage. *See* ALASKA CONST. art. 1, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”); HAW. CONST. art. 1, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

It is interesting to note that it was in Vermont, with the judiciary’s unique recognition of gay couples as parents in *Baker*, that gay marriage rights, in the form of civil unions, first gained real traction.

<sup>45</sup> From a historical perspective, it is not surprising that Massachusetts was the first state to allow gay marriage as the state’s marriage law was always premised on marriage being a secular institution:

It was clear to Plymouth . . . that the best way to avoid interference from the High Church party that controlled early seventeenth century England was to keep as free as possible from political and religious affiliation with England’s government. Ministers of the established church were at that time the only authorized celebrants of marriage in England; in Plymouth, following the

court's decision in *Goodridge v. Department of Public Health* remains the only case in the United States to have granted full marriage rights to homosexual couples.<sup>46</sup> The ruling came on the heels of the major Supreme Court decision in *Lawrence v. Texas*.<sup>47</sup> However, as will be seen, the *Goodridge* court was less concerned with the notions of personal choice that underpinned the *Lawrence* decision and more influenced by the *Baker* court's perception of marriage as an institution for child rearing.<sup>48</sup>

In June of 2003, the United States Supreme Court ruled in *Lawrence* that the right to privacy, rooted in the Due Process Clause of the Constitution, precludes the government of any state from interfering in the private sexual choices made by consenting individuals.<sup>49</sup> Specifically, the Court overturned anti-sodomy laws in Texas that were primarily directed toward homosexual conduct.<sup>50</sup> Some scholars immediately read the

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custom with which the colonists had become familiar in Holland, civil ceremonies only were countenanced.

FRED S. HALL & MARY E. RICHMOND, MARRIAGE AND THE STATE 22-23 (1929). The Massachusetts Supreme Judicial Court in *Goodridge* echoed such a historical understanding of the marriage code: "In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

Furthermore, some analysts saw the struggle for gay marriage in Massachusetts as having "roots that go back at least to 1989, when the Commonwealth became the second state in the nation (after Wisconsin in 1982) to include sexual orientation in statewide laws banning discrimination in employment and public accommodations." DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 34 (2006).

<sup>46</sup> See, e.g., Cece Cox, *To Have and To Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 LAW & SEXUALITY REV. LESBIAN GAY BISEXUAL & TRANSGENDER LEGAL ISSUES 1, 6 (2005) ("Currently, only one of the fifty states, Massachusetts, has recognized gay marriage."). See generally *Goodridge*, 798 N.E.2d 941 (Mass. 2003).

<sup>47</sup> 539 U.S. 558, 578 (2003) (finding unconstitutional Texas laws prohibiting sodomy).

<sup>48</sup> Compare *Baker*, 744 A.2d at 882 ("[T]he exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against." (emphasis omitted)), with *Goodridge*, 798 N.E.2d at 964 ("Excluding same-sex couples from civil marriage . . . does prevent children of same-sex couples from enjoying the immeasurable advantages that flow [through marriage].").

That Massachusetts would confront marriage law from a similar viewpoint as one of its New England neighbors is consistent with the history of the region. See Hall, *supra* note 45, at 22 ("Beginning with Massachusetts, we find that it shares with the entire New England group of states a development different from that of all other sections of the country.").

<sup>49</sup> *Lawrence*, 539 U.S. at 578 ("[I]ndividual decisions . . . concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by [the Due Process Clause]" (quoting *Bowers v Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

<sup>50</sup> Justice Kennedy wrote:

ruling to suggest that “[i]f a state singles out gays for unprecedentedly harsh treatment, the Court will presume what is going on is a bare desire to harm, rather than moral disapproval . . . plac[ing] all antigay laws under suspicion.”<sup>51</sup> This perception, coupled with the timing of the Massachusetts ruling in *Goodridge*<sup>52</sup> only five months later, made it easy to assume there was a causal connection between the two rulings.<sup>53</sup> Indeed, the Massachusetts court immediately referenced the *Lawrence* decision in the second paragraph of its ruling in *Goodridge*.<sup>54</sup> However, the substance of the Massachusetts ruling owes less of a debt to the Supreme Court than it does to the *Baker* decision from Vermont.<sup>55</sup>

In *Goodridge*, seven couples challenged the Department of Health’s decision to refuse to issue marriage licenses to the same-sex couples.<sup>56</sup> The same-sex partners had met all the express requirements of the marriage code necessary to obtain a license; however, the Department of Health rejected their applications based on the Department’s understanding that Massachusetts did not recognize same-sex marriage.<sup>57</sup> The Massachusetts Supreme Judicial Court found that the ordinary

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The [anti-sodomy] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals . . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

*Id.* at 567.

<sup>51</sup> Symposium, *Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1017, 1019 (2004).

<sup>52</sup> *Goodridge*, 798 N.E.2d at 941. *Goodridge* was decided in November of 2003; the *Lawrence* Court made its ruling the preceding June. *Lawrence*, 539 U.S. at 558.

<sup>53</sup> In fact, this seems to be a popular common perception. See David Moats, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 265 (2004) (“The court’s reasoning in the *Lawrence* case paralleled the reasoning of the plaintiffs in the *Goodridge* case, particularly in its emphasis on the right to privacy in decisions about intimate conduct.”); see also Same-Sex Marriage Status in the United States by Statute, [http://en.wikipedia.org/wiki/List\\_of\\_state\\_laws\\_on\\_same-sex\\_unions](http://en.wikipedia.org/wiki/List_of_state_laws_on_same-sex_unions) (“In 2003, the U.S. Supreme Court’s decision in *Lawrence v. Texas* paved the way for same-sex marriage to emerge as a hot-button political issue. Since Massachusetts became the first state to legalize same-sex marriage in 2004, other states have rushed to either restrict or liberalize their own marriage laws.”) (last visited Oct. 12, 2007).

<sup>54</sup> *Goodridge*, 798 N.E.2d at 948 (“Our obligation is to define liberty of all, not to mandate our own moral code.” (quoting *Lawrence*, 539 U.S. at 571)).

<sup>55</sup> See *supra* note 48 and accompanying text.

<sup>56</sup> *Goodridge*, 798 N.E.2d at 949.

<sup>57</sup> *Id.* at 950.

usage of the term “marriage,” when used by the legislature in the marriage code, did preclude homosexual marriage.<sup>58</sup> However, the court went on to say that because the state had no rational basis for denying same-sex couples the right to marry, the practice of denying marriage licenses to homosexual partners was a violation of equal protection under the Massachusetts Constitution.<sup>59</sup> In the course of this determination, the court’s repeated references to the children of homosexual partners were truly fascinating.

Reasoning related to the equal protection of children raised by gay parents, unseen before Vermont’s decision in *Baker*,<sup>60</sup> permeates the *Goodridge* decision.<sup>61</sup> The Vermont court held that the impositions placed upon the children of gay parents undermined the state’s purported interest in differentiating between straight and gay couples’ marriage rights.<sup>62</sup> The Massachusetts Supreme Judicial Court took this concept further and found that such a detriment to these children was an affirmative reason to view gay marriage as a civil right.<sup>63</sup> When making its determination the court recognized:

[M]arital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.<sup>64</sup>

Viewing the issue through this child-centered lens, the court concluded, “It is undoubtedly for these concrete reasons . . . that civil marriage has long been termed a ‘civil right.’”<sup>65</sup>

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<sup>58</sup> *Id.* at 953.

<sup>59</sup> *Id.* at 961.

<sup>60</sup> *See supra* Part II.A.

<sup>61</sup> *Goodridge*, 798 N.E.2d at 964 (“Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’” (quoting *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting))); *id.* at 963 (“[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.”).

<sup>62</sup> *See supra* Part II.A.

<sup>63</sup> *See Goodridge*, 798 N.E.2d at 956-57.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Furthermore, the *Goodridge* court took the unprecedented step of enumerating certain parental rights as “benefits accessible only by way of a marriage license.”<sup>66</sup> Specifically, the court explicitly recognized that “[e]xclusive marital benefits that are not directly tied to property rights include the *presumptions of legitimacy and parentage of children born to a married couple.*”<sup>67</sup> It is largely due to this type of consideration—a broad view of marriage as a parental construct—that enabled the *Goodridge* court to find that no legislative rationale for anti-gay marriage laws could survive even a rational basis examination.<sup>68</sup> The court therefore found it unnecessary to consider the plaintiff-couple’s argument that their case merited a stricter standard of review.<sup>69</sup>

Ultimately, the Massachusetts court summarily rejected the Department of Health’s proposed legislative rationales.<sup>70</sup> The court concluded that “[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex couples marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’”<sup>71</sup> The Supreme Judicial Court of Massachusetts, without ever expressly citing the case, built on the dicta in *Baker v. Vermont* to reach its finding that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates” equal protection.<sup>72</sup> While the press and the public were acutely aware of the benefits that homosexual couples had gained after *Goodridge*, most everyone neglected, and

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<sup>66</sup> *Id.* at 955.

<sup>67</sup> *Id.* at 956 (emphasis added).

<sup>68</sup> “Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.” *Id.* at 961.

<sup>69</sup> *Id.*

<sup>70</sup> The Court wrote:

The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a “favorable setting for procreation”; (2) ensuring the optimal setting for child rearing, which the department defines as “a two-parent family with one parent of each sex”; and (3) preserving scarce State and private financial resources.

*Id.*

<sup>71</sup> *Id.* at 964.

<sup>72</sup> *Id.* at 969.

continues to neglect, the consideration of children's rights that swayed the plurality.<sup>73</sup> As *Goodridge* remains the only case in the United States to grant full marriage rights to homosexuals, its reasoning is a touchstone for the gay marriage debate that seemingly must be either expounded upon or discredited. Therefore, *Goodridge's* treatment of marriage's effects on the children of gay parents will be central to any challenges brought by opponents of gay marriage prohibitions.

C. *The Aftermath—Arizona, Indiana, New York, and New Jersey (2004-2006)*

The backlash against the *Goodridge* decision was immediate and fierce,<sup>74</sup> and perhaps inevitable.<sup>75</sup> Prior to the ruling of the New Jersey Supreme Court in late 2006, courts across the country that were faced with the gay marriage question seemed to be riding the political pendulum's swing away from the Vermont and Massachusetts trend. Courts in Arizona,<sup>76</sup> Indiana,<sup>77</sup> and New York<sup>78</sup> all upheld statutory schemes barring gay marriage. Even the appellate court in New Jersey upheld a statutory interpretation of the marriage code as prohibiting gay marriage,<sup>79</sup> although the New Jersey State Supreme Court ultimately overturned its ruling in *Lewis v. Harris*.<sup>80</sup> However, as the momentum of the debate shifted

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<sup>73</sup> See, e.g., Jason McLure, *Tears of Joy*, NEWSWEEK, Nov. 18, 2003.

<sup>74</sup> One year after *Goodridge*, in the November election, thirteen states approved constitutional amendments banning gay marriage, nullifying the prospect of judicial interference. See Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 221 (2005). In total today, "more than 35 states have introduced legislation aimed at preserving the traditional definition of marriage as a union between a man and a woman." Kavan Peterson, *50-State Rundown on Gay Marriage Laws* (updated Nov. 3, 2004), Stateline.org, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576>.

<sup>75</sup> See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006) (comparing the legal and social backlash against desegregation in light of *Brown v. Board of Education* with the recent backlash following *Goodridge v. Department of Public Health*); Michael J. Klarman, *Brown and Lawrence (And Goodridge)*, 104 MICH. L. REV. 431 (2005) (same).

<sup>76</sup> *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

<sup>77</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. App. 2005).

<sup>78</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006); see discussion *supra* Part I.

<sup>79</sup> *Lewis v. Harris*, 875 A.2d 259, 271, 274 (N.J. Super. Ct. App. Div. 2005), *modified*, 908 A.2d 196 (2006).

<sup>80</sup> *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006); see discussion *supra* Part I.

toward a rejection of gay marriage rights (as evidenced by victories in courts across the country), the judicial focus in these cases appeared to remain the same; the central question continued, and continues, to be “what is best for the children?”

For example, in *Standhardt v. Superior Court*, the Arizona Court of Appeals took a particularly questionable bright-line approach in this regard, upholding the prohibition of gay marriage, while nonetheless admitting to the inequities visited upon the children of gay parents caused by the decision.<sup>81</sup> The case revolved around a familiar tale: a homosexual couple applied for a marriage license and their application was denied.<sup>82</sup> The couple appealed directly to the Arizona Court of Appeals and the court chose to exercise jurisdiction.<sup>83</sup> As in *Goodridge* and *Baker*, the case primarily hinged upon whether the Legislature of the state could show a rational basis for a state law barring gay marriage.<sup>84</sup> As seen before, the state premised its rationale for barring gay marriage on “encouraging procreation and child-rearing within the stable environment traditionally associated with marriage” and contended that “limiting marriage to opposite-sex couples is rationally related to that interest.”<sup>85</sup> The plaintiffs, as expected, argued that the law was both over- and under-inclusive because not all heterosexual couples have children, while numerous gay couples do raise children.<sup>86</sup> The court conceded that the plaintiffs’ position was persuasive.<sup>87</sup> However, despite the concession, the court stated, “A perfect fit is not required under the rational basis test, and [the court] will not overturn a statute merely because it is not made with mathematical nicety, or because in practice it results in some inequality.”<sup>88</sup>

The Arizona court brazenly admitted that deference to the state’s purported legislative intent would result in “some inequality.”<sup>89</sup> What is vastly more striking, however, is that the

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<sup>81</sup> *Standhardt*, 77 P.3d at 462 (internal quotation marks omitted).

<sup>82</sup> *Id.* at 454.

<sup>83</sup> “We accept jurisdiction over this special action because there is no equally plain, speedy, or adequate remedy by appeal.” *Id.*

<sup>84</sup> The court held that because the right to same-sex marriage was not a fundamental right, the standard of review should be the minimal test. *Id.* at 460-61.

<sup>85</sup> *Id.* at 461.

<sup>86</sup> *Id.* at 462.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

court went on to specify exactly what demographic would suffer at the hands of this inequality: children, the very group the state claimed it was trying to protect.<sup>90</sup> The court stated:

Children raised in families headed by a same-sex couple deserve and benefit from bilateral parenting within long-term, committed relationships just as much as children with married parents. Thus, children in same-sex families could benefit from the stability offered by same-sex marriage, particularly if such children do not have ties with both biological parents. But although the line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some *inequity for children raised by same-sex couples*, such inequity is insufficient to negate the State's link between opposite-sex marriage, procreation, and child-rearing.<sup>91</sup>

The Arizona Court of Appeals may be right in its final analysis.<sup>92</sup> However, this admitted inequality raises a unique question. Specifically, if the marriage laws of a state do in fact treat children differently based on the nature of their family unit, might such disadvantaged children have a cause of action in opposition to anti-gay marriage legislation?<sup>93</sup>

### III. THE STANDARD OF REVIEW FOR A CAUSE OF ACTION BASED ON ILLEGITIMACY

As suggested, it is conceivable that a child of gay parents may attempt an equal protection attack on anti-gay

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<sup>90</sup> *Id.* at 463.

<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> While it is not addressed directly, the court appears to be correct that unequal treatment of a group that is not a party to the action cannot save the plaintiff's claim if the court does indeed believe that promoting heterosexual unions is a legitimate government purpose. The children simply have no standing to seek redress for the admitted harm. Therefore, if the children are not a party to the action, the fact that they suffer unequal treatment under the law does little to bolster the plaintiff-couple's claim of disparate treatment.

<sup>93</sup> The Court of Appeals in Indiana offered a novel explanation for its own adoption of this inequitable scheme in *Morrison v. Sadler*. 821 N.E.2d 15, 24 (Ind. Ct. App. 2005). There, the court reasoned that because same-sex couples must become parents by virtue of costly adoptions or artificial reproductive means, the children of such gay parents are, by necessity, being brought into families with a monetary and emotional commitment to having a child, ensuring some measure of stability. On the other hand, because opposite-sex couples may inadvertently become pregnant, the Legislature has an interest in inducing such accidental parents into a marriage relationship that will provide greater security for the child. *See id.*

While this argument is admittedly clever, it does not deny the unequal protection under the law faced by the children of gay parents, discussed *infra* Parts III-IV. Rather, the Indiana court has merely provided a fascinating justification for the inequality.

marriage laws.<sup>94</sup> This section will explore one possible avenue for bringing such a claim: inequitable treatment based on illegitimacy. If such an attack were mounted, it would be desirable to argue that anti-gay marriage laws discriminate against the children of gay parents on the basis of illegitimacy because such claims carry an established heightened standard of review, namely, intermediate review.<sup>95</sup>

The Supreme Court “consistently has invalidated laws that deny a benefit to all nonmarital children that is accorded to all marital children.”<sup>96</sup> It has also been noted that, as the Court in *Weber v. Aetna Casualty & Surety Co.* stated, “[N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.”<sup>97</sup> It is therefore clear that federal jurisprudence frowns upon laws that draw distinctions between legitimate and illegitimate children.<sup>98</sup> But what about a law, like the traditional marriage code, that provides unequal access to the right to be considered “legitimate” at birth? Whether the traditional man-woman marriage code violates equal protection by denying the children of same-sex couples the opportunity to be considered the legitimate child of both same-sex parents at birth is a difficult question. A look at the traditional application of the intermediate standard of review in illegitimacy cases provides some insight.

In 1988, the Supreme Court heard the case of *Clark v. Jeter*, a case that concerned a Pennsylvania statute that required paternity suits to be brought within six years of the birth of an illegitimate child.<sup>99</sup> In holding that the statute violated the Equal Protection Clause of the Federal Constitution, the Court explicitly applied the intermediate

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<sup>94</sup> It is likely that any such suit would be brought on behalf of the child by the parent. A general Equal Protection claim could be brought by the unmarried parents at any time; however, arguing unequal application of presumed legitimacy would be notably difficult, as the child would not be able to bring suit until after birth, at which point the presumption of legitimacy from birth will have become moot. However, this situation is similar to other cases in that it involves a claim that it is capable of repetition, but evading review. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1919). For the purpose of conjecturing about the possibility of such a claim, this Note will simply presume that standing to bring the lawsuit may be established under this standard.

<sup>95</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>96</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.6, at 749 (2d ed. 2002); *see, e.g., Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

<sup>97</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

<sup>98</sup> *See, e.g., Clark*, 486 U.S. 456.

<sup>99</sup> *Id.*

standard of review, which requires a substantial relation between the challenged legislation and an important government objective in order to withstand scrutiny.<sup>100</sup> The Court's consideration of that link notably contemplated the financial concerns related to child rearing. The Court wrote:

[I]t is questionable whether Pennsylvania's 6-year period is reasonable . . . since such a mother [with an illegitimate child] might realize only belatedly a loss of income attributable to the need to care for the child; and since financial difficulties are likely to increase as the child matures and incurs additional expenses.<sup>101</sup>

Evidently, optimizing the financial security of children is one consideration to be made when applying intermediate scrutiny in the illegitimacy context. This concern surely applies to a child of same-sex parents who, in the absence of legitimization under the marriage laws of the state, has only one parent legally obligated to support her in the event her same-sex parents should separate.<sup>102</sup>

Furthermore, the Court has given illegitimacy a heightened standard of review because children born illegitimately cannot change their status after birth.<sup>103</sup> So what of children born to gay or lesbian parents who desire to be married but are prevented by law? The children born into these relationships are essentially conferred the status of "illegitimate" as a function of law.<sup>104</sup> To be sure, an argument could be made that because jurisprudence condemns differentiating between legitimate and illegitimate children, there is little worry that children forced into an illegitimate birth by anti-gay marriage laws will suffer ill effects. However, it is equally plausible that the courts, relying on case law forbidding unfair disadvantages for illegitimate children,<sup>105</sup> would look with similar disfavor upon laws that create, by

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<sup>100</sup> *Id.* at 461.

<sup>101</sup> *Id.* at 456-57.

<sup>102</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2004); see also Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Partners*, 49 VILL. L. REV. 363, 366 (2004) (discussing the problems of custody and visitation of children when a same-sex partnership dissolves).

<sup>103</sup> See CHEMERINSKY, *supra* note 96, at 748.

<sup>104</sup> It is not entirely clear whether children born to married lesbians would be considered "legitimate" by definition, but it is clear that such children have no chance to be legitimized if the parents are barred from marrying. See *infra* Part IV for further discussion of whether a child born to gay parents could ever be considered "legitimate."

<sup>105</sup> See generally *Levy v. Louisiana*, 391 U.S. 68 (1968); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1972).

virtue of exclusion, this very distinction between similarly situated children.<sup>106</sup> For example, when a man and woman are married and the woman conceives via artificial insemination from a sperm donor, although the child will not be the biological child of the husband, there will still be a presumption of legitimacy that flows through the marriage to that child.<sup>107</sup> However, for a lesbian couple, if one of the partners is artificially inseminated by a donor, there will be no presumption that the non-birth-giving woman is the legitimate parent of the child.<sup>108</sup>

The idea of two women sharing the status of legitimate parent is not entirely foreign to the law. A California case, *Johnson v. Calvert*,<sup>109</sup> opened the door to such a legal possibility. In *Johnson*, the court found two women to be the legal mothers of the same child, without the requirement of adoption proceedings.<sup>110</sup> A woman provided her egg to be implanted in a surrogate.<sup>111</sup> After relations between the biological mother and the surrogate deteriorated, litigation was initiated to determine who had a legal right to the child.<sup>112</sup> The court determined that California law allowed for motherhood to be established either by a showing of genetic relationship or through proof of actual childbirth.<sup>113</sup> Ultimately, the court determined that the woman who had donated her egg was the mother entitled to the child, based primarily on the weight of the parties' intent.<sup>114</sup>

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<sup>106</sup> For an overall examination of legitimacy as it pertains to gay marriage, see generally Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373 (2007).

<sup>107</sup> See, e.g., 46 N.Y. JUR. 2D, *Domestic Relations* § 843 ("There is a presumption that a child born in wedlock, that is, while the mother was united to a husband in marriage, including a valid common-law marriage, is legitimate.").

<sup>108</sup> While it may seem controversial that two women can be the legitimate parents of the same child, such a statement would not contradict the plain meaning of the word. "Legitimate" is defined as "conceived or born of parents legally married" or more generally as "sanctioned by law or custom." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1035 (2d ed. 1983). In other words, legitimacy is that which the law makes legitimate.

<sup>109</sup> 851 P.2d 776 (1993).

<sup>110</sup> *Id.* at 781.

<sup>111</sup> *Id.* at 778.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 781.

<sup>114</sup> *Id.* at 782; see also ELLMAN ET AL., FAMILY LAW: CASES, TEXTS, PROBLEMS 1055 (4th ed. 2004).

The result in *Johnson* led two lesbian partners to test the limits of the ruling's application.<sup>115</sup> One of the female partners provided the egg, while the other carried and gave birth to the child; their legal intent was that both be considered the mothers of the child, and accordingly a California judge "issued a pre-birth decree recognizing both women as the child's legal mothers."<sup>116</sup> While this conclusion is likely unique to the California jurisdiction, it does lend credence to the theory that two women, as partners, can legally be the legitimate parents of a single child.<sup>117</sup> So how might a child of gay parents bring an action claiming that this denial of the presumption of legitimacy violates equal protection?

#### IV. THE HYPOTHETICAL CHALLENGE

Operating under these newly arrived at assumptions—that two women can legally be the legitimate parents of a child at birth and that denying such a child this presumption of legitimacy may give rise to an intermediate standard of judicial review—this section will now consider the substance of an Equal Protection challenge brought on behalf a child.

##### A. *Background*

As a foundational matter, it is important to recognize the realities of gay parenting in the United States today. According to a U.S. census report published in February of 2003, approximately twenty-two percent of cohabitating male partners are raising a child under the age of eighteen, while

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<sup>115</sup> The lesbian couple in question was Linda McAllister and Leslee Subak. For further description of the couple, their son Max, and their case in general, see Osborne, *supra* note 102, at 371 n.57. As of late 2004, McAllister and Subak continued to live happily together, raising their son Max, who appears to live the normal life of a five-year-old, despite having the distinction of being the first child with two mothers legally conferred the title of "mom" as a result of a pre-birth decree. See Tomas Van Houtryve, *The Gayby Boomers*, THE INDEPENDENT, Nov. 7, 2004, available at [http://www.findarticles.com/p/articles/mi\\_qn4159/is\\_20041107/ai\\_n12761783](http://www.findarticles.com/p/articles/mi_qn4159/is_20041107/ai_n12761783) ("Leslee and Linda tell me that the pre-school [Max] attend[s] has many other children from same-sex parents. The youngsters can relate to their playmates and fit in easily.").

<sup>116</sup> ELLMAN ET AL., *supra* note 114, at 1055 (citing Carol Ness, *Lesbian Moms Gain Rights*, S.F. EXAMINER, May 2, 1999, at A1).

<sup>117</sup> Note that while much of the discussion that follows operates under the hypothetical of two lesbian women having a child who brings an Equal Protection suit, if gay marriage were extended to lesbian women as a result of such a suit, the government would be virtually required to grant homosexual marriage rights to men based on typical gender-based Equal Protection grounds completely apart from the considerations of children put forth herein.

approximately thirty-three percent of cohabitating female partners are raising a minor child.<sup>118</sup> These percentages hold true regardless of the geographic region of the country.<sup>119</sup> For example, “[t]he South had the highest percentage [of lesbian partners] with [their] own [child] under 18 years of age (34%), while the Northeast had the lowest (31%).”<sup>120</sup> In fact, one commentator concluded the census data indicated same-sex couples were living in 96% of the counties in the United States.<sup>121</sup> If one in four of those couples are raising children, as indicated by the census, it is reasonable to assume that virtually every county in the United States is home to one or more sets of homosexual parents.<sup>122</sup>

Furthermore, despite the discontent of certain groups,<sup>123</sup> the vast majority of states allow children to be adopted by same-sex couples.<sup>124</sup> Only one state, Florida, forbids gay parents from adopting,<sup>125</sup> making it fair to say that standard practice around the country is to allow gay parents to raise children. Moreover, the right to procreate has long been established as a fundamental right that no governmental action is allowed to contravene.<sup>126</sup> With these facts not in question, it is fair to draw three conclusions. First, because the right to procreate has been deemed a fundamental right, homosexual parents have an undisputed right to give birth via artificial insemination or otherwise.<sup>127</sup> Second, homosexual parents cannot be denied adoption rights simply because of their sexual orientation.<sup>128</sup>

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<sup>118</sup> See TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, CENSR-5, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, 9 (2003).

<sup>119</sup> *Id.* The census figures subdivide the country into four regions: Northeast, Midwest, South, and West. The figures for each of the four regions are within two percentage points of the national average. *Id.*

<sup>120</sup> *Id.* at 10.

<sup>121</sup> See Michael Wilke, *Research Booms on Same-Sex Couples*, THE GULLY, May 28, 2004, [http://www.thegully.com/essays/gay\\_mundo2/wilke/040528\\_gay\\_US\\_census.html](http://www.thegully.com/essays/gay_mundo2/wilke/040528_gay_US_census.html) (citing GARY GATES ET AL., THE GAY & LESBIAN ATLAS (2004)) (last visited Oct. 5, 2007).

<sup>122</sup> *Id.*; see also SIMMONS & O’CONNELL, *supra* note 118, at 9.

<sup>123</sup> See, e.g., Lucy Ward, *Anger at “Cheap Gimmick” of Anti-Gay Adoption Card*, THE GUARDIAN, Oct. 16, 2002, available at <http://society.guardian.co.uk/adoption/story/0,,812594,00.html> (describing novelty donor-style cards released by a Christian group which read, “In the event of my death I do not want my children to be adopted by homosexuals”).

<sup>124</sup> The only state with an explicit ban on homosexual adoption is Florida. See FLA. STAT. ANN. § 63.042(3) (2003); see also Osbourne, *supra* note 102, at 368.

<sup>125</sup> See *supra* note 124.

<sup>126</sup> See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>127</sup> See *id.*

<sup>128</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (2007).

And third, homosexual parents exist in considerable numbers and are raising children in the United States today.<sup>129</sup>

*B. New York as a Model*

The laws and demographics of New York State fall completely in line with the foregoing principles. New York adoption regulations specifically state, “Applicants shall not be rejected solely on the basis of homosexuality.”<sup>130</sup> The term “family” has even been defined by the New York court for the purpose of rent control statutes; the judiciary has stated “the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.”<sup>131</sup> Rather, the court held as a matter of policy that the law’s protection should focus on the “reality of family life.”<sup>132</sup> The court used this definition to hold that a deceased man’s homosexual partner had the right to assert a familial relationship to the decedent for the purpose of avoiding eviction when his partner, the lease holder, had passed away.<sup>133</sup> In light of this precedent, there can be little doubt that New York courts recognize, if not encourage (particularly in the state adoption laws), the existence of homosexual family units raising children.<sup>134</sup>

However, the New York court, in *Hernandez v. Robles*, ruled that gay marriage may be barred by statute in part because “[t]he Legislature could rationally believe that it is better . . . for children to grow up with both a mother and a father.”<sup>135</sup> But based on the adoption laws of the state, it does not appear that the legislature actually believes that opposite-sex couples are necessarily better equipped to raise children.<sup>136</sup> Rather, what the law of New York clearly evinces is that the “best interests” of children should be protected.<sup>137</sup>

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<sup>129</sup> See SIMMONS & O’CONNELL, *supra* note 118, at 9.

<sup>130</sup> N.Y. COMP. CODES R. & REGS. tit. 18 § 421.16(h)(2) (2007).

<sup>131</sup> *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y.1989).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 53-54.

<sup>134</sup> See, e.g., *In re Jacob, An Infant*, 660 N.E.2d 397, 401 (N.Y. 1995) (holding that the purpose of the adoption law is to “encourag[e] the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them”); see also N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (2007).

<sup>135</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

<sup>136</sup> See N.Y. COMP. CODES R. & REGS. tit. 18 § 421.16(h)(2) (2007).

<sup>137</sup> *Id.*

In *In re Adoption of Evan*, for example, a woman's lesbian partner was allowed to adopt her biological son because the court viewed the adoption as "in Evan's best interest."<sup>138</sup> Evan's best interests were served in that case because allowing said lesbian partner to adopt

would serve only to provide him with important legal rights which he does not presently possess. It would afford him additional economic security because [his mother's partner] would become legally obligated to support him. He would also be entitled to inherit from [his mother's partner] and her family under the law of intestate succession and be eligible for social security benefits in the event of her disability or death. Of immediate practical import, he would be able to participate in the medical and educational benefits provided by her employment, which are more generous than those possessed by [his biological mother].<sup>139</sup>

The court found it clear that the financial and emotional benefits of a two-parent household were in the best interest of a child;<sup>140</sup> what is not entirely clear is whether gay marriage would confer those benefits as of right, circumnavigating the need for costly adoptions.<sup>141</sup>

### 1. Determining the Standard

Suppose that a child born to gay parents, seeking the full financial benefits of a two-parent household already recognized by the New York courts, challenges the law that barred her parents from marrying before her birth, thereby precluding her from the benefits of presumed legitimacy. As discussed, her best claim would be that the law unreasonably violated her equal protection rights by discriminating based on illegitimacy.<sup>142</sup> Once the equal protection claim is brought, discrimination based on illegitimacy would need to be shown in order to establish the application of intermediate scrutiny attendant to illegitimacy claims.<sup>143</sup> The need to avoid costly cross-adoption proceedings is a powerful argument showing the unequal application of the law. Currently, once a child is born

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<sup>138</sup> *In re Adoption of a Child Whose First Name Is Evan*, 583 N.Y.S.2d 997, 999 (1992).

<sup>139</sup> *Id.* at 998-99 (citations omitted).

<sup>140</sup> *Id.*

<sup>141</sup> See Kelley, *supra* note 2, at B1 (questioning how the New Jersey court's decision will affect one lesbian partner's ability to adopt, without financial cost, a child being carried by the other partner).

<sup>142</sup> See *supra* Part III.

<sup>143</sup> See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

to gay parents (particularly lesbian partners), the non-birth-giving partner can legally adopt in order to provide the child with all the rights attendant to a natural parent.<sup>144</sup> However, this process can be long and expensive and may create a deterrent or, in many cases, a complete financial barrier.<sup>145</sup> The children of heterosexual couples face no such barriers to receiving the full financial support of their parents; the heterosexual couple need only marry before the birth of the child, and there is a legal presumption that the child is legitimate.<sup>146</sup>

This disparate treatment of unborn children, based solely on their parents' access to the benefits of the marriage law, is ripe to be contested on Equal Protection grounds. Section 24 of the New York Domestic Relations Law states very generally:

A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.<sup>147</sup>

There is no gender-specific language in the statute.<sup>148</sup> By the plain language of the law, if gay marriage were legal in New York, and two women legally married, if one of the women gave birth to a child, the presumption of the law would be that both women were the natural, legitimate parents of the child.<sup>149</sup> As the *Lewis* court in New Jersey suggested, this type of presumed legitimacy would provide a child of gay parents with a variety of rights (for example, survivor rights under Worker's Compensation) that would flow not only through the birth-

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<sup>144</sup> See, e.g., *In Re Adoption of a Child Whose First Name Is Evan*, 583 N.Y.S.2d 997, 1000 (1992).

<sup>145</sup> See, e.g., *Osborne*, *supra* note 102, at 372 n.59 ("A second-parent adoption can cost from \$2,500 to \$3,000.").

<sup>146</sup> N.Y. DOM. REL. L. § 24(1) (McKinney 1999).

<sup>147</sup> *Id.*

<sup>148</sup> The gender-specific noun terms employed in marriage codes (i.e., consanguinity provisions) are often crippling to gay couples claims of a right to marry. *E.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006). Even Massachusetts denied relief under the plain language of the marriage laws. *Goodridge v. Dep't of Mental Health*, 798 N.E.2d 941, 953 (Mass. 2003).

<sup>149</sup> See discussion of *Johnson v. Calvert*, *supra* Part III; see also comments regarding the definition of "legitimate" *supra* note 108.

giving parent, but through both parents had they been legally married.<sup>150</sup>

With the discriminatory access to presumed legitimacy made clear and the potential remedy established (that is, gay marriage), the final hurdle to proving an equal protection violation would be the language of the state constitution. The New York Constitution's equal protection clause is simple and concise in its wording: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."<sup>151</sup> The New York court held in *Hernandez* that gay marriage could be outlawed because restricting which couples could marry aided policies born out of "the undisputed assumption that marriage is important to the welfare of children."<sup>152</sup> The inference to be drawn is that the marriage code is primarily meant to protect children. However, if the law is designed to protect children, it must do so equally under New York's equal protection clause.<sup>153</sup> Therefore, a child (or the parents on that child's behalf) could presumably challenge the unequal application of the marriage laws, claiming the law creates inequitable distinctions based on legitimacy. This argument, if successful, would warrant review of the marriage law under intermediate scrutiny,<sup>154</sup> circumnavigating the *Hernandez* court's reluctance to apply intermediate scrutiny based on gender inequality.<sup>155</sup>

The central question before the court in such a challenge would be whether the marriage law discriminates on the basis of legitimacy. A differentiation is made between children born into wedlock and those born outside of wedlock: namely, those born into wedlock are presumed to be the

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<sup>150</sup> *Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) ("We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Workers' Compensation Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, tuition assistance when the children of married parents receive such assistance. There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households.").

<sup>151</sup> N.Y. CONST. art. 1, § 11.

<sup>152</sup> *Hernandez*, 855 N.E.2d at 7.

<sup>153</sup> N.Y. CONST. art. 1, § 11.

<sup>154</sup> *See supra* Part III.

<sup>155</sup> *Hernandez*, 855 N.E.2d at 10.

natural children of the couple.<sup>156</sup> This presumption then immediately engenders the right of the child to draw certain responsibilities from those parents. Therefore, the flow of the rights to the child is transitive: if marriage, then legitimacy; if legitimacy, then rights. Without marriage rights for the parents, a child cannot derive benefits from a non-birth-giving partner without a long and costly adoption process. This burdens the child in a way that a child legitimized by married parents is not. While the marriage statute does not discriminate on the basis of legitimacy directly, by determining that marital children get one benefit and nonmarital children another, it forcibly classifies certain children into the category of illegitimate when the law prohibits those children's parents from marrying each other.<sup>157</sup> The marriage law, more than drawing distinctions between legitimate and illegitimate children, creates these distinctions of illegitimacy that would not otherwise exist. These distinctions carry with them what the Supreme Court called a "condemnation on the head of an infant [that] is illogical and unjust."<sup>158</sup> While this type of law-created illegitimacy has never been considered by any court, the inescapable deprivation of rights faced by the children of gay parents is contrary to the policies looked to previously by the Supreme Court in ruling that questions of legitimacy deserved intermediate scrutiny.<sup>159</sup> For this reason, coupled with New York's history of supporting unique family structures,<sup>160</sup> a court might rule that a child's equal protection claim warrants intermediate review.

## 2. Applying the Standard

If a New York court applied the intermediate standard of review to a challenge of the law on illegitimacy grounds, any law barring gay marriage would have to be proven substantially related to an important government objective.<sup>161</sup>

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<sup>156</sup> N.Y. DOM. REL. L. § 24(1) (1969).

<sup>157</sup> It is a standard evidentiary principle that "[t]here is a presumption that a child born in wedlock, that is, while the mother was united with a husband in marriage . . . is legitimate." 46 N.Y. JUR. 2D, *Domestic Relations* § 843. Therefore, the opposite must be true—a child born to unwed parents is presumed illegitimate.

<sup>158</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

<sup>159</sup> See *supra* Part III.

<sup>160</sup> See N.Y. COMP. CODES R. & REGS. tit. 18 § 421.16(h)(2) (2007); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989).

<sup>161</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

The Court of Appeals' analysis in *Hernandez* would thereby recoil upon itself. In *Hernandez*, the court enumerated two important government objectives believed to be at the core of the marriage law's distinction between homosexual and heterosexual couples: promotion of procreation and promotion of dual sex parenting.<sup>162</sup>

Despite the first proffered motive, the promotion of childbirth may be undermined by forbidding gay marriage. Because lesbian couples without the benefit of marriage do not enjoy the advantages of presumed dual parentage, these couples might decide to forego plans to conceive using alternative reproductive measures. Deterring homosexuals from conceiving children might achieve the desired result of promoting dual sex parenting, but such an effort ignores the reality of the same-sex parenting already in place in the United States.<sup>163</sup> Simply because the legislature may want to increase the number of children being raised by both a mother and a father, it cannot wash away the inherent federal constitutional right of homosexual Americans to procreate.<sup>164</sup> The state cannot pursue its objective in opposition to rights guaranteed at the federal level.<sup>165</sup> Homosexual women in this country can, and will, continue to have children, meaning that children will in fact be raised by same-sex parents. The state would essentially have to claim that treating similarly situated children differently is substantially related to discouraging Americans from exercising their fundamental right to procreate. It seems unlikely that any court would hold that state equal protection rights can be legislated around in order to deter people from exercising a fundamental right protected by the Federal Due Process Clause.<sup>166</sup> Therefore, if held to the intermediate standard of review, it appears plausible that a child's equal protection claim could invalidate anti-gay marriage legislation, if the government cannot offer more important objectives than those relied upon in *Hernandez*.

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<sup>162</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

<sup>163</sup> See *supra* notes 118-121.

<sup>164</sup> See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>165</sup> U.S. CONST. art. VI § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>166</sup> See *Skinner*, 316 U.S. at 541.

C. *The Benefit of a Child's Equal Protection Challenge—  
Reframing the Social Debate*

An equal protection challenge brought by a child might also be successful for non-legal reasons. Specifically, a child's argument that she deserves an equal opportunity to be legitimized by her gay parents, in the same way her peers born to married heterosexual parents are already legitimized, could create a shift in the social and moral framework of the gay marriage debate.

To date, the debate over gay marriage in the public square has been largely cantankerous. The opponents of gay marriage unabashedly proclaim "that marriage is between a man and a woman, as God and nature intended."<sup>167</sup> These anti-gay marriage advocates often cite religious and moral convictions for the basis of their firmly held beliefs.<sup>168</sup> On the other side, advocates of gay marriage, often feeling personally attacked, resort to oversimplified name calling, for example, calling anti-gay marriage advocates "homophobic bigots" (especially common in the internet "blogosphere").<sup>169</sup> Too often there seems to be little common ground to be found.

However, one would be hard pressed to find an individual who does not want all children to receive adequate care. In the United States there is an increasing incidence of children being raised in single-family homes as well as a corresponding incidence of increased divorce.<sup>170</sup> And while there are those who undoubtedly disapprove of homosexual couples raising children,<sup>171</sup> it is an unalterable reality that gay couples are raising children<sup>172</sup> and that all Americans have a right to procreate if they so chose.<sup>173</sup> So the new question, in a debate over children's equal protection rights, would be "How can the

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<sup>167</sup> Pat Buchanan, *Time for a New Boston Tea Party*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 85, 85 (Robert M. Baird & Stuart E. Rosenbaum eds., 2d ed. 2004).

<sup>168</sup> See, e.g., PETER SPRIGG, OUTRAGE: HOW GAY ACTIVISTS AND LIBERAL JUDGES ARE TRASHING DEMOCRACY TO REDEFINE MARRIAGE 112-17 (2004).

<sup>169</sup> See, e.g., Posting of Pam Spaulding to Pampaulding.com, [http://www.pampaulding.com/weblog/2004\\_11\\_01\\_pampaulding\\_archive.html](http://www.pampaulding.com/weblog/2004_11_01_pampaulding_archive.html) (last visited Oct. 18, 2007) (on file with author) (disparaging conservative stalwart Phil Burrell for his support of Ohio's gay marriage ban).

<sup>170</sup> NAT'L RESEARCH COUNCIL, WHO CARES FOR AMERICA'S CHILDREN? 22 (Cheryl D. Hayes et al. eds., 1990).

<sup>171</sup> See *supra* note 123 and accompanying text.

<sup>172</sup> See *supra* Part IV.A.

<sup>173</sup> See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

state best accommodate the needs of children raised by gay parents who deserve the benefits of legitimacy and dual parentage?” One unmistakable way to give children those benefits is by allowing their parents to marry.<sup>174</sup> By framing the debate in these terms, the focus shifts to the rights of children with whom no one can possibly find moral fault. If the debate were to move in this new direction and gain traction, this non-legal concept, together with the unique legal posturing of the proposed equal protection claim, could forever change the gay marriage debate on both the state and federal levels.

#### V. POTENTIAL FEDERAL IMPLICATIONS OF A CHILD’S EQUAL PROTECTION CHALLENGE

If a state like New York were to entertain both the aforementioned policy goals and the premise of invalidating its gay marriage ban based on Equal Protection claims raised by the children of homosexual couples, it would undoubtedly open a new wave of speculation regarding gay marriage and the Federal Constitution. To date, at least twenty-six states have added amendments to their state constitutions which serve to effectively preclude gay marriage.<sup>175</sup> In addition, the Federal Defense of Marriage Act gives each state the right to refuse to recognize marriages sanctioned by other states.<sup>176</sup> Regardless,

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<sup>174</sup> See *supra* Part IV.B.

<sup>175</sup> For a detailed state-by-state list, including voting results, of all anti-gay marriage amendments enacted through 2004, see Baker, *supra* note 74, at 239-42.

Additionally, seven states passed amendments in the most recent midterm election on November 7, 2006. See Will Sullivan, *Voters Ban Gay Marriage, Back Minimum Wage*, U.S. NEWS AND WORLD REPORTS, available at <http://www.usnews.com/usnews/news/articles/061108/8ballot.htm> (last visited Oct. 14, 2007). For a complete, though unofficial, breakdown of the status of gay marriage in all fifty U.S. states, see Same-Sex Marriage Status in the United States by Statute, [http://en.wikipedia.org/wiki/List\\_of\\_state\\_laws\\_on\\_same-sex\\_unions](http://en.wikipedia.org/wiki/List_of_state_laws_on_same-sex_unions) (last visited Oct. 14, 2007).

In addition to state constitutional amendments, some have proposed an amendment to the Federal Constitution that would define marriage as only occurring between one man and one woman. See Christopher Wolfe, *Why the Federal Marriage Amendment Is Necessary*, 42 SAN DIEGO L. REV. 895, 895 (2005). However, even the amendment’s proponents do not believe its passage is likely, if only because amending the Constitution is such an arduous a task. *Id.*

<sup>176</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C). Its two separate statutory provisions follow:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word

under the Supremacy Clause, no state constitution may offend the Federal Constitution.<sup>177</sup> Therefore, if a state like New York adopted the view that a ban on gay marriage violated equal protection by drawing distinctions based on the forced illegitimacy of the children born to gay couples, it would be inevitable that a similar claim would be brought in federal court in an attempt to convince the Supreme Court to adopt this view as well. If successful, a single lawsuit could force every state constitutional amendment banning gay marriage to be reviewed under intermediate scrutiny and possibly eradicate them all.

However, because not all anti-gay marriage amendments are worded identically, the effects of a child's successful Equal Protection claim would be felt differently state by state. To understand this differentiation it is necessary to classify the various state amendments and analyze each permutation accordingly. In his article, "Status, Substance, and Structure," Joshua Baker considered each of the state marriage amendments in place as of 2005.<sup>178</sup> The framework he proposes classifies them into three distinct types: status amendments, substance amendments, and structure amendments.<sup>179</sup> Each type of amendment would likely have its own unique strengths and weaknesses when held to the test of intermediate scrutiny. Therefore, each of these three types of amendments will be addressed in turn.

To begin, the so-called substance amendments have been adopted by at least ten states.<sup>180</sup> The typical text of a substance amendment reads: "Marriage in this state consists

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"spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2000).

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2000).

<sup>177</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 633 (1996) (striking down on equal protection grounds Colorado's constitutional amendment prohibiting state legislation enacted to protect homosexuals from discrimination); see also U.S. CONST. art. VI, § 2.

<sup>178</sup> See Baker, *supra* note 74, at 223-37.

<sup>179</sup> *Id.* at 222.

<sup>180</sup> Arkansas, Georgia, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, and Utah. *Id.* at 240-42.

only of the union between a man and a woman. No other relationship shall be recognized as a marriage by this state or its political subdivisions, or given a substantially equivalent legal status.”<sup>181</sup> These amendments are particularly troubling in the context of an equal protection challenge made by a child. The language precluding the possibility of an “equivalent legal status” is destructive because it leaves no opening for any of the rights associated with marriage, including the presumption of legitimacy, to become attached to a homosexual relationship. The complete barring of equivalent status leaves these amendments open to possible federal repeal if challenged by a child bringing a claim under the Equal Protection Clause of the Federal Constitution.<sup>182</sup>

The other two types of amendments are similar to each other and, due to more benign wording, would presumably stand a better chance of surviving the Equal Protection challenge proposed herein. So-called status amendments typically read, “Only marriage between a man and a woman is valid or recognized in this state.”<sup>183</sup> Meanwhile, Hawaii’s amendment, the only so-called structural amendment, simply vests the power to define marriage exclusively with the legislature.<sup>184</sup> These two amendment forms, while furthering the governmental interest in protecting traditional marriage, still leave open the possibility that a child of gay parents could be legitimized by some legislative action other than conferral of full marriage rights.<sup>185</sup> These types of amendments stand a better chance than the substance amendments of surviving a successful Equal Protection claim brought by a child of gay parents.<sup>186</sup> However, allowing gay parents to legitimize children born during their partnership would clearly necessitate the creation of some form of status equivalent to marriage for

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<sup>181</sup> *Id.* at 239.

<sup>182</sup> “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

The Equal Protection Clause is reverse incorporated against the federal government under the Due Process Clause of the Federal Constitution. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>183</sup> *Baker*, *supra* note 74, at 239.

<sup>184</sup> HAW. CONST. art. 1, § 23.

<sup>185</sup> *See infra* note 193 and accompanying text (noting some possible remedies, short of full gay marriage rights, that may help rectify the disparate treatment faced by children raised in households with same-sex parents).

<sup>186</sup> For this reason, opponents of gay marriage should take note that the more malleable status and structure amendments may be preferable in the future due to their ability to weather various types of constitutional challenges.

homosexual relationships. Since this may not happen in any particular state, a court might find that the potential harm to the illegitimate children of gay parents is disproportionate to the government's interest enshrined in these amendments. If a child could successfully bring an Equal Protection claim invalidating a state anti-gay marriage law, all these constitutional amendments, including the substance and structure amendments, may be susceptible to judicial repeal.

## VI. CONCLUSION

The gay marriage debate shows no signs of fading from the public consciousness.<sup>187</sup> The bulk of the case law on this issue has been brought by gay couples on their own behalf with varying success<sup>188</sup> and with a considerable amount of backlash.<sup>189</sup> Today there is no shortage of industrious lawyers advocating on behalf of homosexual couples across the country.<sup>190</sup> And with courts continuing to focus on the nexus between marriage and childrearing,<sup>191</sup> it seems likely that some lawyer seeking a unique challenge will try her hand at arguing a claim similar to the one described herein.<sup>192</sup> For these reasons, a claim to invalidate anti-gay marriage laws and amendments brought by a child of gay parents seems inevitable.

For proponents of gay marriage, the most logical approach will be to attempt to cloak the question in the clothes of legitimacy in order to take advantage of intermediate scrutiny review. For opponents of gay marriage, this approach will raise new concerns. There are other potential ways to confer legitimacy on children without the need for marriage, for example, through pre-birth decrees and the little-known

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<sup>187</sup> See, e.g., KGO-TV/DT, abc7news.com, Gay Marriage Cases Moving to State Supreme Court (Nov. 7, 2006), <http://abclocal.go.com/kgo/story?section=news&id=4738006> (noting that the California Supreme Court is preparing to hear its own round of challenges to domestic partnerships).

<sup>188</sup> See *supra* Part II.

<sup>189</sup> See generally Ball, *supra* note 75; Baker, *supra* note 74.

<sup>190</sup> See, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 946-7 (Mass. 2003) (naming approximately fifty attorneys who worked to complete over twenty-five briefs for submission to the Massachusetts Supreme Court in reference to the Goodridge case alone).

<sup>191</sup> See *supra* Part II.

<sup>192</sup> See *supra* Part IV.

doctrine of parent by estoppel.<sup>193</sup> These obscure techniques for bestowing expanded parent-to-child rights could be used more frequently and codified into law to lessen the harm caused to the children of gay parents born without the presumption of legitimacy. However, social conservatives at odds with gay marriage may find themselves uneasy about facilitating gay parentage by eliminating cross-adoption costs in the interest of establishing dual parentage for the children of gay couples.<sup>194</sup> Moreover, full marriage rights for gay parents seem to be the most direct way to ensure the full flow of marital benefits to the thousands of children being raised in gay households.

If a child brings the Equal Protection claims described herein, it is likely that the new battleground of the gay marriage war will be over the amendment of state laws concerning the presumption of legitimacy and the narrow tailoring of all gay marriage-related constitutional amendments and legislation.<sup>195</sup> Such a challenge would also likely reopen the debate over a federal constitutional amendment.<sup>196</sup>

In the meantime, for the sake of the children, both sides of the debate should be prepared to do whatever is necessary to provide what is best for all children, regardless of who their parents are. Gay marriage is not only about gay rights, but also family rights: the rights of parents to claim their children as

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<sup>193</sup> See Osbourne, *supra* note 102, at 371-89 (discussing various child custody options open to gay parents including pre-birth decrees and parent by estoppel). Parent by estoppel is a fascinating concept:

According to the ALI Principles, a parent by estoppel is one who, although not a biological or adoptive parent:

[L]ived with the child since the child's birth, holding out and accepting full and permanent responsibility as a parent, as part of a prior co-parenting agreement with the child's legal parent . . . to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or

[L]ived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent . . . , when the court finds that recognition of the individual as a parent is in the child's best interests.

Once a co-parent meets these circumstantial requirements of parent by estoppel, the co-parent has the rights and privileges of a legal parent, including standing to bring an action for custody.

*Id.* at 389.

<sup>194</sup> See *supra* Part IV.C (discussing the moral and religious objection to gay marriage).

<sup>195</sup> See *supra* Part V (noting the differences between status, substance, and structural amendments with regard to constitutional analysis).

<sup>196</sup> See *supra* notes 175-176.

their own and the rights of children to do the same with their parents. The gay marriage debate is already fourteen years old and counting, but the kids have yet to have their say.

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