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Tying the Braid of Second-Parent Adoptions—Where Due Process Meets Equal Protection

Cover Page Footnote

J.D. Candidate, 2006, Fordham Law School. I would like to thank Professor Tracy Higgins for her insight and guidance in the development of this Note.

NOTES

TYING THE BRAID OF SECOND-PARENT ADOPTIONS—WHERE DUE PROCESS MEETS EQUAL PROTECTION

*Christopher Colorado**

INTRODUCTION

Victoria and Laura, same-sex partners, both held legal, parental custody of each other's biological children, Maya and Tessa.¹ The parental relationships of Victoria and Laura had been made legitimate by a U.S. District Court for the District of Columbia.² When Victoria died in an automobile accident, Laura was automatically designated as the parent of Victoria's biological child Maya without court involvement.³ But consider an alternate ending where, subsequent to Victoria's death, Maya is not left with Laura and Tessa, but is removed from the home and designated as a ward of the state.⁴ Or, additionally, consider a hypothetical where Victoria leaves Laura after a long-term relationship and a mutual involvement with the children, only to take her child with her and not allow Laura any visitation rights. The striking contrast between these resolutions provides an illustration of the role of adoptions within same-sex relationships, and specifically within second-parent adoptions.⁵

The availability of these second-parent adoptions is not uniform throughout the United States, and approval of this mode of adoption is largely within the jurisdiction of the state legislature or court system.⁶ Family law is only decided on the federal level when state restrictions are in contravention of the Constitution.⁷ This Note addresses the proper seat of second-parent adoption at the constitutional table. Given the deference to

* J.D. Candidate 2006, Fordham Law School. I would like to thank Professor Tracy Higgins for her insight and guidance in the development of this Note.

1. See Nclrights.org, Adoption By Lesbian, Gay and Bisexual Parents: An Overview of Current Law 9, <http://nclrights.org/publications/pubs/adptn0204.pdf> (last visited Oct. 10, 2005) [hereinafter Overview].

2. *Id.*

3. *Id.*

4. See *id.* at 10.

5. For a definition of second-parent adoption, see *infra* text accompanying notes 56-57.

6. See *infra* Parts I.A-B.

7. See Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1880-81 (1995).

the states in the family law arena, there may be no room for second-parent adoptions. Generally, federal courts have left regulation of traditional adoptions to state courts and state law.⁸ However, it remains to be seen whether the second-parent adoption mechanism is more appropriately categorized with the constitutionally unprotected traditional adoptions or with those types of family relationships which have received constitutional protection, and are outside the sphere of state regulation.

To investigate the constitutional implications of second-parent adoptions, this Note will braid three different issues. This Note will explore how the U.S. Supreme Court has dealt with state restrictions on family units.⁹ This Note will also explore constitutional challenges which have involved both equal protection and due process considerations simultaneously.¹⁰ Finally, this Note will look at the conflicting treatment, and approval or disapproval, of the type of adoption known as second-parent adoption.¹¹

Part I addresses the statutory and constitutional foundations needed for an understanding of a claim of heightened constitutional protection for second-parent adoptions. Part II details certain, sometimes conflicting, approaches to areas of constitutional family law.

Part III makes the case that the liberty interest in second-parent adoption is more similar to that of the traditional, and constitutionally protected, family. As a further constitutional consideration, this Note will consider the right implicated in second-parent adoption cases—an equal protection consideration for the homosexual class—asserting that the intertwining of this equal protection interest with the important quasi-family interest buttresses a claim to constitutional respect for second-parent adoptions.

I. ADOPTIONS AND CONSTITUTIONAL CONSIDERATIONS

Part I.A provides a background of second-parent adoptions, juxtaposed with a brief description of the history of traditional adoption. This part also describes the development of the “best interest of the child” standard, by which courts and state agencies determine if a particular adoption should be allowed. Part I.B demonstrates contexts where the Supreme Court has invalidated restrictions related to state family law, exploring particular constitutional liberties related to the family. Part I.C introduces a second constitutional consideration, found in those cases where the Court has relied on or recognized the power of the co-presence of multiple constitutional interests, specifically those related to due process and equal protection.

8. *Id.* at 1789 (noting the U.S. Supreme Court’s fusion “around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority”); *cf., e.g.,* *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting reasoning which would allow Congress to regulate “family law (including marriage, divorce and child custody)”).

9. *See infra* Parts I.B.1-2, II.B.

10. *See infra* Part I.C.

11. *See infra* Part II.A.

A. Adoptions

Adoptions occurred in ancient periods as well as in colonial America. This section will touch on the development of adoption in the United States from the 1800s through 1930s, as well as an explanation of contemporary legal treatment of adoption by the states. This section will also detail the handling of an adoption-related claim on the Supreme Court level in *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*.¹² Finally, the section will explore the “second-parent” adoption variant in which the parent’s same-sex partner adopts the child.

1. Past to Present

Adoption originally began in order to preserve lineage by providing families with male heirs, and has been performed for thousands of years since the Egyptian, Babylonian, and Roman civilizations.¹³ In America, adoptions remain the province of state statutes, and are generally subject only to state regulation.¹⁴ The first American adoption frameworks were constructed in 1846 by Mississippi and 1851 by Massachusetts.¹⁵ The focus of early American adoptions tended to be the potential economic utility of the adopted children rather than “the emotional and sentimental enrichment” created by the addition of an adopted child to a family.¹⁶ However, by the 1930s the general temper towards adoption had shifted,

12. 431 U.S. 816 (1977).

13. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743, 743-44 (1956). In his article, *The Law of Adoption*, Leo Huard notes adoption references in the Hindu Laws of Manu, the writings of Cicero, the biblical account of Moses, as well as the Code of Hammurabi, which states, “If a man take a child in his name, adopt and rear him as a son, this grown up son may not be demanded back.” *Id.* at 744. Adoptions can be categorized into four distinct procedural forms: (i) adoption through public or private agency, (ii) adoption through the mother, (iii) adoption through an international agency, or (iv) a second-parent adoption. Hayden Curry et al., *A Legal Guide for Lesbian and Gay Couples* 3/21 (10th ed. 1999).

14. Joan Heifetz Höllinger, *Adoption Law and Practice* § 1.01[1], at 1-4 (2004) (“For the most part, adoption is the product of and subject to state laws and regulations, not federal ones Nonetheless, there is a growing body of federal statutory and constitutional law pertaining to adoptions.”); *see also infra* notes 251-54 and accompanying text.

15. *See* Huard, *supra* note 13, at 748 (citing Catherine N. McFarlane, *The Mississippi Law on Adoptions*, 10 Miss. L.J. 239, 240 (1938)); *see also* Walter Wadlington & Raymond C. O’Brien, *Family Law in Perspective* 198 (2001). It has been noted that “unlike most American laws” adoption “did not derive from English common law.” Lisa A. Fuller, Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended?*, 77 Cornell L. Rev. 1188, 1191 (1992). In fact, “[a]doption in the Roman sense of the term was not legally possible in England until the Adoption of Children Act of 1926.” Huard, *supra* note 13, at 746.

16. *See* Höllinger, *supra* note 14, § 1.03[7], at 1-44. The lack of concern for the adoptee follows the character of early Roman adoptions where “the primary purpose of adoption [was] the continuity of the adopter’s family—there [was] . . . no visible concern for the ‘best interests’ of the adoptee.” Huard, *supra* note 13, at 745.

and social workers began to frame adoption in terms of the benefits and positive emotional effect on the adopted children.¹⁷

This shift in concern from the family's benefit to the benefit to the child is manifested by the current standard governing approval of adoptions: "the best interest of the child" standard.¹⁸ This standard is used by the majority of states when determining whether to create a relationship between the potential parent and the adoptee child.¹⁹ The state court system, as well as administrative and adoption agencies, evaluates a potential adoption by determining what action is in the "best interest of the child"—this determination often includes an analysis by social workers joined with medical and social profiles of the potential adopters.²⁰ This evaluation becomes an examination of the potential "personal and psychological dynamics of the relationship between the child and the adopting parents."²¹ Ultimately, a successful placement of the child should result in the parental fitness of the adopter and a seamless assimilation of the child into a newly created family unit.²²

In addition to the "best interest of the child" standard, contemporary traditional²³ state adoptions are characterized by elements such as "parental consent" to the adoption and the "permanence of the adoptive

17. See Hollinger, *supra* note 14, § 1.04, at 1-46 ("[C]hild welfare professionals . . . were touting the benefits of placing dependent children in substitute homes that could replicate the 'natural family.'"). The emphasis on providing the child with a positive situation is evident in a 1935 study and treatise on American family law, which notes that the "most important development in the law of adoption" was the administrative assessment of the "suitability of the child for adoption, and the capability and suitability of those desiring to adopt, to care for, and to rear the child." 4 Chester G. Vernier, *American Family Laws* 255, 279-80 (1936).

18. Joan Hollinger states that, in the past, adoption proceedings were more "ministerial" than "judicial," noting that administrative agencies neither looked into the background, income, or compatibility of the adopter nor sought to understand the desires and needs of the children. Hollinger, *supra* note 14, § 1.03[2], at 1-30.

19. See, e.g., N.Y. Dom. Rel. Law § 114 (McKinney 1999); see also Suzanne Bryant, *Second-parent Adoption: A Model Brief*, 2 Duke J. Gender L. & Pol'y 233, 234 (1995); Huard, *supra* note 13, at 750 ("[O]ur adoption laws are all based on the 'best interests' formula.").

20. Hollinger, *supra* note 14, § 1.01[2][b], at 1-12; see N.J. Admin. Code § 10:121A-5.5a (2000) (requiring a pre-adoptive study of the child including (i) medical examination, (ii) child's family history related to hereditary factors and pathological abnormalities, (iii) child's placement history, and (iv) evaluation of a handicapped child's strength and limitations); 10A N.C. Admin. Code 70H.0108(b) (1997) (evaluating the potential adopter by considering, inter alia, (i) the applicant's motive, (ii) attitudes of the family, (iii) ability to provide, (iv) physical examination of the adopter(s), and (v) personal character references).

21. Hollinger, *supra* note 14, § 1.01[2][b], at 1-12.

22. See *id.*, § 3.01[1]; D. Marianne Brower Blair, *Getting the Whole Truth and Nothing but the Truth: The Limits of Liability for Wrongful Adoption*, 67 Notre Dame L. Rev 851, 945 n.502 (1992) (citing Child Welfare League of America, Standards for Adoption Service, which stated that the main function of adoption should be to help children "benefit from family life, to become members of a family that can give them the love, care, protection, and opportunities essential for their healthy personal growth and development").

23. The term "traditional adoption" will be used here and throughout to represent the paradigm of the nuclear couple, mother and father, receiving a child into their home to create the nuclear family.

relationship.”²⁴ Vital to the preservation of these characteristics, and the state framework for the contemporary adoption, is a reliance on both (i) the state judiciary as a gatekeeper of adoption approval, and (ii) the use of state contract principles to facilitate and preserve the institution of adoption.²⁵ Through these state law mechanisms conventional adoption creates a relationship between child and adult.²⁶

A quasi-contractual²⁷ element of adoption is evidenced by the implied promise of the adoptive parents to (i) “support the child” and (ii) “relieve the biological parent of his or her legal duty to support the child” in exchange for the transfer of the child and the parental rights.²⁸ In this exchange, the new parent accepts accountability for decisions regarding the “child’s health, education and well-being,” and pledges to provide economic support.²⁹ Subsequent to the adoption, the adopter has unequivocal parental rights over the adoptee, as if the adoptee were the birth child of the adopter.³⁰

Following this exchange between the biological parent and the adopter, as a general rule, all relations and rights which ran between the child and the biological parents are severed.³¹ Courts have enforced this severance because the discontinuance of parental rights protects “the security of the child’s newly-created family unit by eliminating involvement with the child’s natural parents.”³² However, in contrast to the general rule, some states do not sever the biological parent’s rights and relations upon adoption when the adopter is a stepparent. In these instances, the state allows the

24. See Hollinger, *supra* note 14, § 1.01[2], at 1-8.

25. *Id.*; National Center for State Courts, Knowledge and Information Services: Adoption, <http://www.ncsconline.org/WC/FAQs/AdoptFAQ.htm#What%20role> (last visited Oct. 3, 2005) (“[The] courts are the conduits through which all adoption cases pass . . .”). For a discussion of the “counterhistory” of adoption law, making the case that “adoption practice” has “deep private-ordering roots in contract law,” see Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 Yale L. & Pol’y Rev. 263, 264 (2002). See also *In re Adoption of D*, 252 P.2d 223, 228-29 (Utah 1953) (utilizing contract law concepts to settle an adoption dispute).

26. See Unif. Adoption Act § 1-102, 9 U.L.A. 16 (1999) available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uaa94.pdf> (stating that the purpose of adoption is “creating the relationship of parent and child”).

27. Hollinger points out that adoption can also be characterized as “analogous to testamentary dispositions” in that the parent “bestows’ the child upon the adoptive parents.” See Hollinger, *supra* note 14, § 1.01[2](f), at 1-14, 1-15.

28. *Id.* at 1-15.

29. See Curry et al., *supra* note 13, at 3/3.

30. D. Kelly Weisberg & Susan Frelich Appleton, *Modern Family Law* 1192 (2d ed. 2002) (“This principle treats the adoptee as a legitimate blood descendant of the adopter for all purposes.”).

31. See Hollinger, *supra* note 14, § 12.03[1], at 12-10 to -28.

32. *In re Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993). The divestment of rights in the biological parents promotes the creation of a bona fide family unit between the adopter and adoptee by removing any latent contest for decision making in the child’s life between the biological and adoptive guardians. See Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law’s Challenge to the Lesbian Nonbiological Mother*, 1 UCLA Women’s L.J. 135, 151 (1991) (discussing the necessity of the severance where there will be a struggle among guardians as to the best interest of the child).

spouse of the biological parent to adopt the child without divesting the biological parent of his or her parental rights.³³ In other words, this exception to the severance rule adds on the stepparent without affecting the original parent's rights.³⁴ Statutorily, the "stepparent exception" to the severance rule is available only to a married couple, creating eligibility for the exception only for spouses of the biological parent.³⁵

2. Contract Law and the Right to Adopt: *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*

A claim of the constitutional right to use the adoption mechanism was presented to, and dismissed by, the Supreme Court in *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*.³⁶ In *Smith*, the Court's ambivalence towards contractual relationships, as compared with a respect for the natural family, led to a denial of a constitutional right to adopt.³⁷ *Smith* is often cited as the Supreme Court's determination that a constitutional right to adoption is unavailable because the adoption process lacks a fundamental constitutional quality.³⁸

In *Smith*, foster parents brought an action alleging that procedures governing the removal of foster children from foster homes in New York violated the Due Process Clause of the Fourteenth Amendment.³⁹ Under New York law, as in *Smith*, when a parent was unable or unwilling to properly care for a child, the child was housed in an "institutional setting" or placed in a foster home.⁴⁰ In this surrogate foster family home the responsibility for the child was divided "among [the] agency, foster parents, and natural parents."⁴¹ Under this system any particular parental roles were obscure, and the child's "loyalties, emotional involvements, and responsibilities [were] often divided among three adult authority figures," resulting in anomalous legal and emotional relationships.⁴² Ultimately the agency had the power to terminate the child-foster parent relationship, and

33. Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 *Tenn. L. Rev.* 1019, 1025 n.27 (1999) (citing, among others, *Mont. Code Ann.* § 42-4-311(2) (1997), for the proposition that "[a]n adoption by a stepparent does not affect . . . the relationship between the adoptee and the adoptee's parent who is the adoptive stepparent's spouse or deceased spouse").

34. Hollinger, *supra* note 14, § 3.06[6], at 3-61.

35. See Wadlington & O'Brien, *supra* note 15, at 206.

36. 431 U.S. 816 (1977).

37. *Id.* at 819.

38. See, e.g., *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001) (citing *Smith*, 431 U.S. at 816); *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (citing *Smith*, 431 U.S. at 816).

39. *Smith*, 431 U.S. at 818-20.

40. *Id.* at 826.

41. *Id.* The natural parents have both visitation rights, and "an absolute right to the return of [the] child." *Id.* at 828, 846.

42. *Id.* at 826 n.16.

could transfer a foster child from her foster home pursuant to the satisfaction of a ten-day notice requirement.⁴³

In *Smith*, foster parents contended that a constitutional “liberty interest” existed in the preservation of the foster family, arguing that the use of the adoption mechanism should be protected by the Due Process Clause of the Fourteenth Amendment.⁴⁴ Initially, the *Smith* Court noted that the state’s ability to define the family should be limited by constitutional considerations, but questioned whether the relation of foster parent to foster child was within the projected “continuum” of constitutional protections set forth in preceding family law cases.⁴⁵

The *Smith* Court acknowledged that a biological tie was not a prerequisite to constitutional protection for a family unit, drawing in part on Justice Stewart’s dissent in *Moore v. City of East Cleveland*⁴⁶ which had also alluded to the insufficiency of biology as the sole determinant of whether or not a particular family, or family-like unit, should receive substantive constitutional protection.⁴⁷

However, the Court found that the characteristics of the foster family were too attenuated from those of the natural family to receive constitutional protection.⁴⁸ The primary distinction lay in the fact that the state’s adoption policy only restricted a “family” relationship (the foster family) that was birthed from state contract law “from the outset.”⁴⁹ Flowing from that state-created relationship, defenders of the state policy had argued, was the transitory nature of the child’s placement in the home.⁵⁰ This transitory nature translated into a limited expectation of the continuity of the foster parent-child relationship.⁵¹ With state contract law

43. *Id.* at 829; see also N.Y. Soc. Serv. Law §§ 383(2), 400 (McKinney 2005). If the foster parents oppose the transfer they may file for a conference with the Social Services Department, from which a decision must be issued within five days. *Smith*, 431 U.S. at 829-30. If the child is removed, the foster parents may appeal for a full hearing. *Id.* at 830. “[T]he removal [of the child from the foster home] is not automatically stayed pending the hearing . . .” *Id.*

44. *Smith*, 431 U.S. at 839. The foster parents premised their objection on the classification of this family interest as protected, and they reasoned that flowing from the protected status was the constitutional necessity for increased administrative insulation from the cessation of their foster family. *Id.* Any challenge to procedural due process preceding the deprivation of a right necessarily involves the fundamental nature of the underlying right because the Court must look “to the nature of the interest at stake” in order to determine the sufficiency of the procedure. *Id.* at 841.

45. *Id.* at 842; see *infra* note 112 and accompanying text. This continuum is discussed *infra* in Parts I.B and II.B.

46. 431 U.S. 494, 531 (1977) (Stewart, J., dissenting).

47. *Smith*, 431 U.S. at 843 n.50. In an additional rejection of the primacy of biology, the *Smith* Court noted that “[t]he basic foundation of the family in our society, the marriage relationship, is [itself] not a matter of” biology but rather found in “the emotional attachments that derive from the intimacy of daily association.” *Id.* at 843-44.

48. *Id.* at 845.

49. *Id.*

50. *Id.* at 824-25. This temporary arrangement was “unlike adoptive placement, which implies a permanent substitution of one home for another.” *Id.* at 824.

51. *Id.* at 824, 860.

at the heart of a foster family with temporary expectations, the structure in question was attenuated from family structures receiving constitutional protection in Supreme Court precedent.⁵²

Second, the Court observed the competing liberties attendant under the foster parent/adoption construct created by New York law.⁵³ The establishment of the foster parent's right to adopt the child would "derogat[e] . . . the substantive liberty of another," namely, any remaining rights of the natural parent.⁵⁴ The prospective destruction of the natural parent's rights minimized whatever substantive interest existed in the right to adopt and also the "foster family as an institution."⁵⁵

Thus, the *Smith* Court effectively withheld recognition of a foster parent's constitutional right to adopt. However, Part I.A.3 introduces a variety of adoption, second-parent adoption, which lies outside the foster family context of *Smith* but which rests upon the similar constitutional framework of family rights.

3. Second-Parent Adoptions

Distinct from traditional adoption is the second-parent adoption.⁵⁶ A second-parent adoption pertains to a relationship model initiated in the 1980s by the National Center for Lesbian Rights for the purpose of "protecting children in same-sex parent families."⁵⁷ A second-parent adoption is a "procedure that allows a same-sex co-parent to adopt his or her partner's biological or adopted child."⁵⁸ Once the second-parent

52. *Id.* at 845; see *infra* Parts I.B, II.B.

53. *Smith*, 431 U.S. at 846. This concern is also manifested in the severance provision of the current majority state law adoption doctrine. See *supra* notes 31-32 and accompanying text.

54. *Smith*, 431 U.S. at 846. The Court stated as follows:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest . . . that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset.

Id.

55. *Id.* at 846-47. The Court acknowledged the difficulty in parsing the scope of any liberty interest in the foster family's right to adopt the children. *Id.* at 847. The Court ultimately refrained from a definite ruling on the due process claim, choosing instead to support its holding on the issue of procedural due process. *Id.*

56. See Curry et al., *supra* note 13, at 3/21. But see Jared C. Leuck, *The Best Interests of the Child in Adoption: An Article Review*, 11 J. Contemp. Legal Issues 607, 609 (2000) (stating that "[a]doption can take place in either of two ways: through the auspices of a public or private adoption agency . . . [or] through independent adoption, in which the adoption is arranged directly between the biological and adoptive parents").

57. National Center for Lesbian Rights, *Second-parent Adoptions: A Snapshot of Current Law 1*, <http://nclrights.org/publications/pubs/2pa0803.pdf> (last visited Oct. 10, 2005).

58. See Hollinger, *supra* note 14, § 3.06[6], at 3-57.

adoption is completed, the birth parent and the adopter parent have equivalent rights vis-à-vis the child.⁵⁹

Unlike traditional adoption, which has the purpose of “creating a relationship,”⁶⁰ second-parent adoption legitimizes, in the eyes of the law, a relationship which existed prior to any state involvement. The most common manifestation of the request for state approval of a second-parent adoption occurs where the child is born to a same-sex couple through the use of reproductive technologies, including artificial insemination, and where the nonbiological parent seeks legal ratification of his or her parental status.⁶¹

Within this paradigm of the artificially inseminated “triad” (the biological parent, nonbiological partner, and the child), the consistent parental influence provided by a nonlegal “second-parent” in his or her relationship with the partner’s biological child parallels the consistency commonly thought to pervade conventional biological relationships. Despite a single biological relationship, the two-parent unit (the biological plus the nonbiological partner) participates in rearing and supporting the child from birth.⁶² The similarities of childhoods under either parental construct expand any “traditional notions about reproduction, child-bearing, child-rearing, and those who participate in this process.”⁶³ Unlike the traditional adoption framework which creates a new family,⁶⁴ the relationships fostered within this triad are developed regardless of state involvement.

59. Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 Berkeley Women’s L.J. 17, 26 (1999).

60. See *supra* note 26 and accompanying text.

61. See *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993) (“It is not the courts that have engendered the diverse composition of today’s families. It is the advancement of reproductive technologies and society’s recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle.”); see also Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev. 933, 934 (2000). While the use of reproductive facilities may be more common within the lesbian female framework, it can be seen, hypothetically, in the case of a homosexual father who employs a female surrogate. Second-parent adoptions also evolve where the legal parent has sole custody of a child from a dissolved heterosexual relationship, and looks to form a legal family comprised of his/her child and his/her same-sex partner. Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J.L. & Fam. Stud. 297, 308 (2003).

62. See, e.g., *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d. at 1272. One student commentator summarized the facts that led to the court allowing a second-parent adoption:

Jane and Deborah had lived together in a committed relationship since 1986. Together they decided to have and rear children. On two separate occasions, Jane gave birth to a son after being impregnated with sperm from an anonymous donor. Deborah assisted the midwife at both births, and had been equally responsible for parenting the children since their births.

Elizabeth Rover Bailey, Note, *Three Men and a Baby: Second-Parent Adoptions and Their Implications*, 38 B.C. L. Rev. 569, 572 (1997).

63. Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 Am. U. J. Gender & L. 505, 514 (1998).

64. See *supra* notes 18-30 and accompanying text.

While the everyday, functional value of the triad exists without the state's involvement, the state's legitimization of second-parent adoption adds legal stability to the relationship.⁶⁵ The adoption allows the parent partners to guarantee preservation of the family unit should the biological parent predecease the nonbiological parent.⁶⁶ Further, second-parent adoption also provides support in less remarkable circumstances, by allowing the partner to "consent to medical care, meet with school officials, or represent [the] child's interests to . . . government agencies."⁶⁷ Some state courts have attached weight to this stability when approving second-parent adoptions. For instance, in the case of *In re Adoption of Tammy* the court found the child's best interest to be rooted in the second-parent framework because the child could inherit under intestacy laws, be eligible for coverage under the social security benefits of two parents, and have two guardians obligated to provide economic support.⁶⁸

While second-parent adoptions have been approved in some instances, the approval is not uniform. Part II.A explores legislative and judicial resistance to second-parent adoption. Resistance to recognition of certain family units, such as those created by second-parent adoptions, may raise constitutional issues. Part I.B and I.C explore the Supreme Court's treatment of two types of cases necessary to an evaluation of the constitutional weight accorded to second-parent adoptions: (i) cases related to family law, and (ii) cases which implicate both due process and equal protection interests at the same time. Part II.B explores an argument that the category of family units the Constitution has been held to protect is constantly expanding.

B. *Additional Constitutional Implications for Second-Parent Adoption*

State adoption law may not be the only legal structure applicable to the regulation of adoptions. When same-sex parents propose to legalize a family unit this attempt may implicate constitutional considerations related to the right to craft or maintain a family. Part I.B.1 examines the constitutional jurisprudence related to the right to raise a family. Part I.B.2 addresses the constitutional jurisprudence concerning the definition of the family unit.

Family law, which includes both standard and second-parent forms of adoption, is generally within the province of state regulation, and limits on overregulation by the state are provided by the Constitution.⁶⁹ Because

65. See *infra* notes 300-21.

66. See *In re Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993).

67. See Shapiro, *supra* note 59, at 22-23.

68. See Bailey, *supra* note 62, at 586 (citing *In re Adoption of Tammy*, 619 N.E.2d at 320).

69. See, e.g., *Planned Parenthood of So. Pa. v. Casey*, 505 U.S. 833, 849 (1992) ("It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."); *Loving v. Virginia*, 388 U.S. 1, 7 (1967); see also Hollinger, *supra* note 14, § 1.01[1], at 1-4.

majoritarian rule necessarily means the failure, to some extent, of the minority to achieve legislative validation of their cause, the “[f]ederal courts are often called upon . . . to consider the constitutional due process and equal protection aspects of adoption proceedings.”⁷⁰ In the due process arena, prospective adoptive parents have challenged restrictions as improper burdens on the right to define and establish a family.⁷¹ Challenges under the Equal Protection Clause refer to the unequal availability of adoption to potential adopters who are homosexual, as compared with those who are heterosexual.⁷² While the Supreme Court has not specifically held which constitutional protections, if any, attach to second-parent adoptions, it has addressed general issues in the area of adoption, namely *Smith*,⁷³ and alternatively, in the area of the traditional family.

1. Constitutionally Protected Rights: Raising a Family and Controlling the Child

Supreme Court jurisprudence relating to the development of the constitutionally protected family has involved the right to have a family and raise a child. *Meyer v. Nebraska*⁷⁴ and *Pierce v. Society of Sisters*⁷⁵ are two early cases concerning family relations and constitutional rights, namely the right or power of parents to control portions of a child’s life. In *Meyer*, the Court invalidated a state statute which criminalized the teaching of foreign languages to children in schools.⁷⁶ The Court viewed this statute as an infringement upon the constitutional liberties of the parent, which included, among other things, the right to “establish a home and bring up children” and “the power of parents to control the education of their own.”⁷⁷ In *Pierce*, the power of parents within the family construct was further solidified when the Court invalidated a state statute which required children to attend public schools, rather than those which were parochial or

70. Hollinger, *supra* note 14, § 1.01[1], at 1-5; see also C. Quince Hopkins, *The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 Cornell J.L. & Pub. Pol’y 431, 445-46 (2004) (stating that “family-related cases fall under several different Constitutional provisions and doctrines,” namely the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

71. See, e.g., *Spielman v. Hildebrand*, 873 F.2d 1377, 1384-85 (10th Cir. 1989) (addressing a liberty interest held in relationship to a child where the parents were in the “preadoptive” stage); cf. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (challenging an adoption statute, in part, as an invalid restriction on a father’s liberty interest to have a relationship with his son).

72. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (challenging a state statute denying a custody hearing on gender equal protection grounds); *Drummond v. Fulton County Dep’t of Family & Children’s Servs.*, 563 F.2d 1200 (5th Cir. 1977) (challenging the denial of an adoption application on racial equal protection grounds).

73. See *supra* notes 36-55 and accompanying text.

74. 262 U.S. 390 (1923).

75. 268 U.S. 510 (1925).

76. *Meyer*, 262 U.S. at 400-01, 403.

77. *Id.* at 399, 401.

private.⁷⁸ The Court stated that the child was not the “mere creature of the state,” and as such, the law interfered “with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁷⁹

Following the early establishment of certain rights belonging to biological, and presumably married, parents, the Court, in *Stanley v. Illinois*, faced a claim to parental rights by a biological, but unwed, father.⁸⁰ Petitioner Peter Stanley, an unwed father, had lived with his children and their mother intermittently for eighteen years.⁸¹ When their mother died, Illinois state law automatically designated Stanley’s children as wards of the state.⁸² The state reasoned that unwed fathers were presumptively unfit to raise their own children.⁸³ The Supreme Court heard Stanley’s claim that the state law violated the Equal Protection Clause of the Fourteenth Amendment because neither married fathers nor unmarried mothers were presumed to be unfit while he, as an unmarried father, was presumed to be an unfit parent.⁸⁴

The Court recognized Stanley’s claim, finding the state’s presumption “inescapably contrary to the Equal Protection Clause” because “all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.”⁸⁵ In addition, the Court noted that despite the lack of the legitimizing marital relationship that existed in *Meyer and Pierce*, filaments of familial fundamental rights were present:⁸⁶ “[We have] frequently emphasized the importance of the family. The rights to conceive and raise one’s children have been deemed ‘essential,’ [and t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment”⁸⁷ *Stanley* held that rights to the child could flourish in a nonmarital relationship, so long as this structure provided bonds just as “warm, enduring, and important as those arising within a more formally organized family unit.”⁸⁸

Despite the recognition of the power of parents, including the power of parents outside of the marital construct, the Supreme Court has hedged per

78. *Pierce*, 268 U.S. at 534-35.

79. *Id.* at 534-35.

80. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

81. *Id.*

82. *Id.*

83. *Id.* at 647.

84. *See id.*

85. *Id.* at 658.

86. *Id.* at 651 (stating that the law has not “refused to recognize those family relationships unlegitimized by . . . marriage”).

87. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court explicitly recognized the presence of both interests, and found the holding on the equal protection thread, the interest which was raised below in the state court, to be congruent with a previous holding in *Picard v. Connor*, 404 U.S. 270 (1971), where a due process claim was raised below, and the court was barred from recognizing the equal protection claim. *Id.* at 276-77 n.9.

88. *Stanley*, 405 U.S. at 652.

se validation of the parental rights of the unmarried, as evidenced by the cases of *Quilloin v. Walcott*⁸⁹ and *Caban v. Mohammed*.⁹⁰ In *Caban*, the Court examined a New York statute that allowed children to be adopted without their biological father's consent, resulting in the severance of any parental relationship between the natural father and the child.⁹¹ Similarly in *Quilloin*, a Georgia statute did not permit a father to veto the adoption of his eleven-year-old son by a stepfather.⁹² The challenge to the statute in *Caban* was filed by an unmarried father who had lived with his children and their mother for several years.⁹³ Conversely, the unmarried father and challenger in *Quilloin*, decided by the Court a year earlier, had a minimal relationship with the child, had never lived with his child, and had failed to petition for legitimation for eleven years.⁹⁴

While both statutes in *Quilloin* and *Caban*, much as in *Stanley*,⁹⁵ implicated the parental status of an unmarried father, only the statute in *Caban* was invalidated. Justice Lewis Powell, writing for the *Caban* Court, held the statute constitutionally invalid as it was based on overbroad gender generalizations which did not support a "fundamental difference between maternal and paternal relations."⁹⁶ The *Caban* Court focused on the substance of the family and distinguished the decision upholding the statute in *Quilloin*, because in *Quilloin* the father had not developed a relationship with his child, an important step in the development of constitutionally protected fundamental parental rights.⁹⁷ Thus, after *Caban* and *Quilloin*, while an unmarried, biological father does not have automatic parental rights, his involvement with the child may give rise to such rights.⁹⁸

In 1989, the Supreme Court granted certiorari in another case relating to control of a child, as well as parental rights, *Michael H. v. Gerald D.*⁹⁹ *Michael H.* considered a California state statute that required the legal presumption of paternity when any child was born into an intact marriage.¹⁰⁰ Consequently, a biological but unmarried father, Michael H., was denied visitation rights to his child, where the child was conceived and born during the mother's marriage to another man.¹⁰¹ Despite evidence of active parenting by Michael H., the Supreme Court couched Michael H.'s

89. 434 U.S. 246 (1978).

90. 441 U.S. 380 (1979); Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really "Strangers Without Rights"?*, 1995 Ann. Surv. Am. L. 165, 191-93 (stating that in *Caban* both the majority and dissent relied upon the importance of the actual, substantive relationships in the family structure).

91. *Caban*, 441 U.S. at 381-82.

92. See *Quilloin*, 434 U.S. at 248-49.

93. *Caban*, 441 U.S. at 382.

94. *Quilloin*, 434 U.S. at 247, 249-50.

95. See *supra* notes 81-88 and accompanying text.

96. *Caban*, 441 U.S. at 388.

97. *Id.* at 389 n.7.

98. See *id.*

99. 491 U.S. 110 (1989).

100. *Id.* at 115.

101. *Id.*

interest as that of an adulterous parent.¹⁰² In denying Michael H. visitation rights, the court relied on a historical disrespect for an adulterous father, in spite of a biological relationship.¹⁰³ The *Michael H.* plurality detached the right of parenting from biology, upholding the denial of Michael H.'s parental rights in favor of the marital family.¹⁰⁴ Along the spectrum of constitutionally protected family rights, *Michael H.* demonstrates that even the presence of a biological relationship and parental involvement may be trumped in certain instances.¹⁰⁵ The Supreme Court's handling of the assorted family constructs from *Meyer* and *Pierce* through *Stanley*, *Quilloin* and *Michael H.* show the expansion of constitutional respect from the nuclear family to those relationships outside of the traditional nuclear family.

2. Constitutionally Protected Rights: Defining the Family

Beyond the right to control aspects of a child's life, the Court has invalidated, in some circumstances, restrictions which prevent groups of persons from defining themselves as a family.¹⁰⁶ In *Moore v. City of East Cleveland*, Cleveland's zoning regulations restricted occupancy of a housing unit to members of a "single family."¹⁰⁷ "Family," as defined by the ordinance, was limited only to "a few categories of related individuals."¹⁰⁸ The petitioner, a grandmother living with her two grandsons, who were cousins, was outside the scope of the statutory definition of "family."¹⁰⁹ The grandmother challenged Cleveland's zoning ordinance as an improper restriction on her due process and equal protection rights.¹¹⁰

The *Moore* Court examined a "lineage" of cases "acknowledg[ing] a 'private realm of family life which the state cannot enter.'"¹¹¹ These cases projected a "rational continuum" which would include expanded protection for family arrangements under the Due Process Clause.¹¹² Included in this

102. *See id.* at 120-21.

103. *See id.* at 124-25.

104. *Id.* at 132.

105. *See infra* Part II.B.3.

106. *See infra* notes 107-15 and accompanying text; *see also* Pamela Scheininger, *Legal Separateness, Private Connectedness: An Impediment to Gender Equality in the Family*, 31 Colum. J.L. & Soc. Probs. 283, 301 n.85 (1998); Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 Stan. L. Rev. 607, 624 (1997).

107. *Moore v. City of E. Cleveland*, 431 U.S. 494, 495-96 (1977).

108. *Id.* at 496.

109. *Id.* at 497.

110. *Id.* at 496 & n.3.

111. *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) and noting *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

112. *Id.* at 501-02. The Court stated, while prior cases did not specifically address the circumstance before the Court, the rationale of those cases would apply to additional situations, including the one at bar, "unless [the Court] close[d their] eyes to the basic

protection is the freedom from “cutting off any protection of family rights at the . . . arbitrary boundary . . . of the nuclear family.”¹¹³ The Court looked to “[r]ecent census reports” in determining that constitutional protection related to the family should extend at least as far as “[t]he tradition of uncles, aunts, cousins, and . . . grandparents.”¹¹⁴ The Court protected the expanded vision of the constitutional family, and struck down the Cleveland statute as an improper constriction on family structures under the Due Process Clause.¹¹⁵

C. *An Additional Consideration in Second-Parent Adoption Cases: The Hybrid Presence of Equal Protection and Due Process*

Second-parent adoption may implicate constitutional due process considerations, as discussed in the context of biological and functional families. Second-parent adoption also presents a second potential basis for implicating the Constitution—the equal protection of the homosexual class. Notably, the Supreme Court has not elevated sexual orientation to the level of a suspect class entitled to the most heightened level of constitutional scrutiny.¹¹⁶

This concurrent presence of certain due process (here, family rights) and equal protection (sexual orientation) interests is not unique to second-parent adoptions. A number of cases in Supreme Court history have struck down state legislation when both substantive due process interests and equal protection interests are implicated, even while the equal protection and due process elements challenged are generally understood to be distinct.¹¹⁷

reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause.” *Id.* at 501.

113. *Id.* at 502.

114. *Id.* at 504 & n.14. The Court also noted the special need for a more inclusive family definition in “times of adversity, such as . . . death of a spouse or economic need.” *Id.* at 505.

115. *Id.* at 506. Conversely, a few years prior to *Moore v. City of East Cleveland*, in *Village of Belle Terre v. Boraas*, the Court faced a challenge to a New York statute which limited living arrangements to one-family dwellings. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974). The owner of a house, who had leased room to six college students, challenged the ordinance as violative of equal protection and the rights of association, travel, and privacy where the statute limited a one-family dwelling to the housing of “persons related by blood, adoption, or marriage.” *Id.* The Court upheld that statute, focusing on the primacy of the state legislative discretion to draw a line with regards to the scope of sanctioned living arrangements. *Id.* at 8. The *Moore* Court distinguished *Belle Terre* as a valid exercise of municipal power to restrict persons of no relation from living together. *Moore*, 431 U.S. at 499. For analysis of the *Moore* Court’s treatment of *Belle Terre*, see *infra* Part II.B.4.

116. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (invalidating an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination, but applying a “rational basis” review indicative of an unprotected class).

117. Jeffrey Goehring, *Lawrence v. Texas: Dignity, A New Standard for Substantive Rational Basis Review*, 13 *Law & Sexuality* 727, 732 (2004) (“Equal application of the law is a constitutional principle distinct from substantive due process . . .”).

Equal protection and due process principles have similar roots, finding their foundation in the “teachings of history [and a] recognition of . . . values.”¹¹⁸ Since these protections are birthed from related values, it is logical that they have been intertwined in their growth. The Supreme Court has noted that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.”¹¹⁹ This link is especially demonstrable in cases, such as with second-parent adoptions, where the protectionist ambitions of both equal protection and substantive due process bear equal relevance to the challenged legislation.

Almost unanimously, state laws are not invalidated when the challenged basis is a single equal protection or due process interest, which triggers only a review for a rational basis.¹²⁰ It has been posited that when a state restriction is invalidated under “rational basis” review, the Court has actually cloaked an increased level of examination and scrutiny under the name of rational basis.¹²¹ The impetus for a heightened level of scrutiny, and increased constitutional weight, where suspect classifications or fundamental rights are absent, may come from “a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix.”¹²² Under this “double helix,” “certain fundamental facets of

118. See *Moore*, 431 U.S. at 503 & n.10 (finding that “similar restraint[s]” mark the approach to substantive due process and equal protection).

119. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); cf. Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999). Professor Amar notes that, for the drafters of the Fourteenth Amendment, “the Equal Protection Clause was in part a clarifying gloss on the due process idea” rather than an expression of a separate notion. *Id.* at 772. Amar demonstrates a “marriage” of due process and equal protection interests as early as 1896:

[Justice John Marshall Harlan] proclaims that the “guarantees of life, liberty and property are for all persons within the jurisdiction . . . without discrimination against any because of their race” [T]his formulation marries due process language (“life, liberty, and property”) with equal protection language (“all persons within the jurisdiction,” a phrase found only in the Equal Protection Clause) and equal protection norms against race discrimination.

Id. at 773 (quoting *Gibson v. Mississippi*, 162 U.S. 565 (1896) (Harlan, J.)).

120. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

121. *Id.*

122. Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004); see also Nan D. Hunter, *Gay Rights After Lawrence v. Texas: Living with Lawrence*, 88 Minn. L. Rev. 1103, 1135 (2004).

In cases where the Court has confronted claims of not-quite-deprivation of liberty, as experienced by persons in not-quite-suspect classes, it has in practice displayed a willingness to take into account a kind of cross-doctrinal cumulative weighting of the interests involved and the consequences of adverse legal treatment.

Id. For a discussion of the Court’s use of a hybrid analysis in the area of economic regulation, see Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. Rev. 411, 424 (1998). Professor Zietlow recognizes the Court’s tendency to combine elements of equal protection and due process, and then to decide the case “without determining which clause was the deciding principle,” instead emphasizing the

freedom have won fierce protection . . . even when they have defied easy labeling.”¹²³ The Supreme Court’s opinions in *Loving v. Virginia*,¹²⁴ *Skinner v. Oklahoma*,¹²⁵ *Zablocki v. Redhail*,¹²⁶ *M.L.B. v. S.L.J.*,¹²⁷ and *Lawrence v. Texas*¹²⁸ evince an increasing reliance on the amalgamation of the Due Process and Equal Protection Clauses to invalidate state regulation, an amalgamation which may also occur with second-parent adoptions.

1. *Loving v. Virginia*

A seminal case for the co-presence of challenges under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment is *Loving v. Virginia*.¹²⁹ In *Loving*, a Virginia statute prohibited marriage between a white person and a nonwhite person.¹³⁰ A married, interracial couple,¹³¹ previously convicted of violating the statute,

fundamental nature of the interest and the way in which it is applied unequally. *Id.* at 424-25; see also Randal S. Jeffrey, *Restricting Prisoners’ Equal Access to the Federal Courts: The Three Strikes Provision of the Prison Litigation Reform Act and Substantive Equal Protection*, 49 *Buff. L. Rev.* 1099, 1128 (2001) (discussing poverty and access to the court system as creating “a hybrid of the fundamental right and suspect classification” resulting in a “substantive equal protection”); Sundeep Kothari, Comment, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 *Tul. L. Rev.* 2159 (1998). One student commentator discusses *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), a case concerning a state law restriction of appellate reviews relating to the defendants’ wealth status, a classification deprived of special constitutional protection. Kothari, *supra*, at 2174. The student commentator states, “The plurality’s opinion showed that an amalgamation of equal protection and due process was a more potent force than the separate use of either.” *Id.* at 2176. The student also notes the dissent, in which Justice Harlan takes issue with the doctrine employed by the majority, and asserts that “neither the Due Process Clause nor the Equal Protection Clause was a sufficient source to establish this new right of free transcripts for criminal defendants.” *Id.* The Court has acknowledged that constitutional protections may merge in order to provide protection that neither would provide alone. *Cf.* *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990) (suggesting that “the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [only when] the Free Exercise Clause” acts “in conjunction with other constitutional protections”).

123. See Tribe, *supra* note 122, at 1898.

124. 388 U.S. 1 (1967).

125. 316 U.S. 535 (1942).

126. 434 U.S. 374 (1978).

127. 519 U.S. 102 (1996).

128. 539 U.S. 558 (2003).

129. 388 U.S. 1 (1967); see also Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 559 (14th ed. 2001).

130. *Loving*, 388 U.S. at 2.

131. See Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 *Va. L. Rev.* 1189, 1210 (1966). Richard and Mildred Loving, residents of Virginia, had traveled from their home state to the District of Columbia in order to be married. *Loving*, 388 U.S. at 2. Upon return and cohabitation, the couple was arrested and convicted under the Virginia anti-miscegenation statute. *Id.* at 2-3. They were sentenced to one year in jail, with the sentence suspended provided they left Virginia and did not return for twenty-five years. *Id.* at 3.

challenged the law as an invalid infringement of certain equal protection interests, as well as certain due process rights.¹³²

The *Loving* Court, led by Chief Justice Earl Warren, found that the racial marriage restriction mandated a review of the legislation with a “most rigid scrutiny.”¹³³ Under this highest tier of scrutiny, the Court dismissed the notion of procedural equality,¹³⁴ finding that the statute was “invidious racial discrimination” and simply the “maint[enance] of White Supremacy”; this was not a legitimate purpose for a state law.¹³⁵ The Court ultimately held that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”¹³⁶

Parallel to the equal protection interest at hand, the Court noted the statutory burden placed on Virginia residents’ marriage interest.¹³⁷ The Court stated that the “freedom of choice to marry . . . a person of another race” is an individual one, and as such the statute was an improper “depriv[ation of] the [petitioners’] liberty . . . in violation of the Due Process Clause.”¹³⁸

Thus, “*Loving* was not simply an equal protection case;” rather, much like the dual constitutional interests in second-parent adoptions, the dual discussions of equal protection of the multiple racial classifications and the liberty interest in marriage represented the operation of both the Equal Protection Clause and Due Process Clause “in tandem.”¹³⁹ Professor Pamela Karlan takes specific note of the Court’s adoption of an equal protection rationale from *Skinner v. Oklahoma* in order to flesh out its own “Due Process Clause-based argument” related to the liberty interest in marriage.¹⁴⁰ Thus, the Equal Protection Clause jurisprudence was intertwined with the Due Process Clause doctrinal analysis, a networking of the Due Process and Equal Protection Clauses which, Karlan notes, was “a hallmark of the Warren Court.”¹⁴¹

132. *Loving*, 388 U.S. at 2. The equal protection interests was based in the unequal access of to marriage to a black man available to white women as compared with black women; the due process interest was the protection from burdens on marriage.

133. *Id.* at 11.

134. *Id.*

135. *Id.*

136. *Id.* at 12.

137. *Id.*

138. *Id.* The Court noted the denial of a liberty interest within the construct of an unequal protection: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” *Id.*

139. See Pamela Karlan, *Loving Lawrence*, 102 Mich. L. Rev. 1447, 1448 (2004).

140. *Id.*; see also *infra* Part I.C.2.

141. Karlan, *supra* note 139, at 1448-49 & n.12. Professor Karlan posits that this merger of the established equal protection jurisprudence with the protected liberty interest “mark[s] the rebirth of substantive due process.” *Id.*

2. *Skinner v. Oklahoma*

The co-presence of substantive due process and equal protection is also palpable in *Skinner v. Oklahoma*.¹⁴² The *Skinner* Court confronted a prisoner who had been convicted of stealing chickens and twice convicted of robbery with firearms within a period of eight years.¹⁴³ Oklahoma's Habitual Criminal Sterilization Act punished by sterilization those persons who habitually committed crimes of moral turpitude.¹⁴⁴ Excepted from the definition of "moral turpitude" were "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."¹⁴⁵ The highest state court in Oklahoma enforced the habitual criminal statute, and punished the prisoner with an "operation of vasectomy."¹⁴⁶ *Skinner* petitioned the Supreme Court to overturn the punishment on the basis of procedural due process as well as a claim of cruel and unusual punishment.¹⁴⁷

The Court dismissed the petitioner's reasoning, and discussed the validity of the legislation in terms of equal protection and due process.¹⁴⁸ First, the statute burdened any due process interest the prisoner held in procreation.¹⁴⁹ Additionally, the statute had a disparate application to different classes of criminal offenders.¹⁵⁰

In order to invalidate the state penalty, the *Skinner* Court traversed the paths of both the Due Process and Equal Protection Clauses. The Court labeled the statute as an improper interference with "a right which is basic to the perpetuation of a race—the right to have offspring," language characteristic of protection derived from the Due Process Clause.¹⁵¹ Despite language that implicates due process protection, the Court's invalidation of the statute was rooted not in due process, but rather in the Equal Protection Clause: The Court stated that "the law lays an unequal hand on those who have committed . . . the same quality of offense, and sterilizes one and not the other."¹⁵²

It is important to note that *Skinner v. Oklahoma* does not fall within the construct of a strict scrutiny-type case.¹⁵³ Even the sitting Court recognized

142. 316 U.S. 535 (1942).

143. *Id.* at 537.

144. *Id.* at 536.

145. *Id.* at 537.

146. *Id.*

147. *Id.* at 538.

148. *Id.* at 537-43.

149. *Id.* at 541.

150. *Id.*

151. *Id.* at 536. This language is redolent of fundamental rights, substantive due process and the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 2.

152. *Skinner*, 316 U.S. at 541.

153. That is a case addressing a challenge of a legislative restriction on a constitutionally protected class. For a criticism of the Court's choice of equal protection, the "conceptual theory of the narrowest possible decision-making," see Norman Dorsen, *Editor's*

that the strict scrutiny lens could not be derivative of the class restricted by the Oklahoma statute—convicted felons—which is not a suspect category entitled to heightened constitutional protection.¹⁵⁴ Alternatively, the notion that the strict scrutiny sprung from the felons' constitutional interest in procreation is attenuated: The right to procreate, within the unique context of state sterilization, was not clearly established as fundamental.¹⁵⁵ In fact, the Supreme Court had actually condoned the employment of involuntary sterilization, and the *Skinner* Court avoided overturning that precedent.¹⁵⁶ As a practical matter, and inapposite to the establishment of the right as fundamental, a number of states continued to employ restrictions on the procreation liberty interests in the form of involuntary sterilization penalties.¹⁵⁷ Thirty-five years after the Court decided *Skinner* over half of the states still enforced sterilization laws for a variety of classes, including "habitual criminals."¹⁵⁸

A more palatable solution may be found in the interplay of the due process and equal protection doctrines.¹⁵⁹ The punishment and legislation would not have been overturned were it not for the presence of both an equal protection and substantive due process interest.¹⁶⁰ Where the Court looked at both the equal protection and due process interests simultaneously, the lopsided application (unavailable to criminals) of a quasi-liberty interest (the right to procreate) created a heightened awareness

Introduction, The Proper Role of the United States Supreme Court in Civil Liberties Cases, 10 Wayne L. Rev. 457, 472 (1964).

154. "I seriously doubt that the [E]qual [P]rotection [C]lause requires [the legislation] to apply the measure to all criminals in the first instance, or to none." *Skinner*, 316 U.S. at 543 (Stone, J., concurring); see also Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. U. L. Rev. 65, 89 (2003); Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999). Felons are often constrained more than non-felons, and it has been noted that if "[*Skinner*] involved the imposition of a prison sentence for one but not for the other of two similar offenses, there is little question that the Court would have approved the disparity as rationally related to a legitimate state interest." Sherry F. Colb, *Freedom from Incarceration: Why Is this Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781, 797 (1994).

155. See *infra* notes 157-59.

156. *Skinner*, 316 U.S. at 542-43; *Buck v. Bell*, 274 U.S. 200 (1927).

157. Jana Leslie Miller, *From Bell to Bell: Responsible Reproduction in the Twentieth Century*, 8 Md. J. Contemp. Legal Issues 123, 132 (1997).

158. "Of the states with eugenic sterilization laws as of 1968, the feebleminded or mentally deficient were subject to sterilization in all 27, the mentally ill in 25, epileptics in 14, habitual criminals in 7, and moral degenerates and sexual perverts in 7." Jeffrey F. Ghent, Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R.3d 960, § 2(a) (2004) (internal quotation omitted).

159. See Gerald Gunther, *Constitutional Law* 492-93 (12th ed. 1991) (noting the extraordinary situation in *Skinner*: the mixing of due process, and the absence of a "specific constitutional guarantee"); see also Gretchen Ritter, *Women's Citizenship and the Problem of Legal Personhood in the United States in the 1960's and 1970's*, 13 Tex. J. Women & L. 1, 31 & n.182 (2003) (noting the "bring[ing] together" of due process and equal protection in a handful of high court cases, including *Skinner*).

160. See Sullivan & Gunther, *supra* note 129, at 509 (stating that the unequal classifications regarding criminals would not have been overturned were it not for the presence of a "basic civil right[] of man").

of a constitutional conflict, and placed a greater burden of justification on the state.¹⁶¹

3. *Zablocki v. Redhail*

In *Zablocki v. Redhail*,¹⁶² the Supreme Court again reviewed a challenge which implicated both the Equal Protection and Due Process Clauses—specifically, a class action challenge to a Wisconsin statute that refused a marriage license to those residents who were obligated to support children not in their custody.¹⁶³ In order to overcome this denial, the party seeking marriage was required to obtain “a court order granting permission.”¹⁶⁴ Permission from the court necessitated proof that the resident’s previous “minor issue” would not become “public charges.”¹⁶⁵ The petitioner challenged the statute as an invalid legislative restriction under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁶⁶

The *Zablocki* Court intermingled notions of the equal protection of wealth-based classes and the substantive due process right in marriage, finally applying an equal protection-based strict scrutiny to invalidate the state statute.¹⁶⁷ The Court began by framing the examination as an inquiry under the Equal Protection Clause.¹⁶⁸ However, the Court swiftly moved to dialogue concerning rights protected by the Due Process Clause, specifically engaging in a chronology of the “fundamental importance” of the right to marry.¹⁶⁹ Rather than bifurcate the analysis into separate equal protection and due process contingents, the Court interwove discussion of the two interests, ultimately recognizing that the due process marriage

161. Professor Lawrence Tribe’s complementing theory of the interplay of due process and equal protection asserts the Court’s cognizance of the

inequality in the way government would wield the surgeon’s scalpel if given the power to control the choice of who may have offspring and who must be prevented from leaving a genetic trace in succeeding generations as an important factor in the judicial decision to treat the underlying liberty as fundamental.

Tribe, *supra* note 122, at 1902 n.32.

162. 434 U.S. 374 (1978).

163. *Id.*

164. *Id.* at 375.

165. *Id.*

166. *Id.* at 376-77. The petitioner challenged the statute as a substantial abridgement of the right to marry and, alternatively, as an improper discrimination of a wealth based classification. Brief of Appellees at 16, 23, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (No. 76-879), available at 1977 WL 189327.

167. *Zablocki*, 434 U.S. at 376-77 (“[A]ppellee brought this class action . . . challenging the statute as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”).

168. *Id.* at 383 (“In evaluating [the statute] under the Equal Protection Clause, ‘we must first determine what burden of justification the classification created thereby must meet’” (quoting *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974))).

169. “‘Marriage is one of the basic civil rights of man,’ fundamental to our very existence and survival.” *Id.* ((quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

interests were at the core of the equal protection analysis.¹⁷⁰ Justice Thurgood Marshall, writing for the Court, applied strict scrutiny, and dismissed the statute as an invalid restriction on marriage because it unnecessarily interfered with the right to marry.¹⁷¹ While braiding both the due process and equal protection analyses, the Court withheld prohibition on all restrictions on marriage, stating that only some burdens on the marital relationship would be permitted.¹⁷²

The necessity of the braiding of these interests becomes more evident when each interest is reviewed individually. If the constitutional due process interest related to marriage was treated as distinct from the equal protection interest, then it might have been argued that the basis for Justice Marshall's application of strict scrutiny was found in the constitutional weight attached to marriage—a liberty which has received some shelter in Supreme Court precedent.¹⁷³ Yet, the substantive due process right to marry, as defined by the *Zablocki* Court, is not a wholly fundamental right. The marriage right structured by the *Zablocki* majority appears, to some extent, hollowed; the Court hedges the “right” of marriage almost immediately after confirming its existence, by noting that a number of regulations on marriage could “legitimately be imposed.”¹⁷⁴ Further, as a historical matter and inapposite to a finding of the right to marry as a fundamental right, access to marriage has been withheld from a number of classes, including “Black Americans” and “genetic undesirables.”¹⁷⁵ A concurring Justice Powell noted that although the right of marriage is somewhat protected by the Constitution, “the Court has yet to hold that all regulation touching . . . a ‘fundamental right’ trigger[s] the most exacting judicial scrutiny.”¹⁷⁶ The exclusion of homosexuals from marriage also evinces the gaps in the fundamental nature of the right to marry.¹⁷⁷

Theoretically, an alternative to finding that the strict scrutiny analysis was birthed from any constitutional interest in marriage, strict review in *Zablocki*, as stated in the opinion, may derive from a constitutional interest in the equal protection of the indigent. However, on multiple occasions the

170. *Id.* at 383-85 (employing a rationale which interwove analysis “under the Equal Protection Clause” and included a consideration of the “violation of the Equal Protection Clause” in *Loving v. Virginia*, and “the right ‘to marry, establish a home and bring up children’ . . . protected by the Due Process Clause”).

171. *Id.* at 388.

172. *Id.* at 386. “By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.” *Id.*

173. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

174. *Zablocki*, 434 U.S. at 386.

175. See Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. Miami L. Rev. 101, 116 (2002) (criticizing the *Zablocki* Court for not explaining how tradition has made the right to marry fundamental, and stating that “United States history is replete with examples of the systematic denial of the right to marry”).

176. *Zablocki*, 434 U.S. at 397 (Powell, J., concurring).

177. *Id.* at 399.

Court has withheld suspect classification, and strict scrutiny equal protection treatment, from financial or wealth-based challenges.¹⁷⁸ Specifically, in *Kadrmas v. Dickinson Public Schools*,¹⁷⁹ the Court stated, "We have . . . rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny."¹⁸⁰

Finally, a view consistent with the history of marriage rights, the majority's actual language and a hybrid equal protection-due process scheme may lie in Justice John Paul Stevens's concurring opinion in *Zablocki*. Stevens found the impetus for strict scrutiny and legislative invalidation not in the innate fundamental quality of marriage, but rather in the unequal administration of the sometimes protected marital interest.¹⁸¹ Thus, the quasi-fundamental right of marriage analysis takes into account the unprotected, but unequal, classification, resulting in a more powerful amalgamation when the two quasi-fundamental rights are recognized in tandem.

4. *M.L.B. v. S.L.J.*

Another example of the co-presence of equal protection and due process in the arena of family law occurred in *M.L.B. v. S.L.J.*¹⁸² In *M.L.B.*, the Court confronted a family law dispute in which a divorced father, who maintained custody of his children, had successfully terminated his ex-wife's (M.L.B.'s) parental rights to allow the adoption of the children by his new spouse.¹⁸³ The lower court had noted that the permission for the termination of M.L.B.'s parental rights was statutorily endorsed following the "erosion of the relationship between the parent and child[ren]" caused in part by neglect by the mother.¹⁸⁴

Subsequently, the biological mother, M.L.B., appealed the termination of rights; Mississippi law required M.L.B. to submit transcripts of the previous proceedings in order to proceed with the appeal.¹⁸⁵ The transcript fees were estimated at \$2352.36, an amount M.L.B. could not afford.¹⁸⁶ When Mississippi courts denied her application to proceed *in forma pauperis*,¹⁸⁷ M.L.B. challenged the Mississippi ruling as an improper equal protection

178. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) (denying suspect classification and strict scrutiny to an indigent woman).

179. 487 U.S. 450 (1988).

180. *Id.* at 458.

181. *Zablocki*, 434 U.S. at 404 (Stevens, J., concurring). Justice John Paul Stevens notes that while "[t]he individual's interest . . . is sufficiently important to merit special constitutional protection, . . . [i]t is not . . . an interest which is constitutionally immune from evenhanded regulation." *Id.* (citations omitted).

182. 519 U.S. 102 (1996).

183. *Id.* at 107.

184. *Id.* at 108 n.1.

185. *Id.* at 108-09.

186. *Id.* at 109.

187. *Id.*

infringement based on wealth, as well as an improper burden on the protected due process area of the family.¹⁸⁸

The Supreme Court overturned the statute as unconstitutional without clarity as to whether the source of the constitutional protection was the Equal Protection Clause, the Due Process Clause, or both.¹⁸⁹ In the invalidation, the Court relied primarily on *Griffin v. Illinois*,¹⁹⁰ a case that struck down a state statute requiring a criminal appellant to pay transcript costs.¹⁹¹ Central to the plurality holding in *Griffin* was the notion that while neither the classification of the indigent criminal appellee, nor access to criminal appellate review were constitutionally protected categories, the Court could draw "support from" both "the Due Process and Equal Protection Clauses."¹⁹²

The *M.L.B.* Court also looked to previous, expanded applications of the *Griffin* doctrine: the threading of equal protection and due process in a "narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees."¹⁹³ The *M.L.B.* Court noted that while *Griffin* did not extend generally to the "broad array of civil cases,"¹⁹⁴ there was something peculiar about those cases "involving state controls or intrusions on family relationships."¹⁹⁵ The Court ultimately framed the constitutional issue in terms of equal access to the appellate court in light of the biological mother's interest in "affiliation with her children," and found that the state legislation was proscribed by the sphere of protection "established by . . . past decisions" in

188. *Id.* at 107.

189. Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. Ill. L. Rev. 1209, 1242.

190. 351 U.S. 12 (1956).

191. *Id.* at 20; see also *supra* note 122.

192. *M.L.B.*, 519 U.S. at 110. "[I]n the Court's *Griffin*-line cases, '[d]ue process and equal protection principles converge' A 'precise rationale' has not been composed, because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole[d] analysis.'" *Id.* at 120 (citations omitted) (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)).

193. *Id.* at 113. Specifically the Court noted *Boddie v. Connecticut*, 401 U.S. 371 (1979), a case invalidating a state restriction which required the payment of court costs prior to obtaining a divorce, and *Lindsey v. Normet*, 405 U.S. 56 (1972), in which the Court rejected Oregon's double-bond requirement because it burdened a particular class of litigants, evicted tenants, a barrier "faced by no other civil litigant in Oregon." *M.L.B.*, 519 U.S. at 113-14 (quoting *Lindsey*, 405 U.S. at 79).

194. *M.L.B.*, 519 U.S. at 116. The Court noted that the "general rule" was that fee requirements were "examined only for rationality" which was satisfied by "need for revenue." *Id.* at 123.

195. *Id.* at 116. The *M.L.B.* Court then segued to dual holdings concerned with the discontinuation of parental rights, *Lassiter v. Department of Social Services of Durham City*, 452 U.S. 18 (1981), and *Santosky v. Kramer*, 455 U.S. 745 (1982), which underscored the importance of the interest parents held in their relationship with their children. *M.L.B.*, 519 U.S. at 119. The Court found that the exception to the "mine run of cases," and the propriety of a subsequent application of the *Griffin* doctrine, is found in cases relating to the termination of parental rights. *Id.* at 123.

the *Griffin* line.¹⁹⁶ This “*Griffin* line,” inexorably, relies on the convergence of due process and equal protection.¹⁹⁷

While the Court concluded that most of the cases in its cited precedent, the cases of the *Griffin* line, “rested on equal protection grounds,” a concurring Justice Anthony Kennedy noted that “three of the decisions on which the majority relied rested exclusively on the Due Process Clause.”¹⁹⁸

Significantly, the braiding of the due process and equal protection interests is evinced by the dissent of Justice Clarence Thomas, where the majority is criticized for “perpetuating ‘ambiguity’ by not specifying the constitutional source for its holding.”¹⁹⁹

“[C]rucial to the understanding of the meaning of *M.L.B.*” is the absence of a single fundamental constitutional right—first the Court conceded that the Constitution did not require any appeal of a judicial determination.²⁰⁰ Further, any constitutional equal protection given to wealth-based classes is minimal, if existent at all.²⁰¹ Professor Julie A. Nice notes that “[r]ather than holding that parental rights were fundamental or quasi-fundamental (what the Court considered but did not hold) or that poor parents were a suspect or quasi-suspect class (what the Court never suggested), *M.L.B.* melded consideration of the right and class, emphasizing the interaction between them.”²⁰² Thus, it can be reasoned that the “majority combined” the attendant rights, rooting the decision in an acknowledgment of the duality of the “denial of a fairly important right (a civil appeal challenging termination of parental rights) from a relatively targeted class (parents who cannot afford the requisite appellate fees).”²⁰³

5. *Lawrence v. Texas*

The Court’s latest decision in the grey area where equal protection and due process converge occurred in *Lawrence v. Texas*.²⁰⁴ In *Lawrence*, Houston police entered the apartment of one of the petitioners in response to a reported “weapons disturbance” call.²⁰⁵ The police discovered the petitioners engaged in homosexual activity.²⁰⁶ The men were subsequently

196. *Id.* at 119, 120.

197. *See* Nice, *supra* note 189, at 1243 (referring to *Boddie*, *Lassiter*, and *Santosky*). Additionally Justice Clarence Thomas criticized the majority, stating “If neither Clause affords petitioner the right to a free, civil-appeal transcript, I assume that no amalgam of the two does.” *M.L.B.*, 519 U.S. at 130 (Thomas, J., dissenting); Nice, *supra* note 189, at 1243.

198. Nice, *supra* note 189, at 1243.

199. *Id.* (quoting *M.L.B.*, 519 U.S. at 130 (Thomas, J., dissenting)).

200. *Id.* This differs from the claim to any initial review and fairness hearing, a right mandated by *Stanley v. Illinois*. *See supra* text accompanying note 85.

201. *M.L.B.*, 519 U.S. at 110; *see also supra* notes 182-84 and accompanying text.

202. Nice, *supra* note 189, at 1247.

203. *Id.* at 1247 n.222, 1248.

204. 539 U.S. 558 (2003).

205. *Id.* at 562.

206. *Id.* at 563.

convicted under Texas's state statute that made it a crime to "engage[] in deviate sexual intercourse with another individual of the same-sex."²⁰⁷

The Court granted certiorari to review the petitioners' challenges that the statute violated the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.²⁰⁸ The defendants argued that the restriction on homosexual sodomy was improper under the Equal Protection Clause because it applied unevenly to heterosexual and homosexual classes.²⁰⁹ Second, the defendants argued, the restriction violated the Due Process Clause's protected right of privacy.²¹⁰

A majority of the *Lawrence* Court agreed with the petitioners' due process challenge.²¹¹ The Court found that the restriction on the act, or perhaps the relationship, contested in *Lawrence* fell within a sphere of interests protected from state interference created by the Court's previous cases: *Griswold v. Connecticut*²¹²—protecting a privacy interest in striking down state restrictions on contraception; *Eisenstadt v. Baird*—also striking down restrictions on access to contraception, and declaring "the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person";²¹³ and *Roe v. Wade*²¹⁴—protecting an aspect of "fundamental significance in defining the rights of the person."²¹⁵

As the petitioners' challenge suggested, due process was not the sole interest present in the case; rather, it was accompanied by an equal protection interest as well.²¹⁶ While the Court ostensibly held the restriction invalid under the Due Process Clause,²¹⁷ it also noted that the equal protection challenge, the claim that unfair application to homosexuals as compared to heterosexuals was unconstitutional, was a "tenable argument."²¹⁸ Indeed, Justice Sandra Day O'Connor, concurring in the

207. *Id.* "Deviate sexual intercourse" included "(A) any contact between . . . the genitals of one person and the mouth or anus of another; or (B) the penetration of the genitals or the anus of another with an object." *Id.*

208. *Id.* at 564.

209. Reply Brief for the Petitioners at 11, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

210. *Id.* at 1, 3.

211. *Lawrence*, 538 U.S. at 578-79.

212. 381 U.S. 479 (1965).

213. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

214. 410 U.S. 113 (1973).

215. *Lawrence*, 539 U.S. at 565.

216. *Id.* at 574.

217. The Court felt it important to address the challenge on the grounds of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in order to show that *Bowers* "was wrong the day it was decided." See Tribe, *supra* note 122, at 1909 (quoting *Planned Parenthood of So. Pa. v. Casey*, 505 U.S. 833, 863 (1992)).

218. *Lawrence*, 538 U.S. at 574. "As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity." *Id.* at 574-75. The Court stated further that "[e]quality of treatment and the due

judgment, reasoned that the state restriction was constitutionally invalid solely on the tenets of the Equal Protection Clause.²¹⁹ O'Connor stated that the "Texas statute makes homosexuals unequal in the eyes of the law."²²⁰ Thus, *Lawrence* presents another scenario that evidences the co-presence of equal protection and due process interests.

In the Court's examination of the rights implicated by the statute, the majority refrained from classifying any right of the petitioner as fundamental.²²¹ However, the Court also shied away from the opposite extreme, that of rational basis review, refusing to "analyze the Texas sodomy law in the deferential manner that it uses when only a rational basis is required."²²² Historically, Due Process Clause jurisprudence has stressed the importance of a clear statement of any "fundamental liberty interest" at issue.²²³ While the *Lawrence* Court promulgated the Due Process Clause as the appropriate shelter for the petitioner's right, it failed to provide a "careful description" of the protected interests.²²⁴

Alternatively, if the opinion is viewed solely from the equal protection standpoint, the classification present—sexual identity—is not quite a suspect class deserving of a heightened judicial scrutiny.²²⁵ Further, equal protection jurisprudence mandates as an initial step in an equal protection challenge the determination of the weight of the classification in order to determine the level of scrutiny.²²⁶ Yet the *Lawrence* Court failed to provide a level of scrutiny on which to proceed.²²⁷ The Court may have discerned both the under-inclusiveness²²⁸ and overbreadth of any

process right [involved] . . . are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575.

219. *Id.* at 579 (O'Connor, J., concurring in the judgment).

220. *Id.* at 581.

221. See Hunter, *supra* note 122, at 1114 ("[T]he Court's text makes clear that it is somehow a core right, but never crosses the line into denominating it as fundamental . . .").

222. *Id.*

223. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); Karlan, *supra* note 139, at 1450 n.18.

224. *Glucksberg*, 521 U.S. at 721 (citations omitted); see also *Lawrence*, 539 U.S. at 586 (Scalia, J. dissenting) ("Though there is discussion of 'fundamental proposition[s],' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause." (citations omitted)); cf. *id.* at 567 (framing the claim as more than "the right to engage in certain sexual conduct"); Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Rights*, 30 Ohio N.U. L. Rev. 189, 197 (2004) ("Justice Kennedy never actually explains what the full scope of 'liberty' is or why 'homosexual conduct' comes within it.").

225. See *supra* note 110 and accompanying text.

226. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (citing *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974)) (noting that an examination under the Equal Protection Clause requires a determination of which burden the restriction must meet).

227. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (stating that the majority fails to "subject the Texas law to the standard of review that would be appropriate (strict scrutiny)"); see also Karlan, *supra* note 139, at 1450.

228. Presumably, if the equal protection argument were to hold, the state of Texas could still prohibit sodomy, if the prohibition were applied to all persons. Cf. Meghan M. Peterson, *The Right Decision for the Wrong Reason: The Supreme Court Correctly Invalidates the Texas Homosexual Sodomy Statute, but Rather than Finding an Equal Protection Violation*

decision²²⁹ based on a constitutionally protected equal treatment of sexual preference classification.

Inapposite to jurisprudential procedure of either a discrete, singular version of equal protection or due process, the Court described the petitioners' liberty interest at a level of generality that encompassed both due process and equal protection concerns, allowing "the Court [to] recast the right as involving not just autonomy but equality as well."²³⁰

The *Lawrence* Court's threading of the due process and equal protection interests has been noted particularly in the Court's treatment of *Bowers v. Hardwick*.²³¹ Professor Nan D. Hunter posits that in overturning *Bowers*, the *Lawrence* Court adopted the *Bowers* dissent of Justice Stevens, specifically Stevens's use and acknowledgment of "liberty," rather than the *Bowers* dissent of Justice Harry Blackmun, which is pervaded by the constitutional right of "privacy."²³² In this sense, the Court avoids directly categorizing the *Lawrence* protection as solely birthed from the due process privacy line from *Griswold v. Connecticut* to *Roe v. Wade*.²³³ Stevens's *Bowers* dissent is seen, instead, as an extension of *Eisenstadt v. Baird*²³⁴ where Justice William Brennan braided privacy—the right to contraception—with equal protection—the unmarried versus the married—by stating that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion."²³⁵ It follows that a foundation of the *Lawrence* decision is Stevens's *Bowers* dissent, which "weaves together privacy and equality themes in a . . . seamless way."²³⁶

In a fashion similar to Stevens's *Bowers* dissent,²³⁷ the *Lawrence* decision allows the equal protection realities to intermingle with the due process liberties. The Court takes note of the unequal effect of burdening the relationship liberty with state restriction: notably, the actual and

in *Lawrence v. Texas, the Court Incorrectly and Unnecessarily Overrules Bowers v. Hardwick*, 37 Creighton L. Rev. 653 (2004) (arguing that *Bowers v. Hardwick*, permitting the restriction of homosexual sodomy, was unnecessarily overturned by *Lawrence* where the Court may have held the Texas statute invalid under equal protection).

229. A holding solely on equal protection may elevate homosexuals to a protected class and have ramifications on marital rights. Cf. *Lawrence*, 539 U.S. at 590 (Scalia, J. dissenting).

230. Karlan, *supra* note 139, at 1452.

231. 478 U.S. 186, 188 n.1 (1986) (upholding a Georgia statute making it a crime to perform or submit to "any sexual act involving the sex organs of one person and the mouth or anus of another").

232. See Hunter, *supra* note 122, at 1106-07.

233. *Id.* at 1105-06.

234. "Stevens's central move is to extend the *Eisenstadt* logic Justice Stevens makes equal treatment under the law the logical fulcrum of his dissent; it is the critical insertion of the equal protection point which extends the liberty (privacy) right to Michael Hardwick." *Id.* at 1108.

235. *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

236. *Id.*

237. *Id.* ("The same quality of interwoven doctrine is the hallmark of *Lawrence*.").

theoretical stigmatization of criminalizing homosexuality.²³⁸ Thus, while the decision is professed to be a protection under the Due Process Clause, the Court's concern with liberty was just as much about the equality of protection the liberty receives.²³⁹ *Lawrence's* dual concern marks the apex of hybrid analysis, "presuppos[ing] and advanc[ing] an explicitly equality-based . . . theory of substantive liberty" more than "any other decision in Supreme Court[] history."²⁴⁰

A general description encompassing the dual interests is necessary to tell *Lawrence's* "single, unfolding tail of equal liberty and increasingly universal dignity."²⁴¹ Without recognition of the dual interests the Court would have blinded itself to the degree of constitutional offensiveness the statute represented. Thus, the "*Lawrence* Court's discussion of liberty would be incoherent without some underlying commitment to equality among groups."²⁴²

The line of cases displaying the co-presence of quasi-fundamental rights and quasi-suspect classes display a possible tendency of the Supreme Court to rely on multiple constitutional considerations in order to strike down invasive state regulations. In addition to the use of due process-equal protection hybrids as a mode of constitutional doctrine, the Court has shown a shift towards the recognition of an expanded "constitutional family."

Having developed the distinctions of adoption categories, as well as provided a factual background for the constitutional implications of adoptions, including the expanded family and the co-presence of due process and equal protection interests, this Note will next address a conflict that exists in the contemporary judicial treatment of the second-parent adoption mechanism.

II. EXTRACTIONS FROM THE LEGISLATION AND JURISPRUDENCE

This part describes certain often differing jurisprudential approaches to family law, beginning with the conflicting legal treatment of second-parent adoptions, and more specifically the contrasting approaches to the statutory mandate that the biological parent's rights to the child are severed when an adoption occurs. The disparate state laws accept second-parent adoptions only in some instances, often reject them, and in some instances show only ambivalence. Next, this part briefly describes the conflicting social views

238. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); Tribe, *supra* note 122, at 1905 ("The stigmatization of same-sex relationships is concretized and aggravated by the law's denunciation as criminal of virtually the only ways of consummating sexual intimacy possible in such relationships.").

239. Karlan, *supra* note 139, at 1458 ("[W]hatever the Court chooses to call it, [it] is as much a claim about equality as it is a claim about liberty."); Tribe, *supra* note 122, at 1898.

240. See Tribe, *supra* note 122, at 1898.

241. *Id.*; see also Karlan, *supra* note 139, at 1449 ("[L]iberty and equality are more intertwined in *Lawrence* than in *Loving*.").

242. Karlan, *supra* note 139, at 1449; Tribe, *supra* note 122, at 1898 (noting that the due process and equal protection "missions" are "interlocked").

of second-parent adoption. Finally this part details certain scholarly interpretations of the Supreme Court's approach to state restrictions on particular family relationships.²⁴³

A. *Family Law and Attitudes to Second-Parent Adoptions*

Family law, including second-parent adoptions, is traditionally placed strictly within the purview of state control.²⁴⁴ Certain constitutional theories promote a level of federal inaction with regard to family law, "deferring to the . . . state courts, which traditionally have controlled and developed expertise in family law."²⁴⁵ In addition to the specialization of state courts, placing family law exclusively at the state level decentralizes the strength of the federal government in its encouragement of any particular values or morals.²⁴⁶ The result is a diversity of states and experimentation at the state level, generally seen as beneficial effects of limited federal involvement.²⁴⁷

Alternately, there is a point where the interests of localism are superceded by the rights guaranteed by the Constitution. At this point, a function of the federal government arises—manifested through the protection of certain fundamental rights. Conflict over the placement of the line which runs between state sovereignty in family law, on one side, and the corrective hand of the federal government, on the other, is the framework upon which the right to, or decision to withhold the right of, second-parent adoption should be viewed.²⁴⁸

243. See *supra* Part I.B.

244. See D. Kelly Weisburg & Susan Frelich Appleton, *Modern Family Law*, at xxxiii (2d ed. 2002) ("Fundamental to family law today . . . is the tension between respect for family privacy and deference to state authority."); see also Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 Iowa L. Rev. 1073, 1073 (1994) ("Whether family law belongs in the federal courts under diversity jurisdiction is somewhat contested within federal court jurisprudence."). The Supreme Court has identified the primacy of state legislatures and courts, in some instances, to develop family-related regulations. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 392-93 n.13 (1979) (identifying the right of the state to set some confines of child custody proceedings). Further, the Supreme Court has struck down federal legislation for fear of its effect on the state's ability to promulgate family law. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting reasoning which would allow Congress to regulate "family law (including marriage, divorce and child custody)").

245. Cahn, *supra* note 244, at 1074-75 (citing Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1143-44 (1988)); see also Dailey, *supra* note 7, at 1792 (1995) (promoting a "localist theory of family law" which includes "adoption, foster care, and child welfare laws").

246. See Dailey, *supra* note 7, at 1872.

247. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.").

248. See Dailey, *supra* note 7, at 1880 ("The federal government always operates in the area of family law against a background of presumptive state authority.").

Only three states, California, Connecticut, and Vermont, specifically provide codified vehicles for second-parent adoption.²⁴⁹ The overwhelming absence of second-parent adoptions available through state legislation in the remaining forty-seven states has resulted in discordance between the structural form of second-parent adoptions, namely the need for the biological parent to keep their parental rights, and the state statutory framework of automatic severance of the first parent's rights upon adoption.²⁵⁰ This severance of rights is inapposite to the goal of legalizing the more inclusive family sought by second-parent advocates.²⁵¹ Additionally, in the strictly textual sense the "step-parent exception"²⁵² empowers only adoption by a "spouse" to be excepted from the parental rights severance rule.²⁵³ Couching the exception in marital terms is problematic for the non-married person, or persons not eligible for marriage; in fact, the exception has been held to be out of reach for persons so situated.²⁵⁴

1. Approval of Second-Parent Adoption: Judicial Statute Construction

While three states have explicit statutory approval of second-parent adoptions, forty-seven states do not.²⁵⁵ In those states permitting second-parent adoptions, while not providing second-parent legislation, a certain judicial construction has been required in order to permit the second-parent adoption without a severance of the biological parent's rights.²⁵⁶ To obtain authority for a second-parent adoption without specific sanction, the court must "forego an overly literal and rigid interpretation of state adoption statutes in order to advance the . . . underlying purpose of promoting the child's best interests."²⁵⁷ It is notable that, save one exception,²⁵⁸ no

249. See Hollinger, *supra* note 14, § 3.06[6], at 3-62 ("These statutes are based on the Uniform Adoption Act (1994) provisions that generally recognize that right of 'any one' to seek to adopt for the purpose of creating a parent-child relationship . . .").

250. See *supra* note 31-32 and accompanying text.

251. See Hollinger, *supra* note 14, § 3.06[6], at 3-61 ("A more difficult issue is whether existing adoption statutes bar someone who is already a legal parent—through birth or adoption—from consenting to the adoption of his or her child . . . in order for someone else to assume all parental rights and responsibilities."); Shapiro, *supra* note 59, at 26-27.

252. See *supra* note 33 and accompanying text.

253. See *supra* note 35 and accompanying text.

254. See *In re Adoption of R.B.F. & R.C.F.*, 762 A.2d 739, 742 (Pa. Super. Ct. 2000) (holding that the "step-parent exception," allowing the spouse of a legal parent to adopt a child without terminating the legal parent's rights, cannot be used in light of the passage of the state's legislation outlawing same-sex marriages).

255. See Alona R. Croteau, Comment, *Voices in the Dark: Second Parent Adoptions When the Law Is Silent*, 50 Loy. L. Rev. 675, 691 (2004) (noting that California, Connecticut, and Vermont have explicit statutory approval of second-parent adoptions).

256. See Overview, *supra* note 1.

257. *Id.*; see also, Wadlington & O'Brien, *supra* note 15, at 206 ("Courts that have decided such cases sometimes have engaged in a tortuous process of statutory interpretation . . .").

258. See Overview, *supra* note 1.

judicial interpretation of state law permitting second-parent adoption has been codified into state statute.²⁵⁹

Take as an example the case of *In re Adoptions of B.L.V.B. & E.L.V.B.*, in which the Vermont Supreme Court focused not on the specific “spousal” verbiage²⁶⁰ of the stepparent exception, but rather on (i) the absence of a specific statutory prohibition of second-parent adoptions in the state, and (ii) the legislative intent of the stepparent exception—securing the first legal parent’s rights.²⁶¹ The court allowed the second-parent adoption, holding that the “general purpose” of the adoption statute was “to clarify and protect the legal rights of the adopted person . . . not to proscribe adoptions by certain combinations of individuals.”²⁶² *In re B.L.V.B.* is emblematic of a modern trend, as appellate court rulings in a number of states and the District of Columbia have sidestepped the strict textualist reading of adoption statutes in order to allow second-parent adoptions without severance of the first parent’s parental rights.²⁶³

2. Disapproval of Second-Parent Adoption: Explicit Statutes and Judicial Construction

Certain states read around the rights severance rule in order to accomplish second-parent adoptions; however, other courts take a “divergent view[]” and disapprove of this method of judicial interpretation.²⁶⁴ These states oppose the shift toward approval of second-parent adoption, and refuse to permit second-parent adoptions.²⁶⁵ In

259. See Schacter, *supra* note 61, at 935.

260. Section 448 of the Vermont Family code read, in relevant part:

The natural parents of a minor shall be deprived, by the adoption, of all legal right to control of such minor, and such minor shall be freed from all obligations of obedience and maintenance to them. . . . Notwithstanding the foregoing provisions of this section, when the adoption is made by a spouse of a natural parent, obligations of obedience to, and rights of inheritance by and through the natural parent who has intermarried with the adopting parent shall not be affected.

In re Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1273-74 (Vt. 1993) (internal quotation omitted).

261. *Id.* at 1274.

262. *Id.*; see also *In re Adoption by S.M.Y.*, 620 N.Y.S.2d 897, 902-03 (N.Y. Fam. Ct. 1994) (finding that stepparent adoptions and second-parent adoptions are essentially the same mechanism, despite the lack of a formalized relationship in second-parent adoptions).

263. Higher courts recognizing second-parent adoptions include, among others, those of District of Columbia, *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995), Illinois, *In re Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995), Indiana, *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004), Massachusetts, *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993), New Jersey, *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995), New York, *In re Jacob*, 636 N.Y.S.2d 716 (1995), Pennsylvania, *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002), Vermont, *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d at 1271. See National Center for Lesbian Rights, Second-parent Adoptions: A Snapshot of Current Law, <http://nclrights.org/publications/2ndparentadoptions.htm> (last visited Oct. 18, 2005).

264. See Hollinger, *supra* note 14, § 12.03[1], at 12-19.

265. See Schacter, *supra* note 61, at 934.

Mississippi, same-sex couples are expressly prohibited from adopting.²⁶⁶ In Florida, the adoption statute²⁶⁷ also explicitly prohibits adoptions by homosexuals, and despite a recent expansion of adoption availability to include “cohabitating,” unmarried couples, Florida’s Department of Children and Families has stated that Florida will continue to favor married couples.²⁶⁸ Utah adoption law proscribes adoptions by persons who cohabit but are not married under Utah law.²⁶⁹ Given that homosexual marriage is not available under Utah law, this provision effectively eliminates the possibility for any second-parent family units.

Appellate court decisions in a handful of states, including Colorado,²⁷⁰ Nebraska,²⁷¹ Ohio,²⁷² and Wisconsin,²⁷³ have held that second-parent adoptions are not available under various state adoption statutes. “[T]hese courts construe as ‘mandatory’ [the] statutory provisions that call for the termination of the rights and duties of a parent who consents to the adoption of his or her child by anyone other than the parent’s spouse.”²⁷⁴

Further, within a number of other states, trial court approval remains regional rather than statewide.²⁷⁵ Thus, the inconsistent treatment of second-parent adoptions on the national level is mirrored on the intrastate level in a number of states where only limited trial court approval of the second-parent adoption exists.²⁷⁶ In these states, such as in Minnesota, where second-parent adoptions have been approved in only three of the state’s counties, the effects of a lower court approval of second-parent adoption are limited to the jurisdiction of that particular trial court.²⁷⁷ So “in some states, what is allowed one year or in one particular county may not be okay in a different time or place.”²⁷⁸ What is more, this cloud of uncertainty regarding second-parent adoption status extends to a number of states where the courts have not yet addressed second-parent adoptions, or

266. Miss. Code Ann. § 93-17-3(2) (Supp. 2004).

267. Fla. Stat. Ann. § 63.042(1) (West 2005); *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (affirming Florida’s ban on gay adoption).

268. See Hollinger, *supra* note 14, § 3.06[6], at 3-64; Maya Bell, *Florida Revamps Rules for Adoption*, Ft. Lauderdale Sun-Sentinel, Oct. 12, 2003, at 1A.

269. See Utah Code Ann. § 78-30-1 (2002).

270. *In re Adoption of T.K.J. & K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1998). *But see In the Interest of E.M.L.C.*, 100 P.3d 546 (Col. Ct. App. 2004) (granting visitation rights to an estranged nonbiological same-sex parent).

271. *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002).

272. *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

273. *In the Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

274. Hollinger, *supra* note 14, § 3.06[6], at 3-63.

275. Second-parent adoptions have been approved in some lower courts in Alabama, Alaska, Georgia, Hawaii, Iowa, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington. See Overview, *supra* note 1, at 7; see also Hollinger *supra* note 14, § 3.06[6], at 3-63.

276. See *infra* notes 277-81 and accompanying text.

277. See Lambda Legal, Overview of State Adoption Laws (Dec. 15, 2004), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=399> [hereinafter Lambda].

278. See Curry et al., *supra* note 13, at 3/4.

where the decisions favoring second-parent adoption have been sealed.²⁷⁹ Courts in Arizona, Florida, Idaho, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming have yet to address or publicly permit second-parent adoptions.²⁸⁰

Any shift towards acceptance and promotion of second-parent adoptions, as described in Part II.A.1, is not uniform because some "courts and legislatures are attempting to block . . . adoptions by lesbian and gay couples."²⁸¹ The national landscape of second-parent adoption is fraught with an undercurrent of opposition and obstacles in forms ranging from express prohibition to judicial resistance or silence.

In addition, for advocates of second-parent adoption, the danger in relying on judicial interpretation of a particular state adoption statute is the power of the legislature to voice disapproval by overturning any permission of a court with an explicit prohibition.²⁸² Campaigns have been mounted in recent years to ban second-parent adoptions, as well as homosexual adoptions in general.²⁸³ Most notably, the U.S. House of Representatives passed a bill to ban second-parent adoptions in the District of Columbia in 1998.²⁸⁴ It has been asserted that the proposed amendments are not "offered to promote the best interests of children, but rather to promote a particular political agenda."²⁸⁵

A peripheral component of the conflict, where second-parent adoptions operate without a specific statutory vehicle, is the issue of increased litigation costs. California's treatment of gay "stranger" adoptions²⁸⁶ can be taken as an analogous situation, and has been noted as "quite instructive" with respect to the financial concern related to adoption access.²⁸⁷ In the early 1990s gay adoptions "became almost routine," especially in the state's more liberal counties, such as San Francisco, Los Angeles, and Alameda. However, in 1995, then-Governor Pete Wilson overturned a Department of Social Services policy that permitted adoptions without consideration of sexuality.²⁸⁸ Social service employees were forced to "automatically reject[]" any bid from a homosexual to adopt any child.²⁸⁹ This pushed adoption hearings further from the discretion of social service employees, requiring the prospective adopter to litigate their cases in the local court

279. See *Lambda*, *supra* note 277.

280. *Id.*

281. See *Curry et al.*, *supra* note 13, at 3/4.

282. *Id.*

283. See *Strasser*, *supra* note 33, at 1047 ("[L]egislators may adopt measures in order to disadvantage a disfavored group . . .").

284. *Id.* at 1040.

285. *Id.*

286. A stranger adoption exists where the adoptee has no previous relationship with the adopter before placement.

287. *Curry et al.*, *supra* note 13, at 3/4.

288. *Id.*

289. *Id.*

system, “mak[ing] the process more difficult and more expensive.”²⁹⁰ Similarly, where second-parent adoptions rely on litigation and judicial interpretation in order to legitimate a relationship, they faced increased transaction costs as compared with more routine traditional adoption.²⁹¹

While some state courts have found a place for second-parent adoptions within their state statute, other states have refused to recognize second-parent adoptions without the severance of the biological parent’s parental rights. In addition, where only the courts of a state have recognized the second-parent mechanism the potential remains for an abolition of this adoption option through legislation. Finally, in the absence of a legislated second-parent adoption process a potential second parent must seek legitimation through the court system rather than through a less invasive process. The next section will detail further implications of the denial of the second-parent adoption method.

3. Consequences of Lack of Second-Parent Adoptions

Further evidence of the conflict between states that permit second-parent adoptions and those that do not are those consequences which result where second-parent adoptions are rejected by eligible couples (assuming the option is available to them), or rejected through state proscription of the second-parent mechanism.²⁹² Generally, the adoption structure utilizes an “all-or-nothing” approach to apportioning parental rights, meaning that if a parent is unsuccessful in retaining legal parental rights before a court, he or she has no claim to the child.²⁹³ Unlike custody disputes between “two legally-recognized parents,” who “begin the litigation on equal footing . . . when lesbian mothers litigate custody, the legal mother begins with a nearly insurmountable advantage over the non-legal mother.”²⁹⁴ In *Alison D. v. Virginia M.*,²⁹⁵ Alison and Virginia shared a relationship for three years, and cohabitated for more than two years, when they decided to have a child, agreeing that Virginia would be artificially inseminated.²⁹⁶ In July of 1981, Virginia gave birth to a child who was given both last names of Virginia and Alison.²⁹⁷ Both women acted as parents to the child, providing equal parts economic and emotional support, and the child referred to both

290. *Id.*

291. See National Center for Lesbian Rights Web Site, Second Parent and Domestic Partner Adoptions in California: What Lesbian and Gay Parents Need to Know in the Wake of the Sharon S. Decision and AB 25, <http://www.nclrights.org/releases/2ndparent-faq.htm> (last visited Oct. 12, 2005) (“In general, however, domestic partner adoptions cost less and require less extensive investigation than do second-parent adoptions.”).

292. See *infra* notes 293-315 and accompanying text.

293. See Young, *supra* note 63, at 522.

294. Shapiro, *supra* note 59, at 23; see also Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459, 471-72 (1990).

295. 572 N.E.2d 27 (N.Y. 1991).

296. *Id.* at 28.

297. *Id.*

women as “mommy.”²⁹⁸ Nearly two and a half years subsequent to the birth of their child, the women ended their relationship, and Alison moved from their jointly owned home.²⁹⁹ After some time, Virginia refused Alison any access to the child, and Alison was forced to litigate for visitation rights.³⁰⁰

The court defined Alison as neither “the biological mother of the child nor . . . a legal parent by virtue of an adoption,” and rejected any finding of parental rights on equitable grounds.³⁰¹ Alison was denied her bid to have access to the child, despite her role in the child’s conception, rearing, and support spanning six years.³⁰² The dissent noted that the result of this decision would weigh heavily on the children raised in same-sex relationships, “limiting their opportunity to maintain bonds that may be crucial to their development.”³⁰³

In addition to a mutual suspension of a relationship, unexpected death without legal recognition can lead to unfortunate results. In the case of *Nancy S. v. Michelle G.*,³⁰⁴ Nancy S., the gestational mother, and Michelle G., the nonbiological partner, had lived together for eleven years before deciding to have a child.³⁰⁵ Nancy S. was twice inseminated, and gave birth to two children: Kate, in 1980, and another, Micah, in 1984.³⁰⁶

Six months after Micah’s birth, Nancy ended her relationship with Michelle. After years of visitation, during which the children lived with both parents, Nancy successfully petitioned the state court to declare Michelle a nonparent.³⁰⁷ Despite Michelle’s pleas that the children were “everything” to her, the state (at the time) did not award second-parent adoptions, and Michelle had no legal leverage.³⁰⁸ Several years after the severance, Kate had convinced Nancy to let her live with Michelle.³⁰⁹ Nancy soon moved to Oklahoma.³¹⁰ While living in Oklahoma with Micah, Nancy was killed in a car accident, and Micah was without a guardian.³¹¹ “Oklahoma authorities refused to contact Michelle and instead Micah was declared a ward of the state.”³¹² Days passed, and “repeated pleas by Michelle and Nancy’s relatives” were heard before the dispute was

298. *Id.*

299. *Id.* Alison also “agreed to continue to pay one half of the mortgage and major household expenses.” *Id.*

300. *Id.* at 28-29.

301. *Id.* at 29.

302. *Id.* at 30.

303. *Id.* (Kaye, J., dissenting). This reasoning is in line with social science studies that find that the childhood relationships develop with the primary, daily caretakers, regardless of biological relationship. See Bryant, *supra* note 19, at 238 n.37.

304. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (Dist. Ct. App. 1991).

305. Elaine Herscher, *Family Circle*, S.F. Chron., Aug. 29, 1999, at 1Z1.

306. *Id.*

307. *Nancy S.*, 279 Cal. Rptr. at 219.

308. See Herscher, *supra* note 305.

309. *Id.*

310. *Id.*

311. See Overview, *supra* note 1.

312. *Id.*

resolved and Micah was allowed to live with Michelle.³¹³ The lack of legal recognition had led to days of uncertainty.

Finally, even the effects of September 11, 2001, may have been compounded by lack of second-parent relationships, leaving children of same-sex relationships without legal privilege to their nonlegal parent's inheritance, Social Security, retirement, or benefits coverage.³¹⁴

4. Adoption Rights and the Traditional Family

Given the derivative benefits of second-parent adoptions and conceivable injury to both the nonlegal parent and child, it may seem curious to supporters of second-parent adoption that opposition to second-parent adoptions continues. However, in addition to the conflict between the legal rationale of strict statutory constructionists and advocates of second-parent adoptions,³¹⁵ there exist social arguments for and against same-sex adoptions. Contentions for disallowing these same-sex adoptions have materialized in a handful of arguments, including (i) the best interest of the child, and (ii) the defense of the traditional family.

Statistically, the distribution of traditional families has gradually, and consistently, declined since 1940.³¹⁶ Census reports, documenting the explosion of single parent homes from 1960 to 1990, may substantiate a move away from the traditional family.³¹⁷ In fact, by 1988 approximately fifty percent fewer American children lived in traditional families than did in 1975.³¹⁸ It has been suggested that the gap between the "rhetoric" about the family and the "reality" of it is evidenced by the common failures of the traditional family, including divorce, child abuse, and domestic violence.³¹⁹

However, since the focal point of any adoption procedure is the potential effect on the child,³²⁰ categorical appraisals of the effect of homosexuality as a component of the adoptive family unit have been performed and propounded. A loud voice in opposition to homosexual adoptions vis-à-vis the best interest of the child has been Dr. Paul Cameron, who subscribes to

313. *Id.*

314. See Kate Kendall, Second-Class Victims of September 11th Attacks, National Center for Lesbian Rights, <http://nclrights.org/releases/sept11benefits101901.htm> (last visited Oct. 18, 2005). Kendall notes that

[u]nlike legally married spouses . . . surviving lesbian and gay spouses must not only cope with the devastating emotional loss but must also figure out how to pay the mortgage, cover burial expenses and put the kids through college with none of the financial support and protection automatically given to legally recognized spouses.

Id.

315. See *supra* note 272 and accompanying text.

316. See Howard V. Hayghe, *Family Members in the Work Force*, Monthly Lab. Rev., Mar. 1990, at 14, 18-19.

317. See Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Va. L. Rev. 2181, 2188 nn. 13-17, 2189 nn. 18-19 (1995).

318. See Hayghe, *supra* note 316, at 17 & tbl. 3.

319. See Young, *supra* note 63, at 509-10.

320. See *supra* notes 18-19 and accompanying text.

the view that “children of gays or lesbians are social and psychological misfits.”³²¹ Conflicting with Dr. Cameron’s views are those of the American Psychological Association, which has supported the more widely accepted view—that children of gay or lesbian parents are not disadvantaged “in any significant respect” when compared to children of heterosexual parents.³²² Much sociological evidence suggests that gay and lesbian parents provide similarly satisfying atmospheres for “psychosocial growth” as heterosexual parents.³²³

A second social concern, apart from the integration of children of same-sex couples, is the preservation of the value of the institution of the traditional family, which has played a part in judicial definitions of parental rights³²⁴ and also in denying second-parent adoptions.³²⁵ The traditional, nuclear family, phrased as a “conjugal household consisting of a husband, wife and their dependent children,”³²⁶ has been called upon as a source of stability for American society.³²⁷ If this traditional, nuclear family is seen as the default family unit then unmarried parents may be characterized as aberrational in judicial and social systems.³²⁸ The same-sex aberration—and the lack of stability and traditional value attached—can be seen as a source—of at least a portion—of societal social problems.³²⁹

Alternatively, the rationale of the traditional family has been criticized on two grounds: (i) It overvalues the role the traditional family has played in societal development,³³⁰ and (ii) it devalues the merits embodied in the nontraditional family.³³¹

321. See Hollinger, *supra* note 14, § 3.06[6], at 3-56 & n.75.

322. Charlotte J. Patterson, Am. Psychological Ass’n, Lesbian and Gay Parenting: A Resource for Psychologists § I.D (1995), available at <http://www.apa.org/pi/parent.html>.

323. *Id.* Charlotte Patterson’s survey of studies includes analysis of, among other things, the “development of gender identity among children of lesbian mothers”; “[s]ex role behavior of children”; “rates of homosexuality among the offspring of lesbian or gay parents”; and “potential differences between children of gay and lesbian versus heterosexual parents . . . [in the] children’s social relationships.” *Id.* § B.

324. See Michael H. v. Gerald D., 491 U.S. 110, 113-32 (1989) (upholding a restriction on a biological father’s parental liberty interest where the child’s mother was married to another man); *In re D.H.*, 830 So. 2d 21, 35 (Ala. 2002); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1988).

325. See *supra* note 254 and accompanying text; see also 144 Cong. Rec. H19109 (daily ed. Aug. 6, 1998) (statement of Rep. Largent) (stating the second-parent adoptions do not “protect the right of each child to grow up in a permanent, stable, loving family”).

326. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 879 & n.1 (1984).

327. For an argument, based in religion, and espousing the moral realism attached to adoptions by homosexuals, see Lynne Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 New Eng. L. Rev. 643, 653 (2004). “The most loving man cannot teach a girl how to be a woman [T]wo gay dads may not be enough to guide a daughter through her first menstrual cycle. Little boys and little girls need the loving influence of both a male and a female parent.” *Id.*

328. See Young, *supra* note 63, at 533.

329. *Id.*

330. “Americans have . . . glamorized the nuclear family . . . ‘[f]amilies have always been in flux and often in crisis; they have never lived up to the nostalgic notion’” Lynn

Nontraditional families have been touted as apt, or superior, replacements for the traditional, nuclear family.³³² The limited nuclear view of family excludes contributions made by individuals other than the biological mother and father.³³³ And some courts, as well as social and psychological authorities, have recognized that the principle factor in the positive development of the child is not the sexual identity of the parent, or adherence to a predefined family unit, but rather the element of continuity of relationships in the childhood environment.³³⁴

The prevailing social scientific support and limited state court approval of second-parent adoptions stand in conflict with the several states which retain express and tacit disapprovals of the mechanism. As noted, the prohibition of second-parent adoptions may face a constitutional conflict when second-parent adoptions are placed on a spectrum of constitutionally protected family rights running from the constitutionally protected family and control of the child to the unprotected traditional adoption.

B. *Rights of the Biological-Marital Parental Unit*

Second-parent adoption involves the legitimation of a family-like unit, and, in some instances, the protection of the family has been recognized as one of the fundamental and basic tenets woven into the American constitutional fabric.³³⁵ It has been argued that Supreme Court jurisprudence has displayed an ever-growing notion of what is a "family."³³⁶ Initially, the Court's early cases painted the constitutional protection of the family as limited to the "nuclear family."³³⁷ However, the complete contemporary jurisprudence takes a more substantive view of what is a constitutional family, expanding protection for more complex "family forms," at the expense of state autonomy in the arena of family law.³³⁸

Eisaguirre, *The Model Family that Never Was*, Rocky Mtn. News (Denver), Mar. 12, 1995, at 87A. "Social fragmentation and the myriad of configurations of modern families have presented us with new problems and complexities that can not be solved by idealizing the past." *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993) (citation omitted).

331. See *infra* notes 337-39.

332. See *infra* notes 333-34.

333. See Young, *supra* note 63, at 510 ("That vision . . . exclud[es] many people who could or do contribute in various ways to their upbringing. In a society in which fewer children have two married heterosexual parents who can attend to their needs . . . the rationale underlying the paradigm of the exclusive family appears to be especially weak."); *supra* note 114 and accompanying text.

334. See, e.g., *In re Evan*, 583 N.Y.S.2d 997, 1000 (Sup. Ct. 1992) (placing weight on the stability provided to a child); see also Bartlett, *supra* note 326, at 902.

335. See *supra* Parts I.B.1-2.

336. See Hopkins, *supra* note 70, at 452-54.

337. See *supra* Part I.B.1.

338. See Hopkins, *supra* note 70, at 453-54.

1. Parental Rights: Initial Cases

In his article, *The Supreme Court's Family Law Doctrine Revisited*, C. Quince Hopkins states that the initial Supreme Court family cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, centered on the right of the parent to control the life of the child.³³⁹ In establishing a parental right related to the choice of a child's curriculum, the Court in *Meyer v. Nebraska* found that liberty protected by the Constitution encompassed a right to "establish a home and bring up children."³⁴⁰ The *Pierce* decision, which followed a couple of years later, overturned a state mandate that children attend public school rather than private or parochial school, and was built upon the *Meyer* foundation of parental rights and right to control the child.³⁴¹ Thus the Court has distinguished between parent-child relationships which are a product of a caregiver relationship and those which are a product of the state—" "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." "³⁴² It has been stated that *Meyer* and *Pierce* place the right to control and parent the biological child within the purview of the biological parents, rather than under the thumb of the state.³⁴³

2. The Parental Unit from Beyond Marriage: A Move to Substantive Examination

The Supreme Court's decision in *Stanley v. Illinois*³⁴⁴ pulled family law jurisprudence away from the traditional, nuclear home.³⁴⁵ In *Stanley*, an unwed father challenged a state law that presumed him, as an unmarried father, to be an unfit caretaker of his children.³⁴⁶ The Court protected the rights of the unmarried father, and overturned the state statute as improper under the Equal Protection Clause of the Fourteenth Amendment, because the restriction affected unmarried fathers but not mothers or married fathers.³⁴⁷

This expansion of constitutional protection for family units that were more complex than the traditional nuclear family was further clarified in the cases of *Quilloin v. Walcott*³⁴⁸ and *Caban v. Mohammed*.³⁴⁹ Both *Quilloin* and *Caban* involved challenges to statutes which implicated the severance

339. *Id.*; see also *supra* notes 74-79 and accompanying text.

340. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

341. See Welt, *supra* note 90, at 188.

342. Hopkins, *supra* note 70, at 455 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

343. *Id.*

344. 405 U.S. 645 (1972).

345. See *infra* notes 346-56 and accompanying text.

346. *Stanley*, 405 U.S. at 647.

347. *Id.*

348. 434 U.S. 246 (1978).

349. 441 U.S. 380 (1979).

of an unmarried father's parental rights.³⁵⁰ The Court struck the statute in *Caban*, while leaving the statute challenged in *Quilloin* intact, distinguishing *Caban* as a case where the father/petitioner had significant interest and involvement in the child's life—a relationship ripe for constitutional protection.³⁵¹

It has been argued that the dismissal of the formalistic family and the finding of the unmarried father's parental rights in *Stanley v. Illinois* “established a framework for analyzing parental rights based upon each parent's actual involvement with the child, rather than solely on any biological connection.”³⁵² The Court can then be seen as building on this framework, and tending towards a preference for a substantive, rather than structural, evaluation of the family relationship in *Quilloin* and *Caban*. The success and failure of the respective challenges to the similar state statutes faced in *Caban* and *Quilloin* is tied to the level of involvement of the petitioning father.³⁵³ Because of the actual father-child relationship, *Caban* was emblematic of “bonds as warm, enduring, and important as those arising within a more formally organized family unit,” and accordingly the Court struck the statute.³⁵⁴ However, in *Quilloin*, where the father's apathy was inapposite to the traditional and protected family, the Court allowed the father's rights to be restricted.³⁵⁵ The Court, then, has moved from identifying the rights of the traditional parent to control the child's curriculum in *Meyer and Pierce*, to finding parental rights for the biological and involved, but unmarried, parent, in *Caban*.

3. The Parental Unit from Beyond Biology

The shift away from the nuclear family is evidenced not only by the married versus unmarried father context, but also by the Supreme Court's dismissal of biology from the parental rights calculation. Legal scholars have noted that “if there are identifiable benefits from a blood relationship, they are certainly subsidiary to the benefits derived from the association

350. *Id.* at 383 n.1, 384; *Quilloin*, 434 U.S. at 249 n.2, 251-52.

351. *Caban*, 441 U.S. at 389 n.7. Conversely, the biological father in *Quilloin* had a minimal relationship with the child, had never lived with his child, and failed to petition for legitimation for eleven years. *Quilloin*, 434 U.S. at 247-50.

352. See Welt, *supra* note 90, at 190.

353. Philip Welt states, “*Caban v. Mohammed* provide[s] strong protection for parental interests once those interests are established *Quilloin* provides that those unwed fathers who fail to develop a substantial relationship with their offspring cannot claim an absolute constitutional protection for their parent-child interest.” *Id.* at 199 (citation omitted).

354. *Caban*, 441 U.S. at 394; see also *Stanley v. Illinois*, 405 U.S. 645, 652 (1971); *supra* text accompanying notes 85-88.

355. *Quilloin*, 434 U.S. at 253; see also *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that a biological father's parental rights, as protected by due process, were not violated for failure to give him notice of a pending adoption where the father had not developed a substantial relationship with his child). *Lehr* focuses on “the function (engaging in parent-like behavior), rather than the form (i.e., the mere ‘biological link’)” and “on actual kinship-related behavior of people, rather than formalistic structure.” See Hopkins, *supra* note 70, at 458.

between individuals.”³⁵⁶ In this vein, it has been argued that the Court took both a step away, and towards, a structuralist family analysis in *Michael H. v. Gerald D.*³⁵⁷ In *Michael H.*, a California state statute presumed paternity when a child was born into an intact marriage.³⁵⁸ When Michael H. fathered a child with a woman who was married to another man and was denied visitation rights to his child, he challenged the state presumption.³⁵⁹

While some evidence suggested that Michael H. had engaged in active parenting, the Supreme Court relied on the historical disrespect for the adulterous, but biological, father.³⁶⁰ The *Michael H.* Court plurality detached the right of parenting from biology, upholding the denial of Michael H.’s parental rights in favor of the marital family.³⁶¹ The treatment of biology in *Michael H.* can be given multiple readings. From one perspective, the Court can be seen as privileging the marital relationship over the biological relationship.³⁶² In the alternate, as an expansion of the constitutional family, “*Michael H.* might represent a loosening of the biological leash for adult/child kinship ties.”³⁶³

The Supreme Court can be seen as moving from according constitutional protection to the nuclear family towards a recognition of parental rights for certain unmarried and nonbiological fathers. In a concurrent expansion of familial rights, the Court has required broad definitions of the term “family” in state zoning laws. The next part briefly examines the Court’s treatment of such a scenario.

4. A More Inclusive Parental Unit

The claim that the Supreme Court uses a substantive, contextual constitutional read in the province of familial rights³⁶⁴ is not unique to cases related to parental rights—other cases touching upon the protection of the “family” from state restriction employ a similar “function over form” analysis.³⁶⁵ A comparison of the Supreme Court decisions in *Moore v. City*

356. See Welt, *supra* note 90, at 207.

357. 491 U.S. 1101 (1989). “In one view, Michael H. might represent a . . . privileg[e] of a mere social parent . . . over a biological . . . father. A different reading of that case [is] that the Supreme Court was . . . promoting the marriage relationship over a genetic parental one.” Hopkins, *supra* note 70, at 462; see also Welt, *supra* note 90, at 204, 207 (“The *Michael H.* decision significantly diminishes, if not extinguishes, the argument that the Constitution presumptively favors the biological parents in custody disputes.”).

358. *Michael H.*, 491 U.S. at 117-18.

359. *Id.* at 115.

360. *Id.* at 123-27.

361. *Id.* at 131-32.

362. See *supra* note 357.

363. Hopkins, *supra* note 70, at 462.

364. This read is made vis-à-vis the *Caban-Quilloin* line. See *supra* notes 278-81.

365. See Fineman, *supra* note 317, at 2203 (“We must begin to think of family policy in terms of the functions we want the family to perform and to leave behind our obsession with form.”); Hopkins, *supra* note 70, at 469 (“This focus on the functions rather than forms of families encompasses a more expansive notion of family, similar to that adopted in *Moore v. City of East Cleveland* . . .”).

of *East Cleveland*³⁶⁶ and *Village of Belle Terre v. Boraas*³⁶⁷ may elicit evidence of a similar substantive constitutional read. In *Moore*, a plurality of the Court struck down a Cleveland zoning regulation which only allowed members of a single family to live together.³⁶⁸ The ordinance's restrictive definition of "family" prevented the petitioner, a grandmother, from living with her two grandsons.³⁶⁹ In *Belle Terre*, a few years prior, the Court upheld a New York zoning limitation which restricted certain living spaces to "one-family dwellings."³⁷⁰

While the *Belle Terre* housing regulation was similar to that in *Moore*³⁷¹ because both pieces of legislation restricted the makeup of the home, the *Moore* Court distinguished the statute challenged in *Belle Terre* as a valid exercise of municipal power to restrict unrelated people from living together.³⁷² The Court went through pains to distinguish its *Belle Terre* holding from a hypothetical case in which a state regulates two unrelated persons living together—implying that biology was not the critical focal point.³⁷³ Therefore, in the alternative, it may be claimed that the Court, in analyzing "unwed father" cases, as well as *Moore* and *Belle Terre*, employed a substantive analysis that valued the function of the family. In *Moore*, it was clear that the grandmother was playing the role of the surrogate mother, and while the blood relationship of the cousins was distant, the group had a functional family relationship.³⁷⁴ In contrast, the grouping in *Belle Terre* consisted of transient college students with little functional resemblance to the traditional family protected from *Meyer* through *Stanley*.³⁷⁵ It can be reasoned, after *Moore* and *Belle Terre*, that the Court has utilized a substantive constitutional read even when determining the propriety of state statutes offering a definition of "family."

The instances of the Court's willingness to define the constitutional family has shown that, regardless of any preferable placement for legislative authority over family law within the province of state regulation,

366. 431 U.S. 494 (1977).

367. 416 U.S. 1 (1974).

368. *Moore*, 431 U.S. at 506.

369. *Id.* at 496-97.

370. *Id.* at 498 (citing *Belle Terre*, 416 U.S. at 1).

371. David J. Christiansen, Note, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 Val. U. L. Rev. 695, 700 n.44 (1988) (noting that the ordinances in *Belle* and *Moore* were similar).

372. *Moore*, 431 U.S. at 498-99.

373. *Belle Terre*, 416 U.S. at 8.

374. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 579-80 (1986) (noting that in *Moore*, "the relationship of a grandmother to her grandson is functionally similar to that of a parent to his or her child").

375. See *id.* at 580 (finding the basis for the denial of fundamental status in *Belle Terre* to lie in the fact that the "relationship at issue . . . was devoid of child-rearing or potential child-rearing"); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 812 (1985) (noting that *Belle Terre* may not have met the constitutional standard of family because the college students' relationship was "transient" as opposed to the permanent relationship of the grandmother in *Moore*).

constitutional guideposts exist in the form of due process family protections which set the outer limits of state regulation. The next part will offer another circumstance, second-parent adoption, where the Court may define the limits of state regulation through a reliance on multiple constitutional interests.

III. A CONSTITUTIONAL RESOLUTION

A. *Protection of the Functional Family*

Assigning second-parent adoption shelter in constitutional jurisprudence is essentially a call for federal protection—and concomitantly is a claim that federal intrusion into a traditional state domain is permitted under the Constitution.³⁷⁶ The most readily implicated substantive area in a second-parent challenge is that of the constitutional family, but the types of family covered by the constitutional umbrella may or may not include the second-parent unit. In opposition to any protection for second-parent adoption, it may be argued that *Moore v. City of Cleveland*³⁷⁷ and *Belle Terre v. Boraas*,³⁷⁸ together stand for the broadest protection the Constitution has to offer—protection for a non-nuclear but biological relationship.³⁷⁹ However, these two cases must be read in tandem with (i) the *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*³⁸⁰ Court's claim that biology is insufficient for a determination of the protected family,³⁸¹ and also (ii) the severance of biology from paternity in *Michael H. v. Gerald D.* When the expanded constitutional family is analyzed with these mandates, those "boundaries" denounced in *Moore* (stating that boundaries of family should not be drawn at the "nuclear" line³⁸²) may also characterize both the traditional "nuclear" and "biology" boundaries as improper for family definition.

However, the question should not be framed as entirely formalistic, looking only at previous constitutional boundaries. Instead, the question should be substantive: Why is constitutional capital allocated to various family forms?³⁸³ In other words, what is it about family that the Constitution seeks to protect? Is it those "bonds [just] as warm, enduring, and important as those arising within a more formally organized family unit?"³⁸⁴ Yet, traditional, more formally organized units have become less

376. See *supra* note 70 and accompanying text.

377. 431 U.S. at 494.

378. 416 U.S. at 1.

379. See *supra* notes 366-76 and accompanying text.

380. See *supra* notes 37-55 and accompanying text.

381. Drawing from Justice Stevens's *Moore* dissent, the Court stated that "biological relationships are not [the] exclusive determination of the existence of a family." *Smith v. Org. of Foster Families for Equality & Reform (OFFER)*, 431 U.S. 816, 843 (1977).

382. See *supra* note 113 and accompanying text.

383. See *supra* note 365.

384. *Stanley v. Illinois*, 405 U.S. 645, 652 (1971); see *supra* note 88 and accompanying text.

pervasive.³⁸⁵ Therefore, our notions of what can provide “bond [just] as warm” have been pushed outward.³⁸⁶

Consistent with this characterization of biology as an improper and antiquated constitutional border is the substantive observation by the *Smith* Court that marriage, which, in some instances receives a heightened constitutional protection, is not the product of biology, but rather a “bilateral loyalty.”³⁸⁷ Similarly, second-parent adoption evinces a loyalty and stability for the child that exists in the absence of biology.³⁸⁸ At bottom, when determining a level of constitutional protection, the Supreme Court has supported a flexible reading of “family,” with substantive review of the functional nature of relationships.³⁸⁹ Specifically, the Court’s constitutional jurisprudence evinces an expanded acceptance of the substantive notion of the constitutional family.³⁹⁰ Juxtaposing the cases within the category of the “unwed father”—*Quilloin* versus *Caban* and *Stanley*—it is evident that the Supreme Court has increasingly valued the function of the family over the traditional nuclear, and biological, form.³⁹¹ The Court has expanded its notions of the family, concurrent with societal trends,³⁹² because the nontraditional family may exhibit “bonds . . . [just] as warm, enduring, and important as those arising within a more formally organized family unit.”³⁹³ The Court has distinguished these “warm, enduring” bonds from those of unwed fathers who have failed to be a constant influence in their child’s life.³⁹⁴ If analyzed with an approach that champions function over form, prohibition of second-parent adoptions may run afoul of constitutional considerations.

As in the paradigmatic case of the same-sex couple deciding to become parents together, second-parent adoption exhibits a parent-child relationship like that of a traditional family.³⁹⁵ The triad evinces bonds similar to the traditional family unit. As an example, in *In re Adoptions of B.L.V.B. & E.L.V.B.*,³⁹⁶ after the partners decided to “have and raise [a child],” one partner was artificially inseminated.³⁹⁷ The nonbiological mother took on the role of a non-gestational parent, and “assisted the mid-wife at both births, and [was] equally responsible for raising and parenting the children”

385. See *supra* notes 316-20 and accompanying text.

386. See *supra* notes 88, 332-35 and accompanying text.

387. *Smith v. Org. of Foster Families for Equality & Reform (OFFER)*, 431 U.S. 816, 844 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965)).

388. See *supra* notes 62-63 and accompanying text.

389. See *Hopkins*, *supra* note 70, at 471.

390. See *supra* notes 337-87 and accompanying text.

391. See *supra* notes 364-87 and accompanying text.

392. See *supra* note 114 and accompanying text.

393. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

394. For a discussion of *Quilloin* and *Caban*, see *supra* notes 89-98 and accompanying text.

395. See *supra* notes 56-65 and accompanying text.

396. 628 A.2d 1271 (Vt. 1993).

397. *Id.* at 1272; see also *supra* notes 61-62 and accompanying text.

from their birth and throughout their childhood.³⁹⁸ The nonbiological bond in *In re B.L.V.B.* is substantially similar to the unwed father relationship faced by the Court in *Caban v. Mohammed*, where the Court recognized a fundamental parenting interest for a father who had lived with his child and her mother for seven years.³⁹⁹ It is a rapport more closely analogous to the protected grandmother of *Moore* than the unprotected college students of *Belle Terre*. The reason is not biology but function and "warm bonds."

B. A Protection Greater than Adoption

Just as the challenges raised in *Moore*⁴⁰⁰ and *Stanley*⁴⁰¹ sought to preserve biological families, the recognition of second-parent adoption preemptively preserves an existing family. However, because of the necessary involvement of the state for the sanction of a parent-child relationship, second-parent relationships are in some respects akin to adoption. The primary case relied upon for the proposition that adoptions do not fall within the arena of fundamental constitutional protection is *Smith*.⁴⁰² In *Smith*,⁴⁰³ the foster parent-foster child relationship was not entitled to constitutional protection as a liberty interest in the context of the foster parent's right to adopt.⁴⁰⁴ The *Smith* Court's dismissal of the claim relied, in large part, on the origin of the foster relationship: a contract with the state.⁴⁰⁵ Flowing from this contract was a limited expectation of the permanency of the child-foster parent relationship.⁴⁰⁶ Further, the *Smith* Court noted that the adoption by the foster parent may be in conflict with the long-term desires of the biological parent, who at some point may have wanted the child returned from foster care.⁴⁰⁷

On the terms of *Smith* the second-parent adoption form does not ignite the concerns of the Court. First, the relationship develops without state involvement. For example, in the case of *In re B.L.V.B.*, the raising of the child by the same-sex couple took place for years before the couple sought any legal declaration of the nonbiological parent.⁴⁰⁸ As the *In re B.L.V.B.* court noted, when the couple petitioned the state for legal recognition they already had an "existing status" as coparents.⁴⁰⁹ In fact, any denial of second-parent adoption rights also evinces the state's limited involvement in the function of the relationship because, unlike the denial of a traditional

398. *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d at 1272.

399. *See supra* notes 91, 93 and accompanying text.

400. *See supra* notes 107-15 and accompanying text.

401. *See supra* notes 80-87 and accompanying text.

402. *See supra* note 38 and accompanying text.

403. *Smith v. Org. of Foster Families for Equality & Reform (OFFER)*, 431 U.S. 816 (1977).

404. *Id.* at 847.

405. *Id.* at 845-46; *see also supra* notes 48-50 and accompanying text.

406. *Smith*, 431 U.S. at 846; *see also supra* note 51 and accompanying text.

407. *Smith*, 431 U.S. at 846; *see also supra* notes 48-55 and accompanying text.

408. *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993).

409. *Id.*

adoption where the relationship will never be created, the triad, as a social, if not legal entity, will remain intact.

Second, unlike the foster parent relationship in *Smith*, where the relationship created under contract suggested an expectation that the child would be removed from the home,⁴¹⁰ in the case of the second-parent adoption the two-partner decision to “have and raise” a child is a commitment of dual parental presence in the child’s life.⁴¹¹ This presence conveys an expectation that each parent will be as permanent an influence as that of any set of biological parents.

Third, the concern of conflicting parental interests, witnessed both in *Smith* and the severance provision of statutory framework of traditional adoptions,⁴¹² is inapplicable to second-parent adoptions. In *Smith* the Court noted the “tension” between the natural parent and the potential adopter given that New York State provided for the return of the child to the parent. The Court stated as follows:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another’s constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right⁴¹³

Similarly, in the statutory framework of traditional adoptions, the severance of the biological parent’s rights is largely to eliminate the potential for tension between the adopter and the gestational figure.⁴¹⁴ The rationale behind the derogation of these adoptive forms is largely inapplicable to the second parent adoption format. In the case of second-parent adoption, the partners decide together to have and raise the child. Thus the adoption by the second-parent is at the gestational partner’s behest, rather than in opposition to her wishes.⁴¹⁵

If it is recognized that the family can exist outside of biology where the connection is supplemented by a functionality substantially similar to the traditional family, then it can be posited that second-parent adoption should be entitled to a heightened constitutional protection. The fruits of these protections would manifest in a more uniform access to the right of a partner to adopt the child of his or her partner.

410. See *supra* notes 38-55 and accompanying text.

411. See *supra* notes 38-55 and accompanying text.

412. See *supra* notes 38-55 and accompanying text.

413. *Smith v. Org. of Foster Families for Equality & Reform (OFFER)*, 431 U.S. 816, 846 (1977).

414. See *supra* notes 31-32 and accompanying text.

415. See, e.g., *supra* note 305 and accompanying text.

C. *The Hybrid Analysis as Applied to Second-Parent Adoptions*

Second-parent adoptions necessarily involve an interest in addition to the family liberty presence—that is, whatever constitutional weight is attached to the unequal application of laws to homosexuals as compared with heterosexuals. Although homosexuals have not been classified as a suspect class protected by the Fourteenth Amendment (as in the case of race), the melding of the interest attached to the homosexual class with some due process interests may lead to a heightened protection.⁴¹⁶ Importantly, Karlan notes the progression in the interplay between equal protection and due process from *Loving* to *Lawrence*: In *Loving* the Court's decision may have survived with constitutional integrity, under either the distinct umbrellas provided by the Equal Protection Clause or the Due Process Clause, whereas in *Lawrence* both implicated interests required the other interest as support, "undermin[ing] the traditional tiers of scrutiny."⁴¹⁷ "[T]he more closely one looks at the principal cases dealing with rights surrounding . . . parenting [and] family . . . the more one sees equal protection and substantive due process as regularly interlocking and powerfully complementary sources of protection."⁴¹⁸ Much the way the Court has displayed an expansionist view towards treatment of the definition of family, it has increasingly employed the emergent model of due process-equal protection reliance.

The mechanism of, and right to, second-parent adoptions may be susceptible to the interwoven analysis of due process and equal protection. As stated in Parts III.A and III.B, given the vector of expansion vis-à-vis the protection of the constitutional family, second-parent adoption is ripe for increased constitutional protection. This claim of due process constitutional integrity is buttressed by the presence of an equal protection constitutional interest—the equal application of law to both homosexual and heterosexual classes. The restriction of both interests evinces a compounded constitutional offensiveness. This duality was noted by Professor Julie A. Nice in reference to *M.L.B. v. S.L.J.*,⁴¹⁹ where the Court combined the equal protection and due process interests: "a fairly important right" and "a relatively targeted class."⁴²⁰

While the homosexual class has not been held to be a classification deserving of the strictest constitutional scrutiny, it is at least a "fairly important" or "relatively targeted" class. In fact the equal protection interest in the instance of second-parent adoptions is substantially similar to the equal protection interest discussed in *Lawrence v. Texas*,⁴²¹ where the Court acknowledged the equal protection claim as colorable.⁴²²

416. See *supra* notes 118-22 and accompanying text.

417. See *supra* notes 118-22 and accompanying text.

418. Tribe, *supra* note 122, at 1902 n.32.

419. 519 U.S. 102 (1996).

420. Nice, *supra* note 189, at 1229.

421. See *supra* notes 204-28 and accompanying text.

422. See *supra* note 218 and accompanying text.

As in *Lawrence*, where a criminal law banning sodomy was applied to homosexuals but not to heterosexuals, in the case of second-parent adoptions heterosexual stepparents have access to a form of adoption where homosexual second parents do not.⁴²³ The certainty of access to adoption mechanisms for a nonbiological-parent, heterosexual spouse who wishes to adopt their partner's child is not widely available to a homosexual person and his partner. Despite the lack of heightened protection for the homosexual class, it is not completely without constitutional capital: As Karlan notes, the coherence of the *Lawrence* decision required the weight of the homosexual equal protection interests.

Further, the hybrid analysis is not consumed by the individual constitutional weight of interests but rather the interplay between the dual interests. In the case of second-parent adoptions, much like in *Lawrence v. Texas*, the equal protection interest is present, along with a liberty interest—here the protection of an expanded constitutional family. The jurisprudence from *Meyer* to *Michael H.* has evinced an ever-expanding notion of the definition of the “constitutional family,” analyzing the function of the family rather than the form. In this sense, second-parent adoption functions much like the family traditionally protected by the Constitution. Regardless of the makeup of a same-sex parental unit, second-parent adoption should be within the protected sphere of a relational unit because it provides “warm, enduring” bonds.

CONCLUSION

Second-parent adoptions involve both traditional notions of family and families headed by homosexual partners. This braiding of interests is not unlike patterns tackled by the Court in *Loving*, *Skinner*, and most recently *Lawrence*. The Court's constitutional blueprint has included recognition of the dual presence of equal protection and due process interests, which has partially preempted the states' control over family law. The functional value of the second-parent model, supplemented by the dual homosexual interests present a readiness for an increase in the constitutional weight of second-parent adoptions.

423. See *supra* Part II.A.1.

Notes & Observations