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## Equal Protection for Children of Same-Sex Parents

Catherine E. Smith

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## EQUAL PROTECTION FOR CHILDREN OF SAME-SEX PARENTS

CATHERINE E. SMITH\*

### ABSTRACT

*Gay rights litigation and advocacy traditionally have focused on the unequal treatment of gay and lesbian individuals and couples; less attention has been dedicated explicitly to the legal rights of the children of gay and lesbian parents. This Article asserts that a child of same-sex parents denied a government benefit has a cognizable equal protection challenge—a legal claim that is separate and distinct from that of the child’s gay or lesbian parents. It is well-settled equal protection law that the government may not treat nonmarital children differently than marital children because of moral disdain for their parents’ relationship, and laws classifying children based on their parents’ marital status are subject to intermediate scrutiny. Today, a majority of states exclude children of same-sex parents from the economic benefits that could be derived from their non-biological same-sex parent, including health insurance, workers’ compensation benefits, child support, and social security benefits. When medical events, divorces, lay-offs or death occur in the*

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*lives of children of same-sex parents in these “no-protection” states, they are denied important economic safety nets—safety nets that children of married and unmarried opposite-sex parents enjoy. As a subset of nonmarital children, children of same-sex parents exercise no control over their parents’ conduct, but suffer concrete economic injuries because of the state’s imputation of immorality to them. This government-sponsored discrimination cannot be fairly justified on the basis of preserving traditional family values or on the basis of ensuring administrative efficiency. “No-protection” states must dismantle the insurmountable barrier that blocks children of same-sex parents from establishing a legal relationship with their non-biological same-sex parent, and place them on equal footing with their opposite-sex parented peers.*

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## I. INTRODUCTION

What about the children?<sup>1</sup>

Gay-rights litigation and advocacy have traditionally focused on the unequal treatment of gay and lesbian individuals and couples; less has been dedicated explicitly to the legal rights of the children of gay and lesbian parents.<sup>2</sup> To date, no state or federal court has directly addressed what level of scrutiny applies to children who face discrimination because of their same-sex parents' relationships.<sup>3</sup> In one of the few cases brought directly on behalf of children of same-sex parents, a trial judge dismissed the children's equal protection claim against a same-sex marriage ban as lacking "any precedent directly on point . . . that the minor [p]laintiffs may assert such 'derivative' claims."<sup>4</sup> Surprisingly, the court's conclusion does not comport with the history of successful equal protection challenges by children who are discriminated against because of the moral disdain of

1. Many scholars have laid the foundation for the approach taken in this Article. *See, e.g.*, Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

2. *See* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 412 (1999) ("The preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; precious little focus is given to the rights of a child who may be a product of a same-sex relationship.")

3. In light of the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 786 (2012), children in marriage equality states are now eligible for both state and federal benefits. This does not significantly change the plight of children in "no-protection" states as discussed in this Article. *Windsor* was decided as this Article moved to publication. For a more complete discussion of *Windsor* and its effects, *see* Catherine E. Smith, *Windsor's Progeny* (forthcoming) (on file with author).

4. *See* *Varnum v. Brien*, No. CV5965, 2007 WL 2468667, at \*46 (Iowa Dist. Aug. 30, 2007), *aff'd*, 763 N.W.2d 862, 872 (Iowa 2009). *See also* *In re Doe*, 2008 WL 5006172 (Fla. Cir. Ct. 2008).

their parents' relationships.<sup>5</sup> It is well-settled equal protection law that the government may not treat nonmarital children (once called illegitimate children)<sup>6</sup> differently than marital children, and such distinctions are subject to intermediate scrutiny. A child of same-sex parents denied a government benefit has a cognizable equal protection challenge—a legal claim that is separate and distinct from that of the child's gay and lesbian parents.<sup>7</sup>

In a significant number of states, in what this Article will refer to as “no-protection” states, children of same-sex parents are excluded from countless rights and benefits in relation to their non-biological same-sex parent, including health insurance coverage, workers' compensation benefits, child support, social security benefits, inheritance, and wrongful death recovery.<sup>8</sup> Shockingly, even when courts acknowledge these injuries, they simply treat the economic harms to the child as abstract collateral damage in the legal wrangling over same-sex marriage.<sup>9</sup> While supporters and opponents of gay rights invest millions of dollars into the battle over same-sex marriage in states like California that extend significant legal protections to same-sex couples and their children, “no-protection” states operate a complete caste system.

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5. See *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding, in an action brought on behalf of nonmarital children for the wrongful death of their mother, that it was “invidious to discriminate against [the children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother”).

6. Throughout this Article, the author uses the term “nonmarital children,” and will only use the term “illegitimate” when quoting cases or using the term in a historical sense.

7. A party has a direct “cause of action” where the factual situation underlying the action entitles the party to maintain an action in a judicial tribunal. BLACK'S LAW DICTIONARY 251 (9th ed. 2009). A derivative action is “[a] lawsuit arising from an injury to another person, such as a husband's action for loss of consortium arising from an injury to his wife caused by a third person.” *Id.* at 509. This Article argues that the children of same-sex couples have a direct cause of action for economic injuries suffered by them, as opposed to a claim derived from an injury to their parent(s). Issues of standing are beyond the scope of this Article.

8. See Linda L. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 248 (2011); Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1002, 1119 (2008); William Mason Emmett, *Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 GEO. L.J. 433, 437 (1997) (“By and large, courts . . . have refused to extend custody or visitation rights to gay co-parents.”).

9. For example, in an unsuccessful constitutional challenge to Arizona's same-sex marriage ban, the Arizona Court of Appeals explained that “although the line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such inequity was insufficient to negate [Arizona's] link between opposite-sex marriage, procreation, and child-rearing.” *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

Children of same-sex parents are certainly relevant to the gay rights debate,<sup>10</sup> and they are a growing population in number and visibility. According to the United States Census, twenty-eight percent of cohabitating same-sex couples are raising at least one child under the age of eighteen.<sup>11</sup> The exact number is unknown; however, social scientists estimate that our nation is home to somewhere between 300,000 and 1 million children being raised by same-sex couples, and the number of single gays and lesbians raising children increases this estimate to at least two million children.<sup>12</sup> Like children of opposite-sex parents, children of gay and lesbian parents live through the entire range of experiences that define family life, including crises in their households such as medical events, divorces, lay-offs, and deaths.<sup>13</sup> Further, contrary to the popular “affluent gay stereotype,” children of same-sex couples are in need of the benefits that they are denied. These children are twice as likely to live in poverty in comparison to marital children,<sup>14</sup> and their parents have lower median and average incomes than married opposite-sex couples raising children.<sup>15</sup> Yet, when crises occur in the lives of children of same-sex couples, “no-protection” states may deny these children benefits

10. For a discussion about childrens’ interests, see Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 586 (2005); Benjamin G. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2375 (2007); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 85–89 (2011); Ruth Butterfield Isaacson, “Teachable Moments”: *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 131–51 (2010).

11. GARY J. GATES & JASON OST, *THE GAY AND LESBIAN ATLAS* 45 (2004). The exact number of cohabitating same-sex couples with at least one child is unknown because there is a significant undercount: lesbian couples and those involving a bisexual woman were twice as likely as other same-sex couples to report that they live with a child to whom they had not given birth. See Todd Brower, *It’s Not Just Shopping, Urban Lofts, and the Lesbian Gay-by Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL’Y & L. 1, 15 (2009) (citing GARY J. GATES ET AL., *ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES* 5 (2007)).

12. See Brower, *supra* note 11, at 27. Most recent estimates place the figure at roughly two million children being raised by LGBT parents. See MOVEMENT ADVANCEMENT PROJECT, *ALL CHILDREN MATTER: HOW LEGAL AND SOCIAL INEQUALITIES HURT LGBT FAMILIES* 1 (2011) [hereinafter CHILDREN MATTER REPORT], available at [http://www.americanprogress.org/issues/2011/10/pdf/all\\_children\\_matter.pdf](http://www.americanprogress.org/issues/2011/10/pdf/all_children_matter.pdf).

13. See *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 171 (1972) (“Both the statute in *Levy* and the statute in the present case involve state-created compensation schemes, designed to provide close relatives and dependents of a deceased a means of recovery for his often abrupt and accidental death.”).

14. CHILDREN MATTER REPORT, *supra* note 12, at 8. For a comprehensive discussion of the benefits denied children in same-sex families, see *id.* at 51–78. See generally LEE BADGETT, MONEY, MYTHS AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (2001).

15. CHILDREN MATTER REPORT, *supra* note 12, at 8.

specifically designed to serve as safety nets to protect children within family units—benefits that children of married parents obtain as a matter of course.<sup>16</sup>

As a generation of children with gay and lesbian parents come of age in significant numbers and begin to collectively assert their rights, anti-gay policies that subject them to different treatment than their opposite-sex parented peers will be subjected to further social and legal scrutiny.<sup>17</sup> “[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>18</sup> Children of same-sex parents will change the face of the LGBT movement and push the boundaries of this evolving social and legal battleground.<sup>19</sup>

This Article offers a blueprint for an equal protection challenge to remedy government-sponsored discrimination against children of same-sex parents. For practical purposes, this Article suggests that the ideal plaintiff would be a child who has been denied a government benefit in a “no-protection” state, who has same-sex parents, one biological and the other non-biological, and where there is no legal relationship between the child and the donor or surrogate. This Article also focuses on state-level benefits and responsibilities. In this context, this Article first brings to the forefront the unequal treatment of children of same-sex parents who are denied equal treatment in comparison with marital children. It also identifies the inadequacies of potential state justifications for the disparate treatment of children with same-sex parents and offers a number of legal strategies that states could adopt to remedy these unconstitutional

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16. For a list of privileges that benefit mono-racial couples and opposite-sex parents, see Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 236 (2009). There may be some children within “no-protection states” who may receive benefits because their parents have managed to obtain a second-parent adoption from a lower court, however, it may be subjected to the same fate as Boseman should a higher court strike down such adoptions as void. See *infra* notes 24–34 and accompanying text.

17. Despite a long tradition of discrimination against nonmarital children, it escaped constitutional review until 1968. See John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate*: *Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 1–2 (1969).

18. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

19. See Sarah Wildman, *Children Speak for Same-Sex Marriage*, N.Y. TIMES (Jan. 20, 2010), <http://www.nytimes.com/2010/01/21/fashion/21kids.html>. COLAGE is probably the most well-known organization focusing exclusively on the needs and interests of children of LGBT parents. See generally COLAGE: PEOPLE WITH A LESBIAN, GAY, BISEXUAL, TRANSGENDER, OR QUEER PARENT, <http://www.colage.org/> (last visited Mar. 25, 2012); James G. Dwyer, *Children's Interests in a Family Context—A Cautionary Note*, 39 SANTA CLARA L. REV. 1053 (1999).

practices.<sup>20</sup> In Part II, the case is made plain that children of same-sex parents in “no-protection” states—states that offer no state-wide legal avenues to a child to create a legal relationship to their non-biological parent<sup>21</sup>—are treated differently than their opposite-sex parented peers, both married and unmarried, and delineates how this disparate treatment serves as the basis for an equal protection challenge. Part III lays out the nonmarital status jurisprudence and explains why the disparate treatment of children of same-sex parents warrants intermediate scrutiny. Parts IV and V address likely state justifications centered on moral family preservation arguments and those that may hinge on government-based administrative efficiency arguments. Part V concludes by offering potential state options to avoid the maintenance of an “insurmountable barrier” to children of same-sex couples to access government benefits. Part VI offers a brief conclusion.

## II. THE LEGAL EXCLUSION OF CHILDREN OF SAME-SEX PARENTS

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>22</sup> The equal protection mandate “is

20. This Article is not advocating same-sex marriage as the only possible solution to remedy potential constitutional violations. States have a number of channels through which they can establish access to the legal system for children of same-sex parents that would place those children on equal footing with children of opposite-sex parents. The vast majority of federal and state courts that have addressed the constitutionality of laws that deny civil marriages to same-sex couples have applied a rational basis level of Equal Protection review. *See, e.g.,* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 960 n.20 (Mass. 2003) (rational basis review, but not “toothless”); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 681 (Tex. Ct. App. 2010). A few state courts, however, have applied heightened review. *See* *Kerrigan v. Comm’n of Pub. Health*, 957 A. 2d 407, 482 (Conn. 2008) (holding that law classifying on basis of sexual orientation, a quasi-suspect class, failed to meet constitutional muster under intermediate scrutiny); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (applying strict scrutiny); *Varnum v. Brien*, 763 N.W.2d 863, 896–904 (Iowa 2009) (applying intermediate scrutiny to same-sex marriage ban). For a normative discussion of how states can equalize access to the legal system and mitigate the disparate treatment of children of same-sex couples by focusing on solutions within the current two-parent paradigm, see Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 *LAW & INEQ.* 307, 311 (2010).

21. This category of states include jurisdictions where same-sex couples are obtaining second-parent adoptions from lower courts and the highest court has not decided the issue yet. I have decided to place these states in this category because the legal status of those relationships are uncertain and subject to being void should the state’s highest court (or legislature) decide to reverse those lower court decisions. *See, e.g.,* *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

22. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is binding on the federal government via the Fifth Amendment’s Due Process Clause. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (explaining that the Court

essentially a direction that all persons similarly situated should be treated alike.”<sup>23</sup> As the next section explains, “no-protection” states treat children of same-sex parents differently than their opposite-sex parented peers. In these states, it is impossible for a child of same-sex parents to establish a legal relationship to a non-biological same-sex parent. The example of *Boseman v. Jarrell*<sup>24</sup> is illustrative.

In 2002 in Raleigh, North Carolina, “John” Jarrell-Boseman was born to Melissa Jarrell and Julia Boseman. John called Melissa “Mommy” and Julia “Mom.”<sup>25</sup> From the early stages of Melissa and Julia’s courtship, they discussed the prospect of having children.<sup>26</sup> They eventually moved in together and shared a home for two years before beginning the process of having John.<sup>27</sup> They jointly decided that Melissa would be the birth mother, and, together, they selected the anonymous sperm donor, and attended the medical appointments, the insemination and the post-conception follow-up visits.<sup>28</sup> Julia also assisted with Melissa’s pre-natal care, including reading to John “in the womb and play[ing] music for him.”<sup>29</sup> After he was born, John was baptized at Julia’s church where both “Mom” and “Mommy” held themselves out in front of their friends and families as his parents.<sup>30</sup>

Although same-sex marriage is prohibited in North Carolina, at the time John was born, a number of sympathetic lower court judges did grant second-parent adoptions to gay and lesbian couples. When John was two, a trial court in Durham County made him Julia’s legally adopted child.<sup>31</sup> His entire life, John knew Julia and Melissa as his parents and “show[ed] lots of love and respect” for both of them.<sup>32</sup> After a contentious split between Melissa and Julia, the North Carolina Supreme Court ruled that the adoption creating eight-year-old John’s child-parent relationship to Julia was “void *ab initio* and that [she] is not a legally recognized parent

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has always treated “Fifth Amendment equal protection claims . . . precisely the same as . . . equal protection claims under the Fourteenth Amendment”).

23. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

24. 704 S.E.2d 494 (N.C. 2010).

25. *Id.* at 497 (internal quotation marks omitted).

26. *Id.* at 496–97.

27. *Id.* at 497.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 497–98.

32. *Id.* at 497 (internal quotation marks omitted).

of [him].”<sup>33</sup> The court refused to recognize two women as John’s legal parents.

The *Boseman* decision rendered John’s relationship with Julia legally meaningless.<sup>34</sup> John, and hundreds of other children with same-sex parents, instantaneously lost a legal parent. The ruling voided the legal relationships between those children and their non-biological same-sex parents who previously had been granted adoptions, including those with parents who remained a harmonious couple.<sup>35</sup> The severance of those legally cognizable relationships also precludes John, and children like him, from securing a host of legal benefits and rights, such as inheriting through intestate succession, from their non-biological same-sex parent.

Surprisingly to many people who assume that gays and lesbians live in more liberal states, Mississippi, South Dakota, Alaska, South Carolina, Louisiana, Alabama, Texas, Utah, and Arizona have the largest concentrations of children with same-sex parents.<sup>36</sup> Unfortunately, these states are similar to North Carolina in that they offer no statewide legal protections for children in same-sex families (or their parents).<sup>37</sup>

A sizable number of “no-protection” states erect a legal blockade—an insurmountable barrier—to the creation of a legal relationship between a child and his or her non-biological same-sex parent.<sup>38</sup> This legal blockade results in the child’s exclusion from significant rights and benefits that other children enjoy.<sup>39</sup> These states serve as ideal jurisdictions to pursue an

33. *Id.* at 505.

34. *Id.*

35. See Nancy Polikoff, *Second-parent adoption no longer available in North Carolina, but nonbio mom can obtain custody; all previously granted adoptions void*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Dec. 21, 2010), <http://beyondstraightandgaymarriage.blogspot.com/2010/12/second-parent-adoption-no-longer.html>. The *Boseman* decision also precludes any future same-sex adoptions absent legislative action. See *Boseman*, 704 S.E.2d at 505.

36. See Brower, *supra* note 11, at 19; Gates & Ost, *supra* note 11, at 46.

37. See Brower, *supra* note 11, at 19. Some of these jurisdictions may have trial courts that have issued second-parent adoptions. See NAT’L CTR. FOR LESBIAN RIGHTS, *Adoption by LGBT Parents*, [http://www.nclrights.org/site/DocServer/2PA\\_state\\_list.pdf](http://www.nclrights.org/site/DocServer/2PA_state_list.pdf).

38. See Silverman, *supra* note 2, at 429 (“Even though both partners collaboratively decided to have a child . . . in the eyes of the law the non-biological parent is deemed a ‘legal stranger’ to the child.”).

39. Limited or “no-protection” states include Alabama, Alaska, Arizona, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. NAT’L CTR. FOR LESBIAN RIGHTS, *supra* note 37.

For a comprehensive overview of state laws prohibiting discrimination on the basis of sexual orientation, see *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (last visited Mar. 25, 2012). Although this Article focuses on “no-protection” states, the arguments herein may be applicable in states that offer some protections for gays and lesbians and their families.

equal protection challenge on behalf of a child denied basic government benefits simply because the child's parents are an unmarried same-sex couple.

Some scholars and jurists argue that treating children of same-sex couples differently makes sense because only opposite-sex couples can produce a biological offspring that is DNA-related to both parents, and marriage is the institution that "completes" the union between man, woman, and child. With closer scrutiny, however, it is clear that neither biology nor marriage is sacrosanct in decisions about legal parentage determinations. Rarely is marriage, biology, or any other consideration the sole criterion. More often than not, the determination of who is a legal parent is constructed by law to serve what the state purports to be in the best economic and psychological interest of the family unit and the children within the unit.<sup>40</sup> This Article argues that, when the well-being of children and the family unit are articulated as reasons to develop legal relationships between children and parents, the government cannot treat some children differently based on the moral view of the parents' relationship without running afoul of the equal protection of laws.

#### A. *The Legal Construction of Parenthood*

Children of opposite-sex parents obtain legal relationships with their parents through a number of legal channels, including marriage, biology, and adoption.<sup>41</sup> The predominant belief is that the primary source of establishing a parent-child relationship is through marriage, and, although it is not the only way, it certainly is the most legally beneficial to children.<sup>42</sup> The legal relationship established between a child born within a marriage and the child's opposite-sex parents is derived automatically and is rarely questioned.<sup>43</sup> The child of married parents, whether the child is biologically related to both of them or not, is entitled to an expansive

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40. See Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1258–72 (2010).

41. This Article focuses on potential equal protection claims brought by children who were born to same-sex couples, children whose same-sex parents planned to parent them from birth. Notably, children whose same-sex parents chose to co-parent after the child's birth may have valid equal protection claims under a state's stepparentage laws.

42. See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 221–22 (2011); for a detailed discussion on parentage see Courtney Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1480 (2012); Courtney Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

43. But see discussion in Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55 (2003).

catalogue of rights and benefits from private and public institutions, simply by virtue of the child's birth to his or her married parents. As will be discussed later, these benefits include financial support, state health insurance, social security, workers' compensation, wrongful death recovery, and other privileges and benefits.<sup>44</sup>

As for children of unmarried opposite-sex parents, the primary way to secure the rights and benefits equal to those of children born to married children is through biology. Opposite-sex unmarried parents are presumed to be responsible for their children and may establish a legal relationship with their child through a number of state sanctioned mechanisms. The mother-child biological connection, and thus the legal relationship, is easily established. It is determining the biological connection to the father that requires affirmative steps on the part of the father or child, and this is the subject of most legislative and judicial actions and decisions about legal parentage and government benefits. In most states, a biological father can acknowledge paternity in a number of ways.<sup>45</sup> If paternity has never been established by the father or has been contested by him (or third parties) in some manner, the child may pursue a paternity action to establish a legal relationship to his or her biological father in order to seek the same rights and benefits of married children.<sup>46</sup> In every state, there are well-established procedures for children of unmarried opposite-sex parents to create a legal relationship with their fathers in reliance on proof of paternity.<sup>47</sup>

In every state, unmarried opposite-sex couples may also establish a legal parent-child relationship through a simple mechanism available at the hospital immediately before or after the birth of the child. A voluntary acknowledgment of paternity (VAP), a part of the federal child support enforcement statute, requires each state to establish such a process to identify fathers.<sup>48</sup> An unmarried couple may sign an affidavit that voluntarily acknowledges that the male signing the form is the father of the child.<sup>49</sup> Although some VAP forms require that the parents believe that

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44. See Cynthia R. Mabry, *Who is the Baby's Daddy (and Why is it Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 233–34 (2004).

45. See James Lockhart, *Cause of Action on Behalf of Child or Mother to Establish Paternity*, 6 CAUSES OF ACTION 2d 1 (originally published 1994, updated Mar. 2013).

46. *Id.*

47. *Id.*

48. See Julia Saladino, *Is a Second Mommy a Good Enough Second Parent?: Why Voluntary Acknowledgments of Paternity Should be Available to Lesbian Co-Parents*, 7 MOD. AM. 2, 2 (2011).

49. *Id.* at 3.

the father is the biological father, many do not.<sup>50</sup> Even in states that require some belief of a biological connection, there is no independent verification of the biological link.<sup>51</sup>

Despite the moral and cultural prioritization of both marriage (and its underlying assumptions of monogamy, fertility, and biological link to offspring) and biology, they do not serve as the sole determinants of who may be a legal parent.<sup>52</sup> States often address the ways in which individual behaviors, qualities, and characteristics do not necessarily reflect the state's own optimal routing—first courtship, then marriage, and then children.

Often, and more increasingly, a gap exists between state marriage and child rearing priorities and the reality of when people actually have children.<sup>53</sup> In an attempt to align (or realign) the reality with the explicit marriage priority, states enact law and policy based on what is perceived to be in the best interest of children and the family unit, irrespective of biology. A primary example of such alignment is the legal fiction of the marital presumption rule. In the majority of states, particularly “no-protection” states, a child born into a marriage is presumed to be the legal child of the husband, even if the husband is not the child's biological father.<sup>54</sup> To avoid undermining the “integrity of the family,” states presume that the husband is the father of the child born into a married household, even when the child is, in fact, the biological offspring of

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50. *Id.*

51. For further discussion about VAPs, see Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467 (2012).

52. See Ristroph & Murray, *supra* note 40, at 1251–70; David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 126 (2006) (“Biology is increasingly called upon to share its privileged status as the foundation stone of parenthood with caregiving and other social values.”); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (finding that a biological link, by itself, does not merit “substantial protection” under the Due Process Clause in the way that demonstrating a full commitment to the responsibilities of parenthood and child-rearing would); *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (denying a biological father's due process challenge to the mother's adoption of his child).

53. Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, *Births: Preliminary Data for 2010*, 60 NAT'L VITAL STATISTICS REPORTS 2, 4 (2011), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf) (47.7% of births in 2010 were to unmarried women).

54. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding, in pertinent part, that California's marital presumption statute did not violate a putative natural father's procedural or substantive due process rights or the involved child's equal protection rights, where the putative natural father submitted to the court a paternity test indicating a 98.07% probability of paternity and evidence of a parent-like relationship with the child; also holding that the law did not violate the child's equal protection rights); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 75–76 (2006) (comparing the rights afforded children of heterosexual married couples to those afforded children of same-sex couples).

another man from the wife's adulterous affair.<sup>55</sup> This presumption also applies in many states where opposite-sex couples use a sperm donor due to the husband's low sperm count or sterility.<sup>56</sup> In other words, a child born to a married couple through another sperm provider is presumed to be a child of the marriage.<sup>57</sup>

Opposite-sex married couples may also establish a legal parent-child relationship through adoption. They may adopt a child that is not biologically related to either one of them. The opposite-sex couple must prove their intent to parent the child, and complete the state-required steps of adoption in order to establish a legal relationship to the child. The legal relationship is imbued with the same parental obligations, rights, and benefits of a child biologically related to his or her parents, or a child born into a marriage.<sup>58</sup> As the modern U.S. family changes, it is clear that "[b]iology is increasingly called upon to share its privileged status as the foundation stone of parenthood with caregiving and other social values."<sup>59</sup> This section is not intended to be an exhaustive treatment of opposite-sex family formation, but rather makes the point that, in order to protect the rights and interests of children within an opposite-sex relationship, states legally construct the parent-child relationship by purportedly focusing on the well-being of the child and the basic safety nets and protections within a family structure.<sup>60</sup> States do not make determinations based on a single factor of the marriage of the parents, a biological connection to parents, or parental intent.

Yet, in "no-protection" states, the interests of children (and the family unit) in same-sex families are ignored.<sup>61</sup> While opposite-sex parents and their children may establish legal relationships to one another through marriage, biology, adoption, and other state-created channels, those

55. Rosato, *supra* note 54, at 75 n.16.

56. *Id.* at 75.

57. *Id.*

58. Utah allows only legally married couples to jointly adopt. See Child Welfare Info. Gateway, *Who May Adopt, Be Adopted, or Place a Child for Adoption?*, CHILDREN'S BUREAU 32 (2012), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/parties.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/parties.pdf).

59. Meyer, *supra* note 52, at 126. See also *Lehr v. Robertson*, 463 U.S. 248, 261 (finding that a biological link, by itself, does not merit "substantial protection" under the Due Process Clause in the way that demonstrating a full commitment to the responsibilities of parenthood and child-rearing would); *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (denying a biological father's due process challenge to the mother's adoption of his child). For a discussion of the de-emphasis of a biological connection as a requisite to legal familial association, see Ristroph & Murray, *supra* note 40, at 51–72.

60. In some situations, individuals may acquire some rights and responsibilities as to children as de facto parents. See, e.g., MINN. STAT. § 257.025 (2008) (granting custody rights to individuals including stepparents and de facto parents when in the "best interests of the child").

61. Rosato, *supra* note 54, at 75.

avenues remain closed to same-sex parents and their children.<sup>62</sup> Although biology establishes the legal link between the child and its same-sex birth mother (or father through surrogacy), it is impossible for the non-biological same-sex parent to establish a legal relationship to the child: same-sex couples cannot marry;<sup>63</sup> the same-sex non-biological parent is not related by blood; gay and lesbian couples cannot adopt;<sup>64</sup> and there is no alternative legal mechanism for a same-sex non-biological parent to voluntarily acknowledge or demonstrate an intent to parent their same-sex partner's biological child. It is also impossible for the child to independently obtain a legal relationship to the non-biological same-sex parent.<sup>65</sup>

As the next part explains, the failure of “no-protection” states to establish legal channels for children of same-sex parents to create a legally recognized relationship to their non-biological parent ensures that they will be denied countless state and federal benefits designed to provide basic financial safety nets and facilitate the transfer of wealth.<sup>66</sup> These insurmountable barriers to establishing a legal relationship assure that children of same-sex parents exist as a subset of nonmarital children who can never be placed on an equal footing with marital children.

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62. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 344–47 (2002). Some states allow gay and lesbian parents to form a legally recognized relationship with a non-biological child. See Polikoff, *supra* note 10, at 586 (asserting that parentage determinations “have become available in many states through adoption decrees, orders of parentage, and, to a lesser extent, through the use of equitable doctrine conferring some, if not all, of the indicia of parenthood”).

63. In the vast majority of states, a child's same-sex parents cannot marry one another; only six states and the District of Columbia allow same-sex couples to marry, and eleven other states allow civil unions. See *Interstate Relationship Recognition*, HUMAN RIGHTS CAMPAIGN (May 27, 2011), [http://www.hrc.org/files/assets/resources/Interstate\\_Relationships\\_Recognition\\_Map\(1\).pdf](http://www.hrc.org/files/assets/resources/Interstate_Relationships_Recognition_Map(1).pdf).

64. Eighteen states and the District of Columbia allow second-parent adoptions, permitting non-biological same-sex parent to legally adopt their partner's child. See *Parenting Laws: Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN (Jan. 18, 2011), [http://www.hrc.org/files/images/general/2nd\\_Parent\\_Adoption.pdf](http://www.hrc.org/files/images/general/2nd_Parent_Adoption.pdf). In eight other states, same-sex families have been successful in obtaining second-parent adoptions in some jurisdictions. *Id.* Mississippi is the only state with an unchallenged ban on gay and lesbian adoptions. See MISS. CODE ANN. § 97-13-3(5) (West 2012).

65. Regardless of whether state level protections exist, children of LGBT parents are still at a comparative disadvantage and must navigate a “patchwork quilt” of laws to obtain a legal relationship with their non-biological same-sex parent. Rosato, *supra* note 54, at 75–76.

66. A child's non-biological same-sex parent is also denied rights and benefits as a result of the lack of legal relationship with the child. For a more comprehensive discussion and list of rights, benefits, and privileges denied such same-sex parents, see Graham, *supra* note 8, at 1034–37; Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, 3 MOD. AM. 3, 4–6 (2007); Jeffrey G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, 26 HUM. RTS. 7, 7–11 (1999); Rosato, *supra* note 54, at 75–76.

### B. *The State Benefits Denied Children of Same-Sex Parents*

As the previous section demonstrated, a majority of children with same-sex parents live in “no-protection” states in which the non-biological parent and child are precluded from forming a legal relationship. This legal barricade results in the blatant exclusion of these children from the rights, benefits, and privileges exercised by children of opposite-sex parents.<sup>67</sup> Children of same-sex couples are denied benefits offered by both public and private institutions; this section, however, focuses primarily on those denied by government—especially state government—actors. There is only one reported case of a benefit denial for social security benefits, as will be discussed subsequently.<sup>68</sup> This section documents a list of state benefits that are subject to a denial of recovery for children of same-sex parents, and, therefore, are ripe for an equal protection challenge.<sup>69</sup>

#### 1. *State Benefits*

Workers’ Compensation Workers’ compensation schemes provide benefits to employees injured or killed in the workplace.<sup>70</sup> Although each state is different, most provide benefits for “dependents” of employees protected under the statute.<sup>71</sup> The definition of dependent in “no-protection” states does not include the child of a non-biological same-sex parent.<sup>72</sup> Although the child may, in fact, be dependent upon the non-

67. For a list of benefits and privileges to which children of opposite-sex parents are entitled but to which children of same-sex parents are denied, see Castic, *supra* note 66, at 4–6; John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 504–06 (1998).

68. See *infra* Part II.B.2.

69. The author can only speculate as to why there is no record of equal protection challenges that have been brought by or on behalf of children in this context. It is likely that in the near future a child will be denied a benefit and seek to challenge its constitutionality.

70. See, e.g., N.C. GEN. STAT. ANN. § 97-3 (West 1973) (All employers and employees are “respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment . . .”).

71. See, e.g., N.C. GEN. STAT. ANN. § 97-39 (West 1973) (“The widow, or widower and all children of deceased employees [are] conclusively presumed to be dependents of deceased and [are] entitled to receive the benefits of [compensation] . . .”).

72. See S.C. CODE ANN. § 42-1-70 (1985) (“‘child’ shall include a posthumous child, a child legally adopted prior to the injury of the employee and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent . . .”); ALA. CODE § 25-5-1 (1975) (“child” or “children” means “posthumous children and all other children entitled by law to inherit as children of the deceased; stepchildren who were members of the family of the deceased, at the time of the accident, and were dependent upon him or her for support . . .”).

biological same-sex parent's income at the time the parent is injured or killed on the job, the child is prohibited from recovery.<sup>73</sup>

Inheritance When an individual dies without a will, the person's property is distributed by the state under an intestacy scheme. For opposite-sex married couples, an intestate's spouse and legally recognized children are entitled to some portion of the estate.<sup>74</sup> In "no-protection" states, same-sex couples and their children are not recognized under this scheme.<sup>75</sup> Neither the same-sex partner nor the child of the same-sex partner is legally recognized under the probate laws; both will be denied the proceeds of the decedent's estate, despite the fact that they are the decedent's immediate "family members." Instead, the proceeds of the estate will go to those legally recognized in the probate code, after spouses and children. Most probate codes then distribute the proceeds of the estate to the parents and siblings of the person who has died. The child will be denied inheritance to their non-biological parent's estate even if the decedent intended for the child to inherit from her estate.<sup>76</sup>

Support, Custody, and Visitation In "no-protection" states, there are no statewide avenues for the non-biological parent or the child to obtain the corresponding right or obligation to child support, custody, or visitation.<sup>77</sup> Child support is reserved for recognized legal parents of a child. "This has the effect of removing from the child the very source of funds that may have supported the child for a considerable period of time, especially if the 'non-biological' parent was the primary wage earner in the household."<sup>78</sup> As for custody and visitation, the non-biological parent is viewed as a legal stranger and, therefore, has no standing to seek custody of the child or visitation. Further, the child also has no legal recourse to develop a relationship with the non-biological parent.<sup>79</sup> Another complexity of

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73. Some states permit recovery based on dependency, as opposed to marriage or blood relation. See Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIMONIAL L. 85, 97-100 (2009).

74. Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 380-81 (2009).

75. *Id.* at 382 (explaining that intestacy statutes use formal definitions to define the parent-child relationship that exclude functional parents).

76. See *id.* at 408-10.

77. Some of these states may have some lower court decisions that are an exception to this rule. See COURTNEY JOSLIN & SHANNON MINTER, *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW* (2d ed. 2012).

78. Silverman, *supra* note 2, at 447. See also Castic, *supra* note 66, at 6.

79. See Silverman, *supra* note 2, at 448; Ledsham, *supra* note 10, at 2375; *Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991) (holding that a woman who sought custody and visitation of the biological son of her former partner of eight years, whom the plaintiff had adopted, had no legal standing for any claims).

custody, support, and visitation rights arises if the biological parent dies. The same-sex non-biological parent may be denied custody, and even visitation, if a third party family member seeks legal custody of the child.<sup>80</sup>

**Wrongful Death** Wrongful death claims focus primarily on pecuniary (economic) loss to the plaintiff from the negligent, reckless, or intentional death of a loved one.<sup>81</sup> Increasingly, states allow parties to recover for their emotional suffering from the loss of a loved one as well.<sup>82</sup> Although the list of eligible plaintiffs varies by state, most limit wrongful death recovery to the deceased's spouse, children, parents, or siblings.<sup>83</sup> Therefore, a child of a non-biological same-sex parent would not fit within the statutory definition of a person entitled to file suit for her losses resulting from the parent's death caused by a negligent, reckless, or intentional actor. The defendant in a potential lawsuit is granted a windfall when they cause the death of a non-biological same-sex parent, because the child is precluded from seeking recovery.

**Bystander Recovery** Most states allow a person to recover emotional harm damages when they witness the serious bodily injury or death of a family member caused by a defendant's negligent or reckless conduct.<sup>84</sup> In order to limit the number of people who may recover under a bystander claim, state statutes and courts only permit claims by bystanders who are the spouse, legal child, or parent of the injured party. A child of a non-biological same-sex parent does not fall within the definition of a legal child of the injured party.

**Civil Service** A child whose non-biological same-sex parent works for the state is denied a laundry list of benefits that children of opposite-sex

80. See Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 255, 258–260 (1998); CHILDREN MATTER REPORT, *supra* note 12, at 48 (After fatal accident kills bio mother of five year old boy, West Virginia Supreme Court affirms reversal of lower court decision denying surviving non-bio mother custody).

81. For further explanation of wrongful death statutes and the limitations therein, see John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953–59 (2001); Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1 (2005).

82. See, e.g., *Green v. Bittner*, 424 A.2d 210, 216 (N.J. 1980) (“[W]e know of no public policy which would prohibit awarding damages that fully compensate . . . for the emotional suffering caused by the [wrongful] death.”).

83. In addition to denying recovery to a child that is not a “child” in the eyes of a given state’s law, these statutory limitations also prevent recovery by family members not falling into the traditional nuclear family. See Culhane, *supra* note 81, at 942–63.

84. See Meredith E. Green, *Who Knows Where the Love Grows?: Unmarried Cohabitants and Bystander Recovery for Negligent Infliction of Emotional Distress*, 44 WAKE FOREST L. REV. 1093, 1094–96 (2009).

parents obtain, including medical and dental benefits,<sup>85</sup> life insurance, and the presence of their non-biological parent for parental and family leave.<sup>86</sup>

## 2. *Social Security and Federal Benefits Dependent on State Definitions of Legal Parentage*

In addition to state benefits, children of same-sex parents in non-marriage equality states are also denied federal benefits that hinge on the state definition of marriage and legal parentage, the most significant being social security.<sup>87</sup>

Under the Social Security Act, a dependent child may receive monthly Child Insurance Benefits (CIB) of a wage earner who retires, suffers a disability, or dies.<sup>88</sup> The determination of who may recover relies on the state definition of “natural child,” which in “no-protection” states excludes children as it relates to the non-biological same-sex parent.<sup>89</sup> In one of the few reported cases of an actual benefit denial to a child of same-sex parents, Nicolaj Caracappa was refused federal social security benefits because his non-biological mother was not recognized as a legal parent. Although New Jersey then offered second-parent adoption and the couple failed to obtain one, the case demonstrates the actual economic injury that can occur to a child.

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85. See *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992) (upholding lower court's dismissal of state employee's employment discrimination complaint, which was filed following denial of the employee's application for family health insurance coverage for her female partner, holding that limiting dependent health insurance coverage to employees' spouses and children doesn't violate marital status, sexual orientation, or gender provisions of the Wisconsin Fair Employment Act); *Hinman v. Dep't of Pers. Admin.*, 167 Cal. App. 3d 516 (1985); Silverman, *supra* note 2, at 443.

86. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956–57 (Mass. 2003) (listing state benefits of marriage, including many that extend to children); *id.* at 956–57 (“the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.”).

87. In light of the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 786 (2012), children in marriage equality states are now eligible for both state and federal benefits. There are a host of federal benefits that a child of same-sex parents in non-marriage states may be denied, including social security, welfare benefits, family medical leave, tax, and rights under immigration law. See Castic, *supra* note 66, at 4–6. *Windsor* was decided as this Article moved to publication. For a more complete discussion of *Windsor* and its effects, see Catherine E. Smith, *Windsor's Progeny* (forthcoming) (on file with author).

88. See Robert E. Rains, *DOMA and the Social Security Act: An Odd Couple Begetting Disfavored Children*, 55 ST. LOUIS U. L.J. 811 (2011).

89. See *id.* at 847–49.

In March 1998, Nicolaj Caracappa was born to Eva Kadray and Camille Caracappa.<sup>90</sup> At the time, New Jersey did not allow same-sex marriage or civil unions. After several years in a committed relationship, Eva and Camille planned for and participated in the alternative insemination, pre-natal care, birth and child-rearing of Nicolaj.<sup>91</sup> Eva was the biological mother of Nicolaj, and she and Camille agreed that Eva would stay home with their child, while Camille worked as their sole financial provider as an oncology nurse.<sup>92</sup> Eva and Camille lived together, jointly owned their home, commingled their finances, and shared joint bank accounts.<sup>93</sup> They gave Nicolaj Camille's last name and baptized him as his parents in their Catholic Church. Although second parent adoption was available in New Jersey, the couple decided to wait on an adoption until their second child was born, so that they could do both adoptions together. Tragically, Camille died of a brain aneurysm before the adoption of Nicolaj could be completed. Despite the fact that Nicolaj was financially dependent on his non-biological mother, Camille Caracappa, an administrative law judge denied the request for social security benefits because the record did not contain evidence of a valid marriage or documentation that Nicolaj is the "natural/biological" child of Camille Caracappa.<sup>94</sup> The judge ultimately concluded that "Nicolaj S. Caracappa is not the 'child of' the deceased insured wage earner, Camille Caracappa, as that term is defined in . . . the Social Security Act and Regulations . . . ."<sup>95</sup> It was clear that they viewed themselves as a family and that she intended to allow Nicolaj to recover based on her years of hard work and payment of taxes. Significantly, in "no-protection" states, children of same-sex parents would have absolutely no recourse because these states do not allow any legal channel to a legal relationship.<sup>96</sup> In addition to social security, the child's family may also be denied welfare benefits and other federal rights.<sup>97</sup>

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90. Nicolaj Sikes Caracappa, Soc. Sec. Admin. Off. (Mar. 30, 2004) (finding "Nicolaj S. Caracappa is not the 'child of' the deceased insured wage earner, Camille Caracappa, as that term is defined in . . . the Social Security Act and Regulations . . . .").

91. *Id.*

92. *Id.*

93. *Id.* at 5.

94. *Id.* (emphasis in original).

95. *Id.*

96. Recovery appears promising for children in states that allow same-sex marriage and adoption by same-sex couples, where their parent(s) take advantage of those legal options. See Rains, *supra* note 88, at 849–51.

97. See CHILDREN MATTER REPORT, *supra* note 12, at 57–59; Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 402–07 (2007).

This section offers merely a brief list of benefits that children of same-sex parents are denied. The individual and collective denial of government benefits to children of same-sex parents has detrimental economic consequences on them to which children of married opposite-sex parents are not subjected, and it is constitutionally suspect based on historical precedent—the disparate treatment of nonmarital children.

### III. THE LEGAL EXCLUSION OF CHILDREN OF SAME-SEX PARENTS WARRANTS INTERMEDIATE SCRUTINY

More than forty years ago, the United States Supreme Court held that government-based distinctions treating nonmarital children differently than marital children because of moral disdain of the parents' relationships were impermissible.<sup>98</sup> Today, government exclusions of children of same-sex parents serve as the modern-day equivalent in which states draw distinctions on the basis of a child's parents' nonmarital status to deny them equal protection of the laws.<sup>99</sup>

#### A. *The Equal Protection Law of Nonmarital Children*

The United States has a long history of discrimination against children born to unmarried parents. At common law, nonmarital children were *filius nullius* or the “child of nobody.”<sup>100</sup> By virtue of society's moral condemnation of their parents' conduct, they were denied social and legal benefits to which children born to married parents were entitled. They were considered non-persons who could not inherit, obtain financial parental support, wrongful death recovery, social security, and countless other benefits.<sup>101</sup> They were also subjected to extensive social ostracism.<sup>102</sup>

The criticism of the legal treatment of nonmarital children began in the early 1940s and was eventually swept into the political and legal debates

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98. For a brief history of nonmarital children, see KRAUSE, *supra* note 1, at 1–8.

99. For similar arguments, see Debra Carrasquillo Hedges, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 898–902 (2000); Ledsham, *supra* note 10, at 2378–86.

100. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*459 (“rights [of a nonmarital child] are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody . . .”) (emphasis in original); Ledsham, *supra* note 10, at 2373; Gareth W. Cook, *Bastards*, 47 TEX. L. REV. 326, 327 n.11 (1969).

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

102. *Id.* See also KRAUSE, *supra* note 1, at 1–8.

of the civil rights movement.<sup>103</sup> In 1944, New York City judge and child rights advocate Justine Wise Polier documented the disparate treatment of nonmarital children in an article entitled *Illegitimacy and the Law*, which called for legislative action to address their plight.<sup>104</sup>

In the early 1960s, litigators challenging illegitimacy did not seek a child-focused strategy alone but incorporated the unfair treatment of nonmarital children as a component of a more expansive civil rights agenda. Nonmarital status laws disproportionately impacted African-American and impoverished children, and therefore seemed like a natural subset of a larger race and poverty-based platform.<sup>105</sup> Professor Martha Davis explains that, despite early efforts to remedy discrimination against nonmarital children by linking it to the civil rights movement, courts “showed little interest in addressing the interrelationships among poverty, race, gender, and illegitimacy . . . .”<sup>106</sup> In response, litigators turned to framing illegitimacy as a classification itself.<sup>107</sup>

At the forefront of this movement was Professor Harry D. Krause.<sup>108</sup> In 1966, in his article, *Equal Protection for the Illegitimate*, he documented the ways in which children born to unmarried parents were denied private and government benefits and urged courts to strike down such statutes as violative of the right to equal protection of laws.<sup>109</sup> He insisted that, instead of courts’ persistent focus on the rights of the parents, “[i]t [was] time that the matter be considered from the standpoint of the child!”<sup>110</sup> In

103. See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 90 (2003) (asserting that early efforts by lawyers to frame illegitimacy arguments around children’s rights was an effective short-term strategy, but that strategy left unanswered many questions about parents’ rights and perpetuated elements of so-called “male coverture” within the law).

104. *Id.* at 90–91 (citing JUSTINE WISE POLIER, *ILLEGITIMACY AND THE LAW* 13 (1944) (NOW Collection, Box 45, Folder 555, on file with the Schlesinger Library, Radcliffe Inst., Harvard Univ.)).

105. See Brief for NAACP Legal Defense Fund as Amicus Curiae Supporting Respondents at 18 n.17, *Levy v. Louisiana*, 391 U.S. 68 (1968); KRAUSE, *supra* note 1, at 1–8.

106. See Davis, *supra* note 103, at 92 (citing *Jefferson v. Hackney*, 406 U.S. 535 (1972)) (explaining the inability of civil rights litigation that is focused on race, gender, and poverty to directly address the plight of nonmarital children, due to the Supreme Court’s refusal to extend heightened scrutiny to disparate racial impact of illegitimacy laws).

107. *Id.* (critiquing child-focused strategy because it ignored the familial context of these cases and left the door open for laws discriminating against out-of-wedlock parents based on persistent race and sex stereotypes).

108. See Harry D. Krause, *Bringing the Bastard Into The Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

109. See Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Davis, *supra* note 103, at 84–89 (delineating the distinctions in rights afforded children born within marriages to those born to un-married parents in terms of wrongful death, inheritance, custody, domicile and adoption).

110. See Krause, *supra* note 109, at 484.

1968, in reliance on a line of racial discrimination cases including *Korematsu v. United States*<sup>111</sup> and *Hirabayashi v. United States*,<sup>112</sup> Krause and civil rights lawyer Norman Dorsen advanced their child-oriented arguments to the Supreme Court in *Levy v. Louisiana*,<sup>113</sup> the first case to bring an equal protection challenge on behalf of nonmarital children.<sup>114</sup>

Louise Levy, an unmarried African American mother with five young children, went to a state hospital with dizziness, chest pains, and slowness of breath. The attending physician failed to take her blood pressure or conduct any tests. A week later, when she returned with worse symptoms, the doctor told her that she was not taking her medication and recommended a psychiatrist. She died ten days later.<sup>115</sup> Thelma Levy, Louise' sister, sued Louisiana on behalf of the Levy children who were prohibited from a "right to recover" because they were born outside of marriage.<sup>116</sup> The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claim on the grounds that they were not "legitimate," insofar as "morals and general welfare . . . discourage[] bringing children into the world out of wedlock."<sup>117</sup> The Supreme Court reversed the Louisiana decision.<sup>118</sup>

The attempts of civil rights advocates to link nonmarital status laws to larger forms of social discrimination like race, poverty, and gender, were unsuccessful; however, the influence of the civil rights cases was clearly present in the early nonmarital status cases.<sup>119</sup> The rights of nonmarital children developed simultaneously with the Supreme Court's conceptualization of modern equal protection jurisprudence. *Levy* and the

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111. 323 U.S. 214 (1944).

112. 320 U.S. 81 (1943).

113. 391 U.S. 68 (1968).

114. See Br. for Appellee at 15, *Levy v. Louisiana*, 391 U.S. 68 (1968) (No. 508), 1968 WL 112826 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (asserting that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"); Davis, *supra* note 103, at 94 ("[Krause] was contacted by Adolph Levy, a Louisiana lawyer handling a wrongful death case on behalf of the estate of Louise Levy . . .").

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

116. *Id.*

117. *Id.* at 3 (quoting *Levy v. Louisiana*, 192 So. 2d 193, 195 (La. Ct. App. 1967)). The Louisiana Supreme Court denied certiorari because it found the Court of Appeals made no error of law.

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

119. Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 26 (1999).

early nonmarital status cases were shaped by, and presumably shaped, the evolving law on the tiers of scrutiny and the factors that would ultimately be deployed to sort different classifications into the assignment-of-rights-pecking-order that now exists. For example, in striking down the right to recover statute, the *Levy* Court, citing *Brown v. Board of Education*,<sup>120</sup> explained, “we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side.”<sup>121</sup> The Court concluded that Louisiana was driven by invidious discrimination because the child’s status as “illegitimate” had nothing to do with the wrong inflicted on the mother.<sup>122</sup> The child engaged in no action or conduct that contributed to the mother’s injuries.

In the same year as *Levy*, the Court decided a companion case, *Glon v. American Guarantee & Liability Insurance Co.*,<sup>123</sup> in which Minnie Glona was denied wrongful death recovery for the death of her son because he was born outside of marriage.<sup>124</sup> Louisiana law required a decedent be “legitimate” in order for an ascendant, in this case his mother, to recover under wrongful death law.<sup>125</sup> Louisiana argued that it could deal with “sin” selectively and was permitted to treat parents of “illegitimate” children differently than parents of “legitimate” ones.<sup>126</sup> The Supreme Court disagreed, reversing the lower court’s ruling because there was no causal connection between the law and the “sin” of having children outside of marriage; it was unlikely that women would get pregnant in order to reap the benefits of wrongful death recoveries. There was no doubt that Minnie Glona was the mother of the child wrongfully killed, and Louisiana could not withhold relief because the child was born outside of marriage.<sup>127</sup> Further, the Court stated that to allow such claims would result in a windfall to tortfeasors.<sup>128</sup>

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120. 347 U.S. 483 (1954).

121. *Levy*, 391 U.S. at 71 (internal citations omitted); see also *Oyama v. California*, 332 U.S. 633, 646 (1948) (“[a]s a general rule, ‘Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’”) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

122. *Levy*, 391 U.S. at 72; see also *Glon v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (invalidating a Louisiana statute that barred recovery for damages to the mother of an illegitimate child, while allowing recovery to the parents of a legitimate child under the Fourteenth Amendment’s Equal Protection Clause); *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

123. 391 U.S. 73 (1968).

124. *Id.* at 73–74.

125. *Id.* at 74–75.

126. *Id.* at 75–76.

127. *Id.* at 76.

128. *Id.* at 75.

Three years later in *Labine v. Vincent*,<sup>129</sup> the Supreme Court appeared to retreat from its stance in *Levy* and *Glonn* by denying a child born out of wedlock inheritance from her father who died without a will.<sup>130</sup> The child's mother and father jointly acknowledged before a notary that Rita Vincent was their natural child.<sup>131</sup> However, under Louisiana law, the public acknowledgment did not give Rita a legal right to share equally as if she were a legitimate child.<sup>132</sup> The Louisiana trial court's decision to deny Rita inheritance rights and to award the inheritance to the father's brothers and sisters was upheld by the Louisiana Court of Appeals.<sup>133</sup> In arguments to the Supreme Court, Rita relied on *Levy* and *Glonn*, and asserted that her exclusion from recovery of a share of her father's estate was invidious discrimination in violation of the Equal Protection Clause.<sup>134</sup> The Supreme Court rejected her equal protection argument as misplaced because, unlike *Levy*, this was not a situation in which the state "created an insurmountable barrier" to the nonmarital child.<sup>135</sup> With limited reference to the equal protection principles previously articulated in *Levy* and *Glonn*, the *Labine* Court held that Louisiana had the power to make laws for the distribution of property, and, within the confines of the state law, the father could have legitimated Rita a number of ways, including by marrying the mother, formulating a will, or stating his desire to legitimate his daughter in an acknowledgment.<sup>136</sup> The father failed to comply with the state's basic formalities, and as such, his actions (or inactions), not those of the state, resulted in the denial of inheritance.<sup>137</sup>

While *Labine* is difficult to align with the equal protection analyses in *Levy* and *Glonn*,<sup>138</sup> it did articulate a baseline below which government could not tread: states cannot create an insurmountable barrier to the father or the nonmarital child to establish a legal relationship. A year later in

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129. 401 U.S. 532 (1971).

130. *See id.* at 540.

131. *Id.* at 533.

132. *Id.*

133. *Id.* at 535.

134. *Id.*

135. *Id.* at 539. In dissent, Justice Brennan pointed out the inconsistency in the "insurmountable barrier" position in *Labine* when compared to the position taken in *Levy*, which did not involve an insurmountable barrier; the plaintiff in *Levy* could have formally acknowledged her children and recovery would have been allowed under Louisiana law. *Id.* at 550–51 (Brennan, J., dissenting). *See also* Nolan, *supra* note 119, at 13.

136. *Labine*, 401 U.S. at 539 (Brennan, J., dissenting); *see id.* at 553 (discussing in depth the problem of attaching obligations of husband and wife to those of father to child.).

137. *Id.* at 539.

138. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 14.15–14.16, at 869–70, 872 (7th ed. 2000).

*Weber v. Aetna Casualty & Surety Co.*, the Supreme Court once again expanded the rights of nonmarital children.<sup>139</sup>

In *Weber*, the Supreme Court struck down another Louisiana provision that awarded workers' compensation proceeds to a deceased worker's children born of his marriage, but denied those same proceeds to children born outside of the marriage.<sup>140</sup> Henry Clyde Stokes died of work-related injuries and, at the time of his death, was living with Willie Mae Weber.<sup>141</sup> Stokes and Weber were not married but maintained a household of five children.<sup>142</sup> One of the children was born to Stokes and Weber, while four others had been born to Stokes and his wife, Adlay Jones, who had previously been committed to a mental hospital.<sup>143</sup> Weber and Stokes' second child was born shortly after Stokes' death.<sup>144</sup>

The four marital children filed a workers' compensation claim for their father's death, and Willie Mae Weber claimed compensation benefits on behalf of the nonmarital children.<sup>145</sup> Under Louisiana workers' compensation law, however, "unacknowledged illegitimate"<sup>146</sup> children were not treated the same as children born to married parents.<sup>147</sup> They were considered "other dependents" entitled to recovery only if surviving dependents in line before them did not exhaust the maximum benefits.<sup>148</sup> The four children from Stokes' marriage were awarded the maximum allowable amount, leaving the two children from the nonmarital partnership between Stokes and Weber with nothing.<sup>149</sup> In reversing the Louisiana Supreme Court, and again articulating the more expansive principles in *Levy* and *Glonn*, the *Weber* Court explained that treating children born outside of marriage differently than those born inside it is impermissible discrimination.<sup>150</sup> The *Weber* Court reasoned that "[a]n

139. 406 U.S. 164 (1972).

140. *Id.* at 175–76.

141. *Id.* at 165.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 165–66.

146. *Id.* at 168. It was not possible for Stokes, the father in *Weber*, to acknowledge his two children because Louisiana law prohibited acknowledgment of children whose parents were incapable of marrying at the time of conception. At the time of conception, Stokes remained married to Jones, making it impossible for him to marry Weber. *Id.* at 171 n.9.

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

148. *Id.* at 168.

149. *Id.* at 167.

150. *Id.* at 169.

unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged.”<sup>151</sup>

*Weber*, the most well-known and cited nonmarital status case, reiterated that a state may not place its moral objection of a child’s parents’ conduct at the feet of the child by withholding government benefits. To do so places the child at an economic disadvantage for conduct over which the child has no control. Further, this punishment speaks of invidious animus as opposed to serving some legitimate governmental purpose. Invoking previous concerns of the “insurmountable barrier” raised in *Labine*, the *Weber* Court found such treatment of nonmarital status children to be particularly concerning as “[t]he burdens of illegitimacy, already weighty, become doubly so when neither the parent nor child can legally lighten them.”<sup>152</sup>

In an interesting mix of developing civil rights doctrine and the basic economic and social protection of children, these early cases laid the foundational principles of the law of nonmarital children.<sup>153</sup> From 1968 to 1986, the Supreme Court heard more than a dozen cases before explicitly holding that classifications treating nonmarital children differently than marital children warranted intermediate scrutiny.<sup>154</sup> The rationales articulated in *Levy*, *Glonn*, *Labine*, and *Weber* were part and parcel of early civil rights and equal protection jurisprudence and spoke to the importance of the social and economic rights unique to children.<sup>155</sup>

Today, it is well-settled equal protection law that the government may not treat children born outside of a marriage differently than those born within one without the treatment being subjected to intermediate scrutiny.<sup>156</sup> States are required to place nonmarital children on equal footing with marital children unless there is a legitimate justification for the unequal treatment.<sup>157</sup> State statutes and the Uniform Parentage Act reflect this equal protection mandate for children of unmarried opposite-

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151. *Id.*

152. *See id.* at 171.

153. *See Nolan, supra* note 119, at 36–37.

154. *See Clark v. Jeter*, 486 U.S. 456, 465 (1988) (holding that Pennsylvania statute was unconstitutional under intermediate or “heightened” scrutiny).

155. *See Nolan, supra* note 119, at 36–37.

156. *See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 748 (2d ed. 2002).

157. In practice, there continue to be areas in which nonmarital children are not treated identical to marital children, such as intestate succession, citizenship, and financial support. *See Maldonado, supra* note 101, at 349 (“This Article demonstrates that, despite statements to the contrary, the law continues to discriminate against nonmarital children, imposing economic, social, and psychic harms.”).

sex couples.<sup>158</sup> Every state has procedures for a father to “legitimate” a child, and procedures for the child (or a third party) to establish paternity, so that the child can pursue the benefits accorded children of married parents.<sup>159</sup> As a society, we view the availability of these paternity procedures as necessary in modern times; however, they did not materialize out of thin air. It took the Supreme Court’s recognition that state-driven moral judgment and invidious animus punished children of unmarried different-sex parents, inflicting unconstitutional injuries. The next logical progression must include equalizing the status of a subset of nonmarital children—children with same-sex parents.

Three key fundamental principles were relied upon to apply intermediate scrutiny to nonmarital children. First, governments cannot punish their citizens for conduct over which they have no control.<sup>160</sup> Second, and related to the immutability of a child’s status of birth, the government cannot treat the nonmarital child differently based on moral objection to the parents’ relationship over which the child has no control. To do so is a form of punishment that is likely driven by impermissible invidious animus.<sup>161</sup> The third fundamental principle relied upon to apply intermediate scrutiny to nonmarital children was that the denial of government benefits impacts such children’s economic and social interests.<sup>162</sup>

### *B. Children of Same-Sex Parents As a Subset of Nonmarital Children*

Today, children of same-sex parents are in a similar position to children of unmarried opposite-sex parents forty years ago. They exercise no control over their parents’ conduct, yet, because of the state’s

158. *See id.* at 347; UNIF. PARENTAGE ACT § 202 (2002) (“A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.”); *see also* COLO. REV. STAT. ANN. § 19-4-103 (West 2005); MINN. STAT. ANN. § 257.53 (West 2007); NEV. REV. STAT. ANN. § 126.031 (West 2008).

159. COLO. REV. STAT. ANN. § 19-4-104 (West 2005).

160. *See Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968) (finding that basic equal protection principles require that even when a citizen has control (as the mother of the nonmarital child), there must be a causal connection between the state’s regulation and the citizen’s conduct).

161. *See id.* at 75 (“[W]e see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.”); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (“[I]t is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.”).

162. *Id.* at 71.

imputation of immorality upon them, they suffer concrete economic injuries.

*1. Children of Same-Sex Parents Have No Control Over Their Parents' Conduct or Their Status of Birth*

Classifications that deny children of same-sex parents government benefits do so based on an immutable characteristic—their status as children of gays and lesbians.<sup>163</sup> Although most lawyers are well aware of the concept of immutability in race-based equal protection cases, a persistent strand of immutability principles, even if less well known, exists in the nonmarital status cases. The *Weber* Court, citing a number of cases including *Brown v. Board of Education*, explained that “imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”<sup>164</sup> The Court expressed its view that it could not prevent the social disapproval of children born outside of marriage; it could, however, “strike down discriminatory laws relating to status of birth.”<sup>165</sup> The early immutability concepts in the nonmarital status cases also influenced the subsequent equal protection law. A year later, in a plurality opinion, the Supreme Court relied on *Weber*'s immutability rationales to argue for heightened scrutiny for gender classifications.<sup>166</sup>

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163. This Article does not endorse the view that immutability is a required factor for heightened classification. For decisions that deny heightened scrutiny to parties claiming sexual orientation discrimination in reliance on the immutability factor, see *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984).

164. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). See also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (“Because illegitimacy is beyond the individual’s control and bears ‘no relation to the individual’s ability to participate in and contribute to society,’ official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions ‘will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.’”) (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (stating that status of illegitimacy “is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual”).

165. *Weber*, 406 U.S. at 176 (citing *Graham v. Richardson*, 403 U.S. 365 (1971), *Hunter v. Erickson*, 393 U.S. 385 (1969), *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

166. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .’”) (quoting *Weber*, 406 U.S. at 173); see also M. Katherine Baird Darmer, “Immutability” and Stigma: Towards a More Progressive Equal Protection Rights Discourse, 18 AM. U. J. GENDER SOC. POL’Y & L. 439 (2010).

Many in the United States believe that same-sex relationships are immoral and run counter to traditional family values. One of the primary contentions is that sexual orientation is a choice, not an immutable characteristic. This Article does not wade into this debate; it is undeniable, however, that children of gays and lesbians have no control over their parents' conduct (or the rest of the country's response to their parents' conduct). They can do nothing about the reality that their biological (or adopted) parent and that parent's same-sex partner (the child's non-biological parent) decided to have a child.

A central tenet of modern equal protection law is that it is unfair to discriminate against an individual because of a trait or characteristic derived at birth that cannot be changed.<sup>167</sup> The nonmarital status cases repeatedly recognized this core principle, and it has also been invoked in other contexts to prohibit discrimination against children.<sup>168</sup> In *Plyler v. Doe*, school-age children of Mexican origin brought an equal protection challenge to a Texas statute that withheld state funds from local school districts that chose to enroll and educate children not "legally admitted" to the United States.<sup>169</sup> In striking down the provision, the Supreme Court made a distinction between individuals illegally in the United States as a result of their own conduct and the children of these individuals. The Court explained that these children "can affect neither their parents' conduct nor their own undocumented status," and that to legislate against them "does not comport with fundamental conceptions of justice."<sup>170</sup> As with nonmarital status children and undocumented children, children of same-sex parents are born into or become members of the gay- or lesbian-headed household through no individual action on their part.

## 2. *Imputing Immorality to the Child to Deny Basic Safety Nets Is Impermissible*

Children of same-sex parents are denied basic safety nets because "no-protection" states morally disagree with their parents' gay or lesbian

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167. See, e.g., *Weber*, 406 U.S. at 175–76; *Mathews*, 427 U.S. at 505 ("[T]he legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 688 (4th ed. 2011) (stating that the applicable level of equal protection scrutiny is determined in part based on whether the characteristic distinguishing the class being discriminated against is immutable).

168. See *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982).

169. *Id.* at 205.

170. *Id.* at 220.

relationships and proceed to impose their moral judgment on the children those relationships produce.

Moral justifications invoked as a shield to insulate the government's disparate treatment of nonmarital child litigants have been routinely rejected as unrelated to the underlying purpose of the government statutes in question and clearly driven by invidious discrimination.<sup>171</sup> The degree of malice and bigotry directed toward LGBT people and their families in "no-protection" states is nothing short of alarming. Bob Barr, the Republican Congressman from Georgia, for example, sponsored the anti-gay Defense of Marriage Act, saying: "The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society, the family unit."<sup>172</sup> In the neighboring state of Alabama, Roy Moore, then Chief Justice of the state's supreme court, openly advocated that the death penalty should be leveraged as a way to keep children away from LGBT people, even their parents. In a lengthy concurrence in a custody case involving a lesbian mother, Moore asserted that "[t]he State carries the power of the sword, that is, the power to prohibit [homosexual] conduct with physical penalties, such as confinement and even execution. It must use that power to prevent the subversion of children toward this lifestyle."<sup>173</sup>

Importantly, it's not just in states in the Deep South where such anti-gay bias is spoken so freely and forcefully. The discussion occurs at a national level as well. Indeed, the two organizations that lead the "traditional family" movement on the national stage—the American Family Association (AFA) and the Family Research Council (FRC)—are so virulent in their homophobia that they have both been deemed "anti-gay groups."<sup>174</sup> In 2010, Bryan Fischer, AFA director of issue analysis for

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171. See Maldonado, *supra* note 101, at 350–52; see also Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1530 (2004) (asserting that in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court "eradicated the last vestiges of state power to criminalize private consensual adult sexual behavior solely on the basis of morality, without any showing of harm either to persons or to legally protected institutions").

172. Remarks from Robert Barr, U.S. Representative, to the U.S. House of Representatives (July 12, 1996), available at <http://www.eskimo.com/~bpentium/articles/marriage.html>. That Barr was married three times, paid for his second wife's abortion, failed to pay child support to the children of his first two wives, and, while married to his third and present wife, was photographed licking whipped cream off of strippers at his inaugural party matters not. See *Bob Barr*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Bob\\_Barr#Controversies\\_over\\_Barr.27s\\_personal\\_conduct](http://en.wikipedia.org/wiki/Bob_Barr#Controversies_over_Barr.27s_personal_conduct) (last visited Mar. 26, 2012). In his worldview, he is fit to be married and to be a parent based solely on his presumed heterosexuality.

173. *Ex parte H.H.*, 830 So.2d 21, 35 (Ala. 2002).

174. See *Am. Family Ass'n*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/groups/american-family-association> (last visited Mar. 26, 2012); *Family Research*

government and public policy, claimed that “[h]omosexuality gave us Adolph Hitler, and homosexuals in the military gave us the Brown Shirts, the Nazi war machine and six million dead Jews.”<sup>175</sup> That same year, FRC President Tony Perkins wrote: “While activists like to claim that pedophilia is a completely distinct orientation from homosexuality, evidence shows a disproportionate overlap between the two. . . . It is a homosexual problem.”<sup>176</sup>

Even in more comparatively moderate tones, government actors consistently deny gays and lesbians the right to marry in reliance on “traditional” family values, such as a preference for raising children within a marriage, exposing children to dual-gender parenting roles, and encouraging procreation. These arguments, as the next section explains, are also driven by moral values about families. While opponents of gay marriage might successfully employ those arguments about traditional families to deny gays and lesbians the right to marry, those opponents cannot deploy those arguments to deny children of gays and lesbians rights equal to those enjoyed by their similarly situated peers.

The *Weber* Court explained this clearly in a now oft-quoted statement:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.<sup>177</sup>

The nonmarital status cases consistently held that children cannot be punished based on moral disagreement with their parents’ conduct or relationships.

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*Council*, SOUTHERN POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/family-research-council> (last visited Mar. 26, 2012).

175. *Am. Family Ass’n*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/groups/american-family-association>.

176. *Family Research Council*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/family-research-council> (last visited Mar. 26, 2012).

177. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

### 3. *Children of Same-Sex Parents Suffer Concrete Economic Injuries*

The children of same-sex parents suffer concrete economic (and non-economic) losses. Persistent themes in the nonmarital status cases are that children should be protected and our basic system of benefits and property rights is designed to afford basic government safety nets to children when necessary, like in the event of family transitions or crisis.<sup>178</sup> The *Levy* Court asked a series of questions that went directly to this concern in the children's claim for wrongful death recovery: "[w]hen the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock?"<sup>179</sup> The court also inquired that if a nonmarital child is "subject to all the responsibilities of a citizen . . . [h]ow under our constitutional regime can he be denied correlative rights which other citizens enjoy?"<sup>180</sup> *Weber* also raised such concerns about the economic interest of children seeking workers' compensation proceeds after the death of their father, noting that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."<sup>181</sup>

Similarly, in *New Jersey Welfare Rights Organization v. Cahill*,<sup>182</sup> the Supreme Court turned to the economic injury to children as its justification for applying heightened review. New Jersey's "Assistance to the Families of the Working Poor" program limited benefits to households comprised of opposite-sex married couples with "legitimate" children.<sup>183</sup> The court found the law unconstitutional, because the benefits under the welfare program were as "indispensable to the health and well-being of illegitimate children as to those who are legitimate."<sup>184</sup> The very notion that some children are worthy of economic safety nets and others are not because of their status as children of "immoral" unmarried parents struck

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178. *See generally id.*; *New Jersey Welfare Rights* 411 U.S. 619 (1973).

179. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

180. *Id.*

181. *Weber*, 406 U.S. at 169.

182. 411 U.S. 619 (1973).

183. 1971 N.J. LAWS 1008 (repealed 1977) provided that the household must be "composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both . . ."

184. *Cahill*, 411 U.S. at 619.

at the heart of prohibited disparate treatment under the equal protection of the laws.<sup>185</sup>

As Section II detailed, children of same-sex parents in “no-protection” states are denied access to a host of state (and federal) benefits.<sup>186</sup> The benefits that children of same-sex parents are denied places them at a social and economic disadvantage in relation to their opposite-sex parented peers and exposes them to unwarranted social and economic hardship.

In conclusion, children of same-sex parents are in a similar position to that of children of opposite-sex unmarried parents at the beginning of the civil rights movement—they exercise no control over their parents’ conduct, yet suffer concrete economic injuries because of moral objections to their parents’ relationships. Children of same-sex parents are identical to, or are a subset of, nonmarital status children, and their disparate treatment warrants intermediate scrutiny.<sup>187</sup>

The remaining sections of the Article explore the potential state justifications put forth to defend government classifications that discriminate against children of unmarried same-sex parents, and offers a legal mechanism that states may adopt to avoid the disparate treatment of children of unmarried same-sex parents.

#### IV. THE LEGAL EXCLUSION OF CHILDREN OF SAME-SEX PARENTS TO “PRESERVE MORAL VALUES”

As explained in the introduction to this Article, there has yet to be an equal protection challenge brought by a child of same-sex parents denied government benefits enjoyed by children of opposite-sex parents; therefore, one can only speculate about the justifications that “no-protection” states might invoke. However, it is possible to glean from both the same-sex marriage litigation to date and the historical justifications

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185. See Nolan, *supra* note 119, at 25 (“Clearly, the result of these cases on behalf of children born to unwed parents has been the transformation of law and policy regarding legitimacy and illegitimacy as to economic rights, nationally. That is, the cases set a floor, which all states are constitutionally bound to follow in regard to these children.”); see also *Pickett v. Brown*, 462 U.S. 1, 8 (1983) (“[A] state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally’ . . . .”) (quoting *Gomez v. Perez*, 409 U.S. 535, 538 (1973)).

186. See *supra* Part II.

187. It is important to note that a court applying intermediate scrutiny to laws affecting children of same-sex parents would not be creating a new suspect classification, but merely acting consistently with cases in which courts applied intermediate scrutiny to laws affecting nonmarital children, because children of same-sex parents in “no-protection” states are a subset of nonmarital children.

raised in the nonmarital status cases the types of arguments that may be advanced. In the legal battles over same-sex marriage and gay adoption,<sup>188</sup> the most frequent arguments deployed are based in traditional notions of family life, including several variations on the theme that child rearing is optimal when a man and a woman are present.<sup>189</sup> Whatever the rationales may be, the denial of government benefits to children of same-sex parents will be difficult to justify as “substantially related to a sufficiently important governmental interest.”<sup>190</sup>

#### A. Preserving “Family Values” Arguments

Family values arguments fall roughly into the following three categories:

First, encouraging children be born within marriage because children raised by married parents are preferable to children raised by unmarried parents. This rationale focuses on encouraging the rearing of a biological child within a marriage, as opposed to outside of it.<sup>191</sup> States argue that they are justified in encouraging marriage for opposite-sex couples who have relationships that result in children because it is preferable to having children raised by unmarried parents.<sup>192</sup>

Second, encouraging children be born within marriage because of the unique ability of opposite-sex couples to “accidentally” have children. A variation on the first argument: states are justified in encouraging

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188. This Article turns to these arguments only in an attempt to anticipate what a state may argue as justifications for denying a child of same-sex parents any of the previously discussed government benefits.

189. For a general overview of these arguments, see Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORDHAM L. REV.* 2733 (2008). For academic arguments supporting these government rationales, see Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 *LA. L. REV.* 773, 773–74, 779–80, 790–91 (2002); Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 *HARV. J.L. & PUB. POL’Y* 771, 797–99 (2001); Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 161, 172 (2004). *But see* Lewis v. Harris, 908 A.2d 196, 217 (N.J. 2006) (“The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children.”).

190. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) and *Craig v. Boren*, 429 U.S. 190 (1976)); *Parham v. Hughes*, 441 U.S. 347 (1979) (applying intermediate scrutiny to the denial of a father’s claim for the wrongful death of his child because the father had not legitimated the child where the government also has the burden of proof under intermediate scrutiny).

191. See *Morrison v. Sadler*, 821 N.E.2d 15, 23–27 (Ind. Ct. App. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 982 (Wash. 2006).

192. *Morrison*, 821 N.E.2d at 25; *Hernandez*, 855 N.E.2d at 7; *Andersen*, 138 P.3d at 982.

opposite-sex marriage because these couples' sexual relations can lead to pregnancy accidentally, something that cannot happen in same-sex relations.<sup>193</sup> The unique heterosexual ability to have children accidentally creates a state incentive to encourage and promote stability in marriage for these children.<sup>194</sup> In *Hernandez v. Robles*,<sup>195</sup> the same-sex marriage ban challenge in New York, the state's highest court clarified this point: "The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse."<sup>196</sup> The court theorized that this potential accident or impulse on the part of opposite-sex couples creates a greater danger that children will be raised in "unstable" homes than with same-sex couples.<sup>197</sup> It is important to note that New York now allows same-sex marriage; several "no-protection" states, however, continue to maintain this "accidental procreation" argument to deny same-sex couples the right to marry.<sup>198</sup>

Third, encouraging children be raised in dual-gender households with a mom and a dad. Another potential government rationale that may be advanced is that there is a legitimate state interest in treating children of same-sex couples differently than children in opposite-sex couples, because "children thrive in opposite-sex marriage environments."<sup>199</sup> States have a legitimate interest in encouraging the "optimal" family structure of a home with both a mother and father to provide gender role-modeling.

In *Lofton v. Secretary of the Department of Children and Family Services*,<sup>200</sup> a challenge to Florida's ban on homosexual adoption, the Eleventh Circuit explained that the regulation was permissible under the Equal Protection Clause because it was rationally related to the best

193. *Hernandez*, 855 N.E.2d at 7.

194. *Id.*

195. 855 N.E.2d 1 (N.Y. 2006).

196. *Id.*

197. *See id.* But see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (limiting marriage to opposite-sex couples was not related to ensuring that children are raised in an "optimal" setting, because extending marriage to same-sex couples would offer a more stable family structure for the children in those households); *Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) (rejecting the argument that Vermont public policy favored opposite-sex parents as "patently without substance" in light of statutes permitting same-sex adoption and offering legal protections in the event of dissolution of same-sex relationships).

198. *See generally* Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT. L. REV. 403 (2009) (arguing that the rationale for prohibiting same-sex marriage is no stronger than the traditional justification of procreation).

199. *Andersen*, 138 P.3d at 983.

200. 358 F.3d 804 (11th Cir. 2004).

interests of Florida's adopted children to place them in homes with married heterosexual parents.<sup>201</sup> Florida, the court found, had a legitimate interest in encouraging the "optimal" family structure of a home with both a mother and father, because of the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."<sup>202</sup> The court dismissed the plaintiffs' argument that Florida's role-modeling rationale was not rationally related to its objectives of dual-gender parenting, given that the state allowed single heterosexual persons to adopt.<sup>203</sup> The Court explained that, unlike gays and lesbians, heterosexual singles have a greater probability of eventually establishing a stable dual-gendered household.<sup>204</sup>

The moral values justifications will suffer the same constitutional faults as similar moral-values arguments raised and rejected forty years ago in the nonmarital status cases.<sup>205</sup> Each rationale has a common theme with the now unconstitutional nonmarital status classifications rooted in the "preservation of the traditional family" arguments. From the standpoint of the child, the government cannot demonstrate how these justifications are substantially related to sufficiently important governmental interests of providing financial stability to children.<sup>206</sup>

### 1. *The Lack of a Nexus to Financial Stability*

State actors will be unable to offer a nexus to government action denying children of same-sex parents their non-biological parent's workers' compensation benefits, social security, or other safety nets. In striking down the workers' compensation provision in *Weber v. Aetna Casualty & Surety Co.*,<sup>207</sup> the Supreme Court explained that the decedent father had as much affinity for his nonmarital children as he did for his four children born within his marriage, and that all of his children had lived with him and were "equally dependent upon him for maintenance and support."<sup>208</sup> The *Weber* Court made it clear that placing the state's moral condemnation of the child's parents "on the head of an infant is

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201. *Id.* at 819–20.

202. *Id.* at 818. For further background on these arguments, see Ball, *supra* note 189, at 2752–56.

203. *Lofton*, 358 F.3d at 820–21.

204. *Id.* at 822.

205. *See supra* Part I.B.

206. *See Silverman*, *supra* note 2, at 435 ("A child-centered analysis reverses the emphasis, but also eliminates some of the arguments leveled against the parents which have been used to sustain the denial of same-sex couples to marry.")

207. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171 (1972).

208. *Id.* at 70.

illogical and unjust. . . . Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.”<sup>209</sup>

An example in the context of a child of same-sex parents may be instructive. Assume that Linda is the child of a lesbian couple, Mary and Jan. They live in a “no-protection” state. Together they planned for and followed through on the necessary steps via alternative insemination to have Linda. Mary is the biological mom, Jan is the non-biological mom. The sperm donor’s parental rights were terminated. Mary and Jan have both been equal participants in raising Linda. Jan, a high school principal, contributes \$60,000 a year in income to the household. Mary works part-time in a bookstore and contributes \$15,000 a year in income. When Linda is 15 years old, Jan is killed by a drunk driver.

In a “no-protection” state, Linda would not be able to recover for economic losses to the household and for her emotional trauma from the tortious death of Jan because she is not legally recognized as Jan’s child. Wrongful death claims allow for recovery of the pecuniary loss to a person for the negligent, reckless, or intentional death of a loved one.<sup>210</sup> Increasingly, states permit plaintiffs to recover for emotional or psychological losses as well.<sup>211</sup> Eligibility to sue varies by state, however, and most limit wrongful death recovery to the deceased’s spouse, children, parents, or siblings.<sup>212</sup> The damage—both economic and emotional—is clearly present in this situation after a fifteen year functional parent-child relationship. To deny the child recovery based on the state’s moral objection to same-sex relationships is contrary to the basic principles of wrongful death actions and tort law—that the dependent child is placed in the position she would have been in had the tortious act never occurred. Instead, the status quo assures that Linda (and Mary) will suffer major economic and emotional hardship. Also, the failure to recognize Linda’s claim grants the negligent defendant a windfall. This result is also contrary to basic equal protection principles—ignoring the fifteen-year parent-child relationship because of moral disapproval and leaving the child without financial compensation for her losses (both economic and emotional)

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209. *Id.* at 175.

210. *See generally supra* note 81.

211. *See, e.g.,* Green v. Bittner, 424 A.2d 210, 215 (N.J. 1980).

212. These statutory limitations prevent not only members of same-sex families from seeking recovery, but also members of many other family relationships that fail to conform to the traditional nuclear family. *See Culhane, supra* note 81, at 942–63.

places the child of same-sex parents at a distinct disadvantage in relation to his or her peers with opposite-sex parents.

A child like Linda would be the modern-day equivalent of the children in *Levy v. Louisiana*, wherein the state of Louisiana denied the “right to recover” for the tortious death of a mother because the children were not “legitimate,” insofar as “morals and general welfare . . . discourage[] bringing children into the world out of wedlock.”<sup>213</sup> To deny Linda these government resources designed to assist children in exactly these sorts of situations does not relate to the objectives of wrongful death recovery. As the *Levy* Court explained:

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.<sup>214</sup>

In the context of children with same-sex parents like Linda, the non-biological same-sex parent nurtures and cares for the child and the child is dependent upon the parent, just as any opposite-sex family configuration, whether rooted in a biological connection or not. To deny Linda the wrongful death recovery because of moral disagreement with the fact that she has two mothers is to do so on the basis of invidious animus.

The insufficiency of these family values arguments has been recognized in state supreme court decisions that have extended marriage equality to gays and lesbians. In 2009, the Iowa Supreme Court struck down its state prohibition on same-sex marriage in reliance, in part, on how marriage bans unjustifiably impose economic and psychological injuries on children within same-sex unions. After deciding that the level of scrutiny applicable to gays and lesbians would be intermediate scrutiny, the court concluded that the state justifications for excluding gays and lesbians from marrying were not substantially related to the objective that children be raised in an “optimal” environment with a mother and a father. The court rejected this state objective as both under and overinclusive:

If the statute was truly about the best interest of children, some benefit to children derived from the ban on same-sex civil marriages

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213. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (quoting *Levy v. State*, 192 So.2d 193, 195 (La. Ct. App. 1966)).

214. *Id.* at 72.

would be observable. Yet, the germane analysis does not show how the best interests of children of gay and lesbian parents, who are denied an environment supported by the benefits of marriage under the statute, are served by the ban.<sup>215</sup>

Similarly, in the landmark ruling in *Goodridge v. Department of Public Health*,<sup>216</sup> the Supreme Court of Massachusetts found the state's refusal to grant marriage licenses to same-sex couples to violate the state constitution's equal protection provision.<sup>217</sup> The court rejected the state's justifications for prohibiting same-sex marriage—procreation and child rearing—under the most minimal rational basis inquiry. First, the statute failed to be rationally related to providing a “favorable setting for procreation” because fertility and procreation are not prerequisites to obtaining a marriage license.<sup>218</sup> Second, limiting marriage to opposite-sex couples failed to relate to the state justification of ensuring that children are raised in the “optimal” setting with one parent of each sex.<sup>219</sup> The court explained that the demographics of the American family make it difficult to describe the average family and extending marriage to same-sex couples would offer a more stable family structure for the children in their households.<sup>220</sup>

“No-protection” states fail to recognize the changing demographics of the American family. Once again, these state actors are driven by moral judgment and invidious animus and, at bottom, they seek to force citizens to conform to particular behaviors—opposite-sex marriage—and punish children to achieve that objective. The rationales articulated, such as the “need” for a child to be raised in a house with a married man and woman, is merely another attempt by the state to ensure the “legitimacy” of children.<sup>221</sup> As Professor Solangel Maldonado observes, the marriage/procreation arguments used to deny same-sex couples the right to marry “serve to reinforce societal disapproval of nonmarital families and children.”<sup>222</sup> This has already been repeatedly struck down as impermissible, however. A state “may not invidiously discriminate against

215. *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972–73, 999–1001 (N.D. Cal. 2010).

216. 798 N.E.2d 941 (Mass. 2003).

217. *Id.* at 948, 973 (holding that the state could not deny the “protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry”).

218. *Id.* at 961.

219. *Id.* at 962.

220. *Id.* at 963.

221. See Smith, *supra* note 20, at 322.

222. See Maldonado, *supra* note 101, at 386.

illegitimate children by denying them substantial benefits accorded children generally.”<sup>223</sup> As with children of married opposite-sex parents, children of same-sex parents in “no-protection” states are entitled to be placed on equal footing with marital children.

Further, although beyond the scope of this Article, the rationale that encourages raising children in “dual-gendered” households based on impermissible moral judgment may violate equal protection doctrine that prohibits gender discrimination. Gender stereotypes about the roles of men and women in parenting responsibilities are also impermissible rationales to deny a child of same-sex parents the equal benefits enjoyed by children of opposite-sex parents.<sup>224</sup>

The equal protection jurisprudence is clear that the Constitution does not permit the government to punish innocent children to express its moral condemnation of their parents’ relationships. Such classification “reflect[s] deep-seated prejudice rather than legislative rationality in pursuit of some legislative objective.”<sup>225</sup> The “traditional family preservation arguments” of encouraging children be raised by a man and a woman are unrelated to the very purpose of the state benefits and provisions designed to protect children.

#### V. ADMINISTRATIVE EFFICIENCY AND THE INSURMOUNTABLE BARRIER DOCTRINE

In addition to invoking moral judgments to prevent children of same-sex couples from recovering government benefits from their non-biological parents, states may allege that such denials are necessary to ensure the efficient administration of government benefits and prevent spurious claims. The administrative efficiency and prevention of spurious claims justifications are likely to fail for two significant reasons.

First, it is morally and legally unacceptable for the government to enact blanket exclusions of nonmarital children to basic government safety nets.<sup>226</sup> As it stands now, as explained in Part II.A, children of same sex

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223. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

224. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982); see also *United States v. Virginia*, 518 U.S. 515, 549–51 (1996) (discussing gender stereotyping in military academies); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (discussing gender stereotyping of women members of the U.S. Armed Service and the dependency, or non-dependency, of their husbands).

225. *Plyler v. Doe*, 457 U.S. 202, at 216 n.14.

226. See *Trimble v. Gordon*, 430 U.S. 762, 772 (1977) (“Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate.”).

parents in “no-protection” states face an insurmountable barrier—they are completely locked out of access to these benefits. “No-protection” states fail to provide any legal channels for the parents or the child to establish a legal relationship with each other. This legal barricade prevents children from accessing government benefits and allows the state to permanently disenfranchise them without ever discovering whether the speculative parade of horrors will actually occur when it comes to proving legal parentage. Second, by virtue of the ways in which same-sex couples (who are the focus of this Article) become parents, it may, in fact, be easier to weed out fraudulent cases than in traditional opposite-sex paternity cases. This section concludes with potential options that states may turn to in removing the insurmountable barrier.

#### A. *The Insurmountable Barrier Doctrine*

Children of same-sex parents face an insurmountable barrier to accessing basic government benefits, a barrier erected by “no-protection” states. It is impossible for the non-biological same-sex parent to establish a legal relationship to the child: same-sex couples cannot marry; the same-sex non-biological parent is not related by blood; gays and lesbians cannot adopt (as couples); and there is no alternative legal mechanism for a same-sex non-biological parent to voluntarily acknowledge or demonstrate an intent to parent their same-sex partner’s biological child. It is also impossible for the child to obtain a legal relationship to the non-biological same-sex parent. The government cannot “create an insurmountable barrier” to the children of same-sex parents to government benefits and property rights.<sup>227</sup>

A central tenet of the nonmarital status cases is that the difficulty in proving paternity does not justify blanket exclusions to nonmarital children. In *Labine v. Vincent*,<sup>228</sup> despite the joint acknowledgment by the unmarried mother and father that Rita Vincent was their natural child, the Supreme Court held that it was insufficient to give Rita a legal right to her father’s inheritance.<sup>229</sup> In explaining its position, the Court argued that Rita Vincent’s equal protection argument was misplaced because, unlike *Levy*, this was not a situation in which the state “created an

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227. See generally *Labine v. Vincent*, 401 U.S. at 539 (holding that because no insurmountable barrier prevented the child from sharing the estate Louisiana did not bar the child from recovery) (citing *Levy v. Louisiana*, 391 U.S. 68 (1968)).

228. 401 U.S. 532 (1971).

229. *Id.* at 533, 539–40.

insurmountable barrier” to the illegitimate child because the father could have legitimated the child a number of ways, including by marrying the mother, formulating a will, or stating his desire to legitimate his daughter in an acknowledgment.<sup>230</sup> Although *Labine* has been criticized for its lackluster equal protection analysis, it did indicate that a baseline exists below which states cannot tread: states cannot create an insurmountable barrier to a nonmarital child to establish a legal relationship to the father.<sup>231</sup>

In *Trimble v. Gordon*,<sup>232</sup> the Supreme Court clarified the “insurmountable (or impenetrable) barrier” doctrine. In *Trimble*, Deta Mona Trimble challenged an Illinois statute that permitted marital children to inherit by intestacy from both their mothers and fathers, but limited the inheritance of nonmarital children only to their mothers.<sup>233</sup> Deta Mona lived with her unmarried opposite-sex parents.<sup>234</sup> Her father openly acknowledged her as his child and, prior to his death, he obtained a court order of paternity.<sup>235</sup> Nevertheless, the Illinois Probate Court upheld the constitutionality of the Illinois statute and denied Deta Mona inheritance of his estate.<sup>236</sup>

In reliance on *Labine*, the Illinois Supreme Court justified Deta Mona’s exclusion from inheritance because nonmarital children were not subjected to an insurmountable barrier preventing them from sharing in their fathers’ estates—fathers, including Deta’s father, could leave wills to ensure their children’s inheritance.

The Supreme Court rejected the state’s preservation of family relationships arguments and the state’s articulated interest in the efficient method of property distribution. Clarifying its position on the insurmountable barrier doctrine from *Labine*, the Court held that Illinois’ interest in the difficulty of proving paternity and the risk of spurious

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230. See *supra* notes 130, 136.

231. See Nolan, *supra* note 119, at 13; Richard L. Brown, *Disinheriting the “Legal Orphan”*: *Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 163 (2005) (“[S]tatutes that impose blanket disadvantages on illegitimate children, without providing some reasonable mechanism to avoid those disadvantages, almost certainly do not bear the substantial relationship to an important governmental interest test required under intermediate scrutiny.”).

232. 430 U.S. 762 (1977).

233. *Id.* at 764.

234. *Id.*

235. *Id.*

236. *Id.* at 764–65.

claims did not support the complete prohibition on inheritance from the intestate father.<sup>237</sup>

The Supreme Court recognized that even when a constitutional violation is invoked, the Court must tread lightly to accord substantial deference to a state's statutory scheme. States, however, must demonstrate a nexus between the law and its stated objectives. The Court said, "[P]roblems [of proof] are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."<sup>238</sup> Illinois gave inadequate consideration to the connection between the statute and the goals of accuracy and efficiency of the disposition of property because a middle ground existed between complete exclusion and a case-by-case determination.<sup>239</sup> According to the *Trimble* Court, the inheritance rights of an entire class of nonmarital children could be recognized without threatening the accurate and efficient settlement of estates.<sup>240</sup> In fact, Deta Mona Trimble was one of those children.<sup>241</sup> By excluding an entire category of easily identifiable nonmarital children, the statute failed to be "carefully tuned to alternative considerations" and engaged in broad discrimination between marital and nonmarital children.<sup>242</sup> As such, the statute extended beyond its asserted purposes.

As for Illinois' interpretation of *Labine* that the statute was justifiable because there was no insurmountable barrier—the father could have executed a will—the Court clarified its position: "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives," and "[i]f the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances."<sup>243</sup> The Court also made it clear that by reframing the focus on other means to inheritance, the analysis lost sight of the essential question regarding the constitutionality of the discrimination against nonmarital children in inheritance law.<sup>244</sup> If

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237. *See id.* at 770 (stating that the Illinois court justified the disparate treatment of nonmarital children because "proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors").

238. *Id.* at 771 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972)).

239. *Id.*

240. *Id.* at 771–72.

241. *Id.* at 774.

242. *Id.* at 772 (internal quotation marks omitted).

243. *Id.* at 773–74.

244. *Id.* at 774.

the father had executed a will, the case would no longer involve intestacy law.<sup>245</sup> The state attempted to argue that the absence of an insurmountable barrier alone would not serve as a defense or justification to treat marital and nonmarital children differently, particularly if the other ways to obtain the right or benefit advanced are through other legal schemes not at issue in the case.

The *Trimble* Court refocused the analysis of the disparate treatment of nonmarital children on whether such treatment is justified by state objectives. The presence or absence of an impenetrable barrier, however, is not the ultimate question. Consistent with the foundation set by *Labine*, the presence of an insurmountable barrier may serve as proof of a state's invidious animus if it includes categories of children denied access to government benefits when they are easily identifiable and pose no proof problems.<sup>246</sup>

In "no-protection" states, complete exclusion continues to exist for children of same-sex parents. All children of same-sex parents are prohibited from establishing a legal relationship with their non-biological parent and are denied government benefits even though, for a broad category of children, the relationship between them and their non-biological parent can be easily established.<sup>247</sup> For example, in *Boseman*, there was no proof problem in determining that John's non-biological mother sought to be his legal parent.<sup>248</sup> There were ample indicia of her intent to parent John, including a court order establishing legal parentage.<sup>249</sup>

Consistent with the nonmarital status cases, the concerns of proof problems with children of same-sex parents establishing a legal relationship to the non-biological same-sex parent does not justify an insurmountable barrier to shield invidious discrimination. To avoid the constitutional infringement of children with same-sex parents, the first step is for states to remove the insurmountable barrier by creating channels for establishing legal parentage. As explained in *Trimble*, it is not the role of federal courts to dictate the exact legal channel that states adopt to remove the insurmountable barrier. In that vein, the next section will offer

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245. *Id.* at 773.

246. *Lalli v. Lalli*, 439 U.S. 259, 266–68 (1978) (holding that there may be some distinctions in terms of assessing who may recover but blanket prohibitions not justifiable).

247. The *Weber* Court reiterated the underlying concern stating, "[t]he burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them." See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171 (1972).

248. *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

249. *Id.* at 497.

some options drawn from well-known family law scholars and from practices in other states.

*B. The State Options to Remove the Insurmountable Barrier*

To avoid constitutional infringement of the equal protection rights of children with same-sex parents, “no-protection” states must avoid the blanket exclusion to the state-level recovery of benefits by creating a legal framework that permits the creation of a legal relationship between a child and his non-biological same-sex parent.

The point of this Article is not to advocate for a particular avenue, but rather to argue that the failure to offer any legal mechanism for the creation of a legal relationship between a child and its non-biological same-sex parent is an equal protection violation. The legal channels states select are within each state’s purview based on its policies, practices, and existing procedures dealing with children and parentage.<sup>250</sup> Fortunately, as a result of same-sex rights developed in other states and legal scholarship, there are a number of models to which states may look for guidance. This Article will briefly touch upon some existing legal channels, including voluntary acknowledgment of parentage, second-parent adoption, and marriage/civil unions. None of these models are free from future litigation challenges, but raising these options at least opens a dialogue that works towards equal access for children of same-sex parents.

*1. Voluntary Acknowledgment of Paternity/Parentage*

As explained earlier in the Article, every state allows unmarried opposite-sex couples to establish a legal parent-child relationship through a voluntary acknowledgment of paternity (VAP), a simple mechanism available at the hospital immediately before or after birth of the child. Once an unmarried couple signs an affidavit that voluntarily acknowledges that the male signing the form is the father of the child, he is assigned all rights and responsibilities as they relate to the child.<sup>251</sup> The VAP—Voluntary Acknowledgment of Parentage—process could be extended to same-sex couples.<sup>252</sup>

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250. See *Trimble*, 430 U.S. at 771 (“The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State’s primary responsibility in this area.”); KRAUSE, *supra* note 1, at 42. (noting conflict of laws concerns).

251. Julia Saladino, *supra* note 48, at 3; Harris, *supra* note 51, at 478 (2012).

252. Harris, *supra* note 51, at 487.

This option may be the least intrusive and least costly to states, parents, and children. Hospitals in all states already have procedures in place whereby willful parties can establish parentage responsibilities and rights immediately before or after birth. For a non-biological, same-sex parent, completing such a form requires no lawyers, no courts, no cost—only her presence and the consent of the birth parent. The VAP is also recognized from state-to-state as granting legal parentage.<sup>253</sup> Further, in more conservative jurisdictions, this pathway to parentage would allow states to compel economic responsibility for children without “endorsing” the relationship of the same-sex couple.

Still, there are downsides to voluntary acknowledgment of parentage as a single avenue, two of which will be mentioned here. First, the window in which a non-biological parent may establish parentage status is extremely narrow. What if a non-biological parent clearly demonstrated an intent to parent before birth, such as cases when both parties consented to and participated in the creation of the child through alternative insemination and provided pre-natal care, yet split up with the biological parent before the child is actually born? Should the child be denied legal access to the intended co-parent? Second, voluntary acknowledgment of parentage may fail to offer parity for gay men. Situations that involve a surrogate mother and two gay men, one the sperm donor and the other non-biologically related, for example, may be complicated by the terms of, or legal issues related to, surrogacy.

## 2. *Other Forms of Parental Acknowledgment*

### a. *Intent to Parent Statutes*

In 2009, the District of Columbia became the first place in the United States where parentage of a non-biological, same-sex parent can be established at insemination.<sup>254</sup> The Domestic Partnership Judicial Determination of Parentage Act of 2009 “provides that when a woman bears a child conceived by artificial insemination, and her spouse or unmarried partner consents in writing to the insemination, the consenting

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253. Saladino, *supra* note 48, at 2, 3; Harris, *supra* note 51, at 475.

254. Nancy D. Polikoff, *Landmark D.C. law grants parental status to two mothers*, BEYOND (STRAIGHT AND GAY) MARRIAGE (July 22, 2009), <http://beyondstraightandgaymarriage.blogspot.com/2009/07/landmark-dc-law-grants-parental-status.html>.

spouse or partner is a legal parent.”<sup>255</sup> Although husbands have always been the presumed parent of a child conceived through artificial insemination, this law extends that right regardless of marital status or gender of the non-biological parent. Unfortunately, the law seems only to apply to female same-sex couples, as surrogacy remains illegal in the District.<sup>256</sup> New Mexico was the first state to create a similar “insemination-intent” pathway to parentage that extends to same-sex couples, not just heterosexual, married men who always were presumed to be a parent.<sup>257</sup> The benefits of such statutes revolve primarily around expediency—for the state, the non-biological parent and the child—and the allowance for the establishment of parentage before birth.<sup>258</sup> It remains unclear, however, how such statutes could be best applied to gay men involved in surrogacy births.<sup>259</sup> To get around such limitations, states might consider drafting statutes less dependent on particular methods of reproductive assistance and with greater emphasis on defining a more inclusive parental presumption.<sup>260</sup>

*b. “De facto” Parental Status*

At least ten states, including Washington, California, Maine, Massachusetts, New Jersey, and Wisconsin, allow a person without a biological or otherwise legal relationship to a child to petition for “de facto” parentage status on the basis of a relationship between the adult and child.<sup>261</sup> The criteria for establishing “de facto” status vary by state, and some jurisdictions are inclusive.<sup>262</sup> What is nearly universal in court actions related to assignments of “de facto” parentage status is that the non-biological parent must spend a significant amount of time parenting

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255. Press Release, Nat’l Ctr. for Lesbian Rights, *New Law Protects Children Born to Same-Sex Parents in the District of Columbia* (July 22, 2010), [http://www.nclrights.org/site/PageServer?pagenam=press\\_DCparentingbill072209](http://www.nclrights.org/site/PageServer?pagenam=press_DCparentingbill072209).

256. See Polikoff, *supra* note 254.

257. See Courtney Joslin & Shannon Minter, *Assisted Reproduction, Excluding Surrogacy*, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 3:3 (updated June 2012).

258. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood An Opportunity for Gender-Neutrality*, 1990 WIS. L. REV. 297 (1990).

259. Intent-to-parent statutes may create unintended consequences in other areas of the law. If parenthood “begins at conception,” so might life, and “life begins at conception” is a fundamental assertion of the anti-choice movement. Such issues are, however, beyond the scope of this Article.

260. See Graham, *supra* note 8, at 1034. Graham proposes model statute language as follows: “A person who is living in a committed same-sex relationship when his or her partner gives birth to or adopts a child shall be presumed to be a legal parent of the child.” *Id.*

261. Sanja Zgonjanin, *What Does it Take to Be A (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN’S L.J. 251, 257–58 (2005).

262. *Id.* at 256–58.

the child before “de facto” parental status can be assigned. Benefits to “de facto” avenues include the allowance of a longer window in which a co-parent may seek parenting status and also their gender-neutral nature. Gay men, lesbians, and heterosexual men and women would all have access to this process. Further, “de facto” approaches “create parental status, without necessitating adoption, for a person who does not plan for a child’s birth or adoption but comes into the child’s life at a later date.”<sup>263</sup> The downsides here include the significant period of time during which the child is left unprotected, in terms of her legal access to the intended second parent, the extent to which this status covers all benefits identified earlier, and the significant costs associated with any court proceeding, which may erect a barrier for some parents without robust financial means.<sup>264</sup>

### 3. *Second-Parent Adoption*

In sixteen states and Washington, D.C., a child born to one legal parent may be adopted by another same-sex adult with the consent of the legal parent.<sup>265</sup> The second-parent adoption affords the second parent all of the rights and responsibilities of legal parenthood. Second-parent adoptions allow the non-biological parent of the child to become a legal parent alongside a birth mother or birth father.<sup>266</sup> Among the benefits of second-parent adoption is the reality that it protects a child’s legal access to an intended parent, whether or not the child’s parents can—or choose to—get married, “civil unioned,” or legally “partnered.” Further, it is gender-neutral in its approach, fully benefiting gay men and lesbians, along with their unmarried opposite-sex counterparts.<sup>267</sup> Still, second-parent

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263. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 224 (2009).

264. *Id.*

265. NAT’L CTR. FOR LESBIAN RIGHTS, *supra* note 37.

266. See generally Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93 (2000); Jason N.W. Plowman, *When Second-Parent Adoption Is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 63 (2008); Eleanor Michael, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family”*, 36 CONN. L. REV. 1439 (2004).

267. See, e.g., *In re Jacob*, 660 N.E. 2d 397, 405 (N.Y. 1995) (alluding to a possible claim on behalf of children whose non-biological unmarried heterosexual parent and same-sex parents were denied the right to adopt).

adoptions are far from perfect as a single avenue toward parentage.<sup>268</sup> As Professor Nancy Polikoff powerfully explains:

[R]ecognition of a child's family should not depend upon the family's access to court proceedings that require a lawyer and take two precious and limited commodities—time and money. The nonbiological mother and her child also should not be legal strangers during the inevitable period of time it takes to obtain an adoption decree.<sup>269</sup>

#### 4. *Domestic Partnerships, Civil Unions and Marriage*

One legal route a state may offer children (and their parents) in same-sex families is access to formal domestic partnerships, civil unions, and marriage. Nine states provide recognition to same-sex partners through domestic partnerships laws or civil unions.<sup>270</sup> Another seven states and the District of Columbia allow same-sex couples to marry.<sup>271</sup> In all of these jurisdictions, same-sex couples have rights and legal protections parallel to those of opposite-sex married couples, and the same-sex spouse should receive the parentage presumption that a child born into the union is the child of both parents.<sup>272</sup> Still, marriage or its legal equivalent is not a panacea.

Many same-sex parents may choose not to get married, “unioned,” or legally “partnered.” This certainly holds true for many opposite-sex couples who have children together. In this way, formally recognizing same-sex couples—through domestic partnerships, civil unions or marriage—may still leave some children of gay and lesbian parents vulnerable. States should seek to ensure that children of unmarried same-sex couples experience treatment equal to that of married same-sex and

268. See Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999).

269. See Polikoff, *supra* note 263, at 267.

270. See *Interstate Relationship Recognition* (May 27, 2011), HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/Interstate\\_Relationships\\_Recognition\\_Map\(1\).pdf](http://www.hrc.org/files/assets/resources/Interstate_Relationships_Recognition_Map(1).pdf).

271. Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and Washington State. Same-sex marriage in two states, Iowa and Massachusetts, is allowed based on court decisions; same-sex marriage in the other six jurisdictions is allowed pursuant to legislative action. See generally *Issue: Marriage*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/marriage> (last visited Mar. 26, 2012).

272. In civil union states, these marriage-like institutions offer state-level rights and benefits that are the equivalent to the rights and benefits of marriage and they also include the extension of the rights and benefits to children within these relationships. See Polikoff, *supra* note 263, at 214. There are some exceptions for states that do not recognize surrogacy. *Id.* at 214 n.46.

opposite-sex couples.<sup>273</sup> Presumably, the prohibition on treating nonmarital children differently than marital children should apply in this context, although this area of the law in the context of same-sex parents has yet to be explored. In same-sex marriage states, second-parent adoptions and other avenues to establish parentage need to remain available.

### 5. *Legal Channels for Children*

The law provides methods for children with opposite-sex parents to seek the establishment of paternity on their own behalf. Importantly, paternity issues for children with opposite-sex parents are not resolved on the sole criteria of a genetic relationship between the child and father. Indeed, the law affords a much broader interpretation of parenthood within paternity issues.<sup>274</sup>

States should consider the development of similar pathways for children of same-sex couples to establish a parentage connection. The reality that same-sex couples cannot have children “accidentally” and must plan thoroughly to do so lends itself well to the creation of a legal test to demonstrate a non-biological parent’s original consent and intent for which he or she should be legally responsible in order to protect the best interests of the child. There has been very little discussion of a parallel system for children of same-sex parents because the first generation of cases has focused simply on getting rights for the parents and their children. This will certainly be a necessary remedy as the issues and cases evolve.

### 6. *Preventing Spurious Claims*

In *Hernandez v. Robles*, the same-sex marriage ban challenge in New York, the court opted to exclude same-sex couples because, in part, unlike

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273. See generally Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 777 (2010); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) (discussing how marriage only rules pertaining to assisted reproductive technology hurt the children of same-sex parents).

274. See Part II.A; see also Jennifer Rosato, *supra* note 54, at 75 (“Courts have even ignored accurate positive results of a paternity test. For example, courts have continued to apply the presumption in situations where a husband finds out, through DNA testing, that the child he has been raising with his wife is not his biological child.”); Melanie B. Jacobs, *supra* note 62, at 375 (“The marital presumption and estoppel have been successfully used to maintain the father-child relationship in the absence of a biological tie because courts know that children rely on established parent-child relationships.”).

opposite-sex couples, they cannot conceive “accidentally.”<sup>275</sup> The court essentially treated the advanced planning of gays and lesbians as a negative quality of their parenting and child-rearing capabilities. In the context of establishing parental connections between children and their non-biological parents, however, such planning is anything but a negative. Indeed, the fact that gays and lesbians must be purposeful—very purposeful—about how and when they bring children into the world severely undercuts the dangers of spurious claims. Couples like Melissa Jarrell and Julia Boseman (John’s same-sex parents), and Eva Kadray and Camille Caracappa (Nicolaj’s same-sex parents) went through a number of detailed steps and extensive planning to seek recognition. Even if the couple splits up, as did Jarrell and Boseman, the steps taken by the gay or lesbian couple to become parents offer sufficient indicia to assess whether the non-biological parent assumed parenting rights and responsibilities of a child. Indeed, the actions of the non-biological parent and the birth mother or birth father leading up to, and beyond, conception and birth provide clear indications of both parties’ intent and consent, and a clear basis for a child to possess expectations of both of his or her parents.

This is not to say that there are not, and will not be, times when it is less than clear whether an individual from a same-sex relationship intended to parent. In *Elisa B. v. Superior Court*,<sup>276</sup> for example, the district attorney sought to establish parentage between children and a non-biological parent after the birth mother applied for public assistance.<sup>277</sup> The court concluded that Elisa, the non-biological parent, “both received the children into her home and held them out as her natural children; had she been a man, this would have made her a presumed father.”<sup>278</sup> In instances such as this, when a non-biological parent is rejecting his or her standing as a parent, sufficient indicia of intent to parent—or the complete absence of them—can make ultimate determinations of parentage more clear. Again, when gays and lesbians plan, as they must, to bring a child into the world, a record of that planning often will be created.

In sum, this Article asserts that government-sponsored discrimination against children of same-sex parents violates the children’s equal protection of the laws because neither government moral preservation arguments nor administrative efficiency arguments are “substantially related to a sufficiently important government interest” as required by

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275. 358 F.3d 804 (11th Cir. 2004).

276. 117 P.3d 660 (Cal. 2005).

277. See Polikoff, *supra* note 263, at 218–19.

278. *Id.* at 218.

intermediate scrutiny.<sup>279</sup> Further, although beyond the scope of the focus of this Article, denying children basic safety nets because of their parents' (unmarried) same-sex relationship is likely to fail rational basis as well. The exclusion of children of same-sex parents in "no-protection" states offers a significant body of evidence to draw upon in demonstrating that the denials are driven by invidious animus.<sup>280</sup>

## VI. CONCLUSION

In 1944, the Virginia Supreme Court, in *Brown v. Brown*,<sup>281</sup> upheld a lower court denial of Jacqueline Brown's request for child support from her father because, consistent with common law, "a bastard was considered as kin to no one, and was, therefore, incapable of being the heir of any person. No inheritable blood flowed through [her] veins."<sup>282</sup> The Court also summarily rejected her Fourteenth Amendment challenge as having "no merit."<sup>283</sup>

Twenty-two years later, in *Levy v. Louisiana*,<sup>284</sup> the U.S. Supreme Court drew a line in the shifting sands of the culture wars and refused to allow children to be the object of government-sponsored discrimination in its efforts to regulate adult relationships. As a society, we look back on the treatment of nonmarital children and are shocked by the callous disregard for them and the limited notion of who constitutes a "parent."

Today, children of same-sex parents and society are at a similar crossroads. As this Article has demonstrated, children of same-sex parents

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279. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

280. *See Levy v. Louisiana*, 391 U.S. 68, 71 (1968) ("[W]e have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side.") (internal citations omitted); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *City of Cleburne*, 473 U.S. at 447 (striking down zoning regulation on basis of mental disability under rational basis because motivated by "a bare . . . desire to harm a politically unpopular group") (quoting *Moreno*, 413 U.S. at 534); *Romer v. Evans*, 517 U.S. 620, 631 (1996) (striking down Colorado's Amendment 2 because it "impose[d] a special disability upon [homosexuals] alone"). For a more nuanced discussion about refining the role of animus in equal protection analysis, see Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in Perry v. Brown*, 64 STAN. L. REV. ONLINE 111, 112 (2012) (responding to William N. Eskridge, Jr., *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (2012)) (asserting that a law that singles out a socially disfavored group for the withdrawal of an important right "reeks of animus").

281. 32 S.E.2d 80 (Va. 1944).

282. *Id.* at 80.

283. *Id.* at 81.

284. 391 U.S. 68 (1968).

are denied important economic safety nets—safety nets that children of married parents obtain as a matter of course—because of the state’s imputation of morality upon them. Such government-sponsored discrimination is not justifiable on the basis of preserving traditional family values or to ensure administrative efficiency. Somewhere in middle America, there is a child of same-sex parents who has been denied a government benefit and deserves redress from this violation of her equal protection of the laws under the Fourteenth Amendment. Let’s hope she need not wait two decades, as did Jacqueline Brown, for the law to catch up with what she already knows is fair.