

THE PATH TO RECOGNITION OF SAME-SEX MARRIAGE: RECONCILING THE INCONSISTENCIES BETWEEN MARRIAGE AND ADOPTION CASES

Vanessa A. Lavelly^{*}

Only five years ago, same-sex marriage was not legal anywhere in the United States. That changed in November 2003, when the Supreme Judicial Court of Massachusetts held in *Goodridge v. Department of Health* that the state may not deny the protections, benefits, and obligations conferred by marriage to two individuals of the same sex who wish to marry. Advocates of same-sex marriage hoped that the decision in *Goodridge* would prompt courts in other states to recognize this right as well. During the summer of 2006, however, those hopes were deflated by decisions reached by the highest state courts in New York and Washington. Within a twenty-day period, the New York and Washington courts both held that restricting marriage to different-sex couples is constitutional. In addition, in the wake of the fall 2006 midterm elections, a total of forty-five states now ban same-sex marriage either by constitutional amendment or by statute. In light of these developments, *Goodridge* seems to have caused a backlash against same-sex marriage, rather than increased acceptance of it.

Although numerous commentators have addressed the differences between Massachusetts, on the one hand, and New York and Washington, on the other, less attention has been paid to what these states have in common: Courts in all three states permit same-sex couples to legally adopt children. Given the distinct standards used in same-sex marriage and same-sex adoption cases, little analysis has been done of the similarities and differences between these two sets of cases. This Comment endeavors to fill that gap. By analyzing the reasoning that underlies each set of cases, this Comment reveals glaring inconsistencies. In states that prohibit same-sex marriage but permit same-sex adoption, terms such as "marriage" and "family" and "parents" are defined differently by courts depending on the context in which they are used. This Comment urges courts to reconcile the inconsistencies by embracing the definitions and reasoning used in the majority of same-sex adoption opinions. If courts adopt this proposal, it may

^{*} Editor-in-Chief, *UCLA Law Review*, Volume 55. J.D. Candidate, UCLA School of Law, 2008; A.B., Harvard University, 2004. I would like to thank Adam Winkler for his support and encouragement, and Kenneth Karst for his helpful feedback. I also greatly appreciate the careful editing of Kris Fredrickson, Jennifer Katz, Eric Mason, Momo Sugawara, and Kristen Williams; the attention to detail of the *UCLA Law Review* board and staff; and the infinite patience of Ann Roller. Finally, I am indebted to my friends for keeping me laughing and to my family for their never-ending love and support.

allow them to take the first step to legally recognizing same-sex marriage. While this is certainly not an inevitable outcome, it would create a greater cohesiveness in family law and, more importantly, would grant to all citizens the rights and benefits that accompany marriage.

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INTRODUCTION

On November 18, 2003, the Supreme Judicial Court of Massachusetts held in *Goodridge v. Department of Public Health*¹ that the state may not deny the protections, benefits, and obligations conferred by marriage to two individuals of the same sex who wish to marry.² By this ruling, Massachusetts became the first state fully to grant the right to same-sex marriage. The legal recognition of same-sex marriage in Massachusetts carries with it numerous rights and responsibilities, including hospital

1. 798 N.E.2d 941 (Mass. 2003).

2. *Id.* at 948.

visitation rights, inheritance rights, and employee benefits.³ In addition to providing these “collateral effects,”⁴ Massachusetts’s legal recognition of same-sex marriage serves as a public statement that same-sex relationships are worth acknowledging. Further, it allows same-sex partners to communicate the strength of their commitment to society at large by using one readily understood word: marriage.

Many commentators suggested that the *Goodridge* decision might prompt other states to recognize the legality of same-sex marriage;⁵ but in the summer of 2006, the highest courts in New York and Washington—in *Hernandez v. Robles*⁶ and *Andersen v. King County*,⁷ respectively—both declined to reach the same conclusion as the Massachusetts court. As a result, same-sex couples in Massachusetts and same-sex couples in New York and Washington now have markedly different legal options.

Since the *Hernandez* and *Andersen* decisions, numerous advocates of same-sex marriage have addressed the differences between Massachusetts, on the one hand, and New York and Washington, on the other.⁸ Little attention has been paid, however, to a similarity that is arguably more troubling than the differences: Courts in Massachusetts, New York, and Washington all allow same-sex couples to legally adopt children.⁹ At first

3. For a list of some of the rights and responsibilities that accompany marriage, see Gay & Lesbian Advocates & Defenders (GLAD), Protections, Benefits, and Responsibilities of Marriage, <http://www.glad.org/rights/OP2-protectionsbenefits.PDF> (last visited Sept. 9, 2007); see also Arthur S. Leonard, *Legal Recognition of Same-Sex Partners Under US State or Local Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 133, 135–38 (Robert Wintemute & Mads Andenæs eds., 2001) [hereinafter LEGAL RECOGNITION] (listing various rights affected by state recognition of same-sex marriage).

4. RICHARD A. POSNER, *SEX AND REASON* 313 (1992).

5. See Carolyn Lochhead, *Pivotal Day for Gay Marriage in U.S. Nears*, S.F. CHRON., May 2, 2004, at A-1 (citing gay activists’ prediction in the wake of *Goodridge* that the decision of the Massachusetts court would increase acceptance of same-sex marriage by “proving with facts on the ground that the world does not come to an end when lesbian and gay couples marry”); cf. Larry Sternbane, Letter to the Editor, *New York’s Gay Marriage Decision*, N.Y. TIMES, July 8, 2006, at A12 (noting mixed reactions to *Hernandez v. Robles*, the post-*Goodridge* decision regarding same-sex marriage in New York). But see Lochhead, *supra*, at A-1 (citing the prediction by opponents of same-sex marriage that *Goodridge* “will ignite [the opponents’] push to ban such marriages in the U.S. Constitution,” and describing the “ferocious backlash” set off by *Goodridge* across the country).

6. 855 N.E.2d 1 (N.Y. 2006).

7. 138 P.3d 963 (Wash. 2006) (en banc).

8. See, e.g., Mary Pitman Kitch, *Same-Sex Marriage: Even the Courts Are Struggling to Explain Why Not*, OREGONIAN, Aug. 13, 2006, at F01; Kavan Peterson, *Gay Activists Hopeful in Colo., S.D., Wis.*, STATELINE.ORG, Aug. 11, 2006, <http://www.stateline.org/live/details/story?contentId=133643>. See generally ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006).

9. See *Adoption of Tammy*, 619 N.E.2d 315, 316 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995); *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (en banc).

glance, this similarity may not seem troubling, given the different legal standards at issue in same-sex marriage and same-sex adoption cases.¹⁰ When analyzing the reasoning that underlies each set of cases, however, glaring contradictions become apparent. For example, the Court of Appeals of New York held that the right to marry need not be defined to include the right to marry someone of the same sex¹¹—despite having already decided that, for the purposes of adoption, the same-sex partner of a child’s biological parent (the second parent¹²) is equivalent to a heterosexual stepparent and has an equal right to adopt.¹³ Similarly, the Supreme Court of Washington accepted the state’s argument that limiting marriage to different-sex couples furthers its interests in procreation and childrearing in a “traditional” nuclear family,¹⁴ despite having also permitted the creation of nontraditional families by granting same-sex adoptions.¹⁵

In states like New York and Washington that reject same-sex marriage but allow same-sex adoption, numerous inconsistencies exist between the two lines of cases. This Comment focuses on two types of inconsistencies—(1) definitional inconsistencies; and (2) inconsistent declarations of states’ interests—and argues that these inconsistencies create instability in the law. This Comment argues that these inconsistencies can be reconciled, at least in a general sense,¹⁶ if courts in same-sex marriage decisions embrace the definition of marriage and the reasoning used in the majority of same-sex adoption opinions. If courts adopt this proposal, same-sex marriage

10. See *infra* Part II. As the term is used in this Comment and elsewhere, “same-sex adoption” refers to the adoption of children by two individuals of the same sex. See, e.g., Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739 (1999).

11. *Hernandez*, 855 N.E.2d at 9–10.

12. The term “second parent” is used to describe the partner in a same-sex relationship who seeks to adopt the biological child of his or her partner. Adoption by a second parent has been analogized to adoption by a stepparent. See *infra* note 133 and accompanying text.

13. *In re Jacob*, 660 N.E.2d at 398. See generally Nancy D. Polikoff, *Lesbian and Gay Couples Raising Children: The Law in the United States*, in LEGAL RECOGNITION, *supra* note 3, at 153, 159–60, 160 n.17.

14. *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006) (en banc). In its commonly understood sense, a “traditional” family is one comprised of a married woman and man and their naturally conceived child or children.

15. See *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (en banc); see also WASH. REV. CODE ANN. § 26.33.140 (2005).

16. There are limitations to what this Comment endeavors to achieve. While it attempts to resolve the broader inconsistencies between same-sex marriage and same-sex adoption found in many cases, it does not attempt to resolve or even discuss every particular inconsistency within each state. Thus, the argument here may be complicated by specific constitutional amendments and statutory changes. As a result, this Comment should only be read only at the broader level—that is, it should be read only as a first step on the path to recognizing same-sex marriage. For further explanation of this Comment’s limitations, see *infra* note 26 and pp. 284–85.

eventually may follow a path parallel to that of same-sex adoption; that is, same-sex marriage eventually may be given legal recognition by courts.

Before the inconsistencies can be explained, however, a preliminary question must be addressed: What does it mean to “recognize” in these contexts? The dictionary provides one set of relevant definitions: (1) “to admit the fact, truth, or validity of”; (2) “to acknowledge formally”; or (3) “to acknowledge with a show of approval.”¹⁷ Applied to the marriage context, these definitions suggest that by recognizing same-sex marriage, courts would simply be acknowledging a social fact¹⁸—that meaningful same-sex relationships exist and function in much the same way that many different-sex marriages do. In addition, these definitions carry a normative implication: States *should* acknowledge and sanction committed same-sex relationships.

Writing about the rhetoric of justification in the same-sex marriage debate, Janet Halley has described an alternative definition of “recognition” that draws upon the etymology of the term “re-cognition.” According to this definition, “the law should *re-cognise* same-sex relationships, should *re-think* them.”¹⁹ This process of rethinking same-sex relationships necessitates rethinking different-sex relationships and, indeed, the institution of marriage itself.

Initially, these two sets of definitions may seem distinct. If recognize means “to acknowledge a social fact,” then extending the right of marriage to same-sex couples is merely a way of demonstrating that same-sex relationships “exist in the real world in a marriage-like form.”²⁰ On the other hand, if recognize means “to rethink,” then extending the right of marriage to same-sex couples requires reshaping the traditional one man–one woman definition of marriage.²¹ Yet, these definitions can and must be reconciled.

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1896 (Philip Babcock Gove et al. eds., 1993).

18. See Robert Wintemute, *Introduction* to LEGAL RECOGNITION, *supra* note 3, at 1, 5.

19. Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION, *supra* note 3, at 97, 98.

20. See *id.*

21. Since the 1960s, there have been two divergent factions working for gay and lesbian rights: gay-liberals and gay-radicals. Gay-liberals have fought for the reshaping approach to marriage recognition articulated in this Comment. While accepting the basic institutions of American society—marriage and family, the market system, and the mechanics of representative democracy—gay-liberals have worked for reform within the assumptions of the system. Gay-radicals, on the other hand, have argued that because the institution of marriage is oppressive, seeking formal access to it will only strengthen the institution and thereby harm most sexual minorities. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* 13, 17–20 (2006). Notwithstanding the potential significance of the gay-radical argument, this Comment adopts the gay-liberal approach to marriage equality.

The legalization of same-sex marriage requires courts to undergo a two-step process: first acknowledging the social fact of same-sex marriages, and then, in turn, rethinking whether the traditional legal definition of marriage is still capable of protecting the rights of all citizens.²²

This two-part process is currently being resisted or rejected outright in the majority of states.²³ In the context of adoption, however, this process of recognition has taken place (or is currently underway) in most states.²⁴ Owing to the difference between the current legal status of same-sex marriage and same-sex adoption, the majority of gay and lesbian couples can legally self-identify as the parents of their children, but not as married partners.²⁵ Residents of New York and Washington are part of this majority. Only same-sex partners in Massachusetts are in the small minority of couples that can legally identify as both parents and married partners. Given the right of each state to determine its own family laws, one could argue that these inconsistencies merely reflect legislators' efforts to satisfy the interests of the constituents within their state. When these inconsistencies occur intrastate, however, they evidence a deeper underlying conflict that cannot be explained by differences in state governance. By highlighting the inconsistencies between many recent same-sex marriage and same-sex adoption cases, this Comment reveals an instability in marriage and adoption jurisprudence.

While this Comment does not attempt to predict what courts will do in the future, it argues that courts can (and should) reconcile these inconsistencies by incorporating the reasoning from the same-sex adoption cases into the same-sex marriage cases. In doing so, courts would be able to interpret the right to marry to include same-sex marriage.²⁶ Although the

22. In cases, statutes, and legal writing in general, the term "recognize" is often used to indicate some sort of formal status under the law. To avoid confusion with the two-part definition of "recognition" proposed herein, the term "legal recognition" will be used to mean formal recognition under the law.

23. See *infra* Part I.A.

24. See *infra* Part I.B.

25. Of course, like heterosexuals, not all gays and lesbians choose to marry and have children. In this Comment, however, I focus on those gays and lesbians who would choose to marry and have (or adopt) children, if given the option.

26. While legislative changes also significantly affect an individual's right to marry and adopt, such changes are beyond the scope of this Comment except insofar as they have prompted judicial action. For works discussing the impact of legislation on same-sex marriage, see, for example, Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265 (2007); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005); Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation*

majority of courts have rejected the argument that same-sex marriage is part of the fundamental right to marry, the reconciliation of these inconsistencies effectively negates the primary reasons for which courts have refused to expand this right to include gays and lesbians. By extension, this reconciliation negates the reasons that courts have used in refusing to employ strict scrutiny,²⁷ a standard of review that should be used to invalidate the bans on same-sex marriage; however, laws restricting marriage to one man and one woman should not even withstand rational basis review if courts adopt the proposal advocated in this Comment.²⁸

This Comment does not intend to suggest that there have been no successes for the advocates of same-sex marriage, or that same-sex adoption faces no opposition. Some courts have already concluded that depriving same-sex couples of the rights and responsibilities of marriage is not constitutionally permissible.²⁹ In addition, countless organizations now work to effect legal and social change in this area.³⁰ At the same time, efforts to ban gay and lesbian parents from adopting continue to emerge across the country.³¹ Given that some opponents of same-sex marriage regard adoption as the logical next issue to confront,³² one could argue that the public nature of the same-sex marriage debate has caused, and will continue to cause, increased resistance to same-sex adoption. Regardless of whether same-sex marriage causes changes to same-sex adoption laws, or vice versa,³³

Compromising the Campaign for Marriage Equality?, 17 HASTINGS WOMEN'S L.J. 39 (2006); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005).

27. Strict scrutiny is also employed in equal protection claims if a suspect classification is involved. See *Baehr v. Lewin*, 852 P.2d 44, 63–64 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998). Although plaintiffs in same-sex marriage cases often contend that gays and lesbians constitute a suspect classification, see, e.g., *Andersen v. King County*, 138 P.3d 963, 974–76 (Wash. 2006) (en banc), most courts have rejected this argument, see *id.* at 975. Because there is limited use of the suspect classification argument in same-sex adoption cases, this Comment discusses only the fundamental right approach to invoking strict scrutiny. For other approaches used by plaintiffs in same-sex marriage cases, see Mary L. Bonauto, *The Freedom to Marry for Same-Sex Couples in the United States of America*, in LEGAL RECOGNITION, *supra* note 3, at 177, 204–06.

28. See *infra* Part III.

29. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

30. See, e.g., GLAD, <http://www.glad.org>; Human Rights Campaign, <http://www.hrc.org>; Lambda Legal, <http://www.lambdalegal.org>.

31. Andrea Stone, *Drives to Ban Gay Adoption Heat Up*; In 16 States Laws of Ballot Votes Proposed, USA TODAY, Feb. 20, 2006, at 1A.

32. See *id.*

33. See Part III for a discussion of the various outcomes that may result from the interplay between same-sex marriage and same-sex adoption cases.

the overlap between these two issues makes it likely that they will eventually either succeed or fail together.

This Comment proceeds in three Parts. Part I discusses the history and current jurisprudence of same-sex marriage and same-sex adoption. Part II then identifies and analyzes the inconsistencies between the marriage and adoption cases. The inconsistencies are grouped into two categories: definitional inconsistencies and inconsistent state interests. The examples provided in this Part reveal the ways in which the marriage and adoption cases currently diverge. Finally, Part III proposes a way to reconcile these inconsistencies. This Comment argues that if courts adopted this proposal, they would effectively take the first step on the path to recognizing same-sex marriage.

I. THE PATH ALREADY TRAVELED: SAME-SEX MARRIAGE AND SAME-SEX ADOPTION CASES

A. The History and Current Jurisprudence of Same-Sex Marriage

Myriad definitions of “marriage” have been used throughout the history of the institution: “Marriage [is] . . . the union between one man and one woman.”³⁴ “[A]t its core marriage is a legal institution officially sanctioned by society through its Government.”³⁵ “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”³⁶ Marriage is “the most important relation in life,”³⁷ because it is “the foundation of the family and of society, without which there would be neither civilization nor progress.”³⁸ A survey of the various definitions provided in cases, statutes, and legal literature leads to only one conclusion: “The institution of marriage . . . is terrifically hard to define.”³⁹ Defining it, however, is essential to resolving at least some of the legal issues involved. As explained in Part II, the definition of

34. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (App. Div. 2005); see also BLACK’S LAW DICTIONARY 992 (8th ed. 2004) (defining marriage as “[t]he legal union of a couple as husband and wife”).

35. 142 CONG. REC. S10122 (daily ed. Sept. 10, 1996) (statement of Sen. Robb).

36. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

37. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

38. *Id.* at 211.

39. Dan Savage, *Double Standards*, in THE M WORD: WRITERS ON SAME-SEX MARRIAGE 123, 127 (Kathy Pories ed., 2004).

marriage functions as either the starting point or the stopping point of the same-sex marriage debate, depending on which definition is used.

Just as the definition of marriage plays a central role in the current debate, so too does its history. The current legal status of same-sex marriage cannot be understood without first understanding the history of marriage in general. Nancy Cott, a professor of American history at Harvard University, has described the history of marriage in the United States as a “history of change.”⁴⁰ Rejecting “the often repeated claim that marriage has been the same for five thousand years,” Cott noted that “[m]any of the historical changes to marriage were as or more radical in their day than marriage of same-sex couples is today.”⁴¹

Advocates on both sides of the same-sex marriage debate have emphasized the importance of the history of marriage, yet they have interpreted that history in diametrically opposed ways. Opponents of same-sex marriage typically ignore or deemphasize the historical changes to which Cott referred, stressing that there has been one constant throughout that history: the nature of marriage as a relationship between one man and one woman.⁴² Proponents of this one man–one woman view of history fear that the state’s power to defend any limitations on marriage would be eviscerated if it could not justify the exclusion of gays and lesbians.⁴³ On the other hand, advocates of same-sex marriage underscore the protean nature of marriage, using the historical changes to buttress their argument that the right to marry should be extended to include same-sex marriage, just as it was extended to other previously excluded forms of marriage in the past. The most frequently cited example is the legalization of interracial marriage, which, according to same-sex marriage advocates, has clear parallels to the fight for same-sex marriage.⁴⁴ These divergent historical interpretations made by opponents and advocates of same-sex marriage have been present in almost every case that has addressed the issue.

40. Bonauto, *supra* note 27, at 194 n.94. See generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

41. *Id.*

42. See, e.g., *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 458 n.10 (Ariz. Ct. App. 2003); *Andersen v. King County*, 138 P.3d 963, 977–78 (Wash. 2006) (en banc). For the opposing argument that same-sex marriages have existed throughout recorded history, see KATHLEEN A. LAHEY & KEVIN ALDERSON, SAME-SEX MARRIAGE: THE PERSONAL AND THE POLITICAL 15–16 (2004).

43. See Bonauto, *supra* note 27, at 187; see also Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005) (explaining and evaluating the slippery slope arguments associated with same-sex marriage).

44. See, e.g., LAHEY & ALDERSON, *supra* note 42, at 16–17; GLAD, Marriage—A History of Change, <http://www.glad.org/rights/OP3-historyofchange.shtml> (last visited Aug. 7, 2007).

Federal and state courts have played a critical role in shaping the institution of marriage in the United States. In fact, the meaning and significance of marriage have been debated in the judicial forum for over a century. The U.S. Supreme Court first commented on the importance of marriage in 1888 in *Maynard v. Hill*.⁴⁵ Since that time, the Court has firmly established that the right to marry is part of the fundamental right of privacy implicit in the Due Process Clause of the Fourteenth Amendment.⁴⁶ For example, in *Skinner v. Oklahoma ex rel. Williamson*,⁴⁷ the Court declared an Oklahoma compulsory sterilization law unconstitutional, reasoning that “[m]arriage and procreation are fundamental to . . . existence and survival.”⁴⁸ And in *Loving v. Virginia*,⁴⁹ the Court invalidated a ban on interracial marriage, noting that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁵⁰ The Court has also protected the fundamental right to marry for prison inmates⁵¹ and persons with overdue child-support payments.⁵²

However, the Court has not yet directly addressed the issue of same-sex marriage;⁵³ accordingly, state supreme courts have made the determinative decisions. To date, the Supreme Judicial Court of Massachusetts is the only state supreme court to extend the right to marry to same-sex partners.⁵⁴ While Connecticut, New Jersey, and Vermont allow same-sex partners to enter into civil unions,⁵⁵ and some other states permit domestic partner

45. 125 U.S. 190, 205 (1888).

46. U.S. CONST. amend. XIV, § 1.

47. 316 U.S. 535 (1942).

48. *Id.* at 541.

49. 388 U.S. 1 (1967).

50. *Id.* at 12.

51. *Turner v. Safley*, 482 U.S. 78 (1987).

52. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

53. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”). *But cf. id.* at 604–05 (Scalia, J., dissenting) (arguing that, despite the Court’s assurances to the contrary, its decision regarding homosexual sodomy could affect same-sex marriage). See generally Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?* 14 AM. U. J. GENDER SOC. POL’Y & L. 253 (2006).

54. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). For an explanation of the recent defeat of the proposed state constitutional amendment that would have overturned the *Goodridge* decision, see *infra* note 88. Cf. Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1571–75 (2004); Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073 (2006).

55. See CONN. GEN. STAT. § 46b-380o (2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

registration,⁵⁶ many advocates of same-sex marriage regard such purported progress as an effective declaration that gays and lesbians are “not good enough to be included in civil marriage.”⁵⁷ Recent judicial and legislative decisions have only exacerbated this feeling. Within a twenty-day period during the summer of 2006, the highest courts in New York and Washington both held that restricting marriage to different-sex couples is constitutional.⁵⁸ In the fall 2006 midterm elections, seven states passed ballot measures banning the legal recognition of same-sex marriage.⁵⁹ In total, twenty-six states now have constitutional amendments that restrict marriage to one man and one woman, and nineteen states have statutes that do the same.⁶⁰ Such significant backlash against same-sex marriage suggests that states are far more willing to reject such relationships than to begin the process of legally recognizing them. The following six cases illustrate the lack of uniformity between states’ willingness to recognize same-sex marriage.⁶¹

56. See, e.g., CAL. FAM. CODE § 297 (2007); D.C. CODE § 32-702 (2007); HAW. REV. STAT. § 572C-2 (2006); ME. REV. STAT. ANN. tit. 18-A, § 1-201(10-A), (36-A) (2006).

57. Bonauto, *supra* note 27, at 207; see also MICHAEL MELLO, LEGALIZING GAY MARRIAGE 142 (2004) (arguing that civil unions fail as a separate-but-equal version of same-sex marriage and thus carry a “badge of inferiority”). But cf. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION, *supra* note 3, at 437 (proposing a step-by-step approach to same-sex marriage with domestic partnership as an initial “small change”).

58. Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 968 (Wash. 2006) (en banc).

59. See Human Rights Campaign, 2006 Election: State-by-State Returns, <http://www.hrc.org/election2006/states.html> (last visited Sept. 15, 2007).

60. For a list of states with constitutional amendments or laws banning same-sex marriage, see Human Rights Campaign, *Statewide Marriage Laws*, <http://www.hrc.org/documents/MarriageLawMaps20070118.pdf> (last visited Sept. 15, 2007).

61. Although more than six state supreme courts have addressed the issue of same-sex marriage, this Part only discusses the six most recent cases. As this Comment goes to print, however, same-sex marriage cases are pending in both California and Iowa.

Litigation in California over the right to same-sex marriage began in 2004 when the mayor of San Francisco began issuing marriage licenses without regard to the gender or sexual orientation of either prospective spouse. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 686 (Ct. App. 2006), review granted and opinion superseded by 149 P.3d 737 (Cal. 2006). In March 2005, the San Francisco Superior Court held that the California statutes that limited marriage to different-sex unions did not even withstand rational basis analysis, because they did not further any legitimate state interest. *In re Coordination Proceeding*, No. 4365, 2005 WL 583129 (Cal. Sup. Ct. Mar. 14, 2005). Accordingly, the trial court declared them unconstitutional under the state constitution. *See id.* After granting review and consolidating the cases, the California Court of Appeal reversed the decision of the trial court, finding that the statutes in question were not unconstitutional. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675. In December 2006, the California Supreme Court granted review. *In re Marriage Cases*, 149 P.3d 737.

On October 30, 2007, a state trial court in Polk County, Iowa held unconstitutional the state law that restricted marriage to one man and one woman. *Varnum v. Brien*, No. CV5965 (Iowa

1. *Baehr v. Lewin* (Hawaii)

The Supreme Court of Hawaii was not the first court to address the issue of same-sex marriage,⁶² but in *Baehr v. Lewin*,⁶³ it became the first state supreme court to rule that, absent a showing of a compelling interest by the state, the state's refusal to grant same-sex marriages was unconstitutional discrimination.⁶⁴ In addition, *Baehr* was the first decision about same-sex marriage that gained significant national attention.⁶⁵ The state defended the exclusion of same-sex couples from marriage on numerous grounds, with one argument recurring more than any other: "[T]he right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman."⁶⁶ The court rejected this definitional argument—the "marriage is marriage" argument⁶⁷—describing it as tautological.⁶⁸ The court also rejected the plaintiffs' argument that they, as same-sex couples, had a fundamental right to marry.⁶⁹ Instead, the court held that the Hawaii statute established an unconstitutional sex-based classification.⁷⁰ The court then remanded the case to provide the state an opportunity to overcome the presumption of unconstitutionality by demonstrating that the statute

Dist. Ct. Oct. 30, 2007), available at <http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf>. The court rejected each of the supposedly legitimate interests asserted by the state defendant, using reasoning that echoes the proposal set forth in this Comment. See *id.* at 49–63. The ultimate fate of this case is yet to be determined, however, given that the state filed an appeal the day after the decision was filed, and the court granted a stay pending the outcome on appeal. See Lambda Legal, *Varnum v. Brien*, <http://www.lambdalegal.org/our-work/in-court/cases/varnum.html> (last visited Sept. 13, 2007). See generally Monica Davey, *Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway*, N.Y. TIMES, Sept. 1, 2007, at A9; *Judge Overturns Iowa Ban on Same-Sex Marriages*, N.Y. TIMES, Aug. 31, 2007, at A18.

Because both the California and Iowa decisions can be reversed, they are not included in the list of recent same-sex marriage cases.

62. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

63. 852 P.2d 44 (Haw. 1993), superseded by constitutional amendment, HAW. CONST. art. I, § 23 (amended 1998).

64. *Id.*; see Evan Wolfson, *The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality*, in LEGAL RECOGNITION, *supra* note 3, at 169, 169–70.

65. See JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 1–2 (2006).

66. *Baehr*, 852 P.2d at 61 (quoting the brief of the director of the Hawaii Department of Health). On remand, this case became *Baehr v. Miike* because of a change in the director of the Hawaii Department of Health. See CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

67. See *infra* Part II.A.1.

68. *Baehr*, 852 P.2d at 63.

69. *Id.* at 57.

70. *Id.* at 64.

furthered a compelling state interest and was narrowly tailored to that interest;⁷¹ the state failed to sustain its burden on remand.⁷² Although this decision was effectively overturned in 1998 when Hawaiian voters approved an amendment to the state constitution that permitted the legislature “to reserve marriage to opposite-sex couples,”⁷³ the national attention that *Baehr* catalyzed did not wane in its aftermath.

2. *Baker v. State* (Vermont)

Vermont has been described as a significant battlefield in the national war over same-sex marriage.⁷⁴ The most decisive battle began in 1997, when three same-sex couples filed suit after their respective town clerks denied them marriage licenses.⁷⁵ That battle ended two years later, when the Supreme Court of Vermont held in *Baker v. State*⁷⁶ that the state is constitutionally required to extend to same-sex couples the common benefits and protections incident to marriage.⁷⁷ In reaching its decision, the court determined that the well-rooted meaning of marriage in Vermont is “the union of one man and one woman as husband and wife.”⁷⁸ Based on this conclusion, the court conducted a two-step analysis: First, it determined that the Vermont marriage statute excludes anyone who wishes to marry someone of the same sex.⁷⁹ Next, it evaluated whether the interests set forth by the state provided a reasonable and just basis for the continued exclusion of same-sex couples from the benefits and protections of marriage. The state argued that the statutory classification served two primary purposes: (1) “furthering the link between procreation and childrearing”; and (2) promoting a commitment between married partners so as to promote the security of their children and of the community as a whole.⁸⁰ Although the court referred to these goals as “laudable,” it

71. *Id.* at 68. In Hawaii, sex is a suspect category for purposes of equal protection. Thus, laws that discriminate on the basis of sex are subject to strict scrutiny. *Id.* at 67; *cf.* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a sex-based classification on the ground that sex is only a quasi-suspect category under federal law).

72. *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

73. HAW. CONST. art. I, § 23 (amended 1998); *see* GOLDBERG-HILLER, *supra* note 65, at 1–3.

74. MELLO, *supra* note 57, at 1–2. *See generally* DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004).

75. *See* Bonauto, *supra* note 27, at 185.

76. 744 A.2d 864 (Vt. 1999).

77. *Id.* at 867.

78. *Id.* at 868.

79. *Id.* at 880.

80. *Id.* at 881–85.

concluded that they did not constitute a reasonable basis for denying legal benefits to similarly situated same-sex partners.⁸¹ Yet, instead of fashioning a remedy itself, the court deferred to the legislature.⁸² A little over four months after the court's decision, and following extensive debates in the Vermont House and Senate,⁸³ the governor signed the nation's first civil union law.⁸⁴

3. *Goodridge v. Department of Public Health* (Massachusetts)

When the Supreme Court of Vermont issued its limited holding in *Baker v. State*, it suggested that "some future case may attempt to establish that—notwithstanding equal benefits and protections under [state] law—the denial of a marriage license operates per se to deny constitutionally-protected rights"⁸⁵ Less than four years after *Baker*, that "future case" was decided by the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*.⁸⁶ In a 4–3 opinion, the court held that the state "may [not] deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."⁸⁷ In so ruling, the Massachusetts court became the first state supreme court to create the possibility of legalized same-sex marriage. This possibility was realized on February 3, 2004, when the court issued an advisory opinion in response to a request by the Massachusetts Senate regarding the constitutionality of a civil union bill. The court held that such a bill would violate the Massachusetts Constitution by impermissibly "relegat[ing] same-sex couples to a different status."⁸⁸ While the court's actual decision may

81. *Id.* at 884.

82. *Id.* at 867 ("Whether this [remedy] ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature.").

83. See Bonauto, *supra* note 27, at 194–200.

84. See VT. STAT. ANN. tit. 15, § 1204 (2005).

85. 744 A.2d at 886.

86. 798 N.E.2d 941 (Mass. 2003).

87. *Id.* at 948.

88. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

Immediately after the decision in *Goodridge*, efforts began to overturn the decision by amending the state constitution. On June 14, 2007, the Massachusetts Legislature defeated the most recent effort to ban same-sex marriage in the state, with 151 legislators voting against the amendment and 45 supporting it (five votes short of the number required to advance the measure to the November 2008 ballot). This vote unequivocally protected the rights of gays and lesbians to wed in Massachusetts until at least 2012, barring another decision by the Massachusetts Supreme Judicial Court or the U.S. Supreme Court. See Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come: Vote Keeps Proposed Ban Off 2008 State Ballot*, BOSTON GLOBE, June 15, 2007, at 1A.

have been historic,⁸⁹ its approach was less remarkable.⁹⁰ The court declined to consider the plaintiffs' arguments that the issue merited strict scrutiny, having concluded that the same-sex marriage ban did not pass the rational basis test for either due process or equal protection.⁹¹ Despite the court's abstention on the question of whether gay and lesbian individuals possess a fundamental right to marry someone of the same sex, the reasoning it used to reject the state's arguments could bolster a future strict scrutiny analysis.

4. *Hernandez v. Robles* (New York) and *Andersen v. King County* (Washington)

In the summer of 2006, legal observers eagerly awaited decisions from the highest courts in New York and Washington to discover whether other states would follow Massachusetts's lead, as advocates hoped and opponents feared.⁹² The wait ended when both courts declined to reach the same conclusion as *Goodridge*. On July 6, 2006, the Court of Appeals of New York issued a 4–2 decision in *Hernandez v. Robles*,⁹³ ruling that the state constitution does not compel legal recognition of marriages between members of the same sex.⁹⁴ Finding that marriage between two people of the same sex is not a fundamental right,⁹⁵ the court employed rational basis review to uphold the limitation of marriage to different-sex couples.⁹⁶ Only twenty days later, in *Andersen v. King County*,⁹⁷ the Supreme Court of Washington also answered in the affirmative the question of whether the state legislature has the power to limit marriage to different-sex couples.⁹⁸ Like the *Hernandez* court, the *Andersen* court found that the plaintiffs had

89. See Press Release, GLAD, Gay and Lesbian Families Win Marriage Case Before Massachusetts Supreme Judicial Court (Nov. 18, 2003), available at http://www.glad.org/News_Room/press63-11-18-03.shtml.

90. See Jamal Greene, Comment, *Divorcing Marriage From Procreation*, 114 YALE L.J. 1989, 1989–90 (2005).

91. *Goodridge*, 798 N.E.2d at 961.

92. See Adam Liptak & Timothy Egan, *A Sharply Divided Washington Supreme Court Upholds State's Ban on Same-Sex Marriage*, N.Y. TIMES, July 27, 2006, at A18; Sternbane, *supra* note 5, at A12.

93. 855 N.E.2d 1 (N.Y. 2006).

94. *Id.* at 5.

95. *Id.* at 9–10. The court also rejected the plaintiffs' arguments that because the legislation discriminates on the basis of sex and sexual preference, strict or intermediate scrutiny should be used. *Id.* at 10–11. While these alternative arguments ultimately may succeed in a future case, they are beyond the scope of this Comment. See *supra* note 27.

96. *Hernandez*, 855 N.E.2d at 12.

97. 138 P.3d 963 (Wash. 2006) (en banc).

98. *Id.* at 968.

not established that the fundamental right to marry includes the right to marry someone of the same sex.⁹⁹ The court thus concluded, in a 5–4 opinion, that under rational basis review, “limiting marriage to opposite-sex couples furthers the State’s interests in procreation and encouraging families with a mother and father and children biologically related to both.”¹⁰⁰ Although advocates of same-sex marriage regarded these two decisions as defeats,¹⁰¹ the “evenly and very bitterly divided” courts effectively left the issue “in play.”¹⁰²

5. *Lewis v. Harris* (New Jersey)

Over a year before the New York and Washington courts issued their final rulings, an appellate court in New Jersey had held in *Lewis v. Harris*¹⁰³ that restricting marriage to persons of different sexes did not violate the New Jersey Constitution.¹⁰⁴ The momentum created by *Hernandez* and *Andersen* did not bode well for the *Lewis* plaintiffs, who had appealed the grant of summary judgment in favor of the state. Yet, on October 25, 2006, the Supreme Court of New Jersey unanimously ruled that the state must afford same-sex couples the same rights and benefits enjoyed by married different-sex couples.¹⁰⁵ Regarding the remedy, however, the court was divided. The majority deferred to the legislature, giving it 180 days “either [to] amend the marriage statutes to include same-sex couples or [to] enact a parallel statutory structure by another name.”¹⁰⁶ Three justices dissented, arguing that because gays and lesbians possess a fundamental right to marry,¹⁰⁷ the court’s mandate should be extended to provide same-sex couples with full access to the “status” of marriage, including the name itself.¹⁰⁸ On December 14, 2006, the New Jersey legislature rejected the approach proposed by the dissenting justices, voting instead to give gay and lesbian couples the rights and privileges of marriage, but using the term

99. *Id.* at 979–80. Although the plaintiffs put forth other arguments, they are beyond the scope of this Comment. See *supra* notes 27, 95.

100. *Andersen*, 138 P.3d at 985.

101. Liptak & Egan, *supra* note 92, at A18.

102. *Id.* (quoting William B. Rubenstein).

103. 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), *aff’d*, 908 A.2d 196 (N.J. 2006).

104. *Id.* at 262.

105. *Lewis*, 908 A.2d at 224.

106. *Id.*

107. *Id.* at 224–25 (Poritz, C.J., concurring in part and dissenting in part). But see *id.* at 211 (majority opinion) (holding that there is no fundamental right to same-sex marriage).

108. *Id.* at 231 (Poritz, C.J., concurring in part and dissenting in part).

“civil unions” to describe the partnerships.¹⁰⁹ Although some called the result “a win for gay rights,”¹¹⁰ others described it as a “mixed blessing.”¹¹¹ By reaching the same “compromise”¹¹² that the Supreme Court of Vermont did in 1999, the New Jersey court left unclear which path other states should take.

B. The History and Current Jurisprudence of Same-Sex Adoption

At common law, adoption did not exist;¹¹³ thus, it is a statutory privilege, rather than a right.¹¹⁴ Once granted, however, this privilege endows adoptive parents with all the legal rights and responsibilities associated with parenthood.¹¹⁵ Although adoption laws vary from state to state, most of the statutes contain common elements.¹¹⁶ In general, the statutory process allows a nonbiological parent to establish a parent-child relationship “after [the] birth [of the child], after investigation, and upon entry of a judicial decree of adoption.”¹¹⁷ To determine whether to grant an adoption, courts employ a “best interests of the child” standard,¹¹⁸ which was first advanced by then Judge Cardozo.¹¹⁹

109. See Laura Mansnerus, *Legislators Vote for Gay Unions in New Jersey*, N.Y. TIMES, Dec. 15, 2006, at A1.

110. David W. Chen, *New Jersey Backs Full Rights for Gay Couples*, N.Y. TIMES, Oct. 26, 2006, at A1.

111. *N.J. Lawmakers OK Civil Unions, Not Same-Sex Marriage*, CNN.COM, Dec. 14, 2006, <http://www.cnn.com/2006/POLITICS/12/14/same.sex/index.html>.

112. Bonauto, *supra* note 27, at 200 (describing civil unions as a “partnership-style ‘compromise’”).

113. *Washington ex rel. D.R.M. v. Wood*, 34 P.3d 887, 891 (Wash. Ct. App. 2001). See generally Christopher Colorado, Note, *Tying the Braid of Second-Parent Adoptions—Where Due Process Meets Equal Protection*, 74 FORDHAM L. REV. 1425, 1427–32 (2005).

114. Fla. Dep’t of Health and Rehab. Servs. v. Cox, 627 So. 2d 1210, 1216 (Fla. Dist. Ct. App. 1993); see, e.g., N.Y. DOM. REL. LAW § 110 (McKinney 1999); UTAH CODE ANN. § 78-30-1.5 (2002). By extension, there is no fundamental right to adopt or to be adopted. See Lofton v. Sec’y of the Dep’t of Children and Family Servs., 358 F.3d 804, 811–12 (11th Cir. 2004).

115. See 1 JOAN H. HOLLINGER ET AL., *ADOPTION LAW AND PRACTICE* 1-1 (2006).

116. See Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT. L. REV. 933, 936 (2000).

117. *Wood*, 34 P.3d at 891. In an adoption proceeding, the relevant state authorities conduct a background investigation of the applicant(s) to help determine whether the adoption would be in the child’s best interests. See 1 HOLLINGER ET AL., *supra* note 115, § 1.01[2][b].

118. See, e.g., IOWA CODE ANN. § 600.1 (West 2001 & Supp. 2006); Adoption of Tammy, 619 N.E.2d 315, 317–19 (Mass. 1993); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1273 & n.1 (Vt. 1993); see also Polikoff, *supra* note 13, at 159 (“The highest courts of five states and the District of Columbia have . . . instructed trial judges to grant [same-sex adoptions] under the same best-interest-of-the-child standard . . .”).

119. See *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925).

The issue of adoption by gays and lesbians first surfaced in the United States in the 1970s.¹²⁰ At the time, many judges were unsympathetic to the idea of allowing a homosexual man or woman to parent a nonbiological child.¹²¹ For example, in 1975, a Washington judge refused to place a child with two gay men, reasoning that “substituting two male homosexuals for parents does violence not only to the literal definition of who are parents but offends the traditional concept of what a family is.”¹²² Similarly, Florida adopted an express ban on adoption by homosexuals in 1977.¹²³ In fact, “there is no record of an adoption by an openly gay or lesbian parent during the 1970s.”¹²⁴ In 1986, the New Hampshire legislature went even further, enacting a law prohibiting both adoption and foster parenting by lesbians and gay men.¹²⁵ Unable to argue that they have a constitutional right to adopt, gay and lesbian couples who wanted to be formally recognized as parents had few options during the 1970s and 1980s.

A major obstacle that same-sex partners faced on their path to becoming parents was the law relating to termination of a biological parent’s rights during the adoption process. In a traditional adoption, the act of adopting severs all rights and relations between the biological parent(s) and the child.¹²⁶ Yet, as divorce and remarriage became increasing commonplace during the twentieth century,¹²⁷ states began to carve out “stepparent exceptions” in their adoption statutes.¹²⁸ This exception enables a stepparent to become a legal parent of a spouse’s child without forcing the biological spouse to relinquish any existing parental rights.¹²⁹ Courts initially

120. Polikoff, *supra* note 13, at 157. The issue of foster parenting by gay men and lesbians also arose during the 1970s. *Id.* Although this Comment primarily addresses adoption, it also has implications for foster parenting, to the extent such parenting overlaps with adoption.

121. *See id.* at 158.

122. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 907 (1979) (quoting *In re Davis*, 1 Fam. L. Rep. (BNA) 2845, 2846 (Wash. Super. Ct. 1975)).

123. FLA. STAT. ANN. § 63.042(3) (West 2005) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”).

124. Polikoff, *supra* note 13, at 157.

125. *See id.* at 159 n.16.

126. 3 HOLLINGER ET AL., *supra* note 115, § 12.02[1][a].

127. *See generally* RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 516–72 (1988).

128. *See, e.g.*, N.J. STAT. ANN. § 9:3-50(c)(1) (West 2002) (“The entry of a judgment of adoption shall terminate all parental rights and responsibilities of the parent toward the adoptive child except for a parent who is the spouse of the petitioner . . .”); *see also* Colorado, *supra* note 113, at 1429–30.

129. *See* Nicole M. Shkedi, Comment, *When Harry Met Lawrence: Allowing Gays and Lesbians to Adopt*, 35 SETON HALL L. REV. 873, 882 (2005); *see also* Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, The DeBoer-Schmidt Case, and the American*

refused to extend this exception to same-sex partners¹³⁰ on the ground that stepparent exceptions assume that the biological parent and the petitioning parent (the stepparent) are married.¹³¹ As no state allowed same-sex marriage during the 1970s and 1980s,¹³² same-sex partners had no recourse to courts to legally adopt children together.

During the 1990s, however, options began to materialize as courts and legislatures became increasingly receptive to the idea of same-sex couples as parents. Lawyers working on behalf of same-sex couples “coined the term ‘second-parent adoption’ to describe the same-sex equivalent of a stepparent adoption. . . .”¹³³ The first reported cases granting second-parent adoptions took place in the District of Columbia¹³⁴ and Vermont¹³⁵ in 1991.¹³⁶ Two years later, the Supreme Court of Vermont directly addressed this issue in *Adoptions of B.L.V.B. & E.L.V.B.*¹³⁷ The court held that “when the family unit is comprised of the natural mother and her [same-sex] partner, and the adoption is in the best interest of the children, terminating the natural mother’s rights is unreasonable and unnecessary.”¹³⁸ The court reasoned that “[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment.”¹³⁹ A few months later, the Supreme Judicial Court of Massachusetts also acknowledged the changing nature of families in *Adoption of Tammy*.¹⁴⁰ The court broadly interpreted the Massachusetts adoption statute to allow the two lesbian petitioners,

Quest for the Ideal Family, 2 DUKE J. GENDER L. & POL’Y 15, 17 (1995) (discussing the proposed Uniform Adoption Act, and noting that the Act “is premised on the belief that children’s ties to the individuals who actually parent them . . . deserve legal protection even if those ties are psychologically and socially constructed and not biologically rooted”).

130. See, e.g., *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

131. See WALTER WADLINGTON & RAYMOND C. O’BRIEN, *FAMILY LAW IN PERSPECTIVE* 206 (2001).

132. See *supra* Part I.A.

133. Polikoff, *supra* note 13, at 159.

134. *In re L.S. & V.L.*, Nos. A-269-90 & A-270-90, 1991 WL 219598 (D.C. Super. Ct. Aug. 30, 1991).

135. See *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1274 n.3 (Vt. 1993) (“The issue now before us is not a case of first impression even in Vermont. . . . [T]he Addison Probate Court recently allowed the female partner of a child’s adoptive mother to adopt the child as a second parent.” (citing *In re Adoption of R.C.*, No. 9088, slip op. at 5–7 (Addison Prob. Ct. Dec. 9, 1991))).

136. See Polikoff, *supra* note 13, at 159. Although second-parent adoptions were approved as early as 1985 in Alaska, California, Oregon, and Washington, these adoptions were granted by trial court judges without written opinions, making them of limited precedential value. *Id.*

137. 628 A.2d 1271.

138. *Id.* at 1272.

139. *Id.* at 1275.

140. 619 N.E.2d 315 (Mass. 1993).

one of whom was the child's biological mother, to jointly adopt the child without terminating the biological mother's parental rights.¹⁴¹ In 1995, the highest courts of the District of Columbia and New York approved second-parent adoptions,¹⁴² as did appellate courts in New Jersey and Illinois.¹⁴³ At least twelve trial courts in other states have granted such adoptions as well.¹⁴⁴ In response to the increasing judicial recognition of same-sex adoption, in 1999, New Hampshire repealed its former ban on same-sex adoption and same-sex foster parenting.¹⁴⁵ One year later, the Connecticut legislature enacted a statute that explicitly permits same-sex adoptions.¹⁴⁶ As a result, an increasing number of gay and lesbian couples can now legally self-identify as parents of the same child.

Same-sex adoption is by no means universally permitted, however, as recent judicial and legislative decisions in Florida, Mississippi, and Utah illustrate. In 1995, the Supreme Court of Florida upheld the constitutionality of a state statute that explicitly bans same-sex adoption.¹⁴⁷ In 2000, Mississippi amended its adoption statute to prohibit adoption by couples of the same gender.¹⁴⁸ Similarly, Utah now proscribes adoption by "a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of [the] state."¹⁴⁹ Nevertheless, most of the recent changes suggest that, in the context of adoption, some courts are rethinking what it means to be a family. Whether courts will ultimately rethink what it means to be a family in the context of marriage depends on whether they can reconcile the same-sex marriage and same-sex adoption cases.

141. *Id.* at 321.

142. See *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995).

143. *In re* Petition of K.M., 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); see Polikoff, *supra* note 13, at 159–60, 160 n.17.

144. Polikoff, *supra* note 13, at 160; see *id.* ("[I]n some counties, such as those in the San Francisco Bay area, there have probably been thousands over the last fifteen years.").

145. N.H. REV. STAT. ANN. § 170-B:4 (1999), repealed by 1999 N.H. Laws ch. 18.

146. CONN. GEN. STAT. ANN. §§ 45a-727 (West 2004).

147. See *Cox v. Fla. Dep't of Health and Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995). *But see id.* at 905 (Kogan, J., concurring in part and dissenting in part) (critiquing the ban on same-sex adoption, noting that Florida does not impose such an absolute restriction on either convicted felons or registered child abusers).

148. MISS. CODE ANN. § 93-17-3(5) (Supp. 2006).

149. UTAH CODE ANN. § 78-30-1(3)(b) (2002). Unlike the Florida and Mississippi statutes, the Utah statute does not directly prohibit same-sex adoption; instead, it does so indirectly by disallowing adoption by unmarried partners. See *id.* While this statute also affects unmarried heterosexual partners, it does so to a lesser degree, in that heterosexual partners at least have the option of marriage—an option that is not open to same-sex partners in Utah. See *id.* § 30-1-2(5).

II. DIVERGING PATHS: INCONSISTENCIES BETWEEN THE MARRIAGE AND ADOPTION CASES

The constitutional right to marry has been well established as a fundamental right for at least forty years. In *Loving v. Virginia*,¹⁵⁰ an interracial couple who had been convicted of violating Virginia's antimiscegenation laws challenged the statutory scheme on both equal protection and due process grounds. Although the Supreme Court could have based its opinion solely on the ground that the statutes constituted racial discrimination in violation of the Equal Protection Clause,¹⁵¹ it also held that the laws arbitrarily deprived the couple of a fundamental liberty protected by the right of privacy implicit in the Due Process Clause—the freedom to marry.¹⁵² Over a decade later, the Court emphasized in *Zablocki v. Redhail*¹⁵³ that, although *Loving* arose in the context of racial discrimination, “prior and subsequent decisions of [the] Court confirm that the right to marry is of fundamental importance for *all individuals*.”¹⁵⁴ In *Turner v. Safley*,¹⁵⁵ the Court determined that even prison inmates possess a fundamental right to marry.¹⁵⁶

In 1997, the Supreme Court declared that two requirements had to be established for a right or liberty interest to qualify as fundamental for the purposes of substantive due process analysis. First, the asserted interest must be, “objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’”¹⁵⁷

150. 388 U.S. 1 (1967).

151. See U.S. CONST. amend XIV, § 1; *Loving*, 388 U.S. at 11–12.

152. *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); see *Zablocki v. Redhail*, 434 U.S. 374, 383–84 (1978).

153. 434 U.S. 374.

154. *Id.* at 384 (emphasis added).

155. 482 U.S. 78 (1987).

156. *Id.* at 95–98.

157. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)). A number of commentators have questioned whether this requirement from *Glucksberg* still stands after the Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), or whether the Court is moving away from categorical distinctions in the substantive due process context. See, e.g., David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 913–18 (2006); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1921–23 (2004). While there is certainly validity to this argument, this Comment nevertheless assumes that the *Glucksberg* requirements are still valid, given that no majority of the Court has explicitly stated otherwise. I thank Kenneth Karst for bringing this point to my attention.

Second, “a ‘careful description’ of the asserted fundamental liberty interest” is required.¹⁵⁸ If the Court determines that a right qualifies as fundamental, then the state bears the burden of proving that it has a compelling interest that justifies infringing that right, and that the restriction in question is narrowly tailored to achieving that interest.¹⁵⁹

This Part focuses on the arguments states have made (and courts have accepted) as to why gays and lesbians do not possess a fundamental right to marry a person of the same sex. Although some courts have granted the right to same-sex marriage without defining such marriage as a fundamental right,¹⁶⁰ these cases are included only to the extent that they help reveal inconsistencies in cases that have rejected same-sex marriage. This Part focuses instead on the arguments that have been made against defining the fundamental right to marriage to include same-sex marriage, and intersperses reasoning from various same-sex adoption cases. Juxtaposed, the inconsistencies between these two sets of cases reveal the flawed and circular nature of the analyses in the same-sex marriage cases.

A. Definitional Inconsistencies

Courts have employed numerous arguments to reject the right to same-sex marriage. Not surprisingly, the arguments made have depended, at least in part, on the interests asserted by the state defendant.¹⁶¹ Despite these differences, however, one type of argument has recurred in a significant number of cases—what this Comment (and at least one state court¹⁶²) terms the “marriage is marriage” argument. While the validity of this argument is questionable when evaluated in its own right, as demonstrated in Part II.A.1 below, it is even further weakened when compared to the definition of “marital relationship” (and comparable terms) provided in same-sex adoption cases, as shown in Part II.A.2. Taken together, the analyses in this Subpart provide evidence that many same-sex marriage cases are patently inconsistent with the current trend of same-sex adoption cases.

158. *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

159. *See id.* at 721.

160. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). To date, no state supreme court has recognized a fundamental right to same-sex marriage. *But cf.* *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25, (defining marriage as “the recognition of one’s choice of a life partner,” and holding it to be a fundamental right).

161. For further discussion of the interests asserted by states in same-sex marriage cases, see *infra* Part II.B.

162. *See infra* text accompanying note 163.

1. The “Marriage Is Marriage” Argument

The “marriage is marriage” argument was explicitly articulated—and simultaneously critiqued—in *Brause v. Bureau of Vital Statistics*.¹⁶³ The Alaska superior court stated:

[I]t is the definition of marriage itself which the court must test as a result of the plaintiffs’ challenge. It is not enough to say that “marriage is marriage” and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with.¹⁶⁴

The argument that the *Brause* court criticized, which is named for the circular nature of the reasoning involved,¹⁶⁵ has been invoked by litigants, state officials, and commentators alike in support of restricting marriage to one man and one woman.

In *Hernandez v. Robles*,¹⁶⁶ the Court of Appeals of New York stated the truism that “whether the right in question is ‘fundamental’ depends on how [the right] is defined.”¹⁶⁷ By characterizing marriage as a union between one man and one woman, courts have traditionally used the definition of marriage to end the substantive due process analysis before it even begins. For example, in *Singer v. Hara*,¹⁶⁸ in which a Washington appellate court held that the state’s denial of a marriage license to two gay men was both required by state statutes and permitted by the state and federal constitutions,¹⁶⁹ the court reasoned that the men “are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons of the opposite sex.”¹⁷⁰ Similarly, in *Jones v. Hallahan*,¹⁷¹ the

163. 1998 WL 88743.

164. *Id.* at *2.

165. See *Hernandez v. Robles*, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, C.J., dissenting) (“In the end, an argument that marriage is heterosexual because it ‘just is’ amounts to circular reasoning . . .” (citations and internal quotation marks omitted)); *Goodridge*, 798 N.E.2d at 972–73 (“To define the institution of marriage by the characteristics of those to whom it has always been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.”).

166. 855 N.E.2d 1.

167. *Id.* at 9.

168. 522 P.2d 1187 (Wash. Ct. App. 1974).

169. *Id.* at 1197.

170. *Id.* at 1192. *But cf.* *Hernandez*, 855 N.E.2d at 26 (Kaye, C.J., dissenting) (“It is no answer that same-sex couples can be excluded from marriage because ‘marriage,’ by definition, does not include them.”).

171. 501 S.W.2d 588 (Ky. Ct. App. 1973).

Kentucky Court of Appeals suggested that the same-sex appellants were prevented from marrying by “their own incapability of entering into a marriage as that term is defined,”¹⁷² and thus concluded that “the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”¹⁷³

Although courts and commentators today articulate this “definitional objection”¹⁷⁴ in subtler ways, it is still being used to reject the argument that same-sex marriage should be included in the fundamental right to marry.¹⁷⁵ For example, in 2006, a New York appellate court found that denying a gay man or a lesbian the right to marry someone of the same sex does not constitute sex discrimination because “[h]omosexuals may marry persons of the opposite sex”¹⁷⁶ In *Goodridge v. Department of Public Health*,¹⁷⁷ however, the Supreme Judicial Court of Massachusetts explained the flaw inherent in this argument: “[T]he right to marry means little if it does not include the right to marry the person of one’s choice”¹⁷⁸

Judge Posner posited a distinct but related definitional argument against same-sex marriage in *Sex and Reason*¹⁷⁹:

[T]he more broadly *marriage* is defined, the less information it and related terms convey. When we read that Mr. X is married or that Ms. Y is married, we know immediately that X’s spouse is a woman and Y’s a man. If we invite people to a party and ask them to bring their spouses, we know that each man will either come alone or bring a woman and that each woman will either come alone or bring a man. . . . If our son or daughter tells us that he or she is getting married, we know the sex of the prospective spouse. All these understandings would be upset by permitting homosexual marriage.¹⁸⁰

In describing this “information cost,”¹⁸¹ Posner echoes the marriage-is-marriage argument by suggesting that the term “marriage” only conveys a union between a man and a woman. Like the definitional objection, Posner’s argument overlooks what the term “marriage” arguably should

172. *Id.* at 589.

173. *Id.* at 590.

174. ESKRIDGE & SPEDALE, *supra* note 21, at 5.

175. See, e.g., *Hernandez*, 855 N.E.2d at 10 (“We conclude that, by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right”).

176. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 371 (N.Y. App. Div. 2005), *aff’d*, 855 N.E.2d 1.

177. 798 N.E.2d 941 (Mass. 2003).

178. *Id.* at 958 (emphasis added).

179. POSNER, *supra* note 4.

180. *Id.* at 312.

181. *Id.*

convey in its ideal sense: a committed and loving relationship between two people with the attendant legal rights and responsibilities.¹⁸²

Many individuals and groups outside of the judicial arena also have invoked this marriage-is-marriage argument. When same-sex couples first began to petition for marriage licenses, for example, some state officials simply denied the possibility of same-sex marriage, describing it as a “contradiction in terms.”¹⁸³ These officials effectively agreed with the interpretations made by the courts in *Singer* and *Jones*: “[I]t was as preposterous for a man to argue that he had a right to marry another man as it would be for him to argue that he had a right to get pregnant.”¹⁸⁴ Likewise, many ordinary Americans believe, even today, that “same-sex marriage is an oxymoron—wrong as a definitional matter.”¹⁸⁵ Given that a right must be “deeply rooted in this Nation’s history and tradition” to qualify as fundamental,¹⁸⁶ the espousal of the marriage-is-marriage objection by those outside the judicial arena has likely affected courts’ substantive due process analyses of same-sex marriage.

As part of the “deeply rooted” analysis, courts have also used historical interpretations to buttress the marriage-is-marriage objection.¹⁸⁷ In response to the argument frequently made by plaintiffs that the common understanding of marriage has changed dramatically over the centuries,¹⁸⁸ courts often

182. Although Posner acknowledges that there would be an “information benefit” for same-sex couples if they were able to use the term “marriage,” because they could signal with one word the extent of their commitment, he does not assess the relative and arguably unequal weights of the cost and the benefit. See *id.* Further, Posner simply restates the definitional objection in describing this information benefit:

The denial of marriage to homosexuals prevents a homosexual couple from signaling the extent of their commitment. . . . If the “freedom to marry” of which the Supreme Court spoke in *Loving v. Virginia* were taken seriously, the deprivation to the homosexual couple denied the right to marry would carry a heavy weight; but of course the Court was thinking of heterosexual marriage.

Id. at 312–13 (internal citations omitted). For a discussion of the importance of what the term “marriage” conveys, see *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

183. ESKRIDGE & SPEDALE, *supra* note 21, at 5.

184. David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 525 (1999).

185. See ESKRIDGE & SPEDALE, *supra* note 21, at 21.

186. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

187. See *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 977–78 (Wash. 2006) (en banc). *But cf. Hernandez*, 855 N.E.2d at 26 (Kaye, C.J., dissenting) (“The claim that marriage has always had a single and unalterable meaning is a plain distortion of history.”).

188. See Brief of Professors of History and Family Law as Amici Curiae Supporting Plaintiffs-Appellants at 2–14, *Hernandez*, 855 N.E.2d 1 (No. 98084); *cf. Hernandez*, 855 N.E.2d at 16 n.3 (“[T]he rights and responsibilities attendant marriage have changed over time and there have always been differences between the states concerning the legal incidents of marriage . . .”).

contend that such developments actually underscore the one man–one woman nature of marriage: This one attribute has endured despite the many other changes made to the institution.¹⁸⁹ By narrowly framing the right at issue, courts are able to use history selectively to support their conclusion that gays and lesbians do not have a fundamental right to marry. Instead of following precedent that defines the fundamental right to marry as “the right to join in marriage with the *person of one’s choice*,”¹⁹⁰ courts ask whether there is a fundamental right to join in marriage with a person of the same sex.¹⁹¹ Since this limited view of history arguably affects courts’ definition of the fundamental right to marry, it has become part of the marriage-is-marriage objection, thus ending the substantive due process analysis before it begins.¹⁹² Yet, as demonstrated in the following Subpart, the same courts that have narrowly interpreted the history and definition of marriage have been willing to redefine the meaning of a family—including the relationship between same-sex parents—in the context of adoption.

2. Same-Sex Partners “Are a Marital Relationship” for the Purposes of Adoption

As explained above, in adoption cases, in which the best interests of a child are at issue, courts in some states have granted adoptions to same-sex partners for at least twenty years.¹⁹³ In the process of granting such adoptions, many courts have acknowledged the committed relationships between same-sex partners, describing them in terms akin to different-sex marriage. For example, in *In re Evan*,¹⁹⁴ the lesbian partner of the biological mother of a six-year-old boy sought to adopt the boy so that the couple

189. See *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) (“Implicit in *Loving* and predecessor opinions is the notion that marriage . . . is a union forged between one man and one woman.”).

190. *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) (en banc) (emphasis added) (invalidating a California antimiscegenation law); see *Hernandez*, 855 N.E.2d at 24 (Kaye, C.J., dissenting) (“[F]undamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.”).

191. See, e.g., *Hernandez*, 855 N.E.2d at 9.

192. See *Lewis v. Harris*, 908 A.2d 196, 227 (N.J. 2006) (Poritz, C.J., concurring in part and dissenting in part) (“When we ask the question whether there is a fundamental right to same-sex marriage ‘rooted in the tradition, and collective conscience of our people,’ we suggest the answer, and it is ‘no.’”). *But cf. Andersen*, 138 P.3d at 985 (“[T]he constitutional inquiry means little if the entire focus, and perhaps outcome, may be so easily altered by simply rewording the question.”).

193. See Polikoff, *supra* note 13, at 159.

194. 583 N.Y.S.2d 997 (N.Y. Sur. Ct. 1992).

could raise him together as legal parents.¹⁹⁵ A home study conducted by social workers found that the petitioners had “lived together in a committed, long term relationship, which they perceive[d] as permanent, for . . . fourteen years.”¹⁹⁶ Relying on this study, the court found that the boy was part of a successfully functioning family unit, and that the proposed adoption would serve to provide the child with important legal rights and emotional benefits.¹⁹⁷ In holding that the adoption was in the best interest of the child,¹⁹⁸ the court reasoned that, for the child, the petitioners “are a marital relationship at its nurturing supportive best and they seek second-parent adoption for the same reasons of stability and recognition as any couple might.”¹⁹⁹ As a result, the court allowed the petitioners to realize the goal sought by the proposed adoption: “the creation of a legal family unit identical to the actual family setup.”²⁰⁰

The results achieved in *In re Evan* and similar cases can be readily explained in two ways: First, over the last decade, courts have acknowledged that nontraditional family units²⁰¹ are increasingly common.²⁰² Second, responding to the evolving notion of a family unit, courts have redefined the terms “parents” and “families.”²⁰³ Rather than invoking a definitional objection—that, because a married man and woman (or a single man or woman) may adopt, what a same-sex couple seeks is not an “adoption” (the equivalent of the marriage-is-marriage argument)—courts have rejected rigid interpretations of familial relationships. Instead, courts

195. *Id.* at 998.

196. *Id.*

197. *Id.* at 998–99.

198. *Id.* at 1002. *But see In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (holding that a Wisconsin adoption statute does not permit a woman to adopt her lesbian partner’s biological child without terminating the biological mother’s parental rights).

199. *Id.* at 999; *see In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 836 (Fam. Ct. 1994) (describing petitioners’ same-sex relationship as “akin to marriage”); *Washington ex rel. D.R.M. v. Wood*, 34 P.3d 887, 890 (Wash. Ct. App. 2001) (finding that the relationship of the parties in interest, a former same-sex couple, had been “consistent with a marriage” when they lived together, maintained joint bank accounts, and managed their lives together); *see also Bonauto*, *supra* note 27, at 180 (“The result [of granting a second-parent adoption] is not only that the child has two legal parents—but that there is an indirect recognition of the relationship of the parents.”).

200. *In re Evan*, 583 N.Y.S.2d at 1000.

201. For a brief explanation of how the term “traditional” is used in this Comment, see *supra* note 14.

202. *See, e.g., In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995).

203. *See, e.g., In re Parentage of L.B.*, 122 P.3d 161, 165 (Wash. 2005).

have given statutory definitions broad interpretations that reflect modern-day realities and new social mores.²⁰⁴

Both the marriage and adoption cases demonstrate that a court's willingness to adapt to changes in society significantly affects the outcome of a given case. In the context of same-sex marriage, many courts have employed a definition of marriage that is rooted in the past, and have thus refused to allow gay and lesbian couples to legalize their already existing marriage-like relationships. In the context of same-sex adoption, however, courts have been increasingly willing to "meet the changing needs of our growing society"²⁰⁵ by redefining marriage and family, and thus have granted numerous same-sex adoptions.

While one might argue that contrasting these two types of cases is futile, because they involve different legal questions and standards,²⁰⁶ it is the courts' underlying process of reasoning that is important here. The two-part process of recognition—first acknowledging the reality of social facts, and then rethinking traditional definitions—is equally available in both sets of cases. However, this line of analysis predominates only in the context of adoption. When a similar analysis has been conducted in same-sex marriage cases, the courts have given gay and lesbian couples legal acknowledgement of their relationships.²⁰⁷ On the other hand, the same-sex marriage opinions that have rejected this process of recognition²⁰⁸ create glaring inconsistencies with the same-sex adoption decisions described above. These inconsistencies theoretically could be resolved in either direction—by making the marriage cases accord with the adoption cases, or vice versa. But the arguments made by courts against same-sex marriage are often circular and unfounded, and thus should be rejected and replaced by reasoning from the adoption cases.

204. See, e.g., *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 230 (App. Div. 2004); *In re Adoption of Camilla*, 620 N.Y.S.2d 897, 902–03 (Fam. Ct. 1994); *In re Evan*, 583 N.Y.S.2d at 1002; *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1275–76 (Vt. 1993); *In re Parentage of L.B.*, 122 P.3d at 166–67.

205. *In re Adoption of Camilla*, 620 N.Y.S.2d at 902.

206. See *infra* note 259 and accompanying text.

207. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

208. See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc).

B. Inconsistent State Interests

While states have asserted myriad arguments to justify banning same-sex marriage,²⁰⁹ two arguments are most commonly stated: (1) furthering the link between procreation and marriage; and (2) promoting the “optimal environment” for childrearing.²¹⁰ A comparison of these arguments to the reasoning and results in various adoption cases reveals substantive inconsistencies that undermine the claimed legitimacy of states’ interests in the same-sex marriage cases.

1. The Procreation-Marriage Link

In almost every case in which a ban on same-sex marriage has been upheld, the state has used—and the court has accepted—the link between procreation and marriage as a primary justification for limiting marriage to different-sex couples.²¹¹ The typical argument that procreation is a legitimate government interest proceeds as follows²¹²: The state begins by asserting the indisputable fact that, without third-party intervention, the only sexual relationship capable of producing a child biologically related to both parents is one between a man and a woman. The state then reasons that marriage should be limited to a man and a woman because “partners in a marriage are expected to engage in exclusive sexual relations, with children [as] the probable result and paternity presumed.”²¹³ According to the state, the institution of different-sex marriage not only encourages different-sex couples to enter into a stable relationship before having children, but also encourages them to remain in the relationship

209. See, e.g., *Andersen*, 138 P.3d at 1002.

210. Although states often raise the procreation and childrearing interests simultaneously because they overlap to a large extent, see *infra* note 243 and accompanying text, I discuss them separately to the extent they raise different inconsistencies.

211. Cf. *Lewis v. Harris*, 875 A.2d 259, 269 n.2 (N.J. Super. Ct. App. Div. 2005) (noting that although the New Jersey attorney general disclaimed reliance upon the promotion of procreation as a justification for limiting marriage to members of different sexes, several amici curiae asserted the procreation-marriage argument on behalf of the state), *aff’d*, 908 A.2d 196.

212. In some cases, the procreation-marriage argument is made by the court itself, rather than by the state, because the proponents of same-sex marriage bear the burden of persuasion under rational basis review. See, e.g., *Standhardt*, 77 P.3d at 462–63. Further, the court need only find that the state could have had a conceivable basis for enacting the legislation in question. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315–17 (1993). Thus, the state itself is not required to make the argument. For purposes of clarity, however, this Subpart refers to the state as the party asserting the interest.

213. *Goodridge v. Dep’t of Pub. Health*, 298 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting).

if children are conceived unexpectedly during the marriage. Because same-sex couples cannot procreate by themselves, the state contends that the legislature could reasonably believe that sanctioning same-sex marriages would do little to advance the state's interest in ensuring responsible procreation within committed, long-term relationships. The state argues further that sanctioning same-sex unions would actually "diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the function[] of procreation"²¹⁴ This entire argument is, of course, predicated on the assumption that promoting marriage for couples that are capable of naturally bearing children is preferable to promoting marriage for couples for whom natural procreation is impossible.²¹⁵

States base the procreation-marriage argument on the same Supreme Court precedents from which the fundamental right to marry derives. In *Skinner v. Oklahoma ex rel. Williamson*,²¹⁶ for example, the Court held that "[m]arriage and procreation are fundamental to the very existence and survival of the race."²¹⁷ Similarly, in *Loving v. Virginia*,²¹⁸ the Court found that "[m]arriage is . . . fundamental to our very existence and survival."²¹⁹ Finally, in *Zablocki v. Redhail*,²²⁰ the Court noted that "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions related to procreation, childbirth, child rearing, and family relationships."²²¹ Based on such language, states have concluded that marriage has traditionally been linked to procreation and the survival of the human race.²²²

In addition to relying on history and tradition, states often justify the procreation-marriage argument using a defense-of-marriage theory.²²³ The crux of this theory is that if states expand the institution of marriage to include gays and lesbians, such expansion will effect the decline or even the end of the marriage institution, and, by extension, will result in more

214. *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (first alteration and omission in original).

215. See *Standhart*, 77 P.3d at 462-63; *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993), superseded by constitutional amendment, HAW. CONST. art. I, § 23 (amended 1998); *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005); *Andersen v. King County*, 138 P.3d 963, 982 (Wash. 2006) (en banc).

216. 316 U.S. 535 (1942).

217. *Id.* at 541.

218. 388 U.S. 1 (1967).

219. *Id.* at 12 (citing *Skinner*, 316 U.S. at 541).

220. 434 U.S. 374 (1978).

221. *Id.* at 386.

222. See *Andersen v. King County*, 138 P.3d 963, 982 (Wash. 2006) (en banc).

223. See *ESKRIDGE & SPEDALE*, *supra* note 21, at 21 (describing the defense-of-marriage argument).

children born out of wedlock and raised by unmarried partners. Stanley Kurtz, a chief proponent of the defense-of-marriage argument, has claimed that same-sex marriage detaches procreation from marriage.²²⁴ Similar arguments have been made by legislatures and judges as well. For example, when debating the merits of the federal Defense of Marriage Act (DOMA),²²⁵ the House Judiciary Committee concluded that the federal government has “an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.”²²⁶ Likewise, in *Goodridge v. Department of Public Health*,²²⁷ Judge Cordy dissented, raising an extreme form of the defense-of-marriage argument: The result of granting same-sex marriage would be “a [chaotic] society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes”²²⁸

The defense-of-marriage theory, on which the procreation-marriage argument rests, lacks legitimacy when examined in contexts other than court briefs and legislative debates. As a practical matter, neither Massachusetts nor any other state that has approved a form of legal same-sex relationships has yet to erupt into a chaotic society in which marriage has ceased to exist. Even Massachusetts legislators who initially opposed same-sex marriage have since conceded that the *Goodridge* decision did not adversely affect the institution of marriage. As Republican State Senator Brian Lees, one of the original cosponsors of the state constitutional amendment to ban gay marriage in the aftermath of *Goodridge*, stated: “Gay marriage has begun, and life has not changed

224. See Stanley Kurtz, *The End of Marriage in Scandinavia: The “Conservative Case” for Same-Sex Marriage Collapses*, WKLY. STANDARD, Feb. 2, 2004, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp?pg=1> (arguing that registered same-sex partnerships in Scandinavia have led to the erosion of the institution of marriage and the separation of marriage and parenthood, and warning that such results will occur in the United States if same-sex marriage is sanctioned). For a discussion of Stanley Kurtz’s research and conclusions, see ESKRIDGE & SPEDALE, *supra* note 21, at 37–38.

225. Pub. L. No. 104-199 §§ 2(a), 3(a), 100 Stat. 2419 (1996) (codified in scattered sections of 1 and 28 U.S.C.). The Defense of Marriage Act (DOMA) states that for the purposes of federal law, “marriage” means a legal union between a man and a woman. See 1 U.S.C. § 7 (2000). Further, DOMA affirms the power of the states to refuse to give effect to same-sex unions granted in other states. See 28 U.S.C. § 1738C (2000). See generally Chai R. Feldblum, *The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage*, in LEGAL RECOGNITION, *supra* note 3, at 55, 61–72.

226. ESKRIDGE & SPEDALE, *supra* note 21, at 28–29 (quoting H.R. REP. NO. 104-664, at 13 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2917).

227. 798 N.E.2d 941 (Mass. 2003).

228. *Id.* at 996 (Cordy, J., dissenting).

for the citizens of the commonwealth, with the exception of those [gay and lesbian couples] who can now marry."²²⁹

Although empirical evidence helps demonstrate the weaknesses of the defense-of-marriage theory (and, by extension, the procreation-marriage argument) by showing that the "evils" predicted by its promoters have not come to fruition, evidence from other contexts—specifically, same-sex adoption cases—is even more revealing. In numerous same-sex adoption cases, courts have explicitly held that it was in a child's best interest to be adopted and raised by a same-sex couple.²³⁰ Courts have reasoned that such holdings are necessary to protect individual rights in a changing reality. In *Adoptions of B.L.V.B. & E.L.V.B.*,²³¹ in which the Supreme Court of Vermont determined that the adoption of a natural mother's child by her lesbian partner did not terminate the natural mother's parental rights,²³² the court articulated the rationale underlying its holding:

[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle.²³³

It is perhaps not surprising that courts have used such reasoning in states where either same-sex marriage or same-sex civil unions have been approved.²³⁴ What is surprising, however, is that courts in states such as New York and Washington—where bans on same-sex marriage have

229. *Same-Sex Marriage Win in Boston*, CBS NEWS, Sept. 14, 2005, <http://www.cbsnews.com/stories/2005/09/14/national/main846230.shtml>.

230. As noted in Part I.B, the highest courts in several states have held that the same-sex partner of the child's natural parent can legally adopt the child without terminating the natural parent's rights. See, e.g., *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993). Courts have also held that an unmarried couple (whether same-sex or different-sex) may jointly adopt a child who is the biological child of neither of them. See, e.g., *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (N.Y. App. Div. 2004).

231. 628 A.2d 1271.

232. *Id.* at 1272.

233. *Id.* at 1276.

234. All states that have approved same-sex marriage or civil unions—New Jersey, Massachusetts, Vermont, and Connecticut—also have approved same-sex adoptions by either legislative or judicial decision. All jurisdictions that permit domestic partnerships—California, Hawaii, Maine, and the District of Columbia—also permit some form of same-sex adoption. For a state-by-state explanation of adoption laws, see Human Rights Campaign Foundation, *Adoption Laws: State by State*, <http://dcv.hrc.org/issues/parenting/adoptions/2375.htm> (last visited Sept. 15, 2007).

been upheld using the procreation-marriage argument—have also used such reasoning in adoption cases.²³⁵

When a court's acceptance of the procreation-marriage argument is compared to the same court's acceptance of same-sex adoption, an inconsistency becomes apparent. This inconsistency creates instability in the law. By denying the right to same-sex marriage while concomitantly granting same-sex adoptions, courts are furthering the very problem they are critiquing—that is, the problem (according to some courts) of having children raised by unmarried parents.²³⁶ In determining that states have a legitimate interest in maintaining a link between procreation and marriage, courts have suggested that a married man and woman who can procreate naturally may be rationally favored as parents. Yet, these same courts have granted adoptions to same-sex couples that cannot legally wed. In effect, these courts are exposing children of same-sex parents to the precise risks against which, according to the state, the marriage laws are designed to protect.²³⁷

One might argue that because, by their nature, marriage and adoption are different, there is nothing wrong with such an inconsistency. Courts, however, have done nothing to distinguish the underlying issues in these two sets of cases. Instead, many courts ruling on same-sex marriage expressly acknowledge their awareness of the fact that many same-sex couples now adopt and raise children as their own.²³⁸ Despite the

235. See, e.g., *In re Jacob*, 660 N.E.2d 397; *In re Evan*, 583 N.Y.S.2d 997 (N.Y. Sur. Ct. 1992); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

236. The Supreme Judicial Court of Massachusetts articulated this inconsistency in a similar way:

[T]he Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).

237. See *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999); see also *Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) (describing the disparate treatment of unmarried same-sex couples with children as “distinctly unfair”).

238. See, e.g., *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006) (en banc) (“We do not dispute that same-sex couples raise children or that the demographics of ‘family’ have changed significantly over the past decades. We recognize that same-sex couples enter significant, committed relationships that include children, whether adopted, conceived through assisted reproduction, or brought within the family of the same-sex couple after the end of a heterosexual relationship.”).

acknowledgement that “times have changed and are changing”²³⁹ in regard to the composition of families, courts refuse to accept that marriage may be changing as well. Thus, the marriage and adoption decisions remain inconsistent.

Many proponents of same-sex marriage who have commented on this inconsistency have also posed the related critique that the procreation-marriage interest is not rationally related to the exclusion of same-sex couples from marriage. The argument follows that this allegedly legitimate state interest is both underinclusive (because states permit same-sex couples to raise and adopt children) and overinclusive (because states allow individuals of different sexes to marry even if they are elderly, sterile, or do not want to have children).²⁴⁰ But considering that the under- or overinclusiveness of a law often does not defeat a conclusion that a law has a rational basis,²⁴¹ given the highly deferential nature of this standard of review, the significance of this critique can be overstated.²⁴² Yet, this critique nonetheless serves as a useful reminder of the inconsistency of courts’ differential treatments of same-sex marriage and same-sex adoption.

2. The “Optimal Setting” for Childrearing

The “optimal setting” argument overlaps with the procreation-marriage argument. Although they are discussed collectively as one governmental interest in some cases,²⁴³ the arguments do have distinct aspects. Like the procreation-marriage argument, the optimal-setting argument has been posited by the state and accepted by the court in numerous same-sex marriage cases. In making this argument, the state contends that it has a legitimate interest in “ensuring the optimal setting for child rearing, which [it] defines as ‘a two-parent family with one parent of each sex’”²⁴⁴ Often, courts do not even require the state to provide any conclusive evidence demonstrating why this is the “optimal setting” for children.²⁴⁵ Instead, courts simply agree that “the Legislature could

239. *Id.*

240. *See Standhardt v. Superior Court*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003).

241. *See Andersen*, 138 P.3d at 980, 983.

242. *See, e.g., Savage*, *supra* note 39, at 126–27 (overstating the relevance of this critique).

243. *See, e.g., Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (“The principle purpose the State advances in support of [] excluding same-sex couples from the legal benefits of marriage is the government’s interest in ‘furthering the link between procreation and child rearing.’”).

244. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

245. The role that social science plays in the same-sex marriage debate is currently a contested issue that will likely impact future same-sex marriage cases. *See generally* Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537 (2004).

rationally proceed on the *common-sense* premise that children will do best with a mother and father in the home.²⁴⁶ Based on this presumption, courts then conclude that preserving the link between childrearing and different-sex marriage is more important than ensuring that all children obtain the same legal rights and benefits regardless of the sexual orientation of their parents. In *Standhart v. Superior Court*,²⁴⁷ the Court of Appeals of Arizona clearly stated the importance of this link:

[C]hildren in same-sex families could benefit from the stability offered by same-sex marriage But although the line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such inequity is insufficient to negate the State's link between opposite-sex marriage, procreation, and child-rearing.²⁴⁸

What the *Standhart* court did not adequately explain, however, is why this inequity is insufficient to negate the link between different-sex marriage and childrearing. Nor did the court explain why it was willing to create same-sex families through the adoption process, but was unwilling to protect them with the legal rights that accompany marriage. Another inconsistency thus emerges: In trying to preserve the optimal setting in which children should be raised, courts are effectively consigning the children of same-sex parents to a status characterized by inferior rights.

Because adoption is directly and inextricably linked to childrearing, and marriage and childrearing are only tangentially linked (given that both married and unmarried couples may or may not choose to have children), one might assume that the optimal-setting argument appears more frequently in adoption cases; however, this assumption would be incorrect. By focusing on the link between different-sex marriage and childrearing, states have primarily asserted the optimal-setting interest in defending laws forbidding same-sex marriage. Many courts have accepted this interest as legitimate, requiring little or no explanation for a state's inconsistent approaches to marriage and adoption. For example, in *Andersen v. King County*,²⁴⁹ the plaintiffs criticized the state's optimal-setting argument in support of a ban on gay marriage, emphasizing the

246. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (emphasis added). This "common-sense" premise is often grounded in religion. See ABIGAIL GARNER, *FAMILIES LIKE MINE: CHILDREN OF GAY PARENTS TELL LIKE IT IS* 14 (2004) (referring to a document released by the Vatican in 2003 that stated that "[a]llowing children to be adopted by persons living in [same-sex] unions would actually mean doing violence to these children").

247. 77 P.3d 451 (Ariz. Ct. App. 2003).

248. *Id.* at 463.

249. 138 P.3d 963, 983, 1006 (Wash. 2006) (en banc).

supposed harmful effect on the children of same-sex couples. But the court did not directly respond to the merits of the plaintiffs' argument. Instead, it simply restated the optimal-setting assumption: "[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage . . . child-rearing in a 'traditional' nuclear family where children tend to thrive."²⁵⁰ The highest court in New York and judges in other states have responded in similar ways.²⁵¹

Although courts often deploy deferential rational basis review to dismiss arguments highlighting the marriage-adoption inconsistencies, there is one way in which they have attempted to respond to the inconsistencies. This response was articulated clearly by Judge Cordy when he dissented in *Goodridge*. According to Cordy, the fact that Massachusetts allowed same-sex couples to adopt did not affect the rationality of the legislature's conclusion that different-sex parents provide an optimal setting for childrearing. He reasoned that in an adoption case, society has already "lost" the optimal setting in which to raise a child, for the eligibility of a child for adoption presupposes that at least one of the child's biological parents is either unable or unwilling to participate in raising the child. In other words, same-sex parents are suitable only if the "optimal" parents are unavailable. Thus, Cordy concluded, the state still has a legitimate interest in preferring married different-sex parents.²⁵²

However, there are weaknesses in Cordy's argument. One practical flaw is that artificial insemination (which many same-sex couples now use to have children) never creates an optimal setting in the traditional sense, and yet different-sex couples are readily recognized as optimal parents when using this method. In addition, Cordy fails to consider the significance of the "best interests of the child" standard used in adoption cases, which demonstrates that there is no singular paradigm for what a child needs. Instead of comparing a child's unique situation to some "optimal" one man-one woman setting, courts in adoption cases look at the particular arrangement in which that child lives.

Given the myriad configurations of families today, it is no longer accurate to refer to a "typical" family unit. Many courts have perceived and responded to this development. For example, as recently as June 2006, the Supreme Court of Arkansas held unconstitutional a state regulation

250. *Id.*

251. See *Hernandez*, 855 N.E.2d at 8; see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 999-1000 (Mass. 2003) (Cordy, J., dissenting).

252. See *Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting).

that disqualified individuals from becoming foster parents²⁵³ if any adult member of the household was gay.²⁵⁴ The court reasoned that “there is no correlation between the health, welfare, and safety of foster children and the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual.”²⁵⁵ Similarly, in granting same-sex adoptions, numerous courts have reasoned that a parent-child bond can form irrespective of biological relation.²⁵⁶ In selecting parents, a court should focus on the welfare of the child, not the sex—or the sexual orientation—of the would-be parents. As a New York court stated in *In re Evan*²⁵⁷ when granting an adoption to lesbian partners:

Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has . . . *two* adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.²⁵⁸

Taken together, these examples demonstrate that the “best interests of the child” standard cannot be defined in an abstract way. Instead, courts must look at the particular circumstances of the child at issue to determine what in fact is optimal for that child. Thus, although many courts still accept the optimal-setting argument in many same-sex marriage cases, an increasing number of same-sex adoption cases reveal the flaws inherent in doing so.

253. See *supra* note 120.

254. Dep’t of Human Servs. & Child Welfare Agency Review Bd. v. Howard, No. 05-814, 2006 WL 1779467, at *6 (Ark. June 29, 2006).

255. *Id.* (emphasis omitted). The court based its holding on a finding that the Arkansas Department of Human Services and the Child Welfare Agency Review Board, which had enacted the regulation, had acted outside the scope of their authority by attempting to legislate public morality. The court thus determined that the regulation at issue was an unconstitutional violation of the separation-of-powers doctrine. *Id.* at *7. As a result, the court did not need to address the constitutionality of the exclusion itself; nevertheless, it repeatedly critiqued the blanket exclusion attempted by the Board. See *id.* at *3, *5, *6.

256. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005) (“We perceive no reason why both parents of a child cannot be women.”); *Sharon S. v. Superior Court*, 73 P.3d 554, 571 (Cal. 2003); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

257. 583 N.Y.S.2d 997 (Sur. Ct. 1992).

258. *Id.* at 1002.

III. THE FIRST STEP ON THE PATH TO RECOGNITION: RECONCILING THE INCONSISTENCIES

The two-part process of recognizing same-sex marriage is a necessary but not sufficient condition for the ultimate *legal* recognition of same-sex marriage in the United States. As explained in the Introduction, this two-part process requires courts first to acknowledge the social fact of committed same-sex relationships (which are marriage-like in form), and then to rethink whether the traditional definition of marriage suffices to protect the rights of all citizens. The recent same-sex marriage and same-sex adoption jurisprudence demonstrates that many courts have begun to acknowledge the social fact of same-sex relationships. Yet, the inconsistencies between the marriage and adoption cases reveal that many courts still refuse to undertake the rethinking aspect of recognition. Although courts should be encouraged to rethink the traditional definition of marriage, such rethinking alone is not enough; indeed, courts might rethink the social definition of marriage but still find other reasons to uphold the legal ban on same-sex marriage. Nevertheless, recognition—in the sense of the two-step process—is an important first step that is worth taking.

There are limitations on the goal that this Comment endeavors to achieve. It is important briefly to identify what this Comment is not trying to accomplish so as to avoid the critique that it has oversimplified issues. This Comment should not be read as suggesting that courts should use the same-sex adoption cases as precedent—binding or otherwise—when adjudicating the merits of same-sex marriage. Laws relating to marriage and adoption vary significantly.²⁵⁹ Additionally, the standard that governs each set of cases is distinct and thus affects the outcome of the cases differently. Whereas a state appellate court's decision regarding the right to marry can change marriage laws throughout that state, a state appellate court's decision in a particular adoption case may or may not impact future cases, because the best interests of the child standard requires case-by-case evaluation. Thus, a court rendering a decision on same-sex marriage need not follow the decision of a same-sex adoption case. However, just as a court could be influenced by a property law case when deciding a case about marriage, so too can a court hearing a same-sex marriage case be influenced by a same-sex adoption decision. Therefore, the goal of this Comment is to

259. To complicate matters further, both marriage laws and adoption laws vary by state, so an interstate comparison could be futile.

encourage courts to seriously consider and respond to such influences. The ultimate conclusion, however, still remains in the control of courts.

To determine how same-sex adoption cases might influence same-sex marriage cases, it is important to answer an underlying question: What outcomes could result from the interplay between these two sets of cases? Various possibilities exist. First, if courts follow the lead of *Andersen v. King County*²⁶⁰ and *Hernandez v. Robles*²⁶¹ and find that states have a legitimate interest in restricting marriage to one man and one woman, then courts may conclude that same-sex adoption should also be prohibited, given the relevance of the procreation-marriage argument and the optimal-setting argument to adoption. Alternatively, if courts follow *Goodridge v. Department of Public Health*,²⁶² then the resistance to same-sex adoption that still persists in some states may dissipate, because same-sex couples would no longer face the barrier of being unmarried.²⁶³ It is also entirely possible that same-sex marriage and same-sex adoption will remain inconsistent—that is, that some states will continue to prohibit same-sex marriage while permitting same-sex adoption. Finally, the approval of same-sex adoption could lead to the legalization of same-sex marriage. Each of these possibilities can be stated using a causation framework: (1) If the right to same-sex marriage is rejected, then the right to same-sex adoption will be rejected;²⁶⁴ (2) if the right to same-sex marriage is granted, then the right to same-sex adoption will be granted; (3) despite the approval of same-sex adoption, the right to same-sex marriage will continue to be rejected; and (4) because the right to same-sex adoption has been granted, the right to same-sex marriage will be granted.

As this Comment has argued and further explicates below, whether the marriage and adoption cases can be reconciled—and, consequently, the

260. 138 P.3d 963 (Wash. 2006) (en banc).

261. 855 N.E.2d 1 (N.Y. 2006).

262. 798 N.E.2d 941 (Mass. 2003).

263. For example, a Utah statute prohibits adoption by “a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of [the] state.” UTAH CODE ANN. § 78-30-1(3)(b) (2006). If the Utah Supreme Court granted the right to same-sex marriage, then same-sex couples who exercised their right to marry would no longer be banned from adopting, at least if the statutory language remained the same.

264. In using the phrase, “the right to same-sex adoption,” I do not intend to contradict my earlier statement that adoption is a statutory privilege, rather than a right. See *supra* notes 113–114 and accompanying text. The word “right” in this instance simply connotes having the legal option to do so.

fourth possibility realized²⁶⁵—depends on the willingness of courts to import reasoning from same-sex adoption cases into same-sex marriage cases. First, courts must be willing to incorporate the updated definitions of marriage, family, and parents into the same-sex marriage cases. The same courts (and even the same judges) often employ different definitions depending on the type of case. Such courts in particular should rethink the marriage-is-marriage argument in light of the definition of marriage used in many same-sex adoption cases. If same-sex partners have a “marital relationship”²⁶⁶ in the context of adopting a child, then logic suggests that they also have a marital relationship for the purpose of seeking a marriage license. Just as courts in adoption cases have created legal family units to reflect actual family setups,²⁶⁷ courts should create legal marriages that extend to actual relationships between same-sex partners. Courts may resist such changes by relying on the argument that the definition of marriage as a union between a man and a woman is deeply ingrained in our society. But even if this definition was the exclusive understanding of marriage at one time, the adoption cases demonstrate that it has been uprooted in some contexts to make room for other definitions.²⁶⁸ Thus, to reconcile the marriage and adoption cases, the marriage-is-marriage argument should be abandoned.

Second, courts should rethink the procreation-marriage argument and the optimal-setting argument. The fact that many courts now grant same-sex adoptions significantly weakens the premises underlying these arguments. While procreation is an important part of marriage for many couples, it need not be, as evidenced by the fact that different-sex couples that cannot or choose not to procreate can still legally marry. As stated in *Goodridge*, “[t]he ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”²⁶⁹ By granting same-sex adoptions, courts have effectively approved of creating families by means other than procreation.

265. Although the likelihood of the other possibilities occurring is beyond the scope of this Comment, mention of them is included to signify that the direction of the path for same-sex marriage is still unknown.

266. *In re Evan*, 583 N.Y.S.2d 997, 999 (Sur. Ct. 1992).

267. *Id.* at 1000.

268. Unlike proponents of the defense-of-marriage theory, *see supra* pp. 276–79, I am not suggesting that expanding the definition of marriage will eradicate the traditional definition. Instead, I am advocating for the coexistence of multiple definitions or, rather, for one definition that does not depend on the sex of the people involved.

269. 798 N.E.2d 941, 962 (Mass. 2003).

Thus, the adherence to the procreation-marriage link as a reason to exclude same-sex couples from marriage is unfounded.

Similarly, the results of various adoption cases undermine the optimal-setting argument. Given that some courts in adoption cases have redefined the optimal setting as one in which a child has “two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities,”²⁷⁰ courts in marriage cases should not insist that only a married man and woman can provide an ideal home for a child. If courts admit the irony inherent in accepting the procreation-marriage and optimal-setting arguments while also granting same-sex adoptions, then they may be willing to reconcile these two sets of cases.

Assuming courts do reconcile their inconsistent approaches to marriage and adoption, the standard of review that courts employ will still affect the way courts decide future cases. Every state supreme court to address the issue thus far has rejected the argument that gays and lesbians possess a fundamental right to marry.²⁷¹ Even though courts readily admit that the right to marry is a fundamental right,²⁷² they regard the right to same-sex marriage as a different right entirely. As a result, they have refused to find this latter right to be fundamental, reasoning that they must “exercise the utmost care whenever [they] are asked to break new ground” in the field of fundamental rights.²⁷³ Therefore, most courts have subjected marriage laws to rational basis review, rather than strict (or even intermediate) scrutiny.²⁷⁴ Given the highly deferential nature of rational basis review, most courts have accepted the legitimacy of states’ interests without much analysis.

If courts actually compared the marriage interests with those stated in same-sex adoption cases, they would realize that states have taken inconsistent positions on what it currently means to be a family. Although this type of comparative analysis is not required for rational basis review, if courts conducted such a comparison at the outset of same-sex marriage

270. *In re Evan*, 583 N.Y.S.2d at 1002 (emphasis omitted).

271. *See supra* note 160.

272. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

273. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

274. *But cf. Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (holding that the recognition of one’s choice of a life partner is a fundamental right, and thus is subject to strict scrutiny); *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998) (finding that the Hawaii marriage statute constituted a sex-based classification that was subject to strict scrutiny).

cases to determine the appropriate type of review, they would likely find that states' interests lack legitimacy. In other words, if courts incorporated the definitions and reasoning from adoption cases at the outset of the marriage cases (thereby rejecting the marriage-is-marriage argument, the procreation-marriage link, and the optimal-setting argument), they would likely conclude that the question at issue needs to be reframed. As articulated in *Brause v. Bureau of Vital Statistics*,²⁷⁵ in which an Alaska trial court held that gay men and lesbians possess a fundamental right to marry a person of the same sex,²⁷⁶ "[t]he relevant question is not whether *same-sex marriage* is so rooted in our traditions that it is a fundamental right, but whether *the freedom to choose one's own life partner* is so rooted in our traditions."²⁷⁷ If the question is reframed in this way, then courts can treat the right at issue—"the freedom to marry the person of *one's choice*"²⁷⁸—as fundamental. In turn, courts will be able to use strict scrutiny to assess whether restricting marriage to different-sex couples is constitutional. Although the Supreme Court has stated that strict scrutiny should no longer be considered "fatal in fact,"²⁷⁹ the requirements for satisfying this heightened standard are still demanding.²⁸⁰ In light of the weaknesses highlighted in this Comment, courts will probably not find the interests asserted by states either compelling or narrowly tailored to a ban on same-sex marriage.

Even if courts do not accept that same-sex partners possess a fundamental right to marry, however, they should still determine that restricting marriage to different-sex couples is unconstitutional under rational basis review. If courts reconcile the inconsistencies between marriage and adoption cases, they presumably will determine that states have no legitimate reason to exclude gays and lesbians from the institution of marriage. This outcome is certainly possible, as evidenced by the standard of review used and the result reached in *Goodridge*.²⁸¹ Thus, although strict

275. 1998 WL 88743.

276. *Id.* at *1.

277. *Id.* at *4; cf. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) ("On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be the most specific level available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." (citations and internal quotation marks omitted)).

278. *Perez v. Lippold*, 198 P.2d 17, 31 (Cal. 1948) (emphasis added).

279. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citation omitted).

280. Cf. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

281. See *supra* text accompanying note 91.

scrutiny shifts the burden to the government to prove that it has a compelling interest, while rational basis leaves the burden on the plaintiffs to prove that the state's interests lack legitimacy, courts should find restrictive marriage laws unconstitutional under either standard, because the reasoning in the same-sex adoption cases effectively negates states' only supposedly legitimate interests in prohibiting same-sex marriage.

CONCLUSION

The Supreme Court has stated that a large part of the history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded."²⁸² The Supreme Judicial Court of Massachusetts acknowledged this history and added a new chapter in 2003 when it became the first state to legalize same-sex marriage.²⁸³ Reasoning that "civil marriage is an evolving paradigm,"²⁸⁴ the Massachusetts court explained that, just as marriage has survived changes in the past, it can adapt to the inclusion of same-sex partners:

Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.²⁸⁵

Over three years after the Massachusetts court rendered its decision, marriage remains a stable and important institution for many different-sex couples and same-sex couples.²⁸⁶ Yet, despite this evidence, many courts and commentators continue to fear that allowing same-sex marriage will effect the erosion of different-sex marriage.²⁸⁷ As a result, courts use the traditional definition of marriage—a union between one man and one

282. *United States v. Virginia*, 518 U.S. 515, 557 (1996) (citing RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–1789*, 193 (1987)).

283. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

284. *Id.* at 967.

285. *Id.*; see also *Joyner v. Joyner*, 59 N.C. (6 Jones Eq.) 322, 326 (1862) ("[T]here are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce.").

286. See *supra* note 229 and accompanying text.

287. See, e.g., MOATS, *supra* note 74, at 157 ("We believe . . . that redefining marriage, expanding it to include other private relationships, will ultimately attack the age-old truth that traditional marriages and stable families constitute the very foundation of our society." (emphasis added) (quoting Bishop Kenneth Angell of the Roman Catholic diocese of Burlington)).

woman—to end the analysis of whether gays and lesbians possess a fundamental right to marry before it even begins.

Same-sex couples usually seek the right to marry for the same general reason as different-sex couples: to enjoy the myriad benefits and responsibilities that are accessible only via a marriage license. Hundreds of state statutes govern marriage and its accompanying benefits,²⁸⁸ a substantial number of which relate to children. For example, in Massachusetts, such benefits include the presumptions of legitimacy and parentage of children born to a married couple;²⁸⁹ the application of predictable rules of child custody, visitation, support, and out-of-state removal when married parents divorce;²⁹⁰ and “greater ease of access to family-based State and Federal [economic] benefits”²⁹¹ Despite states’ efforts to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, 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.”²⁹² Although the majority of states do not legally recognize same-sex marriages, they do allow same-sex partners to adopt and raise children. By simultaneously permitting same-sex adoption and prohibiting same-sex marriage, states are exposing the children of same-sex parents to the very risks against which the marriage laws are allegedly designed to protect.²⁹³

In time, the inconsistencies between same-sex marriage and same-sex adoption could detrimentally affect the stability of family law in general. Courts can potentially avert this outcome by redirecting same-sex marriage down a path parallel to that of same-sex adoption. To do so, courts must recognize same-sex marriage—that is, they must acknowledge the social fact of same-sex marriages and rethink the traditional definition of marriage. While many courts have undertaken the first step, they have yet to accomplish the second. Instead, they adhere to the marriage-is-marriage argument, the procreation-marriage link, and the optimal-setting argument. Because the same underlying issues are arguably involved in

288. See *Goodridge*, 798 N.E.2d at 955–57 (listing statutes that relate to marriage).

289. MASS. ANN. LAWS ch. 209C, § 6 (LexisNexis 2003).

290. *Id.* at ch. 208, §§ 19 (temporary custody), 20 (temporary support), 28 (custody and support on judgment of divorce), 30 (removal from Commonwealth), 31 (shared custody plan).

291. See *Goodridge*, 798 N.E.2d at 957.

292. *Id.* at 956–57.

293. See *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999).

the marriage and adoption cases,²⁹⁴ states should attempt to reconcile the inconsistencies between these two sets of cases. Although various possibilities exist regarding how courts could reconcile these inconsistencies, this Comment has argued that courts should reconcile them by incorporating the broader definitions of family and relationships into the marriage cases. If they do, courts will likely conclude that gays and lesbians have a fundamental right to marry, which states have no compelling interest to deny.

Recent legislative and judicial decisions regarding marriage and adoption render it difficult to predict the future of same-sex marriage. In July 2006, the highest courts in New York and Washington upheld bans on same-sex marriage. Yet, in October 2006, the Supreme Court of New Jersey followed the lead of Vermont and held that committed same-sex couples must be afforded the same rights and benefits enjoyed by married different-sex couples. As of March 2007, forty-five states had either constitutional amendments or laws restricting marriage to one man and one woman. To date, however, only three states explicitly prohibit same-sex couples from adopting. If this trend continues and adoption remains an option for same-sex couples, then courts may become increasingly willing to reconcile the marriage-adoption inconsistencies in ways similar to Massachusetts, Vermont, and New Jersey. Yet, if this trend reverses and more state legislatures enact bans on same-sex adoption like the one in Florida, then courts may choose to resolve the inconsistencies by upholding restrictions on both same-sex marriage *and* same-sex adoption. Given that it is difficult, if not impossible, to predict what will happen, this Comment has made no effort to do so. Instead, this Comment has simply endeavored to illuminate the current inconsistencies in same-sex marriage and same-sex adoption jurisprudence, with the ultimate goal of encouraging courts to extend the benefits of both marriage and adoption to same-sex couples.

294. See *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *15 (Wash. Super. Ct. Sept. 7, 2004) (“[I]f the defendants are correct that stable families are the foundation of a stable state, then the question becomes, not what counts as ‘marriage,’ but rather what counts as ‘family.’”). *But cf.* Martin R. Gardner, *Adoption by Homosexuals in the Wake of Lawrence v. Texas*, 6 J.L. & FAM. STUD. 19, 41 (2004) (“[There is] no necessary connection between recognition of same-sex marriage and adoptions by homosexuals . . .”).