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LITIGATION STRATEGIES: THE RIGHTS OF HOMOSEXUALS TO ADOPT CHILDREN

I. INTRODUCTION

Traditionally, and in its most basic form, the family has been viewed as a sociological entity comprised of a father, a mother and a child. The legitimacy of this traditional concept of the family has been challenged most vehemently, however, by gay and lesbian parents who seek custody of their biological children. Furthermore, homosexual individuals are increasingly attempting either to adopt children through agencies, or to adopt the child of a partner without severing the legal relationship between child and parent.¹ The impetus behind seeking such a co-parenting arrangement² by a life-long partner³ is to ensure that the child will have a suitable parent should any intervening detrimental event affect the biological parent's ability to care for his or her child. In addition, a co-parenting arrangement confers rights to a homosexual partner for the parental role that he or she occupies.⁴ A co-parent arrangement creates a means through which homosexual couples may form a unit similar to a traditional family. In conceptualizing the formation of the traditional family and in outlining the difficulties encountered in same-sex family formation, the triangle proves a useful tool.

The traditional view of the family places the husband and wife at two points at the bottom of the triangle. Marriage, the legal relationship between the couple, creates the base of the triangle. If

¹ See generally *Adoption of Tammy*, 619 N.E. 2d 315 (Mass. 1993); *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

² The term "co-parent" will be used to describe a situation in which two homosexual individuals both have legal rights to a child.

³ The term "life-long partner" refers to a homosexual individual who is in a committed, life-long relationship with another homosexual person.

⁴ Adams, William E., Jr., *Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 590 (1996) (citing Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233, 239 (1995)).

a child is added to the peak vertex, then both sides of the triangle are formed. It is the legal relationship between the mother and the child, and the legal relationship between the father and the child that create the sides of the triangle, thus enabling the completion of the traditional family and the triangle.

If an equivalent analysis is performed on the non-traditional family, a family comprised of two homosexual individuals, for example, the triangle cannot be formed in the same way as it is for the traditional family. Although it is possible to find a legal relationship between the child and either or both of the homosexual parents, the legal relationship between the two partners is lacking. Thus, although two sides of the triangle may be formed by virtue of a legal relationship between two same-sex parents and a child, the base, which in the traditional family unit is formed as a result of marriage, cannot be formed in a same-sex family. The traditional inability of same-sex partners to establish a legitimate legal relationship, such as that reserved for heterosexual couples, marriage, is the starting point of any challenge, by homosexual parents, to the traditional concept of the family.

Although same-sex partners may not consummate their families in the traditional way, through marriage, the ability to adopt children, either through agency adoption or a co-parenting arrangement, brings them a step nearer their goal: to create a legitimate family. These same-sex arrangements are all attempts to complete the conceptual triangle so that a family may be formed.

However, homosexual individuals have encountered problems in gaining custody of their own children, adopting the biological children of a life-long partner, or in adopting children through an agency. Part II will outline the justifications which have led to state policies and judicial determinations regarding the rights of homosexual couples to adopt. Part III will examine the statutory treatment of adoption of children by homosexual couples, with a particular focus on the New York adoption statute. Part IV will examine whether homosexual couples have any constitutional rights to adopt children under the United States Constitution while Part V will examine any rights for homosexuals to adopt under individual state constitutions.

II. PAST AND PRESENT JUSTIFICATIONS FOR STATE ADOPTION POLICIES

Same-sex couples have increasingly been advocating that law makers at both the federal and state levels adopt policies that permit them to form legal families. However, the battle that homosexual parents are fighting is a difficult one. Not only must gay men and lesbians overcome historical preconceptions about homosexual parenting,⁵ they must also overcome obstacles such as the inability to marry and the anti-sodomy laws that categorize them as criminals.⁶ Homosexual parents have even been deemed unfit to care for their children, because of the determination that homosexuality is a form of mental illness.⁷ Some courts have questioned whether gay parents have the ability to form the necessary bond with a child,⁸ and have concluded that such a bond can not be created, and have, accordingly, denied a gay man the opportunity to adopt a child.⁹

When determining whether to place a child with a gay parent, the courts examine the overall environment in which the child will be raised.¹⁰ For instance, courts might disapprove of an environment wherein the partners are overtly affectionate with one another.¹¹ In *S.E.G. v. R.A.G.*, the court denied child custody to a lesbian mother who was affectionate with her partner in front of her children, because she chose to publicize her sexual preference, and this

⁵ See generally David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994).

⁶ See Shaista-Parveen Ali, Symposium: The Changing Role of the Family, *Comment, Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1030-32 (1989).

⁷ See, e.g., *In re Matter of Jacinta M.*, 764 P.2d 1327, 1329 (N.M.Ct.App. 1988) (overruling trial court's determination that homosexuality is an illness and adequate reason for refusing to place a child with her gay brother).

⁸ In the Matter of the Appeal Pima County Juvenile Action B-10489, 727 P.2d 830, 837 (Ariz. Ct. App. 1986) (Howard, P.J., dissenting) (questioning "whether an appropriate parent-child bond could be created with a bisexual or homosexual adoptive parent").

⁹ See *id.* at 835.

¹⁰ See *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

¹¹ *Id.*

"created an unhealthy environment for minor children."¹² Conversely, in *M.A.B. v. R.B.*,¹³ the court awarded a gay father custody of his child because the father did not "flaunt" his homosexuality and was not affectionate with his partner in the presence of the child.¹⁴

In addition, courts have articulated other reasons to justify denial of an adoption for gay men and lesbians. For example, courts have held that if a child is placed with a homosexual parent, the child might be harassed or stigmatized, the child's sexual orientation might be affected, or the child's moral development might be harmed.¹⁵ In particular, one appellate court justified its decision to deny custody of a child to a lesbian mother because minor children might "suffer from the slings and arrows of a disapproving society."¹⁶ Another court expressed its fear that a child placed with a homosexual parent might be "exposed to ridicule and teasing by other children."¹⁷ On yet another occasion, a court went so far as to state that children should be protected from any increased possibility that they might become gay.¹⁸ In addition, courts have voiced concern for the moral development of children raised by a homosexual parent.¹⁹ For instance, in *Roe v. Roe*, the court

¹² *Id.* at 166-67; *see also* *Puliam v. Smith*, 501 S.E.2d 898, 903-04 (N.C. 1998) (granting order modifying custody against father who was seen in bed with his partner by his children); *In re J.B.F.*, 730 So. 2d 1190, 1195 (Ala 1998) (granting the father modified custody because the mother and her partner openly "established a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage).

¹³ 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. Suffolk County 1986).

¹⁴ *Id.* at 331, 510 N.Y.S. 2d at 968-69.

¹⁵ *See S.E.G. v. R.A.G.*, 735 S.W.2d at 166; *In re J.S. & C.*, 324 A.2d 90, 97 (N.J. Super. 1974).

¹⁶ *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981). The court based this determination on the fact that the child's mother was living with her lesbian lover. *Id.*

¹⁷ *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (noting that while the chancellor below did use the appellant's homosexuality as an important factor, it was not the only factor used in denying custody).

¹⁸ *See, e.g., J.L.P. (H.) v. D.J.P.*, 643 S.W.2d 865, 867-68 (Mo. Ct. App. 1982). The court disregarded expert testimony refuting the "seductive nature" of homosexuality, and its effect on children. *Id.*

¹⁹ *See, e.g., Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

decided that living with or visiting a gay or lesbian parent may harm the child's "moral" well being.²⁰

Courts have based adoption denials on findings that the community rejects homosexuality, which is evident through the existence of state sodomy statutes.²¹ Although a "same sex relationship is in no way defined by, nor dependent, upon sodomy,"²² state sodomy statutes criminalize homosexual conduct and form the basis for denying custody of a child with a gay man or lesbian.²³ For instance, a concurring judge, in *Thigpen v. Carpenter*,²⁴ stated that "[t]he people of both Texas and Arkansas have declared . . . [lesbian sexual conduct] to be so adverse to public morals and policy as to warrant criminal sanctions."²⁵ Similarly, in *Constant A. v. Paul C.A.*,²⁶ the court denied expanded custody of a child to her lesbian mother, because of fear that the mother might be arrested if she traveled to states with sodomy laws.²⁷ This was a recognition that in states that have sodomy laws, homosexuals have been treated as criminals.²⁸ Furthermore, since criminals are often barred from adopting children, homosexuals cannot adopt whether or not they engage in homosexual conduct.²⁹ Thus, homosexuals are criminalized simply by virtue of their sexual orientation.³⁰ The Mississippi Supreme Court expressed its disgust when a homosexual sought the aid of the court in gaining custody of his fourteen year old son.³¹ The court stated that "the conscience of this court is shocked by the audacity and brashness of an individual to come into court, openly and freely admit to engaging in felonious conduct on a

²⁰ *Id.* at 693.

²¹ See *Pima County*, 727 P.2d at 835; *S.E.G.*, 735 S.W.2d at 165.

²² Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 625 (1989).

²³ *Id.* at 630-35.

²⁴ 730 S.W.2d 510 (Ark. Ct. App. 1987).

²⁵ See *Thigpen*, 730 S.W.2d at 514.

²⁶ 496 A.2d 1 (Pa. Super. Ct. 1985).

²⁷ *Id.* at 5.

²⁸ *Id.*

²⁹ See Ali, *supra* note 6, at 1031.

³⁰ *Id.*

³¹ *Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999).

regular basis and expect the court to find such conduct acceptable.”³²

Because individuals are precluded from marrying a person of the same-sex and cannot form a family in the traditional sense, some states prefer to place children with families or heterosexual couples.³³ If no family seeking to adopt exists, a child may be placed with a single heterosexual person rather than a homosexual.³⁴ The justification behind placing the child with a single heterosexual person lies in the traditional notion of the family.³⁵ That is, theoretically, the single heterosexual could marry and create a family.³⁶ However, a homosexual person cannot legally marry a person of the same-sex, and therefore can never create a family for the child. Only if a homosexual person chooses to marry a person of the opposite sex, incongruous to her sexual orientation, may she form a family unit that could, *prima facie*, qualify as traditional. In certain cases where homosexuals have been permitted to adopt children, they have done so under statutes allowing “single adult persons” to adopt.³⁷

III. STATE ADOPTION STATUTES

Since adoption statutes, procedures and decisions are governed by the individual states, issues regarding the adoption of children must be discussed in state specific terms. In the adoption statutes of forty-eight states, there are no express prohibitions that forbid lesbians and gay men may not adopt children.³⁸ In these states the courts rely on the discretion of the judge to reach a decision

³² *Id.* at 590 (McRae, J., dissenting).

³³ *See Ali, supra* note 6, at 1030 n.123.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See infra* notes 41 to 44 and accompanying text.

³⁸ The adoption statutes in New Hampshire and Florida prohibit the adoption of children by any “homosexual.” *See* FLA. STAT. ANN. § 63.042(3) (West 1985), which provides in pertinent part: “No person eligible to adopt under this statute may adopt if that person is a homosexual;” N.H. STAT. ANN. § 170-B:4 (West Supp. 1987) which provides in pertinent part: “Who May Adopt. Specifically as follows, any individual not a minor and not a homosexual may adopt: . . .”

regarding a proposed adoption by a homosexual.³⁹ In exercising this discretion, the judge relies on state sodomy statutes as well as personal biases for justification of any decision.⁴⁰

Anti-sodomy statutes, a product of history and tradition, prohibit any oral-genital or anal-genital contact between people of either the same or the opposite sex.⁴¹ Although not all intimate contact between people of the same-sex is punished, sodomy particularly with regard to homosexuality remains "unnatural."⁴² Most states have not precluded homosexuals from adopting children, but this opportunity has been attained through statutory omission rather than statutory commission. Thus, most state statutes do not expressly prohibit homosexuals from adopting children, yet do not specifically permit them to adopt.⁴³ All states, however, will permit an unmarried adult (absent questions of the parent's sexuality) to adopt children, if the adult is determined by the court to be a fit parent.⁴⁴ It is under this ambiguous standard that many courts deny adoptions to homosexuals.⁴⁵ Parental "fitness" varies from one state to another.⁴⁶ This means that although homosexual individuals may, *prima facie*, adopt a child, many of their applications for adoption are denied based on their sexual orientation.⁴⁷

Adoption may be achieved by second parent or co-parent adoption, agency adoption or private placement adoption.⁴⁸ Second parent adoption suggests an action brought by a

³⁹ See Mark Strasser, *Fit To Be Tied: On Custody, Discretion and Sexual Orientation*, 46 AM. U. L. REV. 841, 890-95 (1997).

⁴⁰ See *supra* note 22, at 630-32.

⁴¹ See Paula A. Brantner, *Note, Removing Bricks From a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992).

⁴² *Id.* at 521-33.

⁴³ *But see supra*, note 26.

⁴⁴ STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES* 5 (1996).

⁴⁵ *Id.*

⁴⁶ *Id.* at 9-13.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 1.

homosexual individual to legally adopt his or her partner's biological or adoptive child.⁴⁹ Agency adoption is the adoption of a foster child that has been placed in the care of a homosexual individual or individuals.⁵⁰ In each of these types of adoptions, determinations of parental fitness are made before an adoption is granted.⁵¹

The general adoption procedure is similar in most states.⁵² The process begins when a person seeking to adopt a child files a petition with the appropriate court.⁵³ The court then examines the evidence presented by the state's child welfare agency.⁵⁴ Such evidence generally includes an investigation of the home environment of the child and the child's upbringing.⁵⁵ Once the petition for the adoption is filed, either relatives of the child or the state may contest the adoption.⁵⁶

To determine whether a petition for an adoption should be approved, courts generally use one of three tests: 1) best interests of the child;⁵⁷ 2) adverse impact;⁵⁸ or 3) nexus test.⁵⁹ The first of these tests examines the individual circumstances of the child in order to determine what is in the "best interests of the person to be

⁴⁹ STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES* 5 (1996).

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² *Id.* at 1.

⁵³ *Id.*

⁵⁴ STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES* 1 (1996).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See William E. Adams, Jr., *Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 600 (1996).

⁵⁸ See Jeffrey S. Loomis, Comment, *An Alternative for Children in Adoption Law: Allowing Homosexuals the Right to Adopt*, 18 OHIO N.U.L. REV. 631, 635 (1992).

⁵⁹ See Mark Strasser, *Fit to Be Tied: On Custody, Discretion and Sexual Orientation*, 46 AM. U.L. REV. 841 (1997); Jeffrey S. Loomis, Comment, *An Alternative to Placement for Children in Adoption Law: Allowing Homosexuals the Right to Adopt*, 18 OHIO N.U.L. REV. 631, 632 (1992).

adopted.”⁶⁰ The adverse impact test considers the possible effect of any purported conduct or abnormal circumstances on the child,⁶¹ which must be demonstrated through a “clear and convincing manner.”⁶² If the courts use the adverse impact test, they will generally not preclude a homosexual parent from obtaining custody of a child merely because the parent is homosexual, unless it is demonstrated that his or her sexual orientation has, in fact, an adverse impact on the child.⁶³ Similar to the adverse impact test, the nexus test considers the possible effect of any purported conduct or abnormal circumstances on the child.⁶⁴ Thus, if it can be demonstrated that there is a “clear factual showing of a connection” between the purported conduct and its “adverse effect on the well-being of the child . . .” the courts will probably deny custody.⁶⁵ In applying this test the courts look to specific evidence that the child has been negatively impacted by the parent’s lifestyle – i.e. sexual behavior.⁶⁶

⁶⁰ *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982) (holding that no single factor is determinative in evaluating the best interests of the child). *See also*, *In re Adoption of Charles B.*, 552 N.E.2d 884, 886 (Ohio 1990); § 402 Uniform Marriage and Divorce Act, 9 U. L. A. 147, 561 (1988) (stating that all “relevant factors” should be taken into consideration in determining the best interests of the child).

⁶¹ *See, e.g.*, *Anonymous v. Anonymous*, 120 A.D.2d 983, 985, 503 N.Y.S.2d 466, 467 (4th Dep’t 1986); *Guinan v. Guinan*, 477 N.Y.S.2d 830, 831 (3d Dep’t 1984).

⁶² *In re Adoption of Charles B.*, 552 N.E.2d 884, 887 (Ohio 1990).

⁶³ *S.E.G. v. R.A.C.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987). *See also*, Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 636 n.15 (1989).

⁶⁴ *See* Mark Strasser, *Fit to Be Tied: On Custody, Discretion and Sexual Orientation*, 46 AM. U.L. REV. 841, 861 (1997); Jeffrey S. Loomis, *Comment, An Alternative to Placement for Children in Adoption Law: Allowing Homosexuals the Right to Adopt*, 18 OHIO N.U.L. REV. 631, 635-37 (1992).

⁶⁵ *Constant A. v. Paul C.A.*, 496 A.2d 1, 12 (Pa. Super. Ct. 1985) (Beck, J., dissenting).

⁶⁶ *See* Kathryn Kendell, *Sexual Orientation and Child Custody*, TRIAL, Aug. 1999, at 43.

In New York, the courts apply a hybrid of the “best interests of the child” and nexus tests.⁶⁷ However, the application of the test is far from uniform because the lack of clear-cut guidelines, which indicate the sort of parent or environment that would be in the best interests of the child. Thus, the outcome is based on the personal determinations and the discretion of the judge.⁶⁸ One scholar noted that notwithstanding social science studies, which indicate that the sexual orientation of the parent have little effect on children, judges continue to use it as a basis for their decisions.⁶⁹ Thus, a judge’s personal biases may preclude a homosexual couple from adopting a child even if the couple is as capable of nurturing and caring for a child as is a heterosexual couple.

An important aspect of an adoption is that it often involves the termination of the biological parent’s rights to her child.⁷⁰ In the area of second-parent adoption, this termination of parental rights may cause problems.⁷¹ Specifically, for homosexual couples, the adoption of a biological parent’s child by his or her partner will, in most states, sever the parental rights of the biological parent.⁷² New York, however, has allowed the life-long partner of a

⁶⁷ STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES 10 (1996).

⁶⁸ *Id.*

⁶⁹ See Kendell, *supra* note 66, at 42.

⁷⁰ See N.Y. DOM REL § 110 (McKinney 1998) which provides in pertinent part: “Who may adopt; effect of article [a]n unmarried person or an adult husband and his adult wife together may adopt another person.” See also STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES 2 (1996).

⁷¹ N.Y. DOM. REL. § 110 (McKinney 1998); See also *Matter of Jacob*, 86 N.Y.2d 651, 656, 600 N.E.2d 397, 398, 636 N.Y.S.2d 716, 717 (1995).

⁷² However, the highest state courts in New York, Vermont and Massachusetts have expressly allowed homosexuals to adopt the children of their partner without the parental rights of the partners being severed. See, e.g., *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, *In re Dana*, 86 N.Y.2d 651, 655, 660 N.E.2d 397, 341, 636 N.Y.S.2d 716, 721 (1995); see also STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES 2-4 (1996).

homosexual to adopt the biological children of his partner without severing the parental rights of the biological parent.⁷³

In New York, the law regarding adoption is found in section 110 of the Domestic Relations Law, which states that "an unmarried person or an adult husband and his adult wife together may adopt another person."⁷⁴ Although the statute does not explicitly grant homosexuals the right to adopt, homosexuals are afforded that right under the "adult unmarried person" language.⁷⁵ Conversely, there is no explicit statement in the statute that prohibits homosexuals from adopting children individually.⁷⁶ However, with reference to married couples, the statute employs the word "together" indicating that in any marriage, both spouses must consent to the adoption of a child.⁷⁷ In a same-sex relationship, the impossibility of achieving marital status renders moot the point of whether both "spouses" agree to an adoption.

Although New York's Domestic Relations Law section 110 permits homosexual individuals to adopt children, a judge must still determine that such an adoption is in the best interests of the child.⁷⁸ Section 114 states that "if satisfied that the best interests of the adoptive child will be promoted thereby, the judge shall make an order approving the adoption and directing that the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parent or parents."⁷⁹ The judge is only guided by precedent in making the "best interests of the child" determination. For instance, in *In re Adoption of Evan*,⁸⁰ the court granted an adoption to the partner of a lesbian mother.⁸¹ The court

⁷³ *In re Jacob*, 86 N.Y.2d 651, 667, 660 N.E.2d 397, 407, 636 N.Y.S.2d 716, 724 (1995) (finding that the New York statute was "designed as a shield to protect new adoptive families, never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents").

⁷⁴ N.Y. DOM. REL. § 110 (McKinney 1998).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See, e.g., In re Jacob*, 86 N.Y.2d at 656, 660 N.E.2d at 398, 636 N.Y.S.2d at 717 (1995).

⁷⁸ N.Y. DOM. REL. LAW § 110:3 (McKinney 1998).

⁷⁹ N.Y. DOM. REL. LAW § 114 (McKinney 1998).

⁸⁰ 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Sur. Ct. New York County 1992).

⁸¹ *Id.* at 852, 583 N.Y.S.2d at 1002.

found that if the couple remained together, the child would benefit emotionally.⁸² Furthermore, regardless of whether the couple remained together or separated, the child's relationship with each parent would be a relationship sustained by the "ongoing, legal recognition of an approved, court ordered adoption."⁸³ Indeed, "the purpose of adoption is uniformly seen as promoting the welfare of the child," and provides "a means of establishing a real home for a child."⁸⁴

Once an adoption is found to be in the best interests of the child, homosexual couples must then overcome the obstacle presented by section 117 of New York's Domestic Relations Law. is the severance of the parental rights upon the adoption of the child by the partner.⁸⁵ Section 117 of the New York's Domestic Relations Law states that "after the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties. . .[and] shall have no rights over the adoptive child. . . ."⁸⁶ Literal interpretation of this section indicates that parental ties to the child are severed when the child is adopted by another person. However, the statute recognizes one exception, which when applicable, preserves parental rights when the child is adopted.⁸⁷

The stepparent exception found in section 117(1)(d) states that "when a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepparent may adopt such child, such consent shall not relieve the parent. . .of any parental duty toward such child."⁸⁸ A literal reading of subsection (1)(d) indicates that the exception is narrow and applies only to a stepparent.⁸⁹ By virtue of a marriage to the parent of the child, the partner attains the status of stepparent and may adopt the child

⁸² *Id.* at 846, 583 N.Y.S.2d at 999 (noting that the child "is part of a family unit that has been functioning successfully for the past six years").

⁸³ *Id.* at 847, 583 N.Y.S.2d at 999.

⁸⁴ *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 572, 331 N.E.2d 486, 489, 370 N.Y.S.2d 511, 515 (1975).

⁸⁵ N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1998).

⁸⁶ *Id.*

⁸⁷ N.Y. DOM. REL. LAW § 117(1)(d) (McKinney 1998).

⁸⁸ *Id.*

⁸⁹ *Id.*

without severing the original parental bond.⁹⁰ In recognizing the parental exception, the court in *In re Adoption of Caitlin and Emily*,⁹¹ held that “the situation presented in same-sex adoption cases. . .is analogous to a stepparent adoption insofar as the biological mother’s position is concerned.”⁹²

However, because a same-sex couple cannot attain the legal status conferred by marriage, the stepparent exception, read literally, will not apply.⁹³ Only if courts expand the definition of family to include same-sex couples who are committed to a long-term relationship may the exception in section 117(1)(d) be invoked. Indeed, in *Braschi v. Stahl Associates Company*,⁹⁴ the New York Court of Appeals allowed the homosexual partner of a deceased man to remain in the rent-controlled apartment in which he and his partner had lived for ten years.⁹⁵ The court held that “the term ‘family’ should not be rigidly restricted to those people who have formalized their relationship by obtaining. . .a marriage certificate.”⁹⁶ Rather, today’s “reality of family life. . .[views the family as]. . .two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence.”⁹⁷ If the courts nationwide were to adopt the view espoused by the *Braschi* court, then same-sex couples would not be precluded from attaining legal family status or from adopting children.⁹⁸

⁹⁰ *Id.*

⁹¹ 163 Misc.2d 999, 622 N.Y.S.2d 835 (Fam. Ct. Monroe County 1994).

⁹² *Id.* at 1005, 622 N.Y.S.2d at 839 (analogizing the New York statute with the Vermont statute the court notes that the issue of same sex adoption is not addressed).

⁹³ *See supra*, note 73 and accompanying text.

⁹⁴ 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

⁹⁵ *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Each partner in a same-sex relationship would be able to adopt the children of his or her partner without severing or disrupting the biological bond between the child and its parent. In New York, the adopting partner would be treated as a stepparent and § 117(1)(d) of the Domestic Relations Law would apply. *See supra* note 73 and accompanying text.

In New York, an adult unmarried person may adopt a child without regard to sexual orientation under the "single person" language of section 110 of the New York adoption statute.⁹⁹ Furthermore, the New York Court of Appeals has held that a gay or lesbian parent need not relinquish his or her legal rights to the child when further rights to the child are granted to a partner.¹⁰⁰ The New York view is, however, unconventional.¹⁰¹

New York courts are mandated to place great significance on the best interests of the child.¹⁰² If a child is well-provided for and nurtured in a same-sex household, the courts will probably allow the child to remain in that household, and allow the same-sex partner of a biological parent to adopt the child.¹⁰³ Returning to the introductory concept of the family unit as a triangle, the legal relationship between the biological parent and the child would remain intact. The adopting partner would have a legal relationship with the child, as would the biological parent. The only legal relationship required to complete the triangle would be the legal relationship between the two homosexual partners. Thus, even in progressive states such as New York, the triangle, even today, would lack its base.

⁹⁹ See *supra* note 74 and accompanying text. See also, *In re Jacob*, 86 N.Y.2d 651, 655, 660 N.E.2d 397, 398, 636 N.Y.S.2d 716, 717 (1995).

¹⁰⁰ *In re Jacob*, 86 N.Y.2d at 665-66, 660 N.E.2d at 403-04, 636 N.Y.S.2d at 722-23.

¹⁰¹ In addition to New York, the highest courts in Vermont and Massachusetts have allowed the biological parents to retain the parental bond while granting second-parent adoption rights to the gay or lesbian partner. See *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (finding the adoption by the biological mother's same-sex partner was in the best interest of the child). See also *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (finding it was not in the legislature's intent to terminate the natural parent's relationship with the child when the natural parent is one of the parties in the adoption proceeding). *Id.* at 321.

¹⁰² See N.Y. DOM. REL. § 70 (McKinney 1998). Section 70 provides in pertinent part: "[T]he court shall determine solely what is for the best interest for the child, and what will best promote its welfare and happiness..."; *Bennett v. Jeffreys*, 40 N.Y.2d 543, 544, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 823 (1976); *Boatwright v. Otero*, 91 Misc. 2d 653, 655, 398 N.Y.S.2d 391, 392 (Fam. Ct Onondaga Co. 1977).

¹⁰³ *In re Adoption of Caitlin*, 163 Misc. 2d 999, 622 N.Y.S.2d 835 (Fam. Ct. Monroe County 1994); *In re Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995).

IV. FEDERAL CONSTITUTIONAL CONSIDERATIONS

A. DUE PROCESS

Under the Fifth and Fourteenth¹⁰⁴ Amendments of the Constitution, both the federal government and state governments are precluded from depriving any person "of life, liberty, or property without due process of law." Due Process is composed of elements of both procedural and substantive due process.¹⁰⁵ The former is comprised of the procedures required when the government deprives an individual of life, liberty, or property.¹⁰⁶ Substantive due process questions the government's motivation behind depriving a person of life, liberty, or property.¹⁰⁷ Issues regarding the rights of homosexuals to adopt children require only substantive due process analysis.¹⁰⁸

¹⁰⁴ U.S. CONST. amend. V, which states in pertinent part: "[No] person shall be deprived of life, liberty, or property, without due process of law;" U.S. CONST. amend. XIV, which states in pertinent part: "[N]o State shall deprive any person of life, liberty, or property without due process of law."

¹⁰⁵ See *infra*, note 100.

¹⁰⁶ Generally, procedural due process requires that the government provide the individual with notice and an opportunity to be heard when depriving that individual of life, liberty or property. (U.S. CONST. amend. V). For a detailed discussion of procedural due process, see Erwin Chemerinsky, *Constitutional Law Principles and Policies*, Aspen Law & Business (1997) 419; see also, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting out a basic formula to determine the form of the procedure when there has been a deprivation).

¹⁰⁷ The doctrine of substantive due process places limitations on the government's power to act and inhibits government action in certain situations even when the government affords process. Whereas the procedural element has clearly recognized, case law has read the due process clause as applying substantive limitations on the government's power to act. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 341-47 (1976).

¹⁰⁸ Procedural due process requires a different analysis from that required for substantive due process. Briefly, procedural due process requires a determination of whether there has been a deprivation of life, liberty or property. If there has not been such a deprivation, due process does not apply and a state does not have to provide notice and opportunity for a hearing. Conversely, if there has been a deprivation, a state must provide notice of the deprivation and an opportunity for a hearing. Thus, the meaning of "deprivation" becomes

Substantive due process requires that all governmental action, at a minimum, reasonably relate to a legitimate government interest.¹⁰⁹ The most rigorous level of review is the strict scrutiny standard, which requires the government to prove that the law is necessary to achieve a compelling governmental interest.¹¹⁰ When the Supreme Court examines a law using the strict scrutiny standard of review, the law is presumed to be unconstitutional and the government has the burden of proving that the method chosen is the least discriminatory means to achieve the desired end.¹¹¹ The compelling state interest test applies in cases dealing with a deprivation of fundamental rights.¹¹²

The Court has not limited fundamental rights to those rights enumerated in the Bill of Rights.¹¹³ Rather, the Court has used substantive due process to find that certain fundamental rights, such as the right to privacy and personal autonomy, are implied in the Fourteenth Amendment of the Constitution.¹¹⁴ The Court has also found that parents have a fundamental right to the custody of their children.¹¹⁵ Where procedural due process ensures that prior to termination of parental rights, the government provides the affected parent with notice and an opportunity to be heard,¹¹⁶ substantive due process requires that the government have a compelling interest in order to interfere with a parent's

essential. The Supreme Court has held that mere negligence on the part of the government or government official is insufficient to constitute a deprivation. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986) (holding that the word "deprive" connotes more than a negligent act).

¹⁰⁹ *See Richardson v. Belcher*, 404 U.S. 78, 82 (1971).

¹¹⁰ *See Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

¹¹¹ *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹¹² Under Equal Protection analysis, strict scrutiny is used when discrimination is based on race, religion, and national origin as well as when there is a deprivation of a fundamental right. *See U.S. v. Carolene Products*, 304 U.S. 144 n.4 (1938).

¹¹³ U.S. CONST. amends. I-X. The Bill of Rights is comprised of the first ten amendments to the Constitution. *Id.*

¹¹⁴ U.S. CONST. amend. XIV. *See, Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹¹⁵ *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹¹⁶ *Santosky*, 455 U.S. at 758-59.

fundamental right to custody of his or her children.¹¹⁷ In *Santosky v. Kramer*,¹¹⁸ the Supreme Court held that parents have a “fundamental liberty interest. . . in the care, custody and management of their child.”¹¹⁹ The Court held that if the government seeks to terminate the rights of parents, the government must prove by “clear and convincing evidence” that this action is necessary as a parent’s “desire for and right to the companionship, care, custody, and management of his or her children is. . . far more precious than any property right.”¹²⁰

Similarly, when conducting an analysis based on a challenge to equal protection, the Court uses the compelling state interest test.¹²¹ The following section examines the Supreme Court’s analysis of fundamental rights under the equal protection strict scrutiny standard.

B. EQUAL PROTECTION

The Fourteenth Amendment of the Constitution prohibits any state from “deny[ing] to any person within [the state’s] jurisdiction the equal protection of the laws.”¹²² Although at first glance it seems as though the equal protection clause applies solely to the states, the Supreme Court has interpreted the equal protection clause as applying to the federal government through the Fifth Amendment.¹²³ Thus, equal protection guarantees that neither a state nor the federal government will enact any law whose effect might cause unwarranted discrimination against any group of persons.¹²⁴

At the heart of any equal protection challenge lies the question of whether the government can point to a sufficiently significant

¹¹⁷ *Id.*

¹¹⁸ 455 U.S. 745 (1982).

¹¹⁹ *Id.* at 753.

¹²⁰ *Id.* at 758-59.

¹²¹ *Eisenstadt v. Baird*, 405 U.S. 330, 447 n.7 (1972).

¹²² U.S. CONST. amend. XIV.

¹²³ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹²⁴ *Id.*

objective so as to justify the discrimination.¹²⁵ To establish whether the government can, in fact, justify discrimination, the Court will examine the classification or how the government differentiates between people, the level of scrutiny to be applied to the governmental action and whether the government meets its burden under the level of scrutiny.¹²⁶

The "rational basis test," which is the least burdensome level of review for the government, requires only that a classification be reasonably related to a legitimate governmental interest.¹²⁷ Thus, so long as a law is not irrational, it will be upheld.¹²⁸ Under the rational basis test, the courts examine the end, which the government aims to meet.¹²⁹ If the desired result is legitimate and the means is, even minimally, related to the end, the law will be sustained.¹³⁰ However, the burden of proving that a law is not reasonably related to the government's intended end, or is wholly irrational, lies with the party challenging the law.¹³¹

The middle level of review, "intermediate scrutiny," imposes a higher burden on the governmental action than rational basis review.¹³² Under this standard, a law must be "substantially related to an important government purpose" in order to be upheld.¹³³ Thus, intermediate scrutiny requires that the law be more than rational, but less than compelling.¹³⁴ The burden of proving that the law is substantially related to an important governmental purpose lies with the government.¹³⁵

¹²⁵ *Id.* at 499-500.

¹²⁶ *Id.*

¹²⁷ *See, e.g.,* *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *U.S. Retirement Board v. Fritz*, 449 U.S. 166, 174-75 (1980).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See, e.g.,* *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹³⁴ *See* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1985) (finding that using sex characteristics often bears no relation to a person's ability to contribute to or perform in society). *See also* *Reed v. Reed*, 404 U.S. 71 (1971) (holding that a statute giving a preference to male executors over female executors, with all else being the same violated the Equal Protection Clause).

¹³⁵ *Erwin Chemerinsky, supra* note 106, at 416.

To determine how the government distinguishes between groups of people, the law challenged on equal protection grounds must itself be examined: does the law discriminate on its face, or is the law facially neutral but have a discriminatory effect?¹³⁶ A law, which is facially discriminatory, may be challenged directly on equal protection grounds.¹³⁷ However, a challenge to a facially neutral law requires proof of a discriminatory purpose behind the enactment of the law in addition to proof of a discriminatory effect.¹³⁸

Furthermore, the level of scrutiny that the Court will employ depends on the nature of the alleged discrimination.¹³⁹ For instance, an infringement of a fundamental right will warrant strict scrutiny and to prevail, the government will be expected to show that the method chosen is the least discriminatory or injurious means of achieving a compelling interest.¹⁴⁰ Similarly, discrimination based on characteristics such as race, national origin or alienage have all been held by the Supreme Court as requiring that the government prove a compelling state interest.¹⁴¹

Thus, the Court examines the constitutionality of both the end that the government aims to meet, as well as the means employed to achieve that end.¹⁴² If the Court uses strict scrutiny, the government must demonstrate that the particular objective behind a

¹³⁶ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that when a statute contains express racial classifications the fact of equal application does not minimize the heavy burden of the Fourteenth Amendment); see also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding that there was no reason for a San Francisco ordinance giving authority to the Board of Supervisor to refuse consent to operate certain laundries, but to harass the city's Chinese population).

¹³⁷ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect).

¹³⁸ See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976).

¹³⁹ *Id.*

¹⁴⁰ See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that the judiciary will defer to the legislature unless there is discrimination against a discrete and insular minority or infringement of a fundamental right).

¹⁴¹ See *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

¹⁴² *Id.*

law serves a compelling state interest and that a less discriminatory means of achieving the objective does not exist.¹⁴³

With regard to discrimination based on a fundamental right, equal protection requires that the government prove a compelling state interest. For instance, in *Skinner v. Oklahoma*,¹⁴⁴ the Court applied the compelling state interest test under the equal protection clause to hold that an Oklahoma statute, requiring the sterilization of three time offenders of crimes of moral turpitude, was unconstitutional because “[m]arriage and procreation are fundamental to the very existence and survival of the race.”¹⁴⁵

Protection of a fundamental right under due process and protection of the same under the equal protection clause is similar in that the government has the burden of proving that it had a compelling state interest in enacting a law. However, the former requires the government to prove that it is sufficiently justified in enacting the law, whereas the latter requires that the disparate classifications between people, as to a particular right, are sufficiently justified.

The issue of whether a right is fundamental is critical, since it is determinative of the level of scrutiny the Court will use in analyzing an infringement of that right. For instance, any infringement of a fundamental right must meet strict scrutiny. However, in deciding that a right is fundamental, the Court must interpret the Constitution. It can be argued that fundamental rights are those explicitly included in the text of the Constitution. However, it can also be argued that it would have been impossible for the framers to explicitly include all the possible fundamental rights within the text of the Constitution. If a right is not expressly given fundamental right status in the text of the Constitution, the Court may look at rights, which are “deeply rooted in this Nation’s history and tradition” to determine whether they are indeed fundamental.¹⁴⁶

Once the Court determines that a right is fundamental, the analysis proceeds to an examination of whether there has been an

¹⁴³ *Id.*

¹⁴⁴ 316 U.S. 535 (1942).

¹⁴⁵ *Id.* at 541.

¹⁴⁶ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

infringement of that right. In *Zablocki v. Redhail*,¹⁴⁷ the Supreme Court held that the “directness and substantiality of the interference” must be considered in order to determine whether that right has been violated.¹⁴⁸

Furthermore, a determination by the Court that a right is fundamental and that it has been infringed, requires that the government prove a compelling state interest to justify the infringement.¹⁴⁹ In addition, the government must prove that the means selected to carry out the particular law is the least restrictive alternative in achieving the intended end.¹⁵⁰

Although the Supreme Court has not ruled on whether there is a right to the adoption of children, states confer the right to adopt through state legislation.¹⁵¹ If state legislation draws a clear line between homosexuals and heterosexuals, i.e., the former group is precluded from adopting, whereas the latter group is not, an equal protection claim may arise. Since homosexuals have not been held to be a suspect class, courts apply a lower level of scrutiny.¹⁵²

Although statutes reviewed under rational basis are usually upheld, theoretically, if a homosexual person is able to show that the statute is irrational because it is based on unsupported justifications and stereotypes, the statute may be held to be irrational and therefore unconstitutional.¹⁵³ On the other hand, states may justify the classification by claiming that allowing heterosexuals to adopt promotes the states’ interest in preserving the family. Even if single heterosexuals are permitted to adopt, where single homosexuals are not, the state may justify such

¹⁴⁷ 434 U.S. 374 (1978).

¹⁴⁸ *Id.* at 387.

¹⁴⁹ See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

¹⁵⁰ See Chemerinsky, *supra* note 106, at 640-44.

¹⁵¹ Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Courts’ Opinions*, XX ARIZ. L. REV. 1497, 1498-99.

¹⁵² See, e.g., *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Ben Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989).

¹⁵³ Jeffery G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, 26 HUM. RTS. Q. 7, 10 (1999) (noting that “currently Florida and New Hampshire are the only two states that categorically prohibit lesbians and gay men from becoming adoptive parents”).

distinction with an argument that a single person may create a family through marriage. The single homosexual, however, unable to marry a person of the same-sex, may not create a family.

In Florida and New Hampshire, where gay men and lesbians are expressly prohibited from adopting children, an equal protection challenge might possibly succeed. In New Hampshire, the law, unchallenged over the past 9 years, prohibits homosexuals from adopting because they are considered to be "unfit."¹⁵⁴ A homosexual needs only to prove that the adoption statute is not reasonably related to a legitimate governmental interest; that there is no rational basis for the distinction between homosexual and heterosexuals as parents; and, homosexuals are equally fit to be parents of children.¹⁵⁵ Homosexuals who wish to adopt under the Florida adoption statute may make a similar challenge.¹⁵⁶

Challenging state adoption statutes under the Federal Constitution is difficult, not only because the Supreme Court has not articulated a standard, under which statutes discriminating against homosexuals should be reviewed, but also because without a Supreme Court indication that a higher level review should be used, courts generally use rational basis review. Because the burden of proof lies with the homosexual challenging the statute, a state may provide any legitimate interest to support its case, and it is more likely than not that the legislation would be upheld.

C. FUNDAMENTAL RIGHTS IN THE FAMILY SPHERE

In *Meyer v. Nebraska*,¹⁵⁷ the Supreme Court held that "liberty [as it is used in the due process clause] denotes not merely freedom from bodily restraint, but also the right . . . to marry, establish a home and bring up children."¹⁵⁸ The *Meyer* Court held that certain

¹⁵⁴ STEVEN M. TANNENBAUM, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES 8 (1996).

¹⁵⁵ See *supra*, note 122-35, and accompanying text.

¹⁵⁶ FLA. STAT. CH. 63.042(3) (1997) (stating in pertinent part: "No person eligible to adopt under this statute may adopt if that person is a homosexual").

¹⁵⁷ 262 U.S. 390 (1923).

¹⁵⁸ *Id.* at 399.

rights in the family sphere, such as the right to marry and the right to bring up one's children are guaranteed liberties long recognized to be essential to the pursuit of happiness and may not be interfered with without passing the strict scrutiny analysis.¹⁵⁹

At the very beginning of family creation is marriage. The Supreme Court has held that the right to marry is fundamental and is protected under the due process clause.¹⁶⁰ Marriage has been described as the "foundation of the family in our society."¹⁶¹

Furthermore, the Supreme Court has recognized that parents have the right to have, raise and care for their children. In *Meyer v. Nebraska*,¹⁶² the Supreme Court held that the right to raise children is a liberty interest guaranteed by the Fourteenth Amendment.¹⁶³ Thus "custody, care and nurture of the child reside first in the parents."¹⁶⁴ The Court reaffirmed the fundamental right of parents to the "care, custody and management of their child" in *Santosky v. Kramer*¹⁶⁵ where it held that the interest of the parents cannot be severed "completely and irrevocably" without due process.¹⁶⁶ Because choices involving family matters are critical to the liberty protected by the Fourteenth Amendment,¹⁶⁷ the Court has made clear that "a parent's desire for and right to 'companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"¹⁶⁸ Thus, parental rights should not be terminated

¹⁵⁹ *Id.* at 399-400.

¹⁶⁰ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival").

¹⁶¹ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

¹⁶² 262 U.S. 390 (1923).

¹⁶³ *Id.* at 399.

¹⁶⁴ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁶⁵ 455 U.S. 745, 753 (1982).

¹⁶⁶ *Id.* at 747-48.

¹⁶⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁶⁸ *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

unless the state can prove by clear and convincing evidence both that the parents are unfit and the child's best interests would be best served if the parental rights were terminated.

The Supreme Court has indeed recognized that the Constitution protects the rights of the family as a unit.¹⁶⁹ In addition, the Supreme Court has held that the family is afforded the right to privacy, free from governmental intrusion.¹⁷⁰ For instance, in *Griswold v. Connecticut*,¹⁷¹ the Court held that a law prohibiting married couples from using contraceptives was violative of the right to privacy. The Court determined that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one The Fourth and Fifth Amendments . . . protec[t] against all governmental invasions of the sanctity of a man's home and the privacies of life."¹⁷² In addition, the *Griswold* Court recognized the sanctity of the family created through marriage, by affording the family "a right of privacy older than the Bill of Rights."¹⁷³

Further, in *Eisenstadt v. Baird* ¹⁷⁴ the Court explained that although the right of privacy inhered in the marital relationship,¹⁷⁵ the "right of privacy . . . is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁷⁶

¹⁶⁹ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

¹⁷⁰ *Id.* at 499. "This court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." *Id.* (quoting *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974)).

¹⁷¹ 381 U.S. 479 (1965).

¹⁷² *Id.* at 484-485.

¹⁷³ *Id.* at 486.

¹⁷⁴ 405 U.S. 438 (1972).

¹⁷⁵ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁷⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); see also, *Casey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (holding that "the decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices").

Thus far, it is evident that the Supreme Court has taken a step by step approach in finding that the right to privacy is fundamental in family and reproductive autonomy, and extends to the family as a unit as well as to individuals, however, the right to privacy is limited. In *Bowers v. Hardwick*,¹⁷⁷ the Court refused to recognize that the fundamental right to privacy extends to homosexual sodomy, even if the act is committed in the home.¹⁷⁸ The Court distinguished the right to privacy as protected in previous cases¹⁷⁹ from the right of homosexuals to engage in acts of homosexual sodomy.¹⁸⁰ The Court could not find a "connection between family, marriage, or procreation on the one hand and homosexual activity on the other."¹⁸¹ Disinclined to find new fundamental rights in the due process clause, the *Bowers* Court stated that "there should be great resistance to expand the reach of [the due process clauses of the Fifth and Fourteenth Amendments] particularly if it requires redefining the category of rights deemed to be fundamental."¹⁸² Although the Supreme Court has recognized the right to privacy as a fundamental right implied within the Bill of Rights, it has limited its application to that which seemingly preserves the morality of the nation.¹⁸³

Under equal protection principles, the protection of a fundamental right requires the government to prove a compelling state interest in infringing the right and that a less restrictive alternative in achieving the desired end was unavailable. In *Bowers*, there was no challenge brought on equal protection grounds, so the issue regarding the level of scrutiny to be used in challenges based on sexual orientation was not addressed.¹⁸⁴ Thus, the Supreme Court has not, to date, ruled on the level of scrutiny to

¹⁷⁷ 478 U.S. 186 (1986).

¹⁷⁸ *Id.* at 195-96.

¹⁷⁹ *Id.* at 190-91.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 191.

¹⁸² *Id.* at 195.

¹⁸³ *Id.* at 196.

¹⁸⁴ Cass R. Sunstein, Note, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1178 (1988).

be used in cases regarding discrimination against homosexuals or bisexuals.¹⁸⁵ However, in *Romer v. Evans*,¹⁸⁶ the Supreme Court, using rational basis review, held that a state constitutional amendment the purpose of which is to harm a politically unpopular group, in this case homosexuals, was found per se unconstitutional.¹⁸⁷ The *Romer* decision could be the beginning for future anti-sexual-orientation discrimination cases and a breakthrough for gays, lesbians and bisexuals in using the courts to combat such discrimination.

It is not anomalous that the Supreme Court in *Romer* used a rational basis level of review. Indeed, most of the decisions in the United States Courts of Appeals have held that such discrimination warrants rational basis review rather than strict scrutiny.¹⁸⁸ However, in *Watkins v. United States Army*,¹⁸⁹ the United States Court of Appeals for the Ninth Circuit held that discrimination based on sexual orientation should be subject to heightened judicial scrutiny.¹⁹⁰ It has been argued that in determining whether child custody or visitation with a parent involved in a same-sex relationship is in the best interests of the child, courts should use the strict scrutiny standard.¹⁹¹

Although the Supreme Court has used strict scrutiny in discrimination cases based on immutable characteristics such as

¹⁸⁵ *Id.*

¹⁸⁶ 517 U.S. 620 (1996).

¹⁸⁷ *Id.* at 635.

¹⁸⁸ See, e.g., *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding that classifications based on sexual orientation are not entitled to strict scrutiny).

¹⁸⁹ 875 F.2d 699 (9th Cir. 1989).

¹⁹⁰ *Id.* The case involved multiple appeals, the last of which is relevant for the present discussion. When *Watkins* appealed the decision of the district court, which had decided the case on remand, a divided panel of judges employed strict scrutiny and held that *Watkins'* equal protection guarantee had been violated because the "army regulations [were] not necessary to promote a legitimate compelling governmental interest." *Watkins v. United States Army*, 847 F.2d 1329, 1352 (9th Cir. 1988). A full court reviewed the issues raised in both of the previous cases and held that the army could not bar *Watkins* from re-enlisting by virtue of his homosexuality, and found it "unnecessary to reach the constitutional issues raised in *Watkins II*." *Watkins*, 875 F.2d 699, 704-705 (9th Cir. 1989).

¹⁹¹ See *supra*, note 22 (arguing that same-sex relationship classification require a strict level of scrutiny review).

gender, race, national origin and illegitimacy, studies indicate that sexual orientation may not necessarily be such a characteristic.¹⁹² For instance, bisexuals may be attracted to persons of both sexes, yet choose to have partners of only one sex.¹⁹³ Similarly, a person may be homosexual, but may choose not to have any same-sex partners or act on an attraction.¹⁹⁴ Thus, it may be argued that while a homosexual may choose not to associate him or herself with homosexual circles or enter into same-sex relationships, people of a particular race or gender do not have the option to make a comparable choice to disassociate themselves from the group to which they belong.¹⁹⁵ Based on this analysis, the courts may be justified bypassing strict scrutiny when deciding cases of discrimination based on sexual orientation. Intermediate scrutiny may be appropriate as homosexuals may be deemed a discreet and insular minority with a history of discrimination as well as a social stigma.¹⁹⁶

In cases involving a homosexual parent who has been denied custody of a child, the courts have tried to justify their decisions based on stereotypes and suppositions that the placement of the child with the homosexual parent might be harmful to the child.¹⁹⁷ As examined in Part II, courts have based their decisions on assumptions that the child might be harassed or stigmatized, the fear that the child's sexual orientation might be affected, or the child's moral development might be harmed.¹⁹⁸ However, the Supreme Court in *Palmore v. Sidoti*¹⁹⁹ ruled that such justifications for custody denials are illegitimate. The Court recognized that although a child of an interracial relationship might be subjected to pressures not otherwise present, the Court could not deny custody

¹⁹² See, e.g., D'Emilio, *Making and Unmaking of Sexual Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915 (1986).

¹⁹³ See *id.*

¹⁹⁴ See *supra*, note 22, at 622.

¹⁹⁵ *Id.*

¹⁹⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

¹⁹⁷ See *supra* note 22, at 630; see also, Gibson, *supra* note 153.

¹⁹⁸ See *supra* note 22, at 630.

¹⁹⁹ 466 U.S. 429 (1984).

of the child based on private biases and the possibility that they might injure the child.²⁰⁰ The *Palmore* Court decided that a child should be punished neither for the circumstances surrounding the child's birth or parentage nor the legal status of her parents. Following this rationale, it can be argued that a court should not punish the child, by denying its homosexual parent custody with simply because the parent is homosexual.²⁰¹

Similarly, in *City of Cleburne v. Cleburne Living Center*,²⁰² the Court ruled that the government's fears of student mockery of the mentally retarded was not a constitutionally sufficient reason to justify the denial of a zoning permit.²⁰³ The Court affirmed the belief that it is not legitimate under the Constitution for a law to be based on a group's fear that an event or circumstances might occur.²⁰⁴ Following this rationale, a child in a same-sex family should not be denied custody with his homosexual parent based on fears of potential public ridicule.²⁰⁵

Although it may be argued that homosexuals are analogous to the mentally retarded in that they have suffered a history of discrimination and social stigma through no fault of their own,²⁰⁶ the Court in *City of Cleburne* used the mere rational basis test.²⁰⁷ At most, the Court's level of scrutiny was slightly more searching than the traditional rational basis review, and has been termed 'mere rationality with a bite.' It seems unlikely that the Supreme

²⁰⁰ *Id.* at 433.

²⁰¹ *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that children of unmarried parents should not be denied benefits afforded to other children).

²⁰² 473 U.S. 432 (1985).

²⁰³ *Id.* at 449.

²⁰⁴ *Id.* at 448 (stating that mere negative attitudes, or fears, unsubstantiated by factors which are properly cognizable in zoning proceeding, are not permissible bases for treating a home for mentally retarded differently from apartment houses, multiple dwellings and the like).

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 461 (stating that the mentally retarded have been subject to a "lengthy and tragic history of segregation and discrimination that can only be called grotesque").

²⁰⁷ *Id.* at 442. The Court stated that "heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation." *Id.*

Court will add groups to those, which already warrant intermediate or strict scrutiny.²⁰⁸

A child should not be denied economic and psychological well being simply because she is in the care of two unmarried adults. The determination of an application for adoption based on the marital status of a child's parents is unconstitutional, unless marital status bears "an evident and substantial relation to the particular interests the statute was designed to serve."²⁰⁹ Hence, marital status should not be weighed in the determination of suitability of potential adoptive parents.

The Federal Constitution does not grant homosexual couples any special rights to adopt children. At most, gay men and lesbians have the right to custody of their children, the right to raise their children, and even the right to a family. However, homosexuals have the right to a family provided that family is composed of a father, mother and a child, that is, a family as it is known in its most traditional sense. Although gay men and lesbians have attempted to invoke substantive due process and equal protection to ascertain recognition of their rights, neither route has proved to be fruitful.²¹⁰

The United States Supreme Court has yet to define expressly the level of scrutiny that should be used in examining issues regarding discrimination against homosexuals.²¹¹ The effect of this lack of guidance on this issue results in the use of the lowest level of review by the courts, or rational basis review, which merely requires that the government action be reasonably related to a legitimate government interest.²¹² For gay persons challenging a

²⁰⁸ United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Discrimination against gender and illegitimate children is reviewed under mid-level scrutiny; discrimination based on race, national origin, or religion are reviewed under strict scrutiny. *Id.*

²⁰⁹ Lalli v. Lalli, 439 U.S. 259 (1978).

²¹⁰ See *supra*, notes 97-149 and accompanying text.

²¹¹ *Chemerinsky*, see *supra* note 106, 634. The Supreme Court has not yet ruled as to whether discrimination based on sexual orientation warrants the application of intermediate or strict scrutiny. *Id.*

²¹² See *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (finding that it is not the dominion of the court to second-guess legislative enactments, such review of the legislature is best made at the polls).

law which the courts will examine using only rational basis review, the battle is a difficult one to win because the government need not demonstrate an actual purpose for the law, but only a conceivable legitimate purpose.²¹³

In addition, in order to determine whether a right is fundamental, the Supreme Court has used the most specific interpretation of a right to examine whether the right is one that is deeply rooted in the history and tradition of the nation.²¹⁴ If the right is not one, which has been deeply rooted in the history and tradition of the nation, it is not fundamental and therefore does not warrant strict judicial scrutiny.²¹⁵ For gay men and lesbians, the right to a "homosexual family" does not constitute a fundamental right. As a result, the homosexual family unit, because it is unconventional, is not protected under the Constitution.

V. RIGHTS OF HOMOSEXUALS TO ADOPT UNDER STATE CONSTITUTIONS

The federal Constitution provides the minimum rights and protections, which the states must confer, to an individual. This means that although the federal Constitution sets out certain protections, the states may, under their own state constitutions, provide additional rights to individuals within a state. However, a state may not offer to an individual less protection under the state constitution than is afforded by the federal Constitution.

For homosexual couples, protections under state constitutions may be a more fruitful source of rights. The preceding discussion indicated that the federal Constitution does not specifically provide any protection for the gay man or lesbian who wants to adopt a child. That is not to say that the same is true under a particular state constitution. Theoretically, a state may, under its state

²¹³ See, e.g., *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

²¹⁴ See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 37 (1996); *Michael H. v. Gerald D.*, 491 U.S. 110 (1988).

²¹⁵ *Chemerinsky*, see *supra* note 106 at 638. The Supreme Court has held that some liberties are so important that they are deemed to be "fundamental" and that generally the government cannot infringe upon them unless the strict scrutiny test is met. *Id.*

constitution, expressly grant homosexual parents the right to adopt children. Or, a state may enact a law, which grants legal rights to a homosexual couple wishing to be married. However, what a state may not do, for instance, is enact a law repealing all legislation providing protection to homosexuals.²¹⁶

If a homosexual couple is denied the right to adopt a child because either the state's adoption statute expressly precludes a homosexual person from adopting or the state criminalizes sodomy and the adoption law, in turn, forbids criminals from adopting children, the homosexual couple may challenge the adoption law on a number of theories.

A. The Right to Privacy

A challenge against a state sodomy statute may be fruitful if a person claims a violation of the right to privacy under the state constitution. A state may, implicitly or explicitly, guarantee the right to privacy under the state constitution and may provide more protection for the individual's right to privacy than does its federal counterpart.²¹⁷ In those states which explicitly grant the right to privacy in their state constitutions,²¹⁸ a challenge to the right of privacy under the state constitution would be stronger than a similar challenge under the federal Constitution, because the latter does not explicitly provide privacy guarantees.²¹⁹ Rather, the right

²¹⁶ *Romer v. Evans*, 517 U.S. 620 (1996).

²¹⁷ See Paula A. Brantner, *Removing Bricks From a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L. Q. 495 (1992) (stating that "whether the right to privacy is explicit or implicit, some states have found their privacy rights more extensive than those found under the federal constitution").

²¹⁸ See *Sexual Orientation and the Law*, Harv. L. Rev. eds., 1989 at 24. Twenty states explicitly provide for the right to privacy. These are: Alabama, Alaska, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Kentucky, Maryland, Louisiana, Montana, Nevada, Ohio, Rhode Island, South Carolina, West Virginia, Washington, Wyoming. *Id.*

²¹⁹ Paula A. Brantner, *Removing Bricks From a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 Hastings Const. L.Q. 495 (1992) at 517.

to privacy has been implied in the United States Constitution through judicial interpretation.

An express guarantee to privacy may include the freedom to make personal choices free from governmental interference.²²⁰ For instance, in *McClosky v. Honolulu Police Department*,²²¹ the Hawaii Supreme Court used the express privacy guarantees under its state constitution to define the right to privacy as the right to be free from the disclosure of personal matters as well as the right to protect important personal decisions from state interference.²²² Thus, it may be argued that the freedom to make personal decisions without state interference includes the right to engage in sexual relations, including sodomy.

Certain states retain anti-sodomy statutes, which criminalize sodomy regardless of whether the act occurs between consenting adults of the same-sex or of the opposite sex.²²³ In such states, homosexual couples are more likely to prevail on a theory asserting sexual privacy under a state constitutional right to

²²⁰ See, e.g., ALASKA CONST. art. I, § 22 (stating that "the right of the people to privacy is recognized and shall not be infringed"); CAL. CONST. art. I, § 1 (providing in pertinent part that "all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and privacy"); FLA. CONST. art. I, § 23 (stating that "every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein"); HAW. CONST. art. I, § 6 (proving that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest"); MONT. CONST. art. II, § 10 (stating "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest").

²²¹ 799 P.2d 953 (Haw. 1990) (holding that Police Department's policy requiring drug testing as a condition to employment did not violate the officer's right to privacy, nor was it an unreasonable search).

²²² *McCloskey*, 799 P.2d at 957.

²²³ Twenty-four states and the District of Columbia criminalize acts of sodomy. See, e.g., *Sexual Orientation and the Law*, note 2 at 9; *Comment, Future Scope of Minnesota's Right to Privacy*, 15 WM. MITCHELL L. REV. 255, 265-66 n. 63 (1989) (explaining that prior to 1962 all fifty states had statutes prohibiting sodomy. In 1962 the American Law Institute proposed decriminalization of private consensual sodomy between adults in its draft of the Model Penal Code. The Institute's commentators viewed the defining of sodomy as a crime as "an attempt to coerce private morality rather than an attempt to prevent harm to individuals or society").

privacy.²²⁴ Therefore, it is important to ascertain whether the state constitution guarantees a right to privacy, explicit or implicit, and what the scope of the right is, i.e., what sort of conduct the privacy guarantee protects. Although the Court in *Bowers v. Hardwick*,²²⁵ held that the federal constitutional right to privacy does not extend to acts of sodomy, the Court expressly stated that the case before it did not raise any "question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those decisions on state constitutional grounds."²²⁶ The decision in *Bowers* did not affect challenges to anti-sodomy statutes under individual state constitutions.

Indeed, challenges to anti-sodomy statutes under state constitutions have, in certain cases, been successful and the statutes have been held to be inconsistent with privacy rights guaranteed to individuals under their state constitutions.²²⁷ For example, in *Morales v. State*,²²⁸ the Texas Court of Appeals held that "if consenting adults have a privacy right to engage in sexual behavior, then it cannot be constitutional, absent a compelling state objective, to prohibit lesbians and gay men from engaging in the same conduct."²²⁹ Similarly, the Kentucky Supreme Court, in

²²⁴ Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses*, 2d ed., Michie Publications, 1996 at § 2-7(a) pg. 128.

²²⁵ 478 U.S. 186 (1986).

²²⁶ *Id.* at 190.

²²⁷ Jennifer Friesen, *supra* note 224, at 129.

Laws punishing private sexual conduct have been deemed inconsistent with state constitutional privacy rights, at least to the extent that such laws criminalize consensual, non-commercial, acts in private locations between adults. Other states adhere to the federal position against finding a right of sexual privacy. The rationale of most of the constitutionally based decisions protecting sexual privacy would extend to such rights regardless of sexual orientation or preference.

Id. at 129-30.

²²⁸ 826 S.W.2d 201 (Tex. Court. App. 1993). Plaintiffs brought a declaratory judgment action challenging the constitutionality of the Texas statute criminalizing private sexual relations between consenting homosexual adults.

Id.

²²⁹ *Id.* at 204-205.

striking down a state anti-sodomy statute which criminalized consensual homosexual sodomy, emphasized that the right to privacy "has been recognized as an integral part of the guarantee of liberty in [the] 1891 Constitution since its inception."²³⁰

Even in the state of Georgia, whose anti-sodomy statute prompted the Supreme Court's decision in *Bowers v. Hardwick*,²³¹ the Georgia Supreme Court has recently conferred a right to privacy greater than that enunciated by the United States Supreme Court.²³² In particular, the Georgia Supreme Court found that sexual activity "conducted in private between adults" is precisely the sort of activity "that reasonable persons would rank as more private and more deserving of protection from governmental interference."²³³ Thus, the Court concluded that "such activity is at the heart of the Georgia Constitution's protection of the right of privacy,"²³⁴ and held the anti-sodomy statute to be in violation of the Georgia State Constitution insofar as it "criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent."²³⁵ The Georgia Supreme Court is the fifth of the highest level state court to invalidate the state's anti-sodomy statute,²³⁶ and may well serve as a catalyst for other courts across the country to invalidate similar statutes.²³⁷

B. The Right To Equal Protection of the Laws

²³⁰ Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

²³¹ 478 U.S. 186 (1986).

²³² See *id.*

²³³ Powell v. State, 1998 WL 804568, *4 (Ga.).

²³⁴ *Id.*

²³⁵ *Id.* at *7.

²³⁶ Sack Kevin, *Georgia's High Court Voids Sodomy Law*, Nov. 24, 1998 NYT-ABS 16, Sec. A, pg. 4. Additionally, in each state where its anti-sodomy statute was rejected by the highest court, the state court ruled that their state constitutions guaranteed more extensive privacy rights than the United States. *Id.*

²³⁷ *Id.* The invalidation of the anti-sodomy statute by the Georgia Supreme Court had special symbolic meaning for the gay right advocates because the Georgia court's opinion has "prompted the United States Supreme Court to declare that the United States Constitution does not confer a fundamental right upon homosexuals to engage in homosexual adoption. *Id.*

Another theory of litigation for homosexuals wishing to challenge an adoption law or an anti-sodomy law, which leads to their preclusion from adopting children, is the principle of equal protection of the laws embodied in most state constitutions.²³⁸ If the law expressly treats different groups of people unequally, then an equal protection claim may arise. In determining whether a particular law violates equal protection, courts have adopted the same three standards of review articulated and employed by the Supreme Court: rational basis, intermediate scrutiny and strict scrutiny.²³⁹ Thus, whether a claim by a homosexual will prevail depends largely on the level of review the court chooses to apply to the state action in question. If a court applies rational basis review, the plaintiff carries a heavy burden because the state need only demonstrate that the action taken is rationally related to a legitimate governmental interest.²⁴⁰ Conversely, if strict scrutiny is applied, the heavy burden of proof shifts to the state and the state must prove that the action taken is necessary to achieve a compelling governmental interest.²⁴¹

Although the Supreme Court has, to date, applied only rational basis review in examining state action that burdens homosexuals,²⁴² individual states are free to use a heightened level of review to determine whether state action violates equal protection. It may be argued that laws treating homosexuals differently from other persons warrant a higher level of review than rational basis.²⁴³ For instance, not only have homosexuals suffered a history of discrimination,²⁴⁴ and political powerlessness,²⁴⁵ homosexuality is in itself an immutable

²³⁸ See, Friesen, *supra* note 224, at § 3-1.

²³⁹ See *supra*, notes 122 to 156 and accompanying text.

²⁴⁰ See *supra*, note 127 and accompanying text.

²⁴¹ See *supra*, note 140 and accompanying text.

²⁴² *Romer v. Evans*, 517 U.S. 620 (1996).

²⁴³ See Harris M. Miller, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV 797 (1984).

²⁴⁴ *Sexual Orientation and the Law*, Harv. L. Rev. eds. 1989 at 10.

²⁴⁵ *Id.*

characteristic.²⁴⁶ Since the Supreme Court has found that these characteristics are subject to intermediate or strict scrutiny, the state courts may choose to apply heightened scrutiny rather than rational basis review. If a state court chooses to apply rational basis review to state action, the challenger of the state action will probably not prevail.²⁴⁷ Conversely, if the state courts apply strict or heightened level scrutiny, then the challenger of the state action has an increased chance of success on an equal protection claim.²⁴⁸

C. New York: an example

New York State does not confer on individuals an express right to privacy under its state constitution.²⁴⁹ Rather, the right to privacy has been implied in its due process clause, strikingly which is similar to its federal counterpart. The New York State Constitution's due process clause states that "[n]o person shall be deprived of life, liberty, or property without due process of law,"²⁵⁰ and is applied in much the same way as the federal Constitution.²⁵¹

²⁴⁶ See *Nabozny v. Polesny*, 92 F.3d 466 (7th Cir. 1996).

²⁴⁷ See *Romer*, 517 U.S. at 620.

²⁴⁸ *Id.*

²⁴⁹ See *Hope v. Perales*, 150 Misc. 2d 985, 992, 571 N.Y.S.2d 972, 977 (Sup. Ct. 1991).

²⁵⁰ Compare, N.Y. CONST. art. I, § 6. This provision states that: "No person shall be deprived of life, liberty or property without due process of law." *Id.* U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." *Id.*

²⁵¹ See Burton C. Agata, *Individual Liberties, The New York State Constitution* THE TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION (1994) at 88. As in the federal system, substantive due process under New York's Constitution requires a state to prove that a deprivation of liberty, life or property be reasonably related to a legitimate governmental interest. The New York State due process clause has a procedural aspect and a substantive aspect, as does the federal due process clause. If the deprivation is of a fundamental right, the courts in New York will require the state to show that the state action was necessary to achieve a compelling state interest. *Id.* See also, *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978). In *Isaacson*, the New York Court of Appeals "recognized that higher standards may be imposed under the state due process clause . . . than under corresponding federal constitutional provisions." *Id.* at 519, 378 N.E.2d at 82, 406 N.Y.S.2d at 718.

Although the right to privacy under the state constitution has not been addressed often, one New York court expressly stated that “the right to privacy [is] guaranteed by the due process clause of the New York State Constitution.”²⁵²

Further, the New York State Constitution guarantees to individuals the equal protection of laws, and provides that “[n]o person shall be denied equal protection of the laws of [New York] state.”²⁵³ Again, New York’s equal protection clause mirrors that of the Fourteenth Amendment of the federal Constitution.²⁵⁴ A claim arising under the equal protection clause will require a choice by the state courts with regard to the appropriate level of judicial review: rational basis review, intermediate scrutiny or strict scrutiny. Depending on the level of review employed by the court, an individual may be conferred greater rights than those granted under the federal Constitution.

However, it is not always necessary for a court to invoke state constitutional provisions if it can extend the rights given to individuals under the federal Constitution. For instance, in invalidating New York’s anti-sodomy statute, the New York Court of Appeals, in a two part decision, applied the federal constitutional rights of privacy and equal protection.²⁵⁵ In

²⁵² Hope v. Perales, 571 N.Y.S.2d 972, 977 (N.Y. Sup. Ct. 1991) (holding that the failure of the Prenatal Care Assistance Program to provide funding for medically necessary abortions violated provisions of the New York Constitution).

²⁵³ N.Y. CONST. art. 1 § 11. This section provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Id.

²⁵⁴ See, e.g., Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522, (1985). In this decision, the Court of Appeals stated that state equal protection law was identical to its federal counterpart. *Id.* at 360, 482 N.E.2d at 7, 492 N.Y.S.2d at 528.

²⁵⁵ See People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

particular, New York's anti-sodomy statute provided that "a person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person"²⁵⁶ yet did not punish the same conduct between two married persons.²⁵⁷ The Court interpreted the federal right to privacy as "[the] right to independence in making certain kinds of important decisions . . . undeterred by governmental restraint"²⁵⁸ and found that there was "no rational basis for decisions such as those made by [the homosexual defendants] . . . so long as the decisions are voluntarily made by adults in a noncommercial, private setting."²⁵⁹ Although the New York Court of Appeals ruled that the anti-sodomy statute was invalid by applying privacy principles, it also held that the statute violated equal protection.²⁶⁰

The anti-sodomy statute drew a distinction between person's married and person's unmarried by criminalizing sodomy with regard to the latter group.²⁶¹ The Court, using a rational basis level of review, concluded that the state's objectives in "protecting and nurturing the institution of marriage"²⁶² did not have "any relationship much less rational relationship"²⁶³ to the prohibitions set out in the anti-sodomy law.²⁶⁴

The New York Court of Appeals used the rights granted under the federal Constitution to overturn New York's anti-sodomy statute and effectively expanded the right to privacy to include consensual sexual activity conducted in the privacy of the home.²⁶⁵ However, the Court could have reached the same decision by invoking the due process and equal protection laws of the New York State Constitution in its analysis.²⁶⁶

²⁵⁶ NEW YORK PENAL LAW § 130.38 (McKinney Supp. 1999).

²⁵⁷ *Onofre*, 51 N.Y.2d at 483, 415 N.E.2d at 937, 434 N.Y.S.2d at 948.

²⁵⁸ *Id.* at 485, 415 N.E.2d at 938, 434 N.Y.S.2d at 949.

²⁵⁹ *Id.* at 488, 415 N.E.2d at 940, 434 N.Y.S.2d at 951.

²⁶⁰ *Id.* at 493, 415 N.E.2d at 944, 434 N.Y.S.2d at 955.

²⁶¹ *Id.* at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.

²⁶² *Id.* at 492, 415 N.E.2d at 943, 434 N.Y.S.2d at 954.

²⁶³ *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 479-481.

²⁶⁶ *Id.* at 482.

Another strategy that homosexual couples may explore to adopt children lies in challenging the definition of family.²⁶⁷ Traditionally, the family has been deemed to consist of a mother, father and their children.²⁶⁸ However, homosexuals may attempt to challenge this traditional view using court decisions which have expanded the definition of family to include persons who are not married to each other, but who live in the same household and share in the responsibilities as does a typical family unit.²⁶⁹ For example, the New York Court of Appeals in *McMinn v. Town of Oyster Bay*, invalidated the definition of family contained in a zoning ordinance because it violated the due process clause of the State Constitution.²⁷⁰ The Court held that a municipality may not “limit the definition of family to exclude a household which in every but a biological sense is a single family”²⁷¹ if [the] household is ‘the functional and factual equivalent of a natural family.’”²⁷² Thus, within the states, homosexuals may challenge the legitimacy of the definition of the family due to the inconsistencies in its application.²⁷³

²⁶⁷ See *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985) (affirming the supreme court judgment that declared article 1, section 1, of the Town of Oyster Bay Building Zone Ordinance invalid because it “prohibits occupancy of a single-family dwelling on the ground that the occupants are not married . . . and not related to each other”).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *McMinn* 66 N.Y.2d at 547-48, 488 N.E.2d at 1241-42, 498 N.Y.S.2d at 129. The ordinance defined “family” as :

(a) Any number of persons, related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit; or (b) any two (2) persons not related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit, both of whom are sixty-two (62) years of age or over, and residing on the premises.

Id.

²⁷¹ *Id.* at 550, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131 (citing *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449 (1994)).

²⁷² *Id.* (citing *Group House v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 272, 380 N.E.2d 207, 210, 408 N.Y.S.2d 377 (1978)).

²⁷³ *Id.*

As illustrated in *McMinn*, the Court of Appeals in New York adopted a broad definition of “family” with respect to zoning ordinances.²⁷⁴ However, the language in New York’s adoption statute expressly allows a traditional family, “an adult husband and his adult wife [to] adopt another person,”²⁷⁵ whereas homosexuals may adopt only as “unmarried persons.”²⁷⁶ Thus, the adoption statute in New York does not expressly state that homosexuals have the right to adopt, and does not recognize a homosexual couple as a family.²⁷⁷

However, more liberal than in most states, the New York adoption statute allows a life-long partner of a gay man or lesbian to adopt the biological child of her partner without severing the parental blood bond.²⁷⁸ Moreover, guidelines adopted by the New York Department of Social Services in 1982 expressly rejected the denial of applications for adoption made by homosexuals based solely on their sexual orientation.²⁷⁹ Homosexuals have, thus, gained the official administrative support that will facilitate a more just review of their applications in their goal to adopt children.²⁸⁰

New York can be viewed as a state with a progressive outlook towards homosexuals. Not only has the highest state court expanded the federal constitutional right to privacy but it has overturned the state anti-sodomy statute. In addition, the state has enacted adoption legislation that allows homosexuals to adopt children.²⁸¹ For homosexual couples, New York’s approach is

²⁷⁴ *Id.* at 547-48, 488 N.E.2d at 1241-42, 498 N.Y.S.2d at 130.

²⁷⁵ N.Y. DOM. REL. § 110 (McKinney 1998) (providing in pertinent part: “an adult unmarried person or an adult husband and his wife together may adopt another person”).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Joseph B. Treaster, *New York Issues Guidelines on Adoptions for State’s Agency*, N.Y. TIMES, Aug. 28, 1982, at 27 (stating that the regulations for the State Adoption Service requires that “anyone 18 years of age and older must be considered as a potential adoptive parent”); *See also*, Shaista-Parveen Ali, Symposium: The Changing Role of the Family in the Law, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009 (1989).

²⁸⁰ *Id.*

²⁸¹ N.Y. DOM. REL. LAW § 110 (McKinney 1998).

liberal and favorable because it does away with the outmoded justifications and stereotypes associated with homosexuality.²⁸² For homosexuals living in states that retain anti-sodomy statutes and/or prohibit homosexuals from adopting children, the developments in New York law provides an example of the ways in which litigation strategies that may be used to achieve similar results in other states.

D. Homosexual rights: recent developments

A recent decision of the Vermont Supreme Court may open the door for homosexuals to challenge the prevailing norms in.²⁸³ That court was faced with a question of whether a state may deny same-sex couples the "benefits and protections that its laws provide to married couples."²⁸⁴ The court held that the plaintiffs were equally entitled to the benefits and protections provided by the state constitution.²⁸⁵ It fell short of implementing its mandate, however, choosing instead to allow the legislature time to "enact legislation consistent with its constitutional mandate."²⁸⁶ The practical effect of this decision is that homosexuals would be able to legally join together as a family.

Perhaps the most progressive state initiative in conferring to homosexuals increased rights over those they are granted under the federal Constitution, was found in a recent Hawaii Supreme Court case allowing two homosexuals to marry. In *Baehr v. Lewin*,²⁸⁷ the court held that denying same-sex couples access to marital status is a sex-based classification that is presumed to be unconstitutional.²⁸⁸

Further, the Circuit Court of Hawaii held that the state failed to prove that the public interest in the well-being of the child would

²⁸² See *supra* note 279, Shaista-Parveen Ali.

²⁸³ See *Baker v. Vermont*, 1999 WL 1211709 (Vt. 1999) (reviewing the constitutionality of the Vermont marriage statutes).

²⁸⁴ *Id.* at *3.

²⁸⁵ *Id.* at *57-58.

²⁸⁶ *Id.* at *67.

²⁸⁷ 852 P.2d 44, 57 (Haw 1993).

²⁸⁸ *Id.* at 67.

be adversely affected by a same-sex marriage.²⁸⁹ Thus, the Hawaii courts created a new status referred to as a reciprocal beneficiary relationship and is open to all Hawaiian couples who are legally prohibited from marrying under the state's laws.²⁹⁰ Although the arrangement did not provide the same sort of favored treatment afforded to married couples who want to adopt children,²⁹¹ it was a major step in the legal recognition of homosexual families.²⁹² However, this step was nullified by the Hawaiian legislature, which defeated the equal protection clause of the Hawaiian Constitution by amending that constitution.²⁹³ The passage of this amendment re-validated the Hawaiian marriage statute, which limited marriage to opposite-sex persons.²⁹⁴ Thus, it is clear that even though the Hawaiian courts were willing to take the steps necessary to allow homosexuals to join in a family relationship, the legislature is not quite ready to take that step.²⁹⁵

VI. CONCLUSION

Misconceptions about homosexuality and a historical fear that children raised by homosexual parents will be traumatized, stigmatized, or raised in an immoral environment have all served as justifications for denying a gay or lesbian parent the right to

²⁸⁹ Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding that the defendant failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage).

²⁹⁰ Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699 (1998). The author argues that "since the public hostility to homosexuals in this country is too widespread to make homosexual marriages a feasible proposal . . . maybe the focus should be shifted to an intermediate solution that would give homosexuals most of what they want." *Id.*

²⁹¹ *Id.* at 1742.

²⁹² *Id.*

²⁹³ Baehr v. Miike, 1999 LEXIS 391 (Haw. 1999). The constitution was amended by adding the following words, "The legislature shall have the power to reserve marriage to opposite-sex couples." *Id.* at *5.

²⁹⁴ *Id.* at 6-7.

²⁹⁵ See *id.*

custody or to adopt a child.²⁹⁶ Gay couples are considered criminals under some state sodomy statutes for engaging in homosexual conduct.²⁹⁷ Since Justice White's opinion in *Bowers v. Hardwick*²⁹⁸ that there is "no connection between family, marriage or procreation on the one hand and homosexual activity on the other."²⁹⁹ Homosexuals have been denied all manner of claims for equal treatment because of the depiction of their lives as immoral.³⁰⁰

Substantive due process analysis indicates that although the Supreme Court has found that parents have a fundamental liberty interest in the care and custody of their child,³⁰¹ the Supreme Court has not expressly stated that individuals have the right to adopt children.³⁰² Nor has the Supreme Court held that homosexuals are denied the equal protection of the laws in relation to adoption.

Individual state constitutions may grant homosexuals greater rights than they are granted under the federal Constitution, but case law indicates that historical misconceptions and judicial biases play a large role in adoption determinations. Although it might be argued that change is occurring at the state level, this is not indicative of change at the federal level in the near future. Notably, homosexuals wishing to adopt have been gaining ground in the legal establishment, as the American Bar Association adopted a resolution in 1999 in support of the right to adopt for gays.³⁰³

²⁹⁶ See generally, *Custody Denials to Parents in Same-sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

²⁹⁷ See *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

²⁹⁸ 478 U.S. 186 (1986). *Hardwick* brought suit to challenge the constitutionality of the Georgia statute that criminalizes sodomy. *Id.* The Court ultimately held that the statute was constitutional. *Id.*

²⁹⁹ *Id.* at 191.

³⁰⁰ See e.g., *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding that classifications based on sexual orientation are not entitled to strict scrutiny).

³⁰¹ *Santosky v. Kramer*, 455 U.S. 745 (1982).

³⁰² *Id.*

³⁰³ Jeffrey G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, 26 HUMAN RIGHTS 7 (Spring 1999). The ABA resolution provides in pertinent part that "the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation

Returning to the triangle used as an illustration of the family unit, the preceding analysis indicates that the vertices between a biological parent and her child is easily formed by virtue of the biological relationship. In some states, such as New York, which allow co-parent adoption without severing the biological bond between the child and its natural parent, a connection may also be formed between the child and its adoptive parent.³⁰⁴ Furthermore, in New York, the adoptive parent may be a homosexual partner of the biological parent.³⁰⁵ In any case, it is possible to create a vertex between the child and its natural parent and one between the child and its adoptive parent. However, the base of the triangle, which in a heterosexual relationship is formed by virtue of marriage, is lacking in the homosexual relationship.

Thus, marriage is the bond that needs to be recognized legally in order to complete the homosexual family unit. In all states, marriage between two people of the same sex is not recognized, and although Hawaii recognizes a "simulacrum of marriage,"³⁰⁶ the sanctity attached to marriage is still lacking.

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shall not be a bar to adoption when the adoption is determined to be in the best interest of the child." *Id.*

³⁰⁴ N.Y. DOM. REL. LAW § 110 (McKinney 1998).

³⁰⁵ *Id.*

³⁰⁶ Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a 'Simulacrum of Marriage,'* 66 FORDHAM L. REV. 1699 (1998).

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