

October 2017

The Crossroads of a Legal Fiction and the Reality of Families

Andrew L. Weinstein
University of Maine School of Law

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Family Law Commons](#), and the [Fourteenth Amendment Commons](#)

Recommended Citation

Andrew L. Weinstein, *The Crossroads of a Legal Fiction and the Reality of Families*, 61 Me. L. Rev. 317 (2017).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol61/iss1/13>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

THE CROSSROADS OF A LEGAL FICTION AND THE REALITY OF FAMILIES

Andrew L. Weinstein

- I. INTRODUCTION
- II. THE EVOLUTION OF THE LEGAL CONSTRUCTION OF “PARENTS” AND “FAMILY”
 - A. *The Authority of the Courts to Intervene and Adjudicate Family Life*
 - B. *Wisconsin’s Approach: A Bellwether Case Provides a Functional De Facto Parent Definition*
 - C. *California’s Approach*
 - D. *New Jersey’s Approach*
 - E. *Washington’s Approach*
 - F. *Maine Addresses the Parent-Child Relationship*
- III. THE ADOPTION OF M.A. DECISION
- IV. FROM THE SOCIAL SCIENCES FIELD TO THE COURTROOM
 - A. *Same-Sex Parenting in a Heterosexual World*
 - B. *Implementing the Research*
 - C. *Application of the Fourteenth Amendment*
 - 1. *Romer v. Evans*
 - 2. *Lawrence v. Texas*
- V. CONCLUSION

THE CROSSROADS OF A LEGAL FICTION AND THE REALITY OF FAMILIES

*Andrew L. Weinstein**

I. INTRODUCTION

In *Adoption of M.A.*,¹ the Maine Supreme Judicial Court, sitting as the Law Court, held that an unmarried, same-sex couple could file a joint petition for adoption of two foster children in their care.² This recent decision is only a fraction of a story that originated a long time ago when same-sex couples began raising children. This Comment begins by examining the role of the state courts and the United States Supreme Court in their exposition of family law relating to adoption by same-sex couples. The United States Supreme Court has periodically weighed in on family law and parenting in the context of the Fourteenth Amendment,³ providing powerful guidance for state courts. In analyzing decisions of several states, the issue of adoption by same-sex couples is explored in the contemporary contexts of de facto parentage,⁴ guardianship, visitation, child support, and marriage. Although certain circumstances raise little doubt as to which individuals constitute the parents of a child, other situations may not be as clear. This Comment will examine the changing definition of a “parent” in cases where roles were not traditionally established, and how courts’ interpretations of who can be a parent, and likewise a family, are changing to meet the needs of families.

Next, this Comment examines the effects of parenting by same-sex couples from a sociological standpoint. Empirical evidence overwhelmingly supports the proposition that children raised by same-sex couples are no different than children parented by heterosexual couples. Accordingly, such social science findings of equality should translate to a presumption of equality in the eyes of the law, thus blinding the process to the sexual orientation of the parents and advancing an argument for parentage based on equality. A legal presumption of this nature would not only find support in the empirical evidence, but would also safely rest upon recent Supreme Court decisions upholding constitutional rights of gay and lesbian persons under the Fourteenth Amendment.

* J.D. Candidate, 2009, University of Maine School of Law. M.S.W. Candidate, 2009, University of Southern Maine. The author would like to thank Professor Nancy Wanderer, his mentor, instructor, and friend, for her enthusiastic support and guidance. Additionally, the author extends his heartfelt appreciation to his parents, sister, and Bethany Chase, as their encouragement and support have allowed this endeavor to embody an incredibly meaningful accomplishment.

1. 2007 ME 123, 930 A.2d 1088.

2. *Id.* ¶ 31, 930 A.2d at 1098.

3. U.S. CONST. amend. XIV.

4. A de facto parent has been defined by one court as a non-biological caregiver who “has participated in the child’s life as a member of the child’s family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent.” *Stitham v. Henderson*, 2001 ME 52, ¶ 25 n.15, 768 A.2d 598, 605 (Saulley, J., concurring) (quoting *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999)).

By painting the contemporary national backdrop of this realm of family law while also weaving in Maine's approach, culminating with the landmark decision in *Adoption of M.A.*, the complexity of the issue at hand is apparent. However, the reader may be left with dissatisfaction regarding our imperfect legal system, which pales in comparison to the frustration experienced by those same-sex couples who are refused the ability to adopt. Despite the inconsistency among the laws of the states on adoption by same-sex couples, a ray of hope lies in the national trend that favors allowing such adoptions. Nevertheless, our nation would be best served by the Supreme Court relying on the Equal Protection Clause of the Fourteenth Amendment to enunciate a uniform standard for adoption that mandates blindness to sexual orientation of the prospective adoptive parents along with consideration of the best interest of the child; thus effecting equality by treating prospective same-sex adoptive couples in the same manner as heterosexual couples. There exists both a rational basis and laudable objective in utilizing the Equal Protection Clause in securing protections for same-sex couples and their children. This would transform a mere ray of hope into the constitutionally guaranteed equality enunciated in the Fourteenth Amendment.

II. THE EVOLUTION OF THE LEGAL CONSTRUCTION OF "PARENTS" AND "FAMILY"

A. *The Authority of the Courts to Intervene and Adjudicate Family Life*

It is unusual that guidance on family law is provided by the United States Supreme Court due to the jurisdictional nature of the issues. However, when provided, such instruction is plenary in nature. For example, in 1880, the Court examined the roots of the equity powers over children:

The general authority of courts of equity over the persons and estates of infants . . . is not questioned. It may be exerted, upon proper application, for the protection of both. This jurisdiction in the English courts of chancery is supposed to have originated in the prerogative of the crown, arising from its general duty as *parens patriae* to protect persons who have no other rightful protector. But . . . it was very naturally exercised by the Court of Chancery as a branch of its original general jurisdiction. The jurisdiction possessed by the English courts of chancery from this supposed delegation of the authority of the crown as *parens patriae* is more frequently exercised in this country by the courts of the States than by the courts of the United States. It is the State and not the Federal government, except in the Territories and the District of Columbia, which stands, with reference to the persons and property of infants, in the situation of *parens patriae*. Accordingly provision is made by law in all the States for the appointment of such guardians, whose duties and powers are carefully defined.⁵

Although state courts possess the requisite jurisdiction over families and children, the privacy of family life is protected from excessive or unwarranted State interference by the Due Process Clause of the Fourteenth Amendment, which provides, "No state shall . . . deprive any person of life, liberty, or property without due process of law . . ."⁶ In applying the Fourteenth Amendment, the Supreme Court stated, "The

5. *Ins. Co. v. Bangs*, 103 U.S. 435, 438 (1880).

6. U.S. CONST. amend. XIV, § 1. See *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (explaining that

history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.⁷ More recently, the Court reiterated this concept when it provided, “Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”⁸

What does the Supreme Court mean when it speaks of “families”? The Court has provided some piecemeal guidance addressing this question, yet there is no cumulative definition. Primarily, the Court has looked to a biological relationship between a parent and child in identifying the existence of a family.⁹ Over sixty years ago the Court articulated, “It is cardinal with us that the custody, care and nurture of the child first reside in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁰

Despite the Court’s emphasis on a biological relationship, in *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*,¹¹ the Court noted that “[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.”¹² In support of this point (and quite ironically because same-sex marriage is only permitted in two states¹³), the Court looked to jurisprudence

the Due Process Clause “does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made”); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972) (holding that parents have a fundamental right to determine the religious upbringing of their children without State interference); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (noting that limitations exist on the power of the state in its ability to make choices for parents on matters of education and upbringing).

7. *Yoder*, 406 U.S. at 232. This approach is aligned with the common law approach of England; families “formed the first natural society, among themselves” WILLIAM BLACKSTONE, 1 COMMENTARIES *47.

8. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

9. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (establishing “[t]he rights to conceive and to raise one’s children” as essential rights of parents).

10. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). It is important to note that in *Prince*, the “parent” was the aunt of the child, who served in the capacity of legal guardian. *Id.* at 159.

11. 431 U.S. 816 (1977).

12. *Id.* at 844.

13. In 2003, Massachusetts became the first State to permit same-sex marriage. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the prohibition of marriage by same-sex couples did not comport with the Massachusetts Constitution on the grounds that it denied same-sex couples the liberty and equal protection afforded to same-sex couples). The court reasoned, “Because marriage is, by all accounts, the cornerstone of our social structure, as well as the defining relationship in our personal lives, confining eligibility in the institution, and all of its accompanying benefits and responsibilities, to opposite-sex couples is basely unfair.” *Id.* at 973 n.5.

In May 2008, the Supreme Court of California invalidated statutory provisions that limited marriage to a union between a man and woman; thus, same-sex marriage became legally permissible. *In re Marriage*

regarding the deeply rooted importance of the institution of marriage, which itself entails a lack of a blood relationship:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁴

Moreover, the *OFFER* Court explained that the familial relationship originates from the “emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children, as well as from the fact of blood relationship.”¹⁵ Additionally, the Court stated that the legal status of families is not controlling in the determination of the family’s rights, but

Cases, 183 P.3d 384 (Cal. 2008) (holding that the State’s failure to designate same-sex “unions” as “marriages” violated the Equal Protection Clause of the California Constitution). The court aptly summarized its conclusion:

[U]nder this state's Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own—and, if the couple chooses, to raise children within that family—constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.

Id. at 399. At the time of publication, this decision was effectively overturned as a result of the statewide referendum known as “Proposition 8,” conducted in November 2008. Nevertheless, the Court’s interpretation is instructive.

In October 2008, the Supreme Court of Connecticut struck down the state’s ban on same-sex marriage, holding that the prohibition constituted violations of due process and equal protection as afforded by the state constitution. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (noting that “because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm”). The court flatly rejected the notion that marriages and civil unions in the State of Connecticut were separate but equal, stating that the disparate treatment was “every bit as restrictive as naked exclusion.” *Id.* at 418 (quoting *Evening Sentinel v. Nat’l Org. for Women*, 357 A.2d 498, 504 (Conn. 1975)).

Vermont, New Jersey, and New Hampshire have created legal unions that provide similar rights to same-sex couples with the exception of the actual label of “marriage.” NATIONAL CONFERENCE OF STATE LEGISLATURES, *SAME SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIP* (2008), <http://www.ncsl.org/programs/cyf/samesex.htm>. Maine, Hawaii, the District of Columbia, Oregon, and Washington have created legal unions that provide a subset of the rights of civil marriage. *Id.* Over half of the states nationwide have incorporated provisions in their state constitutions that limit marriage to heterosexual couples. *Id.*

14. *OFFER*, 431 U.S. at 843-44 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

15. *Id.* at 844 (quoting *Yoder*, 406 U.S. at 231-33).

rather, a more comprehensive inquiry that analyzes the interpersonal relationships is required.¹⁶

In 2000, the Court provided further guidance in *Troxel v. Granville*,¹⁷ striking down a Washington statute on the ground that it unconstitutionally allowed the State to substitute its judgment in matters of childrearing for that of a fit parent.¹⁸ Tommie Granville and Brad Troxel were the unmarried biological parents of their two daughters, Isabelle and Natalie.¹⁹ After the relationship between Tommie and Brad ended, Brad resided with his parents where he regularly brought his daughters during weekend visitation.²⁰ Brad committed suicide in May 1993, and several months later Tommie Granville sought to limit visitation between Brad's parents, Jennifer and Gary Troxel, and her daughters.²¹ The Washington Superior Court for Skagit County initially heard the grandparents' petition for visitation, and broadly interpreted the applicable statute to permit for visitation over the objections of Tommie Granville.²² The Washington Court of Appeals reversed, and the Washington Supreme Court affirmed.²³

In *Troxel*, the Supreme Court set out to resolve this matter by noting: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."²⁴ In reaching its judgment, the Court relied on the "presumption that fit parents act in the best interests of their children."²⁵ Accordingly, the Court concluded that if "a parent adequately cares for

16. *See id.* at 845; *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citation omitted) ("Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony."). Some believe that the family should have the sole ability to determine its rights without state interference, supported by the following policy consideration: A child's need for continuity requires the state to recognize that a new family has been established the moment it has determined who shall be custodial parent(s). *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 38 (1973). The new family deserves, therefore, to be as free of state intervention as any other intact family. *See id.*

17. 530 U.S. 57 (2000).

18. *Id.* At 69. The law at issue stated: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." WASH. REV. CODE § 26.10.160(3) (1994).

19. *Troxel*, 530 U.S. at 60.

20. *Id.*

21. *Id.* at 60-61.

22. *Id.* at 61.

23. *Id.* at 62.

24. *Id.* at 66. *See also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children." (citations omitted)).

25. *Troxel*, 530 U.S. at 68. The Court's reliance on this presumption stems from *Parham v. J.R.* where the Court explained:

[O]ur constitutional system long ago rejected any notion that a child is the mere creature of

his or her children . . . , there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."²⁶ However, the Court cautioned that the challenge to the statute in *Troxel* was as applied to the facts of the case; hence, nonparent visitation statutes of the respective states were not invalidated on a *per se* basis.²⁷ The Court's narrow holding and cautionary remarks serve as a reminder that the individual states govern the world of family law, although guided by the substantive due process rights afforded by the Constitution.

The parent-child doctrine enunciated by the Court has evolved over time as a result of the Court's ambiguity in defining a family (or parents for that matter) and as a result of the Court changing with the needs and social mores of society. We must look to the common law of the states to better understand the applied, functional definitions and how they developed over time to the present day. When looking to the states for guidance, the inherent difficulty is the disparity between states. However, in examining the issue of adoption by same-sex couples, there is a national trend to grant such adoptions.²⁸ To better understand the importance of two (or more) legal parents in the lives of children in the context of adoption by same-sex couples, it is essential to comprehend how courts have addressed circumstances when parentage, and likewise the definition of a family, is in question as is the case with parental rights of third parties who lack a biological relationship to the child. This examination is necessary because adoption is the creation of a legal parent-child relationship between two individuals who lack a blood relation, the same creation enacted by courts in cases of *de facto* parentage and guardianship. Accordingly, an exploration of relevant case law of the states follows.

the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)) (internal quotation marks and citations omitted).

26. *Id.* at 68-69.

27. *Id.* at 73.

28. Statutory provisions in other states allowing an "individual," "person," or "resident" to petition to adopt, have been interpreted to allow such persons to petition jointly. *See, e.g.*, *In the Matter of Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006); *Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. App. 1995); *In re Petition of K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993). Furthermore, a number of states possess statutory authorization permitting joint adoptions by unmarried persons. *See, e.g.*, OR. REV. STAT. ANN. § 109.309(1) (West 2003) ("Any person may petition . . . for leave to adopt another person . . ."); WASH. REV. CODE ANN. § 26.33.140 (West 2005) ("Any person who is legally competent . . . may be an adoptive parent."). Similarly, courts in other jurisdictions have allowed joint petitions for second parent adoptions by unmarried individuals, like the instant case, to proceed on the ground that the biological parents do not relinquish their parental rights. *See, e.g.*, *Sharon S. v. Super. Ct.*, 73 P.3d 554 (Cal. 2003); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002); *Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995); *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

B. Wisconsin's Approach: A Bellwether Case Provides a Functional De Facto Parent Definition

In 1995, the Supreme Court of Wisconsin decided *In re Custody of H.S.H.-K.*,²⁹ holding that a court may grant visitation on the basis of a coparenting agreement between a biological parent and another individual when visitation is in the best interest of the child.³⁰ In this oft-cited³¹ case, two women were in a committed relationship for over ten years.³² The couple resided together and wore rings as symbols of their commitment to each other.³³ After deciding they wanted to raise a child together, one of the women became pregnant through artificial insemination using an anonymous donor.³⁴ Both women attended childbirth classes together, both took time off from work after the baby was born, and the two jointly chose a name for the baby.³⁵ Financial and child-care responsibilities were shared by the two women, and collectively the three considered themselves to be a family with both women dedicating themselves to meeting the needs of the child.³⁶ When the child was approximately four-and-a-half years old, the relationship between the two women ended, and subsequently the biological mother and the child moved out of the shared residence.³⁷

29. 533 N.W.2d 419 (Wis. 1995).

30. *Id.* at 434.

31. *See, e.g., In re E.L.M.C.*, 100 P.3d 546, 559-60 (Colo. Ct. App. 2004) (holding that a former domestic partner possessed standing as a psychological parent to petition for equal parenting time); *In re Hart*, 806 A.2d 1179, 1187-88 (Del. Fam. Ct. 2001) (granting adoption to same-sex partner of an adoptive parent on the ground that the stepparent had standing, the grant of the adoption would not alter the partner's parental rights pursuant to the original adoption, and the adoption was in the best interest of the children); *Janice M. v. Margaret K.*, 910 A.2d 1145, 1148 (Md. Ct. Spec. App. 2006) (concluding that a custody dispute between a legal parent and a de facto parent is best resolved in the same manner as that between two legal parents); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000) (establishing that a *de facto* parent is not required to prove unfitness of the biological parent or exceptional circumstances to be awarded visitation); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 n.11 (Mass. 1999) (determining that a former same-sex partner was the child's de facto parent and therefore the trial court possessed jurisdiction to award visitation); *V.C. v. M.J.B.*, 748 A.2d 539, 550-53 (N.J. 2000) (finding that biological mother's former same-sex partner was the children's psychological parent and as such was entitled to visitation); *Marquez v. Caudill*, 656 S.E.2d 737, 743-45 (S.C. 2008) (relying on the *H.S.H.-K.* four-prong test in reaching the conclusion that stepfather was older child's psychological parent); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 972 (Vt. 2006) (holding that biological mother's former same-sex partner was a parent of the child); *In re Parentage of L.B.*, 122 P.3d 161, 166, 173-74 (Wash. 2005) (for discussion see Part II.F); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 272 n.269 (2006); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 22 n.107, 30 n.149, 74 n.441, 75 n.445, 76 n.448 (2004); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 354-58 nn.61-80 (2002); *see generally* William B. Turner, *The Lesbian De Facto Parent Standard in Holtzman v. Knott: Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135 (2007).

32. *In re H.S.H.-K.*, 533 N.W.2d at 421.

33. *Id.*

34. *Id.*

35. *Id.* The child's last name was a combination of the last names of the biological mother and her partner. *Id.* at 422.

36. *Id.* at 422.

37. *Id.*

Several months later, the biological mother informed her former partner that she was terminating the relationship between the child and the nonbiological parent.³⁸ Following this decision, the nonbiological parent filed a petition for custody and visitation.³⁹

The trial court dismissed the petition on the ground that Wisconsin law did not recognize the relationship that existed between the nonbiological parent and the child.⁴⁰ On appeal, the Supreme Court of Wisconsin held that a trial court has “equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child’s relationship with a biological or adoptive parent.”⁴¹ After meeting these two requirements the court may then consider the best interest of the child in reaching a determination on the issue of visitation.⁴²

The Supreme Court of Wisconsin declared the requirements of a “parent-like relationship” when it provided that

the petitioner must prove four elements: (1) that the biological or adopted parents consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing toward the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.⁴³

Moreover, the court established that for a “significant triggering event” to be present the petitioner “must prove that [the biological or adoptive] parent has interfered substantially with the petitioner’s parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent’s interference.”⁴⁴

The Supreme Court of Wisconsin’s decision in this case was instrumental because it set forth specific requirements qualifying a nonbiological caregiver as a de facto parent, thus taking a major step toward answering the question: “Who can be a parent?” Furthermore, the procedural safeguards implemented by the court protect the due process rights and autonomy of the biological parent by mandating that the parent-like relationship develop only with the permission and support of the biological parent.⁴⁵ Additionally, the court enunciated a mechanism by which “the best interest of a child may override a parent’s right when a parent consents to and fosters another

38. *Id.*

39. *Id.*

40. *Id.* at 423. The decision of the Circuit Court (Dane County) denying a change in custody was affirmed by the Supreme Court of Wisconsin on appeal. *Id.* at 424.

41. *Id.* at 435.

42. *Id.*

43. *Id.* at 435-36 (footnote omitted).

44. *Id.* at 436.

45. *Id.*

person's establishing a parent-like relationship with a child and then substantially interferes with that relationship."⁴⁶

C. California's Approach

In 2005, a California Court of Appeal decided *Steven S. v. Deborah D.*,⁴⁷ which upheld a statute⁴⁸ providing that a sperm donor is not considered to be the natural father of the child, regardless of whether an intimate relationship previously existed between the donor and the mother. Steven S., although formerly in a sexual relationship with Deborah D., donated his sperm for the purposes of impregnating Deborah D.⁴⁹ The court recognized that the State possessed a compelling interest in establishing paternity for all children, yet ultimately concluded that a woman's interest to bear children by artificial insemination without fear of a paternity claim outweighed the State's interest.⁵⁰ Likewise, the court determined that this policy also protected men serving as donors to both married and unmarried women, eliminating liability for child support or other claims.⁵¹

Nearly six months after *Steven S. v. Deborah D.*, the Supreme Court of California decided *Elisa B. v. Superior Court*,⁵² where it held that under the Uniform Parentage Act (UPA), a child may have two female parents, and under such circumstances both parents were financially responsible for the child.⁵³ In this case, two women, Elisa and Emily, entered into a romantic relationship in 1993 and began living together six months later.⁵⁴ The couple decided that they desired children and both wanted to give birth.⁵⁵ Both women chose a mutual donor through a sperm bank so that their children would be "biological brothers and sisters."⁵⁶ Elisa became pregnant in February 1997 and Emily became pregnant in August 1997; subsequently the women attended medical appointments and childbirth classes together as a couple.⁵⁷ Elisa gave birth to Chance in November 1997 and Emily gave birth to twins, Ry and Kaia (hereinafter, "the twins") prematurely in March 1998.⁵⁸ Ry suffered from Down's Syndrome, and

46. *Id.*

47. 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005).

48. UNIF. PARENTAGE ACT (UPA), CAL. FAM. CODE § 7613(b) (West 2004) provides: "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." Section 7613 is part of the UPA, adopted by California, which "provides a comprehensive scheme for judicial determination of paternity, and was intended to rationalize procedure, to eliminate constitutional infirmities in then existing state law, and to improve state systems of support enforcement." *Steven S.*, 25 Cal. Rptr. 3d at 484.

49. *Steven S.*, 25 Cal. Rptr. 3d at 484.

50. *Id.* at 486.

51. *Id.*

52. 117 P.3d 660 (Cal. 2005).

53. *Id.* at 662.

54. *Id.* at 663. The two women considered each other to be partners, and engaged in activities jointly in order to symbolize the committed nature of their relationship. *Id.* Such conduct included the exchanging of rings, opening a joint bank account, and Elisa obtaining a tattoo that translated to "Emily, for life." *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

additionally, he required heart surgery after birth.⁵⁹ After the birth of the three children, the women jointly selected the names, joined their last names by hyphenating them to form the children's last names, both breast-fed all of the children, and identified themselves as coparents of Ry when seeking care for his Down's Syndrome.⁶⁰ Emily did not work after the birth of the children, while Elisa financially supported the household.⁶¹

The couple terminated their relationship in November 1999 and Elisa and Chance moved out.⁶² Elisa initially paid the mortgage payments of approximately \$1,500 per month on the house where Emily and the twins resided, in addition to other expenses.⁶³ Emily's financial circumstances necessitated that she apply for aid.⁶⁴ In November 2000, Emily and Elisa sold the house, and Emily and the twins moved into an apartment.⁶⁵ Thereafter, Elisa paid Emily \$1,000 per month until early 2001, when Elisa lost her position as a full-time employee and told Emily she could no longer provide financial support to Emily and the twins.⁶⁶

In June 2001, the El Dorado County District Attorney filed a complaint in the Superior Court to establish that Elisa was the parent of the twins and to compel Elisa to pay Emily child support.⁶⁷ Elisa responded by filing an answer in which she denied parentage of the twins.⁶⁸ A trial occurred in the Superior Court whereupon the court established that Elisa was a de facto parent on the ground that "[l]egal parentage is not determined exclusively by biology" and that "a person who uses reproductive technology is accountable as a de facto legal parent for the support of that child."⁶⁹ Accordingly, the Superior Court ordered Elisa to pay \$907.50 per child, totaling \$1815 per month in child support.⁷⁰ The Court of Appeal found in favor of Elisa, and directed the Superior Court to vacate its order and dismiss the matter on the ground that Elisa was not a parent of the twins under the UPA, and hence she possessed no obligation to provide financial support.⁷¹ The Court of Appeal reasoned that a child could have only one mother, and because Emily was the twins' biological mother, Elisa had no "legal maternal relationship" with the children.⁷²

The Supreme Court of California granted review and looked to the UPA, adopted by California and contained within the California Family Code, to discern both its plain and implied meanings.⁷³ The court began its analysis by noting the UPA's indifference

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 663-64.

67. *Id.* at 662-63 (footnotes omitted).

68. *Id.* at 663.

69. *Id.* at 664 (emphasis added).

70. *Id.* Elisa was earning \$95,000 per year at the time of trial. *Id.*

71. *Id.*

72. *Id.* at 665.

73. *Id.* at 664.

to marital status,⁷⁴ referencing the following provision: “A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.”⁷⁵ Additionally, the court observed that California’s recently enacted domestic partnership statutes⁷⁶ permit two women to file a “Declaration of Domestic Partnership,” which provides “[t]he rights and obligations of registered domestic partners with respect to a child of either of them [to be] the same as those of spouses.”⁷⁷ Accordingly, the court could “perceive no reason why both parents of a child cannot be women.”⁷⁸

Once the court established that it was possible for the twins to have two female parents, it undertook an analysis to determine whether Elisa was, in fact, a parent of the twins in addition to Emily.⁷⁹ In order to determine Elisa’s status, the court applied the provisions of the UPA utilized to determine whether a *father* and child relationship existed.⁸⁰ Specifically, “a man is presumed to be the natural father of a child if ‘[h]e receives the child into his home and openly holds out the child as his natural child.’”⁸¹ The court briefly addressed the first part of the test, stating that it was “undisputed” that Elisa received the twins into her home.⁸² The focus of the inquiry then turned to

74. *Id.*

75. UNIF. PARENTAGE ACT § 202 (amended 2002).

76. CAL. FAM. CODE §§ 297-299.6. (West 2004). Section 297, in relevant part, provides:

- (a) Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.
- (b) A domestic partnership shall be established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division, and, at the time of filing, all of the following requirements are met:
 - (1) Both persons have a common residence.
 - (2) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
 - (3) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
 - (4) Both persons are at least 18 years of age.
 - (5) Either of the following:
 - (A) Both persons are members of the same sex
 - (6) Both persons are capable of consenting to the domestic partnership.
- (c) “Have a common residence” means that both domestic partners share the same residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return.

CAL. FAM. CODE § 297 (West 2004).

77. *Elisa B.*, 117 P.3d at 666 (quoting CAL. FAM. CODE § 297.5(d) (West 2004)).

78. *Id.* Furthermore, the Supreme Court of California previously recognized that a child could have two female parents when it upheld a second parent adoption where both parents were members of a lesbian couple. *See Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003). In the present case, the court saw no reason why the twins could not have two female parents if an adopted child could have two female parents. *Elisa B.*, 117 P.3d at 666.

79. *Elisa B.*, 117 P.3d at 666.

80. *Id.* at 667.

81. *Id.* (quoting CAL. FAM. CODE § 7611(d) (West 2004)). The court applied the rationale that the basis for presumed fatherhood should equally apply to presumed motherhood. *Id.*

82. *Id.*

whether Elisa openly held out the twins as her natural children.⁸³ Citing the facts mentioned above, the court concluded that Elisa held the twins out as her natural children by assisting Emily in becoming pregnant and subsequently enjoying the rights, and accepting the responsibilities, of parenting the twins.⁸⁴ Thus, “[h]aving helped cause the children to be born, and having raised them as her own, Elisa should not be permitted to later abandon the twins simply because her relationship with Emily dissolved.”⁸⁵ Therefore, the court concluded that Elisa was the twins’ parent under the UPA and as such she possessed an obligation to provide financial support.⁸⁶

D. New Jersey’s Approach

In *Adoption of Two Children by H.N.R.*,⁸⁷ a New Jersey appellate court held that two children could be adopted by their biological mother’s partner and that the adoption was in the children’s best interest.⁸⁸ In that case, two women were committed partners for a significant amount of time, resided together, and intended to have children together.⁸⁹ Through artificial insemination, one of the women became pregnant and gave birth to twins.⁹⁰ Both women actively cared for the children, made parenting decisions jointly, and held themselves out as a family.⁹¹ The biological mother supported the adoption by her partner, and a home study conducted on the family recommended the adoption by the second parent.⁹²

In support of the adoption, the New Jersey Superior Court (Appellate Division) relied on *In re Adoption of B.L.V.B.*,⁹³ where under similar facts, the Supreme Court of Vermont reasoned that the statutory purpose of adoption is to “clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by certain combinations of individuals.”⁹⁴ The Appellate Division determined that granting a second parent adoption would not terminate the parental rights of the biological parent, as that “would produce the unreasonable and irrational result of defeating adoptions that are otherwise indisputably in the best interests of children.”⁹⁵ Furthermore, the circumstances presented “no doubt that the twins’ best interest will be served by the adoption.”⁹⁶

A New Jersey lower court resolved the issue of parentage of a newborn where two females involved in a same-sex relationship proactively sought a determination prior

83. *Id.*

84. *Id.* at 669.

85. *Id.* at 670.

86. *Id.* at 662. In conclusion: “What is sauce for the gander is sauce for the goose.” *Id.* at 673 (Kennard, J., concurring).

87. 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

88. *Id.* at 536.

89. *Id.*

90. *Id.*

91. *Id.* at 537.

92. *Id.*

93. 628 A.2d 1271 (Vt. 1993).

94. *Id.* at 1274.

95. *Adoption of Two Children by H.N.R.*, 666 A.2d at 539 (quoting *In re Adoption of B.L.V.B.*, 628 A.2d at 1274).

96. *Id.* at 541.

to the child's birth.⁹⁷ The two women, Kimberly Robinson and Jeanne LoCicero, began their romantic relationship in the fall of 2003 and subsequently became domestic partners under New York law in December 2003.⁹⁸ The couple decided to have a child, and in mid-2004 Robinson became pregnant through means of alternative insemination with the assistance of a physician.⁹⁹ Robinson and LoCicero married in August 2004 in Canada, and at the time the complaint was filed in March 2005 they resided in New Jersey.¹⁰⁰ On April 30, 2005, Robinson gave birth to a daughter.¹⁰¹ In their complaint, the women sought a declaration of LoCicero's parentage under New Jersey's Artificial Insemination Statute¹⁰² based upon their contention that the statute should be read in a gender-neutral manner.¹⁰³ Under a strict interpretation of the statute, a married man and woman who conceive a child through artificial insemination receive the benefit of a "presumption of paternity [that] attaches at birth."¹⁰⁴

The court began its analysis by noting that New Jersey adopted the UPA in 1982, which supports the State's interest in identifying parentage for the purpose of children garnering support from two parents as opposed to the taxpayers.¹⁰⁵ Additionally, the amendments to the UPA in 2000 and 2002 fostered a more gender-neutral approach, thus allowing the courts to "recognize the obligations of parents in any possible combination and permutation of marriage of the parents, method for conception of the child, and arrangements that intended parents make to have children."¹⁰⁶ Channeling Justice O'Connor's statement in *Troxel* rejecting the notion of a typical American family,¹⁰⁷ the court observed that "[t]he average American family (generally thought to be mom, dad and two children) applies, in fact, to only 23.5% of the American population, a decrease from 45% in 1960."¹⁰⁸ Accordingly, the court looked to legislative guidance and common law precedent in reaching the determination that the overriding concern must be the best interest of the child.¹⁰⁹ Therefore, the court

97. *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005).

98. *Id.* at 1037.

99. *Id.* at 1038. Alternative insemination is defined as a "simple procedure using a squirting device (e.g. a syringe without a needle) to introduce semen into a woman's vaginal canal for the purpose of achieving pregnancy. . . . [T]he phrase is considered less offensive and more descriptive than the more common phrase 'artificial insemination.'" *Id.* at 1037 n.1 (quoting Family Pride Canada, Glossary, <http://www.uwo.ca/pridelib/family/glossary/glossary1.html> (last visited Sept. 19, 2008)).

100. *Id.* at 1037-38.

101. *Id.* at 1037.

102. N.J. STAT. ANN. § 9:17-44 (West 2002). The statute, in relevant part, provides: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." *Id.* § 9:17-44(a).

103. *In re Parentage of Robinson*, 890 A.2d at 1037.

104. *Id.* "The husband is, by operation of law, the natural father of the child." *Id.* (citation omitted).

105. *Id.* at 1039.

106. *Id.* at 1039-40.

107. *Troxel*, 530 U.S. at 63 (noting the difficulties of defining "an average American family").

108. *In re Parentage of Robinson*, 890 A.2d at 1040 (citing U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS, TABLE DP-1 (2000), available at <http://censtats.census.gov/data/US/01000.pdf>).

109. *Id.* at 1040. The legislature established the "best interest of the child" analysis in section 9:2-4 of the New Jersey Code, which was subsequently implemented in the aforementioned case of *Adoption of Two Children by H.N.R.* *Id.*

undertook the endeavor of applying the Artificial Insemination Statute to the circumstances at hand, and established that “the individual seeking equal treatment under the Artificial Insemination statute must show indicia of commitment to be a spouse and to be a parent to the child.”¹¹⁰ With these elements satisfied, coupled with the statutory requirement of assistance by medical personnel, the consideration of the best interest of the child, and the State’s interest in establishing parentage, the court was unable to identify a reason to decline interpreting the Artificial Insemination Statute in a gender-neutral manner.¹¹¹ Hence, the court presumed LoCicero to be the parent of the child.¹¹²

E. Washington’s Approach

In a matter of first impression for the state, the Supreme Court of Washington decided *In re the Matter of the Parentage of L.B.*,¹¹³ and held that a common law claim of de facto parentage existed in the absence of statutory authorization when a former lesbian partner sought shared parentage.¹¹⁴ In June 1989, Sue Ellen Carvin and Page Britain began a romantic relationship and subsequently resided together from September 1989 until February 2001.¹¹⁵ In 1994, the couple decided to conceive a child together, and did so through means of artificial insemination with Britain carrying the child.¹¹⁶ Together, the two women attended prenatal appointments, participated in birthing classes, and signed notarized documents agreeing that they would be the parents of the child.¹¹⁷ On May 10, 1995, Britain gave birth to L.B., a baby girl,¹¹⁸ and the same-sex couple named her in accordance with their respective family names.¹¹⁹ Until L.B. was six years of age, the couple actively coparented her while living together and holding themselves out as a family.¹²⁰ During this time, Carvin and Britain shared parenting rights and responsibilities; both women made decisions of a medical, educational, and disciplinary nature.¹²¹ Additionally, L.B. referred to Carvin as “mama” and Britain as “mommy.”¹²² In 2001, when L.B. was nearly six years old, Britain and Carvin terminated their romantic relationship.¹²³ In the spring of 2002, Britain cut off all of Carvin’s contact with then seven-year-old L.B.¹²⁴ Soon thereafter, Carvin filed a petition in King County Superior Court to establish parentage.¹²⁵

110. *Id.* at 1042.

111. *Id.*

112. *Id.*

113. 122 P.3d 161 (2005).

114. *Id.* at 163.

115. *Id.* at 163-64.

116. *Id.* at 164.

117. *Id.*

118. *Id.* at 163.

119. *Id.* at 164.

120. *Id.*

121. *Id.*

122. *Id.* (footnote omitted).

123. *Id.*

124. *Id.*

125. *Id.*

Upon reaching the Supreme Court of Washington, the primary issue became whether the common law of the State recognized de facto parents, and if so, what rights and responsibilities attached.¹²⁶ The court looked to common law because the “legislature has been conspicuously silent when it comes to the rights of children like L.B., who are born into nontraditional families, including any interests they may have in maintaining their relationships with the members of the family unit in which they are raised.”¹²⁷ Additionally, the court noted that although the “discussion necessarily centers on the interests, rights, and responsibilities of the litigant adults, . . . ‘the best interests of the child’ pervades our judicial consciousness in this field.”¹²⁸

Accordingly, the court cited its “equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities”¹²⁹ in reaching its determination that “[r]eason and common sense support recognizing the existence of de facto parents” and affording them the panoply of rights and responsibilities that attach to parents.¹³⁰ Relying in part on “the persuasive reasoning of out-of-state cases,” the court held that Carvin possessed standing to seek a declaration of de facto parentage.¹³¹ One applicable out-of-state case was the Wisconsin Supreme Court’s *In re Custody of H.S.H.-K.* decision,¹³² from which the Supreme Court of Washington adopted the four criteria for establishment of standing as a de facto parent.¹³³ Additionally, the court cited the Maine Supreme Judicial Court’s statement in *C.E.W. v. D.E.W.*,¹³⁴ where it recognized that a finding of de facto parentage is “limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”¹³⁵ Consequently, with great importance, the court proclaimed that a de facto parent “stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”¹³⁶ The court, quoting the Maine Supreme Judicial Court, concluded that recognition of an individual as a de facto parent “authorizes [a] court to consider an award of parental rights and responsibilities . . . based on its determination of the best interest of the child.”¹³⁷ However, the court went one step further than its counterpart in Maine, clearly articulating that a “de facto parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interest of the child at the center of any such dispute.”¹³⁸

126. *Id.* at 166.

127. *Id.* at 169 (footnote omitted).

128. *Id.* n.10.

129. *Id.* at 166.

130. *Id.* at 176.

131. *Id.*

132. See *supra* Part II.B for discussion.

133. *In re Parentage of L.B.*, 122 P.3d at 176.

134. 2004 ME 43, 845 A.2d 1146. See *infra* Part II.F for discussion.

135. *In re Parentage of L.B.*, 122 P.3d at 177 (quoting *C.E.W. v. D.E.W.*, 2004 ME 43, ¶ 14, 845 A.2d 1146, 1152).

136. *Id.* (footnote and citation omitted).

137. *Id.* (quoting *C.E.W. v. D.E.W.*, 2004 ME 43, ¶ 15, 845 A.2d 1146, 1152).

138. *Id.* The court articulated that “[t]he appropriateness of the ‘best interests’ standard, even in the face of unpredictable and evolving notions, is revealed by the fact that it unequivocally establishes the child as the central focal point of the inquiry.” *Id.* n.26.

F. Maine Addresses the Parent-Child Relationship

In 2001, in *Stitham v. Henderson*,¹³⁹ the Maine Supreme Judicial Court, sitting as the Law Court, noted the existence of a de facto parent, where a nonbiological parent developed a significant parent-child relationship, and that this de facto parent relationship may be recognized by the District Court in determining contact with the nonbiological parent.¹⁴⁰ John Henderson and his wife Norma,¹⁴¹ married in 1986, were named on the birth certificate as the parents of K.M.H. when Norma gave birth to her in 1993.¹⁴² Henderson believed that he was the biological father of the child, and accordingly he developed and fostered a father-daughter relationship with her.¹⁴³ Henderson and Norma divorced in 1996, and the divorce judgment granted shared parental rights of K.M.H. to Henderson and Norma.¹⁴⁴ Several months after the divorce, Norma married David Stitham, and they participated in DNA testing to determine whether Stitham was the biological father of the child.¹⁴⁵ The test results indicated that Stitham's probability of paternity was 99.96%, and subsequent DNA testing excluded Henderson as the biological father of K.M.H.¹⁴⁶

Stitham filed suit against Henderson in the Superior Court, seeking a declaration that Stitham was the biological father of the child.¹⁴⁷ In response, Henderson filed a counterclaim to establish his parental rights.¹⁴⁸ The Superior Court declared that Henderson was not the biological father of K.M.H. and that Stitham was the biological father.¹⁴⁹ Additionally, the judgment dismissed Henderson's counterclaim as not ripe for adjudication,¹⁵⁰ noting that the "District Court is the forum where sensitive family matters should ordinarily be resolved."¹⁵¹ Although the Law Court affirmed the Superior Court's decision that dismissed Henderson's counterclaim,¹⁵² the Law Court broke new ground for the State of Maine in its analysis of the family law issues presented. The *Stitham* case presented a unique dilemma: Could the court recognize that a child had more than two legal parents?

139. 2001 ME 52, 768 A.2d 598.

140. *Id.* ¶ 17, 768 A.2d at 603 (footnote omitted).

141. Norma took Henderson's last name upon marrying him; later, she married Stitham and took his last name. *Id.* ¶ 2 n.1, 768 A.2d at 599.

142. *Id.* ¶ 2, 768 A.2d at 599.

143. *Id.*

144. *Id.* ¶ 2, 768 A.2d at 599-600. In addition to shared parental rights, the divorce judgment, entered in the District Court, awarded primary physical residence of the child to Norma, granted reasonable rights of contact with the child to Henderson, and required Henderson to maintain health insurance for the child and to pay Norma child support. *Id.* ¶ 2, 768 A.2d at 600.

145. *Id.* ¶ 3, 768 A.2d at 600.

146. *Id.* ¶ 3-4, 768 A.2d at 600.

147. *Id.* ¶ 4, 768 A.2d at 600.

148. *Id.* ¶ 5, 768 A.2d at 600.

149. *Id.*

150. *Id.* The Superior Court dismissed Henderson's counterclaim without prejudice for the following reasons: (1) Norma was not a party; (2) Stitham requested nothing other than a declaration of paternity; and (3) Henderson's post-divorce motion to enforce visitation was pending in the District Court. *Id.* ¶ 15, 768 A.2d at 603.

151. *Id.* ¶ 15 n.5, 768 A.2d at 603.

152. *Id.* ¶ 1, 768 A.2d at 599.

For the first time, the Law Court recognized the existence of a de facto parent when it provided: “The parent-child relationship [between Henderson and K.M.H.] . . . places [Henderson] in the position of a de facto parent.”¹⁵³ Furthermore, as a result of his “prior legal relationship to the child and his current role as a de facto parent, the District Court has jurisdiction to decide whether it is in the best interests of K.M.H. for Henderson to have a continuing role in her life and what that role should be.”¹⁵⁴ In a separate concurring opinion, (now Chief) Justice Saufley recognized the evolution of family law, which paralleled the advances in technology and genetics, allowing the possibility for one man to be acknowledged as the legal father of a child through marriage while another man is acknowledged as the biological father.¹⁵⁵ Moreover, Justice Saufley wrote:

Although DNA testing may provide a bright line for determining the biological relationship between a man and a child, it does not and cannot define the human relationship between father and child. When a man has been newly determined to be the biological father of a child, the courts have a responsibility to assure that the child does not, without cause, lose the relationship with the person who has previously been acknowledged to be the father both in the law, through marriage, and in fact, through the development of the parental relationship over time.¹⁵⁶

Although *Stitham* established the existence of a de facto parent in the State of Maine, it remained unclear exactly what functional role a de facto parent could fulfill in the context of the definition of a parent as well as a family.

*In re Guardianship of I.H.*¹⁵⁷ came before the Law Court in 2003 when a biological mother and her same-sex, domestic partner petitioned the Probate Court for co-guardianship of one-year-old I.H.¹⁵⁸ The couple¹⁵⁹ was involved in a committed relationship and decided to have a child shortly after they began residing together.¹⁶⁰ I.H. was conceived through intrauterine insemination¹⁶¹ with sperm donated by an anonymous individual in California through a sperm bank that assured its donors confidentiality and obtained written waivers of claims to parental rights and

153. *Id.* ¶ 17, 768 A.2d at 603.

154. *Id.*

155. *Id.* ¶ 21, 768 A.2d at 604 (Saufley, J., concurring).

156. *Id.* ¶ 24, 768 A.2d at 605 (Saufley, J., concurring) (footnote omitted). *See also* Rideout v. Riendeau, 2000 ME 198, ¶ 28, 761 A.2d 291, 302 (holding that the State has a “compelling interest in providing a forum in which a grandparent, who has acted as a parent to the child . . . may seek continuing contact with the child”).

157. 2003 ME 130, 834 A.2d 922.

158. *Id.* ¶ 3, 834 A.2d at 923.

159. The Law Court utilized the phrase “lesbian partners” in their description of the couple. *Id.* This was the first notable occasion in which the court made an overt observation of the sexual orientation of the couple through a term such as “lesbian.” Arguably, the inclusion of this word symbolized a paradigmatic shift in the ideological perspective of not merely the Law Court and Maine, but those of other progressive (or perhaps more aptly described as fair) states throughout the country, suggesting that a contemporary shifting of norms in society was underway at the time. *See supra* notes 13 and 28.

160. *In re Guardianship of I.H.*, 2003 ME 130, ¶ 3, 834 A.2d at 923.

161. “‘Intrauterine insemination’ is the current term for what used to be called ‘artificial insemination.’” *Id.* ¶ 12 n.4, 834 A.2d at 925-26 (citing UNIF. PARENTAGE ACT § 702 cmt. (2000), 9B U.L.A. 355 (2001)).

responsibilities.¹⁶² Both women held themselves out as coparents and executed a coparenting agreement, a domestic partnership agreement, and wills that designated each other as the guardian of I.H. in the event that either died.¹⁶³

Upon petitioning for co-guardianship, the issues of providing notice of the proceedings to the sperm donor as father and the permissibility of co-guardianship were raised, prompting the Probate Court to report questions surrounding both issues to the Law Court.¹⁶⁴ One complicating factor was the lack of clear statutory guidance on the definition of the term “parent” as it applied to both questions; additionally, as the Law Court observed, Maine has adopted neither the 1973 nor 2000 versions of the UPA.¹⁶⁵ The Law Court concluded that in circumstances where the biological father is an anonymous sperm donor, the court may dispense with the requirement of service on the donor because of the unlikelihood of notifying an anonymous sperm donor, and the belief that anonymous sperm donors desire anonymity and thus forego any claim to parenthood.¹⁶⁶

Although the Law Court discharged the question of co-guardianship as a procedural matter,¹⁶⁷ the court provided guidance to the Probate Court in resolving questions surrounding the appointment of co-guardians. In doing so, the court stated:

A Probate Court has the authority to grant limited guardianships and appoint a guardian with specified and limited duties. ME. REV. STAT. ANN. tit. 18-A, § 5-105 (1998). In determining whether to grant a guardianship, a court decides what is in the best interests of the child. ME. REV. STAT. ANN. tit. 18-A, § 5-204(b)-(c) (1998). This must likewise be true when a court determines whether to grant a full or a limited guardianship or coguardianship.¹⁶⁸

Applying this reasoning, the Law Court alluded to the possibility that a limited guardianship may provide a disposition wherein the biological mother retains all of her parental rights.¹⁶⁹ However, regardless of the Probate Court’s ultimate decision in this matter, the Law Court reiterated the Probate Court’s responsibility to apply a best interest analysis for the child in adjudicating the matter.¹⁷⁰ Thus, this case took *Stitham* to the next level, and stands for the proposition that a same-sex couple may successfully petition the Probate Court for a determination (and in this case a creation) of their legal standing as to parentage.

162. *Id.* ¶ 8, 834 A.2d at 924.

163. *Id.* ¶ 4, 834 A.2d at 924.

164. *Id.* ¶¶ 1-2, 834 A.2d at 923.

165. *Id.* ¶ 12 n.4, 834 A.2d at 925-26. The UPA provides, “A donor is not a parent of a child conceived by means of assisted reproduction.” *Id.* (quoting UNIF. PARENTAGE ACT § 702 (2000), 9B U.L.A. 355 (2001)). “‘Assisted reproduction’ includes ‘intrauterine insemination.’” *Id.* (citing UNIF. PARENTAGE ACT § 102(4)(A) (2000), 9B U.L.A. 7 (Supp. 2003)); *see supra* note 161. Accordingly, same-sex couples benefit from states adopting the UPA because they can seek permanent, legal parenting arrangements for their children conceived through assisted reproduction without fear of an anonymous donor appearing out of the blue and asserting their claim to parenthood.

166. *In re Guardianship of I.H.*, 2003 ME 130, ¶ 16, 834 A.2d at 927.

167. *Id.* ¶ 17, 834 A.2d at 927.

168. *Id.* ¶ 19, 834 A.2d at 927.

169. *Id.* ¶ 20, 834 A.2d at 928.

170. *Id.*

In 2004, the Law Court decided *C.E.W. v. D.E.W.*,¹⁷¹ where it expressly held that a finding of de facto parenthood could result in the District Court's award of parental rights and responsibilities, based on the best interest of the child.¹⁷² C.E.W. and D.E.W. were two women involved in a relationship who resided together.¹⁷³ The couple agreed that D.E.W. would conceive a child through intrauterine insemination, and in anticipation of parenthood, both women changed their last names so that each individual of their family, including their newborn, would all have the same last name.¹⁷⁴ Shortly after the child's birth, both women entered into a parenting agreement "detailing their intention to maintain equal parenting rights and responsibilities for the child."¹⁷⁵ Approximately six years later, C.E.W. and D.E.W. ended their romantic relationship when D.E.W. moved out and left the child with C.E.W. in the family's home.¹⁷⁶ The parties entered into a second parenting agreement that again provided for equal parenting and shared responsibilities, yet explicitly allocated expenses, visitation, and contact.¹⁷⁷ The court summarized the circumstances:

In accordance with their agreements, C.E.W. and D.E.W. have generally parented the child as equals, sharing responsibility for the many decisions and personal sacrifices expected of loving and involved parents. The child, now age nine, has bonded with C.E.W. as his parent. The undisputed material facts suggest that the child is both happy and healthy.¹⁷⁸

Eighteen months after the end of their relationship, C.E.W. filed suit in the Superior Court seeking (1) a declaration of her parental rights and responsibilities for the child and (2) to equitably estop D.E.W. from denying C.E.W.'s parentage.¹⁷⁹ The Superior Court granted C.E.W.'s motion for summary judgment, which declared C.E.W. eligible to be considered for an award of parental rights and responsibilities.¹⁸⁰ In reaching this conclusion, the court accepted the parties' stipulation that C.E.W. had served as the child's de facto parent for the entirety of the child's life.¹⁸¹

On appeal, the Law Court noted, "When exercising its *parens patriae* power, the court puts itself in the position of a 'wise, affectionate, and careful parent' and makes determinations for the child's welfare, focusing on 'what is best for the interest of the child' and not on the needs or desires of the parents."¹⁸² This approach, commonly referred to as the "best interest of the child" standard, was codified in Maine in 1984

171. 2004 ME 43, 845 A.2d 1146.

172. *Id.* ¶ 15, 845 A.2d at 1152.

173. *Id.* ¶ 2, 845 A.2d at 1147.

174. *Id.*

175. *Id.*

176. *Id.* ¶ 3, 845 A.2d at 1147.

177. *Id.*

178. *Id.* ¶ 4, 845 A.2d at 1147.

179. *Id.* ¶ 5, 845 A.2d at 1147-48.

180. *Id.* ¶ 6, 845 A.2d at 1148. The court also granted summary judgment on the second claim, concluding that D.E.W. was "equitably estopped from denying [C.E.W.'s] status as parent of [the child] with all rights and responsibilities of any parent under the State of Maine." *Id.* However, D.E.W. did not appeal the summary judgment as to this claim. *Id.*

181. *Id.*

182. *Id.* ¶ 10, 845 A.2d at 1149 (quoting *Roussel v. State*, 274 A.2d 909, 925-26 (Me. 1971) (footnote omitted)).

and “stands as the cornerstone of the *parens patriae* doctrine.”¹⁸³ Relying on the motion court’s equitable jurisdiction, originating from the English Court of Chancery, the Law Court justified the motion court’s judgment as an embodiment of its *parens patriae* authority.¹⁸⁴ Hence, the Law Court concluded that “when an individual’s status as a *de facto* parent is not disputed and has been so determined by a court properly exercising jurisdiction . . . , the court may consider an award of parental rights and

183. *Id.* ¶ 10, 845 A.2d at 1149-50 (footnote omitted). The “best interest of the child” standard, currently codified in title 19-A, section 1653(3) of the Maine Revised Statutes, provides:

3. Best interest of child. The court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child. In making decisions regarding the child's residence and parent-child contact, the court shall consider as primary the safety and well-being of the child. In applying this standard, the court shall consider the following factors:
 - A. The age of the child;
 - B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;
 - C. The preference of the child, if old enough to express a meaningful preference;
 - D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;
 - E. The stability of any proposed living arrangements for the child;
 - F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;
 - G. The child's adjustment to the child's present home, school and community;
 - H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
 - I. The capacity of each parent to cooperate or to learn to cooperate in child care;
 - J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
 - K. The effect on the child if one parent has sole authority over the child's upbringing;
 - L. The existence of domestic abuse between the parents, in the past or currently, and how that abuse affects:
 - (1) The child emotionally; and
 - (2) The safety of the child;
 - M. The existence of any history of child abuse by a parent;
 - N. All other factors having a reasonable bearing on the physical and psychological well-being of the child;
 - O. A parent's prior willful misuse of the protection from abuse process in chapter 101 in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child . . . ;
 - P. If the child is under one year of age, whether the child is being breast-fed;
 - Q. The existence of a parent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34-A, section 11203; and
 - R. If there is a person residing with a parent, whether that person:
 - (1) Has been convicted of a crime under Title 17-A, chapter 11 or 12 or a comparable crime in another jurisdiction;
 - (2) Has been adjudicated of a juvenile offense that, if the person had been an adult at the time of the offense, would have been a violation of Title 17-A, chapter 11 or 12; or
 - (3) Has been adjudicated in a proceeding, in which the person was a party, under Title 22, chapter 1071 as having committed a sexual offense.

ME. REV. STAT. ANN. tit. 19-A, § 1653(3) (1998 & Supp. 2007) (footnotes omitted).

184. *C.E.W.*, 2004 ME 43, ¶ 11, 845 A.2d at 1151.

responsibilities to that individual as a parent . . . based upon a determination of the child's best interest"¹⁸⁵

The court recognized the importance of de facto parentage and underscored its importance in the greater spectrum of parental rights and responsibilities when it explained that the standard for determining de facto parenthood "implicates both the fundamental liberty interests of natural and adoptive parents, and the protection of those interests within title 19-A's framework for awards of parental rights and responsibilities to parents and third parties."¹⁸⁶ Subsequently, the court refused to formally define the standard for judicial determination of de facto parenthood, leaving this determination to the Maine Legislature or courts in the future.¹⁸⁷ However, the court noted that the ultimate definition of a de facto parenthood standard "must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."¹⁸⁸ The next

185. *Id.*

186. *Id.* ¶ 14, 845 A.2d at 1152.

187. *Id.*

188. *Id.* (footnote omitted). Although the Superior Court noted that the standard for de facto parenthood outlined in section 2.03(1)(c) of the American Law Institute (ALI) Principles of the Law of Family Dissolution was applicable, the court declined to adopt the standard. *Id.* ¶ 14 n.13, 845 A.2d at 1152. Accordingly, the Law Court also refused to adopt the ALI guidelines. *Id.* The ALI provides the following definitions:

- (1) Unless otherwise specified, a *parent* is either a legal parent, a parent by estoppel, or a *de facto* parent.
 - (a) A *legal parent* is an individual who is defined as a parent under other state law.
 - (b) A *parent by estoppel* is an individual who, though not a legal parent,
 - (i) is obligated to pay child support under Chapter 3; or
 - (ii) lived with the child for at least two years and
 - (A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and
 - (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or
 - (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or
 - (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as parent is in the child's best interests.
 - (c) A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
 - (i) lived with the child and,
 - (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform

step within Maine's doctrine of parentage was taken when the court announced the decision of *Adoption of M.A.* in August 2007.

III. THE *ADOPTION OF M.A.* DECISION

On August 30, 2007, the Maine Supreme Judicial Court, sitting as the Law Court, held that title 18-A, section 9-301 (Maine's Adoption Statute)¹⁸⁹ permitted an unmarried, same-sex couple to file joint petitions for adoption of foster children in their care.¹⁹⁰ In this case, two women, A.C. and M.K., filed jointly to adopt two foster children, M.A. and R.A., whose biological parents' parental rights were terminated by the District Court through a child protective proceeding.¹⁹¹ Maine's Department of Health and Human Services placed M.A. and R.A. in the home of the same-sex couple when M.A. was almost four years old and R.A. was four months old.¹⁹² After the couple cared for the children for two years, a home study was conducted, which recommended that A.C. and M.K. be allowed to jointly adopt the siblings.¹⁹³ Subsequently, A.C. and M.K. filed joint adoption petitions for both children and the Probate Court dismissed the petitions on the ground that the court lacked jurisdiction pursuant to the Adoption Statute.¹⁹⁴ A.C. and M.K. appealed.¹⁹⁵

The Law Court began its analysis by looking to the plain meaning of Maine's Adoption Statute. The statute states, in relevant part: "A husband and wife jointly or an unmarried person, resident or nonresident of the State, may petition the Probate

caretaking functions,

- (A) regularly performed a majority of the caretaking functions for the child, or
- (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1) (2000).

189. Title 18-A, section 9-308(b) of the Maine Revised Statutes states:

In determining the best interests of the adoptee, the court shall consider and evaluate the following factors to give the adoptee a permanent home at the earliest possible date:

- (1) The love, affection and other emotional ties existing between the adoptee and the adopting person or persons, the biological parent or biological parents or the putative father;
- (2) The capacity and disposition of the adopting person or persons, the biological parent or biological parents or the putative father to educate and give the adoptee love, affection and guidance and to meet the needs of the adoptee. An adoption may not be delayed or denied because the adoptive parent and the child do not share the same race, color or national origin; and
- (3) The capacity and disposition of the adopting person or persons, the biological parent or biological parents or the putative father to provide the adoptee with food, clothing and other material needs, education, permanence and medical care or other remedial care recognized and permitted in place of medical care under the laws of this State.

ME. REV. STAT. ANN. tit. 18-A, § 9-308(b) (2006).

190. *Adoption of M.A.*, 2007 ME 123, ¶ 1, 930 A.2d 1088, 1090.

191. *Id.* ¶ 2, 930 A.2d at 1090.

192. *Id.*

193. *Id.* ¶ 3, 930 A.2d at 1090.

194. *Id.* ¶ 5, 930 A.2d at 1091.

195. *Id.*

Court to adopt a person, regardless of age, and to change that person's name."¹⁹⁶ The court concluded that the statute was "reasonably susceptible of different constructions," and looked to its history and purpose for direction.¹⁹⁷

In examining Maine's legislative history regarding adoption, the court sought to determine whether the Maine Legislature aimed to define "all possible categories of persons leading to adoptions in the best interests of children."¹⁹⁸ The court concluded that such could not be the case, as new issues periodically arise which fall within the scope and policy of the statute.¹⁹⁹ Furthermore, the court determined that the Adoption Statute was not intended to prohibit unmarried persons from petitioning jointly for adoption.²⁰⁰

The Law Court reasoned that "[a]doption statutes, as well as matters of procedure leading up to adoption, should be liberally construed to carry out the beneficent purposes of the adoption institution and to protect the adopted child in the rights and privileges coming to it as a result of the adoption."²⁰¹ Accordingly, the court recognized the rights, responsibilities, and benefits of joint adoption to include: a continued, certain relationship with an adoptive parent in the event of death of one of the adoptive parents; the eligibility of the child for public and private benefits such as Social Security, employment benefits, and intestate inheritance (among others); and the love, affection, and guidance from two parents instead of one.²⁰²

Citing a "broader, systemic reason" for supporting a broad construction of the Adoption Statute, the court cited the Probate Code's requirement for probate courts to analyze the best interest factors²⁰³ as a mechanism to provide permanence for the child at the earliest possible date.²⁰⁴ Hence, the importance of permanency and stability cannot be understated in the Probate Court's exercise of discretion when evaluating the

196. *Id.* (quoting ME. REV. STAT. ANN. tit. 18-A, § 9-301 (2006)).

197. *Id.* ¶ 16, 930 A.2d at 1093-94.

198. *Id.* ¶ 21, 930 A.2d at 1095 (quoting *Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993)).

199. *Id.*

200. *Id.* ¶ 22, 930 A.2d at 1095.

201. *Id.* ¶ 24, 930 A.2d at 1096 (quoting *In re Estate of Goodwin*, 147 Me. 237, 244, 86 A.2d 88, 91 (1952)).

202. *Id.* ¶ 26, 930 A.2d at 1097. The importance of legal adoption by both parents of a same-sex couple cannot be understated. Children should know that their relationships with both parents are legally stable. Ellen C. Perrin, M.D., Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342 (2002). Furthermore, the two individuals who raise a child ought to have the security that comes along with legal acknowledgment of parental rights and responsibilities. *Id.* The following six elements are achieved when the law recognizes two legal parents (as opposed to one): (1) the second parent's rights and responsibilities are protected if the legal parent dies or becomes incapacitated—this prevents family members of the deceased from successfully petitioning the court to parent the child despite the presence of a legally unrecognized coparent; (2) the second parent's rights are protected if the couple separates, and this would allow the child to maintain relationships with both parents, particularly through visitation; (3) the requirement of child support from both parents is established should the couple separate; (4) the child is guaranteed eligibility of health benefits from both parents; (5) legal footing is provided upon which either parent can provide permission for decisions of a medical, educational, health care, or custodial nature; and (6) financial security for the child is established in the event of death of either parent by ensuring Social Security benefits and other intestate entitlements. *Id.*

203. ME. REV. STAT. ANN. tit. 18-A, § 9-308(b) (2006); *see supra* note 189.

204. *Adoption of M.A.*, 2007 ME 123, ¶ 28, 930 A.2d at 1097.

best interests of a child.²⁰⁵ Moreover, by prioritizing the child welfare goals of Maine's Adoption Statute, the Law Court opted for implementing a construction of the statute that "avoids a result adverse to the public interest."²⁰⁶

IV. FROM THE SOCIAL SCIENCES FIELD TO THE COURTROOM

A. Same-Sex Parenting in a Heterosexual World

In *Troxel*, Justice O'Connor aptly stated, "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."²⁰⁷ It is not uncommon for lesbians and gay men to be parents, as both individuals and couples. "In the 2000 U.S. Census, 33% of female same-sex couple households and 22% of male same-sex couple households reported at least one child under the age of 18 living in the home."²⁰⁸

"[E]very relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment . . ."²⁰⁹ Additionally, there are two potential advantages for children with two lesbian mothers: "First, studies find the nonbiological lesbian co-mothers . . . to be more skilled at parenting and more involved with the children than are stepfathers. Second, lesbian partners in the two-parent families studied enjoy a greater level of synchronicity in parenting than do heterosexual partners."²¹⁰ Furthermore, gay fathers are no different than heterosexual fathers "in providing appropriate recreation, encouraging autonomy, or dealing with general problems of parenting."²¹¹ In fact, "gay fathers have been described to adhere to stricter disciplinary guidelines, to place greater emphasis on guidance and development of cognitive skills, and to be more involved in their children's activities."²¹² Moreover, "there is no reason for concern about the development of children living in the custody of gay fathers; on the contrary, there is every reason to believe that gay fathers are as likely as heterosexual fathers to provide home environments in which children grow and flourish."²¹³

Regarding the children of same-sex parents, "[r]esearch has shown that adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."²¹⁴ Moreover, the American Academy of Pediatrics concluded that "children who grow up with 1 or 2 gay and/or lesbian parents

205. *Id.* ¶ 28, 930 A.2d at 1097-98.

206. *Id.* ¶ 31, 930 A.2d at 1098 (quoting *S. Portland Civil Serv. Comm'n v. City of S. Portland*, 667 A.2d 599, 601 (Me. 1995)).

207. *Troxel*, 530 U.S. at 63.

208. AM. PSYCHOL. ASS'N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004) available at <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf> [hereinafter RESOLUTION].

209. Judith Stacey & Timothy Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AMER. SOC. REV. 159, 176 (2001).

210. *Id.* at 174.

211. Perrin, *supra* note 202.

212. *Id.*

213. Charlotte J. Patterson, *Gay Fathers*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, 397, 412 (Michael E. Lamb ed., 4th ed. 2004).

214. RESOLUTION, *supra* note 208.

fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual.²¹⁵ Furthermore, children of same-sex couples are remarkably free of pathological findings.²¹⁶ Additionally, same-sex parents and their children are similar to heterosexual parents and their children overall in terms of characteristics, traits, and family functioning.²¹⁷ Thus, “no research has shown that the children raised by lesbians and gay men are less well adjusted than those reared within heterosexual relationships.”²¹⁸

Consequently the American Psychological Association (APA) concluded, “There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.”²¹⁹ This conclusion was the basis for the APA’s resolution to resist discrimination against same-sex couples with respect to both joint and second-parent adoptions.²²⁰ Ultimately, the APA announced a powerful statement in their resolution, stating: “Discrimination against lesbian and gay parents deprives their children of benefits, rights, and privileges enjoyed by children of heterosexual married couples.”²²¹

Traditionally, women have faced societal pressure to fulfill a heterosexual role of marrying a man and having children.²²² Along with the civil rights movement, the 1970s witnessed a gay liberation movement, which allowed gay and lesbian individuals to publicly acknowledge their sexual orientations.²²³ This occasionally resulted in one member of a heterosexual relationship “coming out” and identifying him or herself as gay or lesbian.²²⁴ As a result, gay and lesbian parents have continued raising their children either alone or with same-sex partners who fulfill a stepparent role.²²⁵ When a stepparent seeks to adopt a child, and his or her partner is a biological parent, this is referred to as a “second parent” adoption. This is contrasted by the classic adoptive situation where neither member of the couple is a biological parent, and both individuals seek full parental rights through the adoption process, typically through a private adoption agency or through the public child welfare system.

Despite the increasing number of adoptions as well as the growing number of adoptive parents needed, child welfare policies continue to reflect the traditional, dominant “heterocentric” values of society as they relate to children, families, and the

215. Perrin, *supra* note 202, at 341.

216. SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS 199 (4th ed. 1997).

217. *Id.*

218. AM. PSYCHIATRIC ASS’N, POSITION STATEMENT: SUPPORT OF LEGAL RECOGNITION OF SAME-SEX CIVIL MARRIAGE (2005), available at http://www.psych.org/edu/other_res/lib_archives/archives/200502.pdf.

219. RESOLUTION, *supra* note 208 (citations omitted).

220. *Id.*

221. *Id.*

222. Henry M.W. Bos, Frank van Balen & Dymphna C. van den Boom, *Experience of Parenthood, Couple Relationship, Social Support, and Child-Rearing Goals in Planned Lesbian Mother Families*, 45 J. CHILD PSYCHOL. AND PSYCHIATRY 755, 755 (2004).

223. *Id.*

224. *Id.*

225. *Id.*

ongoing oppression of gay and lesbian individuals.²²⁶ “Heterocentrism is understood as a result of heterosexual privilege or heterosexism and is analogous to racism, sexism, and other ideologies of oppression.”²²⁷ Such sentiment, prevalent in the child welfare field, serves as a tool to oppress gay men and lesbians from becoming parents.²²⁸ Despite the movement of the 1970s, which resulted in a great deal of “coming out” by gay men and lesbians, there are still large numbers of gay men and lesbians who choose not to disclose their sexual orientation and this, accordingly, contributes to the invisibility of this minority population.²²⁹ This invisibility leads to the prevalent myths and misconceptions about gays and lesbians, including their ability to effectively parent.²³⁰ The problem is cyclical in nature, as the myths and misconceptions, coupled with hostility and discrimination, are major reasons why gay men and lesbians choose to remain veiled.²³¹ Affirming the equality of gay men and lesbians as parents through cases decided on equal protection grounds would be a significant step toward eviscerating society’s heterocentric stigma surrounding the ability and appropriateness of gay men and lesbians raising children.

B. Implementing the Research

In light of this background, it is difficult to reconcile the actions of state legislatures and courts that refuse to grant same-sex adoptions on the implicit ground that such parenting arrangements are inferior to those consisting of two heterosexual parents. Of course, this idea of inferiority is rarely addressed directly by the legislatures or courts, and one is left to infer such a reason of inequality. Thinking procedurally affords us the opportunity to understand why courts rarely address arguments under the Equal Protection Clause.²³² Starting with the background knowledge that the individual rights of homosexuals are a politically-charged issue, we can see why political figures of all kinds are avoiding the issue. This ambiguity on the part of politicians seems to reflect sizeable opinions by the general public on both sides of the issue. Furthermore, courts are inclined to adhere to the following two principles: (1) taking the easier way out when given the opportunity, and (2) saying no more than they must in their opinions.²³³ Knowing the sensitive nature of the issue, coupled with the

226. GERALD P. MALLON, LET’S GET THIS STRAIGHT: A GAY- AND LESBIAN-AFFIRMING APPROACH TO CHILD WELFARE 1 (1999).

227. *Id.* (citation omitted). “As in the larger social systems, heterocentrism informs much of the child welfare practices and social policies concerning gays and lesbians. Heterosexual privilege underlies all of the statutes, regulations, and case laws that govern child welfare programs in the United States.” *Id.* at 3.

228. *Id.* at 2 (citation omitted).

229. *Id.* (citation omitted). Hence, one reason why it is difficult to obtain an accurate estimate of the number of same-sex couples parenting children, and how many of those couples would jointly adopt if legally permitted.

230. *Id.*

231. *Id.*

232. U.S. CONST. amend. XIV, § 1.

233. For example, in *Adoption of M.A.*, the Law Court reached the conclusion that a same-sex couple could file a joint petition to adopt two foster children in their care on the basis of statutory construction, and not overtly on the basis that a same-sex couple possessed rights equal to those of a heterosexual couple. *See supra* part III. Justice Levy, writing for a unanimous Court, focused on the statutory construction, its procedural implications, and the benefits reaped by the child welfare system. *Adoption of M.A.*, 2007 ME

inclination of courts not to rock the boat if they need not do so, we can see why petitioners' briefs focus on statutory construction and due process arguments rather than those based on equal protection. Consequently, as courts review and consider arguments raised in petitioners' briefs, it is no surprise that decisions are made on less stringent grounds.²³⁴

To defeat undercurrents of inequality, the presumption of equality must extend from the social sciences field to courtrooms across the country in a consistent manner. For this to occur, the responsibility rests upon the shoulders of many throughout the process. For example, more studies are needed to illustrate the benefits, and likewise the lack of detriment, to children raised by same-sex parents. Additionally, such studies should also look at families as a whole, focusing on the overall functioning of the family as a single unit and ideally addressing the benefit to the parents and children of possessing the legal permanence of adoption.

Armed with greater evidence-based ammunition, advocates in support of same-sex adoption should advance this information in support of an equality argument, whether the forum is a courtroom or a congressional committee. The message should be clear that the social science research supports the ultimate premise that equality, due process, and child welfare all mandate that adoptions by same-sex couples be considered in the same manner as heterosexual married individuals.²³⁵ Accordingly, the equality demonstrated in the social sciences field should translate to a legal presumption that same-sex couples be treated in the same manner as a heterosexual couples with respect to ability to parent. This outcome is not only supported by empirical evidence, but is also aligned with recent guidance from the Supreme Court with respect to equality as discussed below.

C. Application of the Fourteenth Amendment

I. Romer v. Evans

In 1996, the Supreme Court decided *Romer v. Evans*,²³⁶ finding an anti-gay Colorado constitutional provision²³⁷ invalid on the ground that the application of the

123, 930 A.2d 1088. In fact, the Law Court made scant reference to the fact that this was a same-sex unmarried couple, and never once mentioned equality. *Id.* Regardless, the decision functionally achieves the same outcome as if the Court had addressed the issue of equality, hence illustrating the desire, functionality, and benefit of the adherence of courts to the idea that they will go no further than they must in explaining their reasoning. However, one drawback of this practice is that it potentially leaves the door open for future arguments based on a seemingly narrow holding.

234. *See supra* part II.

235. *See supra* note 13 and accompanying text. For the footing to be truly equal in the absence of marriage, same-sex couples must be afforded the protections and benefits that a heterosexual marriage would provide. For the purposes of this discussion, the most relevant and important benefit is a joint adoption, vesting both individuals with equal parental rights and responsibilities.

236. 517 U.S. 620 (1996).

237. The enactment, referred to as "Amendment 2" by the parties and state courts, originated in response to ordinances in Denver, Aspen, and Boulder. *Id.* at 623-24. These municipal ordinances afforded protection to persons discriminated against because of their sexual orientation. *Id.* at 624. Amendment 2 provided:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies,

law must be neutral when the rights of individuals are in question.²³⁸ In *Romer*, the amendment in question prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons” from discrimination.²³⁹ The Court concluded that Colorado’s amendment was too “[s]weeping and comprehensive,” and that it removed from gay and lesbian individuals, but no other class, legal protection from discrimination.²⁴⁰ Additionally, its “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”²⁴¹ More simply stated, “The amendment imposes a special disability . . . [in that h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”²⁴²

The Court utilized the vehicle of the Equal Protection Clause of the Fourteenth Amendment as a means to invalidate Colorado’s Amendment 2.²⁴³ In undertaking a traditional Fourteenth Amendment inquiry, the Court sought to find a relationship between “the classification adopted and the object to be attained.”²⁴⁴ The Court explained that the Constitution’s mandate of equal protection required a rational relationship between the legislative action in question and the classification in order to guarantee that classifications are not created to disadvantage groups of persons.²⁴⁵ The Court concluded that no rational relationship existed because Amendment 2 “identifie[d] persons by a single trait and then denie[d] them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”²⁴⁶ Justice Kennedy, writing for the majority, articulated that “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its

political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. (quoting COLO. CONST. art. II, § 30b).

238. *Id.* at 623.

239. *Id.* at 624.

240. *Id.* at 627.

241. *Id.* at 632. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 634-35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

242. *Id.* at 631.

243. *Id.* at 635.

244. *Id.* at 632 (observing that in a typical case “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous”).

245. *Id.* at 633.

246. *Id.* The Court observed that there existed no legislation similar to Amendment 2, and cautioned that “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Id.* (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

assistance.”²⁴⁷ Furthermore, “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”²⁴⁸

2. *Lawrence v. Texas*

Justice Kennedy again delivered the opinion of the Court in 2003 in the landmark case of *Lawrence v. Texas*²⁴⁹ where two men in Houston were charged and convicted for engaging in sexual intercourse with each other under a state law that criminalized intimate sexual conduct between individuals of the same sex.²⁵⁰ The authoritative case at the time was *Bowers v. Harwick*,²⁵¹ decided seventeen years earlier, which sustained a Georgia law that made it a criminal offense to engage in sodomy regardless of the sex of the participants.²⁵² Justice Kennedy, joined by four of his colleagues,²⁵³ analyzed the circumstances broadly under the Fourteenth Amendment and not solely the Equal Protection Clause,²⁵⁴ characterizing the issue as a deprivation of liberty.²⁵⁵ The Court explained that the statutes possessed “more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”²⁵⁶ Moreover, the statutes “seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”²⁵⁷ Furthermore, the Court noted, “When sexuality finds overt expression in intimate

247. *Id.*

248. *Id.*

249. 539 U.S. 558 (2003).

250. *Id.* at 563. The statute provided, “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” TEX. PENAL CODE ANN. § 21.06(a) (2003). “Deviate sexual intercourse” was defined as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” TEX. PENAL CODE ANN. § 21.01(1) (2003).

251. 478 U.S. 186 (1986).

252. *Lawrence*, 539 U.S. at 566.

253. *Id.* at 561. Justices Stevens, Souter, Breyer, and Ginsburg joined Justice Kennedy in forming a five-justice majority, while Justice O’Connor filed a concurring opinion. *Id.*

254. *Id.* at 574-75. Justice Kennedy explained his reliance on the Fourteenth Amendment as follows:

Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants. Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.

Id. at 575.

255. *Id.* at 562. The opinion begins:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

Id.

256. *Id.* at 567.

257. *Id.*

conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”²⁵⁸

The Court concluded that two post-*Bowers* cases, *Romer v. Evans*²⁵⁹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶⁰ cast doubt upon the Court’s willingness to follow *Bowers* pursuant to the doctrine of *stare decisis*.²⁶¹ The Court articulated that *Casey*, which upheld substantive due process rights of the Due Process Clause, “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”²⁶² The *Casey* Court further provided:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁶³

Building upon the reasoning of *Casey*, the *Lawrence* Court determined that upholding the statute in question would deny homosexual persons the autonomy and dignity afforded to heterosexual persons.²⁶⁴ Moreover, the Texas statute advanced no legitimate State interest, and only served to demean a homosexual lifestyle.²⁶⁵ Furthermore, the Court concluded that the liberty afforded by the Fourteenth Amendment gives gay and lesbian persons the right to determine, and act upon, their sexual conduct without interference by the government.²⁶⁶ Therefore, the Court invalidated the Texas statute and emphatically overruled *Bowers*,²⁶⁷ stating that “[i]ts continuance as precedent demeans the lives of homosexual persons.”²⁶⁸ In concluding the majority opinion, the Court provided hope for future constitutional challenges by referring to the concept of the “living” Constitution.²⁶⁹

258. *Id.* at 567.

259. *See supra* Part IV.C.1.

260. 505 U.S. 833 (1992).

261. *Lawrence*, 539 U.S. at 573.

262. *Id.* at 573-74.

263. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

264. *Id.*

265. *Id.* at 578.

266. *Id.*

267. *Id.* In announcing its holding the Court proclaimed, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Id.*

268. *Id.* at 575. During oral argument Justice Breyer described *Bowers* as “harmful in consequence, wrong in theory, and understating the constitutional value.” JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 188 (2007).

269. The concept of the “living” Constitution espouses shifting ideals of society in its interpretation of constitutional rights. “[T]he principle of equality is not a static notion. It is rather a dynamic concept, a moral imperative that constantly challenges us to question our assumptions about human potential.” Wilson Huhn, *Ohio Issue 1 is Unconstitutional*, 28 N.C. CENT. L.J. 1, 11 (2005).

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.²⁷⁰

Justice O'Connor's concurring opinion shared the majority's holding, yet she relied solely on the Equal Protection Clause of the Fourteenth Amendment.²⁷¹ The Texas statute prohibited sexual intercourse only between individuals of the same sex; hence, homosexuals were made "unequal in the eyes of the law."²⁷² In support of this reasoning, Justice O'Connor repudiated the State's argument that its moral disapproval of homosexual sodomy constituted a legitimate interest to justify the statute's prohibition.²⁷³ Troubled by the statute's reliance on moral disapproval, Justice O'Connor firmly defended the Equal Protection Clause with the bright-line explanation that the Court has "*never* held that moral disapproval, without any other asserted state interest, is a sufficient rationale . . . to justify a law that discriminates among a group of persons."²⁷⁴

V. CONCLUSION

"Liberty finds no refuge in a jurisprudence of doubt."²⁷⁵ Same-sex couples seeking to adopt live in a world of uncertainty and confusion, never exactly knowing how legislatures, courts, and society will respond to their "nontraditional" paradigm of "family." Their freedoms surrounding familial relationships, child-rearing, and procreation are trampled upon—yet these are the very sacred areas of a person's existence that the Fourteenth Amendment seeks to protect from unwarranted government intrusion. However, we need not look to the federal judiciary or state courts in order to reach that conclusion. The inequality is simply too clear.

Romer and *Lawrence* do not provide the solution, but they afford guidance as our society moves further along the continuum of discovery of rights, personal freedoms, and equality. Despite these holdings, which along with the various state decisions discussed above are favorable to same-sex couples,²⁷⁶ the nation remains fragmented in terms of a societal public policy. Whether one views this fragmentation in terms of the varied opinions of laypersons, the inconsistent statutory provisions (or lack thereof)

270. *Lawrence*, 539 U.S. at 578-79.

271. *Id.* at 579 (O'Connor, J., concurring). "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Id.* (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

272. *Id.* at 581.

273. *Id.* at 582.

274. *Id.* (emphasis added). Moral disapproval, "like a bare desire to harm the group, is an interest that is insufficient to satisfy rational review under the Equal Protection Clause." *Id.*

275. *Casey*, 505 U.S. at 843.

276. *But see* *Lofton v. Sec'y of Dep't of Children & Family Serv.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding the constitutionality of a Florida law prohibiting homosexuals from adopting children), *cert. denied*, 543 U.S. 1081 (2005).

of the states, or the creative judicial interpretation and reasoning in reaching the scores of different outcomes, one thing is apparent—an unambiguous national standard is necessary. Such a standard would reject the notion of forum-shopping, promote a nationwide approach to child welfare, create more adoptive homes for children in need, and enforce the constitutional ideals of equal protection, due process, and privacy.

Studies have proven that same-sex couples are equally as capable as heterosexual couples with respect to parenting skills and family outcomes. Yet the opposite presumption is still applied to the parenting of same-sex couples in many courtrooms and legislative halls. This negative presumption ought to be eviscerated through an approach advocating a blind eye to sexual orientation, coupled with an analysis under the “best interest of the child” doctrine. This inquiry promotes the emotional needs of the child, and allows the court to assess the parents in terms of their abilities and circumstances just as the court would when petitioned by a heterosexual couple. The decisions of the state courts illustrated above show the many ways that same-sex couples and the respective partners were deemed “parents,” “de facto parents,” “guardians,” and even adoptive parents by the courts adjudicating their cases.

At the end of the day, courts need to decide cases. As such, judges possess the ability to create functional definitions of families based on the circumstances presented in each case. This is the ideal method by which the courts should determine parentage. If there exists indicia that the couple is committed to each other and the child’s needs would be met under the best interest of the child analysis, the family should be afforded the legal protections and benefits that arise from the legally created bond of adoption. This would truly meet the constitutional requirements of equal protection and due process, thus allowing those in search of greater liberty to come forward in an attempt to effectuate their own definition of parentage. Equality of this nature will breed, albeit gradually, societal acceptance of same-sex couples taking on the role of adoptive parents; eventually, the states’ moral disapproval of gays and lesbians will dissipate. The failure to address adoption by same-sex couples in a constitutional manner leaves children, families, and equality in a state of uncertainty—with all three entities being among the most important protected by the Constitution. The time has come for the states, and our nation, to repudiate inequality in the institution of adoption.