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LOCHNER, LAWRENCE, AND LIBERTY

Joseph F. Morrissey*

“It is impossible for us to shut our eyes to the fact that many of the laws of this [regulatory] character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed [for] other motives.”¹

INTRODUCTION

Many of the states of the United States have statutes, constitutional provisions, and court decisions that deny individuals the right to have a family, specifically a spouse and children, based on sexual orientation. Advocates have made a wide variety of arguments attacking such restrictions.² Scholars and litigants frequently argue that such acts violate constitutional guarantees of equal protection or invade a constitutional right to privacy.³ However, such arguments are often defeated by counter arguments presented with religious, moral, and even emotional fervor.

This article presents and defends a new analytical framework based on liberty of contract to advance gay⁴ rights. While the

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1. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

2. *See infra* Part I.A–C.

3. One trial court has even reasoned that one such piece of legislation is an impermissible bill of attainder and that it violates the separation of powers doctrine. *See In re Adoption of Doe*, 2008 WL 5070056, at *22–25 (Fla. Cir. Ct. Aug. 29, 2008) (finding a legislative ban on gay adoption violative of the separation of powers doctrine).

4. The term “gay” is used throughout this article expansively to include all people who are in, are pursuing, or are inclined toward same gender intimate relationships, thus including gay men, lesbian women, and people who might otherwise be referred to as bisexual. The term is used expansively

framework is applied here contextually to the area of gay rights, the framework should also be applicable to a panoply of regulations that affect private orderings—from regulations directly affecting economic relations to those affecting marijuana, gambling, or prostitution, just to name a few examples.⁵

This alternative analytical framework is more neutral and less emotional than either the pleas for equal protection or privacy that advocates of gay rights advance or the religious fervor with which some opponents respond to those pleas. The framework is based on the neutral economic principles embodied in historic notions of liberty of contract.

Those principles were prevalent during what has become known as the *Lochner* era, an era named for the infamous case of *Lochner v. New York*, quoted at the beginning of this article. The *Lochner* case and the era named for it were dominated by a simple presumption that people should be allowed the liberty to order their own affairs through contract and that regulatory encroachments on that liberty interest should be evaluated critically. This article will argue that it is with just such a presumption that restrictions denying individuals the liberty to pursue and have a family should be evaluated and, most likely, found to be unconstitutional.

The framework presented and defended here acknowledges that the Lochnerian analysis of legislation is overly simplistic. Therefore, a modified version of that analysis is advanced. Under this modified Lochnerian analysis, based on the presumption that people should be allowed the liberty to order their own affairs, three questions must be asked when evaluating whether a court should uphold a regulation. The first question is whether a liberty of contract interest is implicated. If not, this framework will not apply. In most situations involving economic arrangements, it is clear that private contractual orderings are involved. *Lochner* itself addressed regulations on

because of the difficulty of exactly categorizing people as specifically or only homosexual in their inclination. See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (discussing the paradox of gay nomenclature and the difficulties presented by attempts to categorize people as definitely or only of one sexual orientation).

5. Application of the framework to other contexts, however, will be left for subsequent articles.

employment arrangements. In that context, there are contracts between employer and employee. Moreover, even in situations that are not clearly or primarily economic in nature, if there is a private ordering, the answer to this foundational question will typically be yes. In the areas of marriage, adoption, and surrogacy (probed in more depth in this article), contracts dictate each arrangement, even if the government is involved. Thus, liberty of contract is implicated even in those social orderings.

The second question then is whether the regulation in question goes too far in trumping the liberty of contract interest of the parties involved. This involves a balancing test. Is the interest advanced by the government sufficient to outweigh the liberty of contract interest implicated? With the presumption running in favor of the liberty interest, the government must have strong reasons why the liberty interest can be burdened. This analysis will not foreclose the ability of the government to regulate in areas that impinge on the liberty of contract but will simply ensure that the burden on that liberty interest is warranted by a legitimate and compelling government interest. As this article will explore, morality alone should not be a sufficient reason.⁶ Typical areas deemed to be within the police powers of the state, namely the health and welfare of individuals, could provide sufficient reasons to legitimately regulate even if a liberty of contract interest is burdened.

The final question that the framework presented here asks is whether the regulation is designed to counter a significant structural or procedural defect in the contracts subject to the regulation in question. If so, the presumption in favor of the liberty of contract interest should shift in favor of the regulation. In these cases, the regulation is more likely than not to be warranted and appropriate, allowing the parties involved to better achieve outcomes that would be achieved if the defects to contracting in that context did not exist.

6. The Supreme Court made this principle clear in *Lawrence v. Texas* when Justice Kennedy cited to Justice Stevens's dissent in *Bowers v. Hardwick*: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . ." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

Further, where there are structural or procedural defects in the contracts that are the subject of regulation, the very notion of a liberty interest in protecting those contracts is illusory and indeed oxymoronic. There is no genuine liberty interest involved in entering into a contract when the structure or procedure involved with that contract is flawed, one where either party is subject to duress, for example, or where one of the parties is likely to be fraudulently induced into the bargain. Thus, in areas where there seems to be a risk of inherent unfairness in bargaining, *ex ante* regulations that impinge on the liberty of contract should be acceptable.

As this article further develops below, the *Lochner* case itself provides a good example of this type of situation. If a court were to determine that the employees of bakeries in 1905 had little or no bargaining ability with their employers, then government intervention to set fair employment conditions between those parties—conditions that might be achieved if the bargaining process was fair—likely would be warranted and appropriate. In such a case under this new framework, the presumption should be in favor of the regulation.

The context explored in this article for this new paradigm is the area of gay rights to family. Thus, this article will begin in Part I by presenting a survey of the primary encroachments on the liberty of gay people to enter into formal arrangements to create a family.⁷

Part II of this article will discuss the *Lochner* decision and develop its potential for renewed application. Part II will also discuss the philosophy and history that led up to that decision and certain other decisions from that era. Finally, Part II will present critical analyses of the downfall of *Lochner* and its analytical framework. The goal of this part is to explain the meaning of the Lochnerian liberty of contract interest.

Part III will explain that many of the traditional criticisms of *Lochner* are unfounded and are currently being re-considered by scholars. Part III will admit to certain shortcomings of the traditional

7. The ability of all people to create informal families is acknowledged and respected, and this article in no way intends to diminish the significance and power of those relationships. In addition, Part I will survey the primary challenges that have been made to those restrictions and the successes and failures of those arguments.

Lochner framework but will set forth more fully the modification to that framework outlined briefly above, making the framework more balanced and appropriate for use by modern courts. Part III will then apply that approach to gay rights to family, hypothesizing the results in each of the three main areas under inquiry here: rights to marry, adopt, and enter into surrogacy arrangements.

Finally, this article will conclude in part with a summary of what has been considered. It will then make some final remarks about the potential usefulness of a modified *Lochnerian* approach to liberty of contract, and thus to liberty itself.

I. THE SYSTEMATIC DENIAL OF GAY RIGHTS TO FAMILY

As much of the case law involving rights to family indicates, the Supreme Court has on many occasions expressed the view that the Constitution does protect individuals' basic liberty interest in having a family, including raising children. Stretching back to the landmark case of *Meyer v. Nebraska*,⁸ interestingly a case decided during the *Lochner* era, the basic notion of the liberty interest in having a family was spelled out clearly.⁹ In *Meyer*, the Court considered and ruled as unconstitutional a state statute that mandated that English be the only language taught in school.¹⁰ The Court did not need to express its view with respect to the wide array of liberties protected by the Fourteenth Amendment, but it took the occasion to do so, stating that

[w]ithout doubt . . . [the Fourteenth Amendment's due process liberty interest] denotes . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long

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

9. *See also* *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress").

10. *Meyer*, 262 U.S. at 403.

recognized at common law as essential to the orderly pursuit of happiness by free men.¹¹

Notwithstanding the strong Supreme Court support for the notion that the United States Constitution protects the rights of people generally to marry and have children, gay people in the United States have been and are still systematically denied those basic rights.¹²

A. *The Right to Marry*

Many U.S. Supreme Court cases over the years have specifically found constitutional support for the liberty to marry. More recent than *Meyer* cited above, but still decades old, is the landmark case, *Loving v. Virginia*.¹³ While *Meyer* was decided during the *Lochner* era, *Loving* was decided in the wake of *Lochner* and at a time when *Lochner* had been widely discredited. Still, *Loving* was as clear as *Meyer* in its support of the liberty of people to marry when, in 1967, it struck down Virginia's legislation that made interracial marriage illegal.¹⁴ Regardless of the rhetoric discrediting *Lochner* and its support of liberty of contract, *Loving* stands as testimony to the fact that the liberty to marry was still guarded dearly in the post-*Lochner* period.

In *Loving*, it is disturbing but instructive to note that the trial judge was convinced, as a moral and religious matter, that marriage should not exist between people from different races. In his opinion he wrote unabashedly,

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for

11. *Id.* at 399.

12. *See infra* Part I.A–C.

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

14. *Id.* at 2.

such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹⁵

The ease with which the trial court was able to invoke religion and morality as a basis for its decision is shocking. However, many modern arguments opposing gay rights to family are similarly premised, though perhaps slightly more disguised.¹⁶ In overturning the trial court's conclusion, the Supreme Court denounced the trial court's reasoning and again reiterated its support for the general liberty interest of people of all kinds to marry: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."¹⁷

Ultimately, the *Loving* Court declared that the prohibition on interracial marriage violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution for reasons that "reflect the central meaning of those constitutional commands."¹⁸ The prohibition violated the Equal Protection Clause by impermissibly denying individuals the right to marry the person they chose based solely on their racial classifications.¹⁹ The Court found "patently no legitimate overriding purpose independent of invidious racial discrimination" to justify the legislation.²⁰ The prohibition violated the liberty interest of the Due Process Clause on similar but slightly broader grounds—it generally denied individuals the basic liberty to marry.²¹ As the Court put it, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."²²

15. *Id.* at 3.

16. *See, e.g.*, Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1376–77, 1378 (2007) (arguing the legalization of same-sex marriage alters the meaning of heterosexual marriage through "the transformative power of inclusion," and "constitutes a very real and dangerous attack upon the institution of conjugal marriage").

17. *Loving*, 388 U.S. at 12.

18. *Id.* at 2.

19. *Id.* at 12.

20. *Id.* at 11.

21. *Id.* at 12.

22. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and citing *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888)).

Still other, more recent cases reflect this same strong support for the rights of people to marry. In 1978, the Supreme Court decided *Zablocki v. Redhail*,²³ striking down a Wisconsin statute requiring individuals who have child support obligations to get court permission to marry. The Court found the statute to be an unconstitutional limitation on the liberty to marry, “reaffirming the fundamental character of the right to marry.”²⁴ Still, the Court did state that reasonable restrictions on marriage may be imposed provided that those restrictions do not significantly interfere with the right to marry.²⁵

In contrast to these cases that illustrate the importance of the right to marry in constitutional law jurisprudence, it is well known today that many states have enacted legislation and even constitutional amendments restricting marriage to a union between one man and one woman.²⁶ Thus, no gay couple can enter into a marriage contract in those states, despite the strong Supreme Court support for the fundamental liberty interest in choosing whether and whom to marry.²⁷ Twenty-nine states currently have constitutional provisions that restrict marriage to one man and one woman.²⁸ Eleven states have statutes that do the same thing.²⁹

23. *Zablocki v. Redhail*, 434 U.S. 378 (1978).

24. *Id.* at 386.

25. *Id.*

26. Most recently, Florida and California have enacted such amendments. On November 4, 2008, citizens of Florida passed Proposition 2, which amended the Florida constitution to include the following language: “Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.” FLA. CONST. art. I, § 27. On the same day, the citizens of California passed Proposition 8 pursuant to which a new section (7.5) was added to Article I of the California constitution, stating: “Only marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5, *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Interestingly, on May 26, 2009, the California Supreme Court ruled that the ballot initiative was constitutional but that the 18,000 homosexual marriages that pre-dated the constitutional amendment would remain valid. *See* John Schwartz, *Ruling Upholds California’s Ban on Gay Marriage*, N.Y. TIMES, May 27, 2009, at A1. In a much watched federal court challenge, California’s Proposition 8 was ruled unconstitutional as violative of both equal protection and due process rights. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

27. For the status of gay marriage in the states, see *infra* Appendix A: State Marriage and Relationship Laws.

28. Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), California (2008), Colorado (2006), Florida (2008), Georgia (2004), Kansas (2005), Idaho (2006), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (2000),

On the federal level, in 1996, Congress passed the Defense of Marriage Act (DOMA) pursuant to which no state need recognize a marriage from another state other than one that is between one man and one woman.³⁰ DOMA also defines marriage on the federal level as a union between one man and one woman.³¹

By contrast, there are now five states and the District of Columbia that have legalized same-sex marriages.³² That number would have been six but for the fact that a statute making same-sex marriage legal in Maine was repealed through a referendum on November 3, 2009.³³ The statute had been passed just six months earlier. Further, another five states have some form of same-sex relationship recognition, in the form of either domestic partnerships or civil unions.³⁴

1. Cases Supporting the Marriage Ban

One of the earliest cases to present a constitutional claim of a right to gay marriage was *Baker v. Nelson* in 1971.³⁵ In that case, the Minnesota Supreme Court acknowledged that *Loving* stood for limited government intrusions into the right to marry but reasoned that the gay marriage ban was completely different from the interracial marriage ban and did not merit constitutional protection.³⁶

Nevada (2002), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia (2006), and Wisconsin (2006). Human Rights Campaign, Statewide Marriage Prohibitions, http://www.hrc.org/documents/marriage_prohibitions_2009.pdf (last visited Sept. 22, 2010) [hereinafter Human Rights Campaign, Statewide Marriage Prohibitions].

29. Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming. *Id.*

30. Defense of Marriage Act, 28 U.S.C. § 1738C (2006).

31. 1 U.S.C. § 7 (2006).

32. Connecticut (2008), District of Columbia (2010), Iowa (2009), Massachusetts (2004), New Hampshire (2010), and Vermont (2009). Human Rights Campaign, Marriage Equality and Other Relationship Recognition Laws, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited Sept. 22, 2010) [hereinafter Human Rights Campaign, Marriage Equality].

33. See Abby Goodnough, *Gay Rights Rebuke May Bring Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25 (describing the results as especially surprising in “Maine, with its libertarian leanings”).

34. California (domestic partnerships), District of Columbia (domestic partnerships), Nevada (domestic partnerships), New Jersey (civil unions), Oregon (domestic partnerships), and Washington (domestic partnerships). Human Rights Campaign, Marriage Equality, *supra* note 32.

35. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

36. The court in *Baker* described the distinction between interracial and same-sex marriage as both “commonsense” and “constitutional.” *Id.* at 187.

The U.S. Supreme Court dismissed the appeal, claiming that there was no federal question presented and that the issue was one solely of state law.³⁷

There has been a string of subsequent cases regarding gay marriage, some citing *Baker*, that have found, similarly, that there is no constitutional right for same-sex marriages.³⁸ Those cases routinely provide only rational basis review of the marriage ban, the lowest level of judicial scrutiny for legislative regulations.³⁹ In accord with rational basis review, legislatures need only have some rational basis for passing the regulation.⁴⁰ The basis need not even be proved to be accurate or, for that matter, even be the ultimate reason why the regulation was passed. There simply needs to be some rational basis for the regulation. Courts upholding a ban on gay marriage have typically reasoned that protecting traditional marriage and family is a sufficiently rational basis for the ban.⁴¹

37. *Baker v. Nelson*, 409 U.S. 810 (1972).

38. *See, e.g., Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005) (finding no fundamental right to marry a person of the same-sex); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) (finding marriage to be a fundamental right, but not same-sex marriage because it is not “deeply rooted”); *Andersen v. King County*, 138 P.3d 963, 976–79 (Wash. 2006) (finding that same-sex marriage is not included in the fundamental right to marry because it is not in the state’s history and tradition).

39. *See, e.g., Wilson*, 354 F. Supp. 2d at 1307–08 (specifically deciding that both DOMA and the Florida gay marriage ban warranted only rational basis review, despite the litigants appeal that *Lawrence* dictated a higher level of scrutiny).

40. *Id.* at 1308 (explaining that when rational basis review is being used, the plaintiff has the burden of negating every possible basis upon which the legislation might have been passed); *Andersen*, 138 P.3d at 980. In *Andersen*, the plaintiffs claimed that the driving animus behind Washington’s DOMA was anti-gay sentiment:

[Plaintiffs] say that the act’s prime sponsor distributed an article on the House floor saying that gays and lesbians are not normal, House Floor Debate at 23 (Wash. Mar. 18, 1997) (CP at 467), and told the legislature’s only openly gay member that homosexuals should be put on a boat and shipped out of the country, House Floor Debate at 40 (Wash. Feb. 4, 1998), and that another legislator said that when individuals engage in homosexual activity they confirm a “disordered sexual inclination” that is “essentially self-indulgent,” House Floor Debate at 44 (Wash. Feb. 4, 1998) (CP at 471). They also point to antigay sentiments expressed during legislative committee meetings.

Id. at 980. Despite these motivations, the *Andersen* Court went on to reason that there had to be some legitimate reasons for passing the act, those reasons being related to the stability of a traditional family. *Id.* at 985.

41. *See, e.g., id.* at 983 (“Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”).

The federal DOMA was challenged in a California state court in the case of *Smelt v. United States*.⁴² The U.S. Department of Justice filed a motion to dismiss the challenge in that case on June 11, 2009.⁴³ In the memorandum supporting that motion, the United States used traditional reasoning, arguing vehemently that DOMA does not violate any provisions of the U.S. Constitution because the ban on gay marriage meets rational basis review.⁴⁴ *Smelt v. United States* was ultimately dismissed on a technicality.

Recently, DOMA was challenged in two cases in Massachusetts. In one of those cases the Commonwealth of Massachusetts itself has filed a suit against the federal government.⁴⁵ In that case, the federal district court ruled that DOMA violates the Tenth Amendment of the U.S. Constitution.⁴⁶ The Tenth Amendment reserves powers to the states that are not specifically granted to the federal government. In its decision, the district court reasoned that marriage is a matter of state law, and therefore the federal government overstepped its powers in attempting to define marriage in DOMA.⁴⁷

In the other case challenging DOMA in Massachusetts, a gay advocacy group, Gay and Lesbian Advocates and Defenders, sued to get federal marriage benefits for seven gay couples and three survivors of same-sex spouses who had been married in Massachusetts.⁴⁸ In its opinion on that case, the federal district court

42. *Smelt v. United States*, No. 09-00286 (D. Cent. Cal. S. filed Mar. 9, 2009).

43. United States' Motion to Dismiss and Memorandum of Points and Authority in Support of Defendant United States' Motion to Dismiss, *Smelt v. United States*, No. 09-00286 (D. Cent. Cal. June 11, 2009).

44. Memorandum for the Defendant, *Smelt*, *supra* note 43, at 32–37. The case was dismissed on August 24, 2009, on technical grounds. Liz Seaton, *Despite Court Rejection, A Measure of Progress on DOMA*, ACS BLOG, (Aug. 25, 2009, 4:00 PM), <http://www.americanconstitutionsociety.org/taxonomy/term/735>.

45. Complaint, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, No. 09CV11156, 2009 WL 1995808 (D. Mass. July 8, 2009); Martin Finucane, *Mass. Challenges Federal Defense of Marriage Act*, BOSTON GLOBE, July 8, 2009, available at http://www.boston.com/news/local/breaking_news/2009/07/mass_to_challen.html?s_campaign=8315.

46. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

47. *Id.*; Abby Goodnough & John Schwartz, *Judge Topples U.S. Rejection of Gay Unions*, N.Y. TIMES, July 9, 2010, at A3.

48. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010), available at www.glad.org/uploads/docs/cases/2010-07-08-gill-district-court-decision.pdf.

ruled that DOMA violated the Equal Protection Clause by denying gay, married people the rights afforded to married people generally.⁴⁹ While these two rulings represent a tremendous advance in the fight to recognize a right for gay people to marry, they are sure to be appealed.

2. *Cases Against the Marriage Ban*

Some recent state court cases have been ardent in their positions that bans on gay marriage violate their state constitutions. Among those recent cases are cases from the highest courts of Massachusetts and California. In *Goodrich v. Massachusetts Department of Public Health*, the Massachusetts Supreme Judicial Court ruled that any prohibition on gay marriage violated their state constitution's equal protection and due process clauses.⁵⁰ The Massachusetts court declined to find that the restrictions warranted heightened strict scrutiny review⁵¹ (as discrimination based on race, for example, would). Still, even applying the lower rational basis review, the court found the justifications for the ban against gay marriage to have no rational basis at all. As the court explained, "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."⁵² The court further stated, "That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law."⁵³ The restrictions were thus struck down.⁵⁴ As a result, gay marriage is now legal in Massachusetts.

In California, a more complicated landscape has emerged. In the summer of 2008, the Supreme Court of California overturned an appellate court decision to uphold a statutory ban on gay marriage in

49. *Id.* at 397.

50. *Goodrich v. Mass. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

51. *Id.* ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.")

52. *Id.* at 948.

53. *Id.* at 949.

54. *Id.* at 961.

California.⁵⁵ The appellate court had reasoned that (1) the legislature had a reasonable interest in promoting the traditional definition of marriage, and (2) the legislature had spoken by passing the ban, which represented the widely held views of Californians that gay marriage should be banned.⁵⁶ The California Supreme Court rejected these arguments and instead applied the heightened strict scrutiny test to the discrimination against gay people represented by the marriage ban.⁵⁷ Under strict scrutiny, the marriage ban must have been necessary to achieve a compelling state interest.⁵⁸ The California Supreme Court could not find the ban on gay marriage necessary or at all related to a compelling state interest and struck it down.⁵⁹

Nonetheless, Californians were presented with a constitutional amendment in November of 2008 to include the ban on gay marriage in their state constitution.⁶⁰ The measure passed, restoring the ban on gay marriage that the California Supreme Court had rejected.⁶¹ A subsequent state court challenge to the constitutional amendment was unsuccessful.⁶² However, the constitutional amendment was challenged in federal court in the case of *Perry v. Schwarzenegger*.⁶³ The *Perry* court reversed the law in California again, ruling that Proposition 8 violated both the equal protection and due process provisions of the Constitution.⁶⁴

Even though the California Supreme Court was unsuccessful in removing the ban against gay marriage in its state, two other states have very recently followed the California Supreme Court's lead and used a heightened degree of scrutiny to find their state's ban on gay

55. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

56. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 718–26 (Cal. Ct. App. 2006).

57. *In re Marriage Cases*, 183 P.3d at 446.

58. *Id.* at 452.

59. *Id.*

60. See *supra* note 26 and accompanying text (discussing the language and effect of the constitutional amendment).

61. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1–3, available at http://www.nytimes.com/2008/11/06/us/politics/marriage.html?_r=1&scp=6&sq=%22gay+marriage%22+and+california&st=nyt.

62. Schwartz, *supra* note 26.

63. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); see Eva Conant, *The Conscience of a Conservative*, NEWSWEEK, Jan. 18, 2010, at 46–54.

64. *Schwarzenegger*, 704 F. Supp at 1004.

marriage unconstitutional. In 2008, the Connecticut Supreme Court found, among other things, that discrimination against gay people warrants the intermediate standard of constitutional review and that a ban on gay marriage cannot meet that standard.⁶⁵ Then, in early 2009, the Iowa Supreme Court did the same.⁶⁶

B. The Right to Have Children

There are also a variety of statutes and cases that are specifically aimed at the right of gay people to have children. The regulations on having children fall into two general categories that correspond with avenues for individuals or couples to have children when they are unable to have them naturally: adoption and surrogacy.

1. Adoption

Most of the states in the United States have adoption statutes that are dictated by proceeding in the “best interests” of the child.⁶⁷ In Arkansas, Florida, Michigan, Mississippi, and Utah, however, the best interests of the child have largely been ignored, or subordinated, if the intended parents are gay.⁶⁸

Florida has witnessed a very recent turn around in what was a decided anti-gay adoption environment. In 1977, the Florida legislature adopted a statute that made it patently illegal for a gay person to enter into an adoption contract notwithstanding any other qualifications that person might have as an adoptive parent or the best

65. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 476–82 (Conn. 2008) (“Although we acknowledge that many legislators and many of their constituents hold strong personal convictions with respect to preserving the traditional concept of marriage as a heterosexual institution, such beliefs, no matter how deeply held, do not constitute the exceedingly persuasive justification required to sustain a statute that discriminates on the basis of a quasi-suspect classification.”).

66. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (“We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination.”).

67. Debra Carrasquillo Hedges, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 885 (2000).

68. For an outline of the adoption restrictions in the states, see *infra* Appendix B: State Adoption Laws.

interests of the child involved.⁶⁹ The statute reads simply, “No person eligible to adopt under this statute may adopt if that person is a homosexual.”⁷⁰

That statute was motivated by a surprisingly clear and expressed intention to keep gay people in the closet. One of the senators who led the passage of the legislation back in 1977 stated, “We’re trying to send a message telling them, ‘We’re really tired of you. We wish you’d go back in the closet.’”⁷¹

In the federal circuit court case addressing the Florida ban on gay adoption, *Lofton v. Secretary of the Department of Children & Family Services*, the federal court accepted the promotion of traditional families as a legitimate state interest that was advanced by the ban.⁷² In what could be viewed as a tacit approval of the discriminatory intent of the statute, the court then went as far as to say that the specified rationale need not have actually been the intent of the statute as long as the rationale provides a plausible purpose.⁷³

In a more recent Florida state court case coming out of Monroe County (home to the free-thinkers of Key West), the ban on gay adoption was challenged again.⁷⁴ In that case, the trial court accepted

69. FLA. STAT. § 63.042(3) (2003), *invalidated by In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008). The invalidation of this Florida statute was later reaffirmed by the Third Circuit Court of Appeals of Florida on September 22, 2010. *See Fla. Dep’t of Children & Families v. Adoption of X.X.G.*, 2010 WL 3655782 (Fla. Dist. Ct. App. Sept. 22, 2010).

70. *Id.*

71. *Gay Bills Pass Both Chambers*, FLA. TIMES UNION (Jacksonville, Fla.), June 1, 1977, at B2. Senator Peterson’s remarks were even more extensive and outrageous. He explained in this article that “[t]he problem in Florida has been that homosexuals are surfacing to such an extent that they’re beginning to aggravate the ordinary folks who have a few rights of their own They are trying to flaunt it.” *Id.* When asked about the potential difficulty in identifying who is a homosexual when trying to enforce the legislation, Senator Peterson responded, “I have no problem knowing what a homosexual is . . . and the judge or whoever makes the decision on adoption . . . will [also just] know.” Transcript of Senate Floor Debate on SB 354, May 11, 1977 (Sen. Peterson), at 21–22, *cited in In re Adoption of Doe*, 2008 WL 5070056, at *10 (Fla. Cir. Ct. Aug. 29, 2008). At the same time the adoption ban for gay people was being considered, Senator Peterson was also attempting to pass legislation to ensure that clothing stores had separate changing rooms for men and women, claiming “[w]e’re trying to stop men from trying on women’s clothes . . . it is becoming a real problem in Tallahassee, Lakeland and Miami.” *Gay Bills Pass Both Chambers*, *supra* note 71, at B2, *cited in In re Adoption of Doe*, 2008 WL 5070056, at *11 (Fla. Cir. Ct. Aug. 29, 2008).

72. *Lofton*, 358 F.3d at 819.

73. *Id.* at 818 (noting that the burden is on the one attacking the legislation to negate all conceivable bases for it, whether or not the basis can be found in the record).

74. *See In re Adoption of Doe*, 2008 WL 5070056, at *1 (Fla. Cir. Ct. Aug. 29, 2008).

three theories upon which it found the ban on gay adoption to be inconsistent with the Florida Constitution.⁷⁵ First, the court found the ban to be a special law pertaining to adoption that is prohibited by the Florida Constitution.⁷⁶ A special law in Florida is one that impermissibly classifies people or groups in a way that does not relate to the primary purpose of the statute.⁷⁷ The court found that treating gay people uniquely and forbidding them from adopting made the statute an impermissible special statute.⁷⁸ Second, the court found the ban to be an unconstitutional bill of attainder, as it acts punitively against the people who are forbidden to adopt.⁷⁹ Third, the court reasoned that the legislation usurped the power of the court in determining the best interest of the child in a violation of the separation of powers that had been spelled out in the Florida Constitution.⁸⁰ These novel arguments allowed the circuit court to find, differently from *Lofton* and earlier Florida state court cases,⁸¹ that the ban on gay adoption was impermissible.

Yet another recent Florida circuit court case challenged Florida's ban on gay adoption head-on. In that case, coming out of Miami-Dade County, the court ruled that there was absolutely no rational basis for the discrimination against gay people in the Florida adoption statute.⁸² Further, the court stated, citing *Lawrence v. Texas*,⁸³ that morality alone was not a sufficient basis for the ban.⁸⁴ "[P]ublic morality *per se*, disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment."⁸⁵ On September 22, 2010, the Third District Court of Appeals in

75. *Id.* at *21–23.

76. *Id.* at *21.

77. *Id.*

78. *Id.* at *22.

79. *Id.* at *22, *26.

80. *In re Adoption of Doe*, 2008 WL 5070056, at *27–32 (Fla. Cir. Ct. Aug. 29, 2008). The court referred to Article II, Section 3 of the Florida Constitution. *Id.*

81. *See, e.g.*, *Cox v. Fla. Dep't of Health & Rehabilitative Servs.*, 656 So. 2d 902, 903, 905 (Fla. 1995).

82. *In re Adoption of Doe*, 2008 WL 5006172, at *25–29 (Fla. Cir. Ct. Nov. 25, 2008).

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

84. *In re Adoption of Doe*, 2008 WL 5006172, at *29.

85. *Id.* (emphasis added).

Florida upheld the lower court decision ruling that the adoption ban had no rational basis.⁸⁶

Mississippi currently still targets gay people, prohibiting adoption by gay couples.⁸⁷ Unlike under the Florida statute, however, it seems that single gay people in Mississippi are not specifically prohibited from adopting.⁸⁸

Michigan and Utah each forbid unmarried couples from adopting though single people are allowed to do so. Michigan's law simply makes adoption by unmarried couples illegal.⁸⁹ Utah also prohibits an individual from adopting if that person is cohabitating with a partner of either the same or opposite sex and is not married.⁹⁰

On November 4, 2008, Arkansas voters approved a ballot measure to create a law providing that an individual "cohabitating with a sexual partner outside of a [valid] marriage" may not adopt or serve as a foster parent.⁹¹ This meant gay couples could not jointly petition to adopt, and second-parent adoption was also not available to them. Single gay people *could* adopt.⁹² In April 2010, however, a circuit court judge in Pulaski County, Arkansas struck down this adoption law, finding that it violated the Arkansas Constitution.⁹³

In Michigan and Utah (and, until very recently, in Arkansas), a gay person living together with a same-sex partner would be prohibited from adopting. However, each of those states does allow unmarried single people to adopt. Arguably then, a single gay person in those states could adopt, but one who is in a committed relationship (with more resources and more help for child care) cannot.⁹⁴ Utah's statute

86. *In re Adoption of Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008). This case was upheld by the Third District Court of Appeals of Florida on September 22, 2010. *See Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 2010 WL 3655782 (Fla. Dist. Ct. App. Sept. 22, 2010).

87. Adoption by couples of the same gender is prohibited. MISS. CODE ANN. § 93-17-3(5) (2004).

88. "Any person may be adopted . . . by an unmarried adult or by a married person whose spouse joins in the petition." MISS. CODE ANN. § 93-17-3(4) (2004).

89. Single people and married couples may adopt. Unmarried couples may not jointly petition for adoption. *See MICH. COMP. LAWS* § 710.24 (2005).

90. UTAH CODE ANN. § 78B-6-117(3) (2008).

91. Initiated Act 1, 2009 Ark. Acts 14, 14-16 (codified at Ark. Code Ann. §§ 9-8-301 to -306 (Repl. 2009)).

92. *See id.*

93. *Cole v. Arkansas Dep't Human Servs.*, No. 60CV-08-14284 (Ark. 6th Cir. Ct. Apr. 16, 2010).

94. *Id.* § 78B-6-117(2)(b).

goes further and creates a presumption that it is in the best interests of the child to be placed with a married couple and only under exceptional enumerated circumstances would that rule be broken.⁹⁵

Restrictions such as these on the freedom of individuals to structure their own personal life arrangements through contracts and thereby to pursue their own vision of a happy and fulfilled life are justified as regulations that are meant to promote public welfare.⁹⁶ Scholars and litigants alike have attacked such restrictions as unconstitutional for violating both the Equal Protection and Due Process provisions of the Fourteenth Amendment. However, in part because gay people are generally not part of a group that has traditionally been afforded heightened protection under the Constitution, the challenges have been met with mixed success.⁹⁷

2. Surrogacy

Surrogacy arrangements are, for many people, the only way to have genetically related children. Surrogacy arrangements have been controversial throughout the United States for many years but are now legally permitted in about half of the states.⁹⁸ States that uphold surrogacy agreements do so because surrogacy allows people who otherwise could not have their own biological children to have and enjoy that basic human experience. Still, in certain states where surrogacy agreements are permitted and upheld, gay people are

95. *Id.* § 78B-6-117(4).

96. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819–20 (11th Cir. 2004). In that case, Florida's ban on gay adoption was challenged. "Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers." *Id.* at 818. The court concludes:

Florida also asserts that the statute is rationally related to its interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families. Appellants respond that public morality cannot serve as a legitimate state interest. Because of our conclusion that Florida's interest in promoting married-couple adoption provides a rational basis, it is unnecessary for us to resolve the question.

Id. at 819, n.17.

97. A few state decisions have been exceptions to this rule. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). These are discussed *supra* Part I.A.1.

98. *See infra* Appendix C: State Surrogacy Laws Categorized.

carved out and categorically forbidden from pursuing this avenue to having children.⁹⁹

In a surrogacy arrangement, a woman carries a baby for another intended parent or parents and relinquishes any claim to custody when the child is born. There are two basic forms of surrogacy: traditional and gestational.¹⁰⁰ In a traditional surrogacy arrangement, the surrogate's egg is used and is fertilized by the sperm provided by the intended parent or parents.¹⁰¹ The traditional surrogate then carries the baby and, though genetically related to her, relinquishes custody pursuant to the surrogacy agreement to the intended parent or parents. Alternatively, in a gestational surrogacy, the egg used to create the embryo is not the surrogate's but is provided, as is the sperm, by the intended parent or parents. Thus, in a gestational surrogacy agreement, the surrogate is not biologically related to the child born but is the gestational carrier.

The availability of surrogacy as an option is much more vital for gay men than for gay women. Many gay women are able to use a sperm donor and then carry their own biological child—a process that is not so easy for gay men. Thus, it is often two gay men who are a couple, unable to have a baby by themselves, who enlist the help of an egg donor and a surrogate. One of the men uses his sperm to fertilize the egg, and the resulting embryo is placed into the surrogate. If successful, the surrogate delivers the child, and the gay men take custody and become parents, with one of the men being the biological father of the child.

One of the difficulties of surrogacy arrangements is what to do if the surrogate refuses to relinquish custody after the birth of the baby. Upholding surrogacy agreements (pursuant to which the surrogate

99. See *infra* Part I.B.2.a (describing states that have a marriage requirement as a pre-requisite for a binding surrogacy contract).

100. See generally Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995) (explaining the state statutory schemes for surrogacy).

101. The terms “traditional” and “gestational” surrogacy are used commonly. See, e.g., Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602, 604 (2002) (advocating for the elimination of a marriage restriction on parenthood).

had agreed to relinquish custody) has, to some states, seemed like upholding a contract whereby the surrogate sells her baby to the intended parents for the fees paid under the contract. This form of “baby selling” has seemed inappropriate and against public policy in many states.¹⁰²

The most celebrated case in this area is the case of *In re Baby M* decided in 1988.¹⁰³ That case involved a traditional surrogacy arrangement. After the surrogate decided to violate her surrogacy agreement and keep custody of the child, the case went to court to consider whether the surrogacy agreement was enforceable.¹⁰⁴ The New Jersey Supreme Court, in this landmark case, refused to uphold the agreement for the very reason specified above, that the arrangement seemed like paying for a child and was against the public policy of the state of New Jersey.¹⁰⁵ The case has become the touchstone for debates about the ethics of surrogacy and whether such arrangements should be permitted or whether they essentially create a market for babies and commodify women in a way that is repugnant to modern society and the public policy of the states.¹⁰⁶

More than twenty years have passed since the *Baby M* case and now eighteen states in the United States clearly permit and regulate surrogacy, with only eight states clearly making it illegal. In the remaining states, the law regarding surrogacy arrangements is unclear.¹⁰⁷ Advances in technology that make artificial insemination safer, more reliable, and more commonplace combined with the growing use and demand for surrogacy have pushed states to

102. See *infra* Appendix C: State Surrogacy Laws Categorized.

103. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

104. *Id.* at 1237.

105. *Id.* at 1240.

106. For a thoughtful examination of that case, see Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007). In a very recent case involving gestational surrogacy, New Jersey affirmed that surrogacy agreements in that state are against public policy and will not be upheld. *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 (N.J. Sup. Ct. Dec. 23, 2009); Jacob M. Appel, *Doubling Down in Baby M: New Jersey's Ongoing Resistance to Surrogacy*, HUFFINGTON POST, Jan. 3, 2010, http://huffingtonpost.com/jacob-m-appel/doubling-down-in-baby-M-n_b_409992.html.

107. See *infra* Appendix C: Surrogacy Laws by State.

recognize that there is a need and a place for surrogacy in society.¹⁰⁸ The trend toward allowing surrogacy, albeit with safeguards and restrictions, seems to indicate that more states will likely move in this direction as well.

a. States with a Marriage Requirement

Notwithstanding the widespread availability of surrogacy in the United States, some of the states which expressly permit surrogacy, including Florida, Nevada, New Hampshire, Oklahoma, Texas, Utah, and Virginia, have closed off this avenue to unmarried people. Those states have all passed legislation to make surrogacy contracts binding only if the intended parents are married.¹⁰⁹ Thus, in states where gay marriage is prohibited (all but one of the states just listed), gay people will be unable to avail themselves of surrogacy as an option.

The marriage requirement for surrogacy contracts was actually challenged in 2000 in Florida in *Lowe v. Broward County*.¹¹⁰ The Florida courts were clear. The appellate court declared that gay couples in a committed domestic partnership simply are not entitled to the same benefits reserved exclusively for married couples under Florida state law, including the right to enter into a valid and binding surrogacy agreement.¹¹¹ Despite the clear discrimination recognized by the court in this case, the law was vigorously defended and upheld.¹¹²

The status of the surrogacy law in New Hampshire will be interesting to observe since gay marriage became possible beginning in January 2010.¹¹³ Thus, the marriage requirement for surrogacy contracts in New Hampshire will presumably no longer restrict gay

108. This is indicated by the wide number of states that now permit surrogacy agreements to be entered into and enforced. *See infra* Appendix C: Surrogacy Laws by State.

109. In addition, there are many other requirements for surrogacy agreements in states that permit them. In Florida, for example, the intended mother must be either infertile or at high risk for injuring her own or the baby's life. FLA. STAT. § 742.15 (2010). In Utah, the intended parents must be married, but there are also additional requirements including that the surrogacy must proceed from assisted reproduction and not sexual intercourse. UTAH CODE ANN. §§ 78B-15-801(3), (5) (2010).

110. *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000).

111. *Id.* at 1205.

112. *Id.*

113. *See* Human Rights Campaign, Marriage Equality, *supra* note 32.

couples from entering into those contracts. Still, as with the other states that insist on marriage as a requirement to enter into a surrogacy statute, any single people, gay or otherwise, will be foreclosed from this option. Note that these particular statutes discriminate not only against gay people but also against all unmarried people generally.¹¹⁴ The arguments advanced in this article should apply equally to defend against that discrimination as well.¹¹⁵

The result of the surrogacy legislation in these states that require the intended parents to be married is slightly complicated. It is not that gay people (or single people) cannot enter into surrogacy contracts and proceed to attempt to have biological children through that route. It is simply that, if there is a dispute under the contract (about the ultimate custody of the child or anything else), the courts of those states will not uphold or enforce the surrogacy contract. Thus, a single gay person or couple entering into a surrogacy arrangement would be risking the surrogate keeping custody of the resulting child, despite having agreed not to do so.

This was exactly the situation presented in the *Baby M* case. In that case, the surrogate decided to breach her agreement to give custody of the child to the intended parents. The court was then faced with a custody battle between the biological mother who acted as the surrogate, and the biological father who had commissioned the surrogate's services. The court ultimately did award custody to the biological father (the intended parent under the contract) and not the surrogate but did so in accordance with typical custody considerations—the best interests of the child—and not with deference to the surrogacy agreement.¹¹⁶ Had the surrogate in the *Baby M* case been awarded custody, she also would have had legal

114. For an extensive discussion of the detrimental impact of marriage requirements in adoption and surrogacy arrangements, see Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487 (1991); Richard Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006).

115. See Storrow, *supra* note 114, at 314–31; Jamie L. Zuckerman, Comment, *Extreme Makeover—Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements*, 32 NOVA L. REV. 661, 676–78 (2008).

116. *In re Baby M*, 537 A.2d 1227, 1555–61 (N.J. 1988).

rights to claim child support from the biological father despite having intentionally breached her agreement with him.¹¹⁷

b. States Without a Marriage Requirement

There are now eleven states that clearly allow surrogacy regardless of whether the intended parent or parents are gay or single.¹¹⁸ Illinois passed a progressive surrogacy act in 2005 that is very strong in its protection of the liberty of all individuals to enter into surrogacy contracts but at the same time very protective of all of the parties involved.¹¹⁹ Accordingly, any person can enter into a contract with a surrogate as an intended parent and have the contract upheld, provided that the arrangement complies with the statute's requirements.¹²⁰ The safeguards dictated by the statute include requirements that protect the health and mental well-being of the surrogate.¹²¹ Thus, the surrogate must be of a certain age,¹²² have received psychological and legal counseling,¹²³ and cannot be forced through a specific performance remedy to be impregnated if she decides to breach her contractual promise to proceed as a surrogate.¹²⁴ These safeguards benefit not only the surrogate but also the intended parents who can be more certain that the surrogate is appropriate for that role and is therefore more likely to fulfill her role in accordance with the agreement.

As the foregoing discussion has shown, strident restrictions still abound preventing gay people from marrying and having children, just as their heterosexual counterparts can and have throughout history. With the few exceptions outlined above (California, Iowa, and Connecticut state courts), courts addressing constitutional

117. *Id.* at 1227.

118. *See infra* Appendix C: Surrogacy Laws by State.

119. *See generally* Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. 47 (2009) (outlining the statutory scheme for surrogacy agreements in Illinois).

120. *See id.* at 47/25.

121. *Id.* at 47/20, 47/50.

122. *Id.* at 47/20(a)(1).

123. *Id.* at 47/20(a)(4), (5).

124. *Id.* at 47/50(b).

challenges to these restrictions have used the lowest level of constitutional scrutiny to find that the bans are justified.¹²⁵

In light of the Supreme Court's opinion in *Lawrence v. Texas*¹²⁶ (overturning a Texas law that made homosexual sodomy illegal), there is some indication that federal courts could impose a heightened level of scrutiny to such cases. That heightened level of scrutiny is appropriate; however, it still remains controversial and has yet to be fully embraced by any U.S. federal court.¹²⁷ In the meantime, there are still prohibitions and restrictions in the United States, as just described, that simply forbid or significantly impede the ability of gay people to marry and have children.

II. LOCHNERIAN LIBERTY OF CONTRACT AS A BASIS FOR PROTECTING LIBERTY GENERALLY

This article has just described the variety of ways that state legislation and constitutional provisions restrict the liberty of gay people to enter into arrangements to create families. In that discussion, it became apparent that many arguments have been used in attempts to protect the liberty interest of gay people in having families.¹²⁸

125. This was the case in *Lofton*, and it continues to be the position of the executive branch of the federal government, as reflected in the 2009 Department of Justice memorandum submitted in the case challenging DOMA. State courts have largely followed suit, though with some notable exceptions where a heightened level of scrutiny was found not to be met by courts in California, Connecticut, and Iowa.

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

127. For an article making a strong case for such heightened scrutiny, see Evangelos Kostoulas, Comment, *Ask, Tell, and Be Merry: The Constitutionality of "Don't Ask, Don't Tell" Following Lawrence v. Texas and United States v. Marcum*, 9 U. PA. J. CONST. L. 565, 585-88 (2007) (stating homosexuals as a group have both traits necessary for an application of heightened scrutiny as suggested by the Supreme Court). See also Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to a claim that the "Don't Ask Don't Tell" policy violated plaintiff's right to substantive due process).

128. Those arguments typically hinge on affording gay people protection from discriminatory restrictions under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution or similar provisions of state constitutions. Heightened protection under those clauses has typically been reserved for categories of discrimination that relate to race or gender but not sexual orientation. As we have seen though, some state courts have applied heightened scrutiny to discrimination based on sexual orientation. *Lawrence v. Texas* may well represent a heightened level of scrutiny on the federal level for sexual orientation. See *supra* note 127. Arguments based on equal protection and due process have been successful in some states (e.g., the marriage cases in California,

Despite the intellectual merit of those arguments, the vast majority of the states still prevent gay people from marrying,¹²⁹ and many states restrict gay people from entering into contracts to adopt¹³⁰ or entering into surrogacy arrangements.¹³¹ These restrictions are often the result of historically strong religious and moral sentiments that are skeptical of accepting gay people and granting them the same rights accorded to heterosexual people. Those sentiments are often set forth directly in the opinions on point.¹³² There are fears of the normative consequences of effectively sanctioning gay nature and behavior. Nowhere has this been clearer than in statements from legislators regarding the adoption ban in Florida specifically stating that the legislation was meant to tell gay people to get back in the closet.¹³³ Some claim that allowing gay marriage threatens heterosexual marriage.¹³⁴ There are claims that traditional relationships must be given primacy and held up as the only truly acceptable norm.¹³⁵ Neither the high divorce rate for traditional marriage nor the number of high profile heterosexual politicians and celebrities having extra-marital affairs seem to weaken the force of these arguments.¹³⁶ The arguments are filled with religious and moral zeal and come in direct conflict with the constitutional arguments based on well accepted understandings of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Furthermore, the traditional framework for analysis under the Fourteenth Amendment has grown to involve a threshold step of

Connecticut, Iowa, and Massachusetts) but have been more often unsuccessful (e.g., the adoption and surrogacy cases coming out of Florida).

129. *See supra* Part I.A.

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

131. *See supra* Part I.B.2.

132. *See, e.g.,* Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804, 819 n.17 (11th Cir. 2004).

133. *See supra* text accompanying note 71.

134. *See, e.g.,* Lynn D. Wardle, *supra* note 16, at 1376–78.

135. *Id.* at 1377–78; *see also* Conant, *supra* note 63.

136. “If the country needs any Defense of Marriage Act at this point, it would be to defend heterosexual marriage from the right-wing ‘family values’ trinity of Sanford, Ensign, and Vitter [referring to Congressmen Sanford, Ensign, and Vitter, each of whom had recently committed adultery, with Vitter being identified as a regular client of a prostitution service in Washington D.C.].” Frank Rich, *40 Years Later, Still Second-Class Americans*, N.Y. TIMES, June 28, 2009, at WK8.

categorizing the type of interest or the category of people involved and then applying a level of scrutiny to legislation based on that interest or that category. This categorization process has resulted in the rights of certain interests and groups getting greater protection than the rights of other interests or groups. The existing levels of scrutiny have been criticized as creating double (or perhaps even triple) standards.

Under the current paradigm, for example, discrimination against gay people typically receives the lowest of the three levels of scrutiny, rational basis.¹³⁷ By contrast, discrimination against women receives the intermediate level of scrutiny, while discrimination against people based on race receives the highest level of strict scrutiny. Further, scholars have posited that the outcome of challenges is typically determined by what level of scrutiny is applied. The lowest level typically means regulations and discrimination will be upheld. The highest level, strict scrutiny, typically means that the regulation and discrimination will be struck down. The intermediate level, however, is not as clearly predictive. Nowhere in the Constitution was such a system devised or contemplated.

As was described in the Introduction, the purpose of this article is to reframe the discussion of how civil liberties should be protected and to provide another lens through which courts can evaluate legislative restrictions. This new framework is somewhat separate from the emotional arguments regarding the advancement of gay rights on the one hand and the religious and moral arguments used to protect the status quo on the other hand. The basis for this new framework is economic and even-handed. It does not create the double standards or different levels of scrutiny for legislation that depend on the issues or groups affected. The framework focuses on and defends the liberty of contract of all people. The liberty interest is implicated across the full spectrum of life's many aspects, not specifically or only sexual orientation, though that is the focus for application here.

137. *See supra* note 39.

The central argument upon which this framework is based is that a return to the critical scrutiny of all legislative encroachments on liberty of contract that was prevalent during the *Lochner* era is warranted, albeit with certain critical modifications. Such an analytical framework is a neutral, even-handed, and appropriate tool through which legislative restrictions can be evaluated. Neutral is used here not as some have used it, meaning protection of the status quo,¹³⁸ but neutral in the sense that it applies equally to all groups and issues.

A. *The Lochner Decision and Framework*

Beginning with the case itself, *Lochner v. New York*¹³⁹ was decided in 1905 and confronted the constitutionality of legislation limiting the number of hours a person could work in a bakery.¹⁴⁰ As is well known by students and scholars of Constitutional Law, the *Lochner* Court struck down this piece of legislation as an unconstitutional limitation on the liberty of individuals to enter into contracts of their choosing. Justice Rufus Peckham, writing for the majority of the *Lochner* Court, reiterated a principle that was already found in federal and state court cases,¹⁴¹ that “the general right to make a

138. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 885 (1987) (arguing that *Lochner* can be interpreted as the judiciary attempting to take a neutral position with respect to the existing common law in the sense that it did not want to change the status quo, nor did it think it was appropriate for it to do so).

139. *Lochner v. New York*, 198 U.S. 45 (1905).

140. The limits of the statute were not particularly extreme. The statute mandated that no one work in a bakery for more than sixty hours a week or ten hours a day. *Id.* at 46 n.†.

141. *Id.* at 53 (citing *Allgeyer v. Louisiana* 165 U.S. 578 (1897)). State court cases have defended the liberty of contract. See *Ritchie v. People*, 40 N.E. 454, 462 (Ill. 1895) (striking down a statute regulating the number of hours a woman could work in any factory or workshop); *In re Jacobs*, 98 N.Y. 98, 112–15 (1885) (striking down a statute restricting where tobacco could be manufactured, describing such a restriction as an infringement on the right of an individual to earn a living); *People v. Marx* 2 N.E. 29, 33, 34 (N.Y. 1885) (ruling unconstitutional an act that prohibited the manufacture of butter substitutes and stating “[t]he term ‘liberty,’ as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties”). Interestingly, the language that Justice Peckham used in *Allgeyer* to advance liberty of contract as a constitutional interest was taken *verbatim* from the *Jacobs* case (though it did not cite to *Jacobs*) when *Allgeyer* defined liberty as

not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and

contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”¹⁴²

The *Lochner* Court was not without balance in its defense of liberty of contract. It went to great lengths to expound upon the notion that a state can legitimately interfere with the liberty interest of the individual if that interference is within the appropriate police powers of the state:¹⁴³ “The question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty . . . ?”¹⁴⁴ The Court was careful to explain that it was not trying to substitute its judgment for the legislative judgment of the state but was instead strictly assessing the regulation to see if it was appropriately within the power of the state to enact.¹⁴⁵

Of course, deciding whether a piece of legislation is within the police power of the state mandates defining the police power of the state. Without going into much detail, the *Lochner* Court described the traditional police powers of the state as those powers that “relate to the safety, health, morals, and general welfare of the public.”¹⁴⁶ The Court was wary, however, that any piece of legislation might easily be said to relate to such areas, effectively making any state legislation immune from challenge under the Constitution. That approach, however, would have been out of line with the very notion of judicial review enunciated by the infamous Chief Justice John Marshall back in the seminal case of *Marbury v. Madison* in 1803.¹⁴⁷ Thus, the *Lochner* Court declared that the standard of review had to

work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Allgeyer 165 U.S. at 589. *Marx* also cited to this language from *Jacobs*. See *Marx*, 2 N.E. at 33.

142. *Lochner*, 198 U.S. at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)).

143. *Id.* at 53–56.

144. *Id.* at 56.

145. *Id.* at 56–57.

146. *Id.* at 53.

147. *Marbury v. Madison*, 5 U.S. 137 (1803).

be more critical and searching of legislative regulations than deferential.¹⁴⁸ According to the *Lochner* Court, courts need to carefully evaluate any legislative act before allowing it to curtail liberty and survive:¹⁴⁹ “The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person”¹⁵⁰ Thus, the *Lochner* Court established a framework for the evaluation of whether legislative regulations are permissible under the Constitution. Legislative regulations are only allowed to impinge on personal liberty of contract if they have a direct relation, as a means to an end, which is appropriate and legitimate.

In evaluating the legislation at issue in the case—the limitation on the hours a person could work in a bakery—the Court considered the possible justifications for the regulation.¹⁵¹ The *Lochner* Court concluded that the only possible justification was to protect the health of the workers involved.¹⁵² While not rejecting the notion that the health of workers was a legitimate part of the police powers of the state, the Court rejected that justification in this case, skeptical of any particular hardship that a bakery imposes on individuals.¹⁵³ Using a slippery slope argument, the Court claimed that if such a regulation were allowed, regulations setting maximum working hours for employees in all fields of work could be set.¹⁵⁴ The Court was not prepared to accept such regulations. A person “in almost any kind of business . . . would . . . come under the power of the legislature, on this assumption.”¹⁵⁵ The Court viewed the liberty interest of being able to work longer hours “to support himself and his family” as a liberty interest that the state could not arbitrarily limit.¹⁵⁶

148. *See Lochner*, 198 U.S. at 57.

149. *Id.*

150. *Id.* at 57–58.

151. *Id.* at 58.

152. *Id.* at 57.

153. *Id.* at 58.

154. *Lochner v. New York*, 198 U.S. 45, 59–60 (1905).

155. *Id.* at 59.

156. *Id.*

The Court did cite to a case where a regulation setting maximum working hours was upheld as Constitutional.¹⁵⁷ In that case, however, the industries involved were mining and smelting.¹⁵⁸ The Court highlighted a distinction that in such ultra-hazardous occupations, health and public welfare were concerns if employees were left to work hours that were too long.¹⁵⁹ By contrast, and almost comically, the Court described bakeries differently, stating, “Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.”¹⁶⁰

B. Other Cases Decided During the *Lochner* Era

The *Lochner* era is so named because there were a wide variety of cases the Supreme Court heard in which it applied this liberty of contract framework to determine whether a particular piece of state regulatory legislation was constitutional. The *Lochner* era is always said to have begun in 1897 with *Allgeyer v. Louisiana*,¹⁶¹ a case cited to by the majority in *Lochner*. In *Allgeyer*, the state of Louisiana attempted to criminalize making an insurance contract with an out-of-state insurer that did not abide by Louisiana laws and regulations.¹⁶² Allgeyer had entered into just such a contract with a New York insurer but had done so in the state of New York.¹⁶³ The only contact with Louisiana was a notification that Allgeyer had sent to its New York insurer.¹⁶⁴ Justice Peckham, the same Justice who later wrote for the majority in *Lochner*, wrote the opinion for the Court in *Allgeyer* and struck down the regulatory action as an unconstitutional infringement on the liberty of the Louisiana citizen to enter into the insurance contract outside of the state of Louisiana.¹⁶⁵ Justice

157. *Holden v. Hardy*, 169 U.S. 366, 395 (1898).

158. *Id.*

159. *Lochner*, 198 U.S. at 54–55.

160. *Id.* at 57.

161. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

162. *Id.* at 579.

163. *Id.* at 580.

164. *Id.* at 579, 581.

165. *Id.* at 589, 593.

Peckham used reasoning similar to that which he later used in *Lochner*:

The “liberty” mentioned in [the Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out . . . [those] purposes¹⁶⁶

The Supreme Court continued to follow the liberty of contract principles laid out in *Allgeyer* and *Lochner* until *West Coast Hotel Co. v. Parrish* was decided in 1937.¹⁶⁷ In fact, the scholar Benjamin Wright wrote in 1942 that 184 cases decided during the *Lochner* era found state legislative regulations unconstitutional as violations of the liberty interest protected by the Fourteenth Amendment.¹⁶⁸ Those statutes involved everything from maximum working hours (as in *Lochner* itself), minimum wage requirements,¹⁶⁹ and prohibitions on organizing unions,¹⁷⁰ to laws requiring children to be raised in English-only schools.¹⁷¹

In 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish*.¹⁷² In *West Coast Hotel*, the Court considered the constitutionality of a minimum wage law for women and minors. In its deferential finding, the Court reasoned that protecting women and minors from predatory commercial practices was surely within the

166. *Id.* at 589.

167. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

168. Benjamin F. Wright, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (Univ. of Chicago Press 1942).

169. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 539 (1923).

170. *Coppage v. Kansas*, 236 U.S. 1, 4–7 (1915).

171. *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923).

172. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

police powers of the state and in the interest of the welfare of society as a whole.¹⁷³

West Coast Hotel overruled another Supreme Court opinion from just fifteen years earlier, *Adkins v. Children's Hospital*, which followed *Lochner* and found a statute prescribing a minimum wage for women and children to be unconstitutional.¹⁷⁴ The *West Coast Hotel* Court found that the economic experience of the intervening fifteen or so years warranted renewed consideration of the question and a different finding, with more deference to the government regulation.¹⁷⁵ Perhaps ironically, the *Adkins* Court rejected the results and reasoning of a case decided fifteen years earlier,¹⁷⁶ *Muller v. Oregon*.¹⁷⁷ Like *West Coast Hotel*, *Muller* upheld as constitutional a regulation protecting women in the workplace. In *Muller*, the regulation mandated maximum working hours for women.¹⁷⁸

The *West Coast Hotel* Court spoke disparagingly of the freedom of contract trumpeted by the *Lochner* Court, asking almost facetiously, "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty"¹⁷⁹

Despite its critical tone toward any notion of liberty of contract, *West Coast Hotel* still essentially followed *Lochner* in the sense that it explained that the liberty interest of the Fourteenth Amendment surely existed but was subject to the police power of the state.¹⁸⁰ It was in the application of the *Lochner* framework that the *West Coast Hotel* Court shifted gears away from *Lochner's* critical assessment of regulation and toward a more deferential approach that gave latitude to the legislature to consider social and economic conditions when enacting regulations.

173. *Id.* at 397–400.

174. *Adkins*, 261 U.S. at 548.

175. *See West Coast Hotel Co.*, 300 U.S. at 389–90.

176. *Adkins*, 261 U.S. at 552–53.

177. *Muller v. Oregon*, 208 U.S. 412 (1908).

178. *Id.* The statute in question was an Oregon statute that prohibited women from working in laundries for more than ten hours per day.

179. *West Coast Hotel Co.*, 300 U.S. at 391.

180. *Id.*

The *West Coast Hotel* Court explained that many states had been enacting employment regulations to protect their work forces.¹⁸¹ The Court then said, defiantly, “Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide.”¹⁸² In other words, the *West Coast Hotel* Court said that as long as the state legislature was not being arbitrary or capricious, it was acting within its appropriate police power.¹⁸³ This did indeed represent a more deferential standard of review than the more rigorous standard outlined in *Lochner*.

Shortly after the *West Coast Hotel* case was decided, the Supreme Court put the final nail in the *Lochner* coffin with the *Carolene Products*¹⁸⁴ case, in which it confronted the constitutionality of the national Filled Milk Act.¹⁸⁵ The *Carolene Products* Court relied on precedent from some twenty years earlier to find that regulating food products is clearly within the police powers of the state in protecting the health of its citizens.¹⁸⁶

The *Carolene Products* opinion went on aggressively to state that the presumption regarding legislation should be that “it rests upon some rational basis within the knowledge and experience of the legislators.”¹⁸⁷ Attached to that sentence was the now-famous footnote 4. In footnote 4, the Court continued to describe the “presumption of constitutionality” that should be accorded legislation.¹⁸⁸ The Court went on to suggest a heightened degree of scrutiny for legislation that “appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”¹⁸⁹ In this way, the Supreme Court

181. *Id.* at 393.

182. *Id.* at 399.

183. *Id.*

184. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

185. The Filled Milk Act prohibited certain milk substitutes from entering interstate commerce. *Id.* at 144.

186. *Id.* at 148 (citing *Hebe Co. v. Shaw*, 248 U.S. 297 (1919) (upholding the constitutionality of an Ohio statute that mandated that condensed milk be made from full cream milk)).

187. *Id.* at 152.

188. *Id.* at 152 n.4.

189. *Id.*

formally enshrined a new judicial deference to general legislation, with potentially heightened scrutiny for legislation that appears to specifically violate the Constitution—legislation that might, for example, impact freedom of speech or discriminate on the basis of race.¹⁹⁰

C. Criticisms of *Lochner*

The *Lochner* Court itself was divided on how to approach the maximum working hours regulation under review in that case.¹⁹¹ Subsequent cases and scholars have joined with the dissenters in decrying the logic and outcome of *Lochner* and by association the other cases that were decided along similar principles.

Justice Holmes wrote a scathing dissent in *Lochner* that is often quoted by critics of the majority's opinion.¹⁹² Holmes claimed that the majority's decision was enforcing a laissez-faire political philosophy upon society and that the Court was not acting within its proper power in doing so.¹⁹³ Holmes went further to suggest that Justices in the majority were acting in accord with their preferences as if they were legislators and not neutral interpreters of a constitution.¹⁹⁴ He described a variety of encroachments on the liberty of contract that the Justices, were they acting as legislators might think injudicious, but which nonetheless rightly were held to be constitutional.¹⁹⁵

Justice Harlan, joined by Justices White and Day, dissenting, stated that legislation ought to be left undisturbed “unless it be, beyond question, plainly and palpably in excess of legislative power.”¹⁹⁶ Justice Harlan went on to describe the working conditions of bakers

190. See *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931) (showing the use of a “presumption of constitutionality” by Justice Louis Brandeis to evaluate state regulations).

191. See *generally* *Lochner v. New York*, 198 U.S. 45 (1905).

192. *Lochner*, 198 U.S. at 75–76 (Harlan, J., dissenting).

193. *Id.*

194. *Id.*

195. *Id.* at 75 (citing *Otis v. Parker*, 187 U. S. 606 (1903) (upholding a prohibition on selling stock on margin) and *Holden v. Hardy*, 169 U. S. 366 (1898) (upholding a maximum eight hour work day for miners)).

196. *Id.* at 68.

as being particularly brutal and therefore well within the power of the New York legislature to regulate:¹⁹⁷ “Nearly all bakers are pale faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living”¹⁹⁸ In their dissents, Justices Holmes and Harlan, and the other Justices who joined them showed the great deference to state legislation that ultimately was echoed by the majority opinions in *West Coast Hotel* and *Carolene Products*.

There have been many caustic scholarly commentaries on the *Lochner* decision and its aftermath.¹⁹⁹ In 2003 David Strauss wrote that “*Lochner v. New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years.”²⁰⁰ Another scholar recently referred to *Lochner* as a “*bête noire* of modern constitutional scholarship.”²⁰¹ Yet another scholar described *Lochner* as, for many years, an established element of the anti-canon of constitutional law.²⁰² In other words, it is an opinion that was so wrong that it needed to be studied for its place in the historical development of the canon of cases that got the law and analysis correct. All the more scholarship and debate concerning *Lochner* was generated at the centennial of the decision in 2005.²⁰³

Just as Justices Holmes and Harlan argued, critics have decried the *Lochner* court for substituting a laissez-faire political philosophy for the policy preferences of the legislative bodies passing the

197. *Id.* at 70–71, 73.

198. *Lochner*, 198 U.S. at 70 (Harlan, J., dissenting).

199. For a lengthy listing of scholars who have decried the *Lochner* case as a glaring example of judicial activism and an attempt by those Justices to empower businesses at the expense of the working classes, see David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 218–19 (2009). Included in that listing are such heavy hitters as Roscoe Pound, Learned Hand, Charles Warren, and contemporary scholars such as Geoffrey Stone, Jesse Choper, Lawrence Tribe, and Robert Bork.

200. David A. Strauss, *Why Was Lochner Wrong?* 70 U. CHI. L. REV. 373, 373 (2003) (footnote omitted).

201. Trevor W. Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 840 (2005).

202. Jack M. Balkin, “*Wrong the Day it Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 682 (2005).

203. See, e.g., Symposium, *Lochner Centennial Conference*, 85 B.U.L. REV. 671 (2005); Symposium, *The 100th Anniversary of Lochner v. New York, 198 U.S. 45 (1905)*, 1 N.Y.U. J. L. & LIBERTY 323 (2005).

regulations being reviewed.²⁰⁴ Indeed, the political proclivities of the Lochnerian Justices have been routinely described as demonically Darwinist; the Justices were aware that their “survival of the fittest” decisions favored the ruling class and sacrificed the working class but were content with that result.²⁰⁵ This, the scholars argue, was inappropriate, indeed inexcusable.²⁰⁶ It was in all of these commentaries and the subsequent cases that cited back to *Lochner* as an example of inappropriate judicial political activism that, as Professor Howard Gillman expressed it, “*Lochner* had finally become Lochnerized” and became a touchstone for inappropriate judicial activism.²⁰⁷ Arguments of this sort were given more credence by Justice Holmes’s claim in his dissent that the majority was relying on a famous laissez-faire political treatise of the era, Sir Herbert Spencer’s *Social Statics*.²⁰⁸

There are also a variety of nuanced critiques of the *Lochner* decision that a mere label of judicial activism does not capture. Some argue that *Lochner* found a constitutional liberty of contract in the Fourteenth Amendment where there simply was none.²⁰⁹ While “liberty” is mentioned in that clause, “contract” never is. Charles

204. See Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 821 (2005) (referring to the *Lochner* Court as “one of the great activist Supreme Courts of U.S. history”).

205. For a survey of these arguments, see David Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 3 n.6 (citing Derrick Bell, Loren Beth, Archibald Cox, Robert McCloskey, and others in a fierce condemnation of the Lochnerian justices and their support of the wealthier classes at the expense of the poor).

206. See Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 860–61 (2005) (discussing but challenging the traditional view of *Lochner*’s illegitimate policy-making).

207. *Id.* at 861 (citing WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 123–25 (1988)).

208. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”).

209. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 44–46, 49 (1990) (footnote omitted) (“In his 1905 *Lochner* opinion, Justice Peckham, defending liberty from what he conceived to be ‘a mere meddlesome interference,’ asked rhetorically, ‘[A]re we all . . . at the mercy of legislative majorities?’ The correct answer, where the Constitution is silent, must be ‘yes.’”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18–20 (1980) (arguing that substantive due process is an oxymoron and that the demise of *Lochner* was appropriate); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 574–78 (2nd ed. 1988) (discussing the internal inconsistencies of the application of liberty of contract even during the *Lochner* era); Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 449 (1926) (“Whatever may be pedigree of the *Allgeyer* case definition [of liberty], it is clear that the Court had departed from the original definition of ‘liberty’ which prevailed in 1789, and which had been the definition adopted by the State Courts prior to 1868.”).

Warren was particularly skeptical of *Lochner* for having embraced a constitutional right to liberty of contract. Warren argued that this right was completely out of line with the framers' notion that liberty meant freedom from physical restraint.²¹⁰ With a similar perspective, in its opinion, the *West Coast Hotel* Court asked the public, "What is this freedom?"²¹¹

Cass Sunstein argues that the *Lochner* decision should be viewed as being more than just a case of judicial activism but also a case that enshrines the judicial principle of neutrality.²¹² Sunstein views this neutrality as a duty to defend the status quo as defined by the baseline of the existing common law.²¹³ According to Sunstein, *Lochner* exemplifies this neutrality principle because the Court defended the existing distribution of wealth and entitlement by overriding a legislative action attempting to disrupt that balance. The status quo being defended is based on the common law that existed at that time, which allowed employers to freely contract with employees, regardless of whether that may have favored the wealthier classes.²¹⁴

Other critics do not focus on whether or not liberty of contract exists in the Constitution but rather merely the extent to which it should trump social legislation deemed necessary by the majority (as reflected in a legislative enactment).²¹⁵ Those critics find *Lochner* objectionable in its overly-strong defense of that liberty interest and in its sacrifice of the majoritarian regulations it defeated.²¹⁶

Another, perhaps more palliative, critique was offered by the Supreme Court in its opinion in *Planned Parenthood v. Casey*.²¹⁷ That opinion reflected the notion that the *Lochner* Court was not wrong to find a liberty of contract interest in the Constitution nor was it wrong to defend the liberty of contract in 1905.²¹⁸ According to the

210. See Warren, *supra* note 209, at 449–50.

211. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

212. Sunstein, *supra* note 138, at 874.

213. *Id.*

214. See *id.* at 885.

215. See, e.g., Strauss, *supra* note 200, at 376 (describing how judicial review was acceptable only to correct significant governmental errors).

216. *Id.*; see also BORK, *supra* note 209.

217. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

218. *Id.* at 861.

Casey Court, at that time the *Lochner* Court simply was unaware of what an unregulated market might mean for social welfare.²¹⁹ As the *Casey* Court stated, the *Lochner* line of cases “rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.”²²⁰ Awareness of those false assumptions came later as the Depression took hold.²²¹ It is only in light of that new awareness that more modern courts could understand that regulations on social life needed a more deferential constitutional approach.²²²

A large part of *Lochnerian* scholarship has been devoted to the attempt to harmonize *Lochner’s* demise with the rise of other unenumerated liberty interests that have since been found in the Constitution.²²³ Criticizing *Lochner’s* support of a liberty interest found in the Due Process Clause of the Fourteenth Amendment presents a challenge to scholars who saw the growth of the right of privacy and all of the specific case decisions based on that right as a positive development. Included in those cases are those concerning the right to use contraceptives,²²⁴ abortion,²²⁵ and even gay rights.²²⁶ In the 1970s, John Hart Ely coined the phrase “*Lochnering*” in relation to the *Roe v. Wade*²²⁷ abortion case to indicate that the *Roe* Court had, like the *Lochner* Court, based its opinion on rights that were simply not present in the Constitution.²²⁸ Indeed, Robert Bork has argued that if one wishes to support unenumerated rights to privacy in the Fourteenth Amendment, then one should go “all the way” and support *Lochner* too.²²⁹ Bork was not advocating for that outcome. Quite the contrary, he was attempting to show why cases

219. *Id.* at 861–62.

220. *Id.*

221. *Id.*

222. See also Balkin, *supra* note 203.

223. Bernstein, *supra* note 205, at 12–13.

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

225. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

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

227. *Roe v. Wade*, 410 U.S. 113 (1973).

228. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 944 (1973).

229. BORK, *supra* note 209, at 224–29.

overturning restrictive legislation concerning contraception and abortion were, like *Lochner*, inappropriate exercises of judicial authority.²³⁰

D. A Historical Perspective

The demise of *Lochner* should also be put into its historical context. As much as the philosophy of *Lochner* itself grew out of the ideological underpinnings of the birth of a new nation and the reconstruction era, its demise was precipitated by the new economic conditions thrust upon a growing nation during the Great Depression.

Lochner's basic premise that people should have the liberty to structure their own lives free of government interference echoes the trumpets of freedom that cried for independence from the monarchical social structure of Europe. The Declaration of Independence was clear in its guarantees of "life, liberty, and the pursuit of happiness."²³¹ Early Supreme Court jurisprudence emphasized that the federal courts were designed and empowered by the structure of the new nation to review and keep a check on the legislative branch of both the federal and state governments.²³² Cases like *Lochner*, its predecessor, *Allgeyer*, and cases decided in the same era, like *Adkins*, all discussed above, reflect this suspicion of government intrusions into the liberty of individuals to structure their own arrangements and lives.

As the United States developed, so too did the strength of the liberty of contract philosophy. By 1866, that philosophy was expressly echoed in the Civil Rights Act passed that year, which gave all "citizens, of every race and color, . . . [the] right . . . to make and enforce contracts."²³³ Liberty of contract in that era was a metaphor

230. *Id.*

231. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

232. *Marbury v. Madison*, 5 U.S. 137 (1803).

233. Civil Rights Act of 1866, 14 Stat. 27 (1866). For a comprehensive examination of freedom of contract as it evolved in antebellum years of the 1800s, see James W. Fox Jr., *The Law of Many Faces: Antebellum Contract Law Background of Reconstruction-Era Freedom of Contract*, 49 AM. J. LEGAL HIST. 61 (2007).

for liberty itself.²³⁴ The Fourteenth Amendment to the Constitution, complete with its guaranty of “liberty,” was drafted in this context.

The pressures of the Great Depression, however, saw a call for more government intervention. There was growing distrust of the managerial classes and suspicion that the working classes were being abused and did not have the leverage in contract negotiations to represent their own interests adequately. This view was clearly manifested in the *West Coast Hotel* opinion, in which the Court went to great lengths to discuss the possibility for abuse of women in the workforce and the necessity of government intervention and protection.²³⁵ “The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless [sic] against the denial of a living wage . . . casts a direct burden . . . upon the community.”²³⁶

The progressives of the Depression Era rejected the individualism espoused by the Lochnerian cases and their promotion of individual liberties. Such scholars, politicians, and judges believed that more social regulation was appropriate and advocated accordingly. Roscoe Pound, Learned Hand, and Charles Warren all criticized Lochnerian liberty of contract as going too far in sacrificing public welfare for individual interests.²³⁷ Amazingly, Learned Hand actually advocated amending the Constitution to delete the Due Process Clauses of the Fifth and Fourteenth Amendments as being too powerful in their ability to defeat social legislation.²³⁸

President Franklin Roosevelt, upset with the Supreme Court’s decisions rejecting regulatory legislation, threatened to change the

234. *Id.* at 61.

235. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

236. *Id.* at 399.

237. See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 456–57 (1909) (arguing that the theorists advocating for liberty of contract were giving no consideration to actual industrial working conditions for much of the public and that individualist conceptions of the private right of contract were exaggerated at the expense of the public); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 699–700 (1931); Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

238. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 249 (1994).

make-up of the Court to include twice as many Justices.²³⁹ Of course Roosevelt would have chosen the new Justices to achieve the results from the Court that he wanted. Suddenly, change was in the air, and Lochnerian liberty had become a jurisprudential moment of the past, replaced by the judicial deference embodied by the rational basis test.

III. THE FLAWS OF *LOCHNER* AND THE SOLUTION: A SHIFTING PRESUMPTION

As Part II just described, by the late 1930s the *Lochner* framework had been discredited, and it continues to be largely out of favor.²⁴⁰ Many modern scholars continue to echo the writings and sentiments of the scholars and judges who criticized *Lochner* in the early part of the twentieth century.²⁴¹

Nonetheless, the logic and philosophy underlying the *Lochner* era cases still have great merit. The rulings in those cases rested on the notion that there should be a presumption of liberty of contract for individuals—allowing individuals to structure their own lives as they see fit—and that the government should have some compelling reason to interfere with that liberty interest. As Part I indicated, there are still many ways in which government regulations restrict individual liberty of contract, the focus there being on the liberty of gay people to be married and have children. A return to a modified version of that Lochnerian framework would help safeguard the public against legislation that restricts individual liberty of contract and consequentially individual liberty itself.

This Part will survey some of the neo-Lochnerian scholars who are defenders, in some way, of the *Lochner* decision and framework. It will then attempt to crystallize a modified Lochnerian framework that can be used by modern courts as a safeguard against encroachments

239. It is impossible to resist citing the old adage that grew out of this historical moment, the famous “switch in time that saved nine.”

240. See generally Mayer, *supra* note 199 (discussing the orthodox view of *Lochner* and its reasoning).

241. *Id.* at 218–19.

on civil liberties. Finally, it will apply that framework to the restrictions on gay rights to family outlined in Part I.

A. Recent Scholarship and Case Law Supporting Lochner

Despite the strong criticism of *Lochner* over the past 100 years, there are a growing number of voices that are recognizing that the reaction to *Lochner* was overblown. Some of these voices suggest a Machiavellian attempt by Progressive Era scholars, judges, and politicians to demonize *Lochner* and its focus on individual liberty in order to advance a different agenda, one centered on the promotion of social legislation.²⁴²

One of the most recent and comprehensive articles rehabilitating *Lochner* is David Mayer's 2009 article, which criticizes what he refers to as the commonly held "myths" about *Lochner*.²⁴³ Mayer claims that "the orthodox view is wrong in virtually all its assumptions."²⁴⁴ Mayer employs a historical approach to explain that the *Lochner* majority was not particularly laissez-faire in its prevailing ideology but focused on balancing what it perceived were historic and well-grounded liberty guarantees against undue intrusion by government regulation.²⁴⁵ Mayer points out that if the *Lochner* courts were truly laissez-faire in their approach then only those laws that prohibit acts which actually harm others or abridge the legitimate rights of others rights would have ever passed constitutional muster.²⁴⁶ Quite the contrary, one of the major critiques of the *Lochner* era was that so many cases seemed out of line with each other.²⁴⁷ As much as there were many cases ruling that legislation was unconstitutional as impinging on individuals' liberty of contract,

242. *Id.* at 219–20 (stating that the progressive critics of *Lochner* were not at all objective or neutral in their analysis). "[R]elying on the views of such partisans . . . [is like] relying on the views of the National Right to Life organization to interpret *Roe v. Wade*." *Id.* at 220.

243. *Id.* at 224.

244. *Id.*

245. *Id.* at 258–63.

246. Mayer, *supra* note 199, at 252–58. Laws that prohibit acts that actually harm others or that abridge others' legitimate rights would pass constitutional muster, as consistent with the limited scope of the police power as envisioned by laissez-faire theorists (like Tiedeman).

247. Strauss, *supra* note 200, at 376.

there were others upholding legislative restrictions.²⁴⁸ Mayer is one scholar who criticizes the critics, claiming that the Progressive Era scholars who defamed *Lochner* had their own activist agenda advocating for a broader governmental role in structuring society.²⁴⁹

In a 2003 essay entitled, “Why Was *Lochner* Wrong,” David Strauss both criticizes and defends the *Lochner* Court.²⁵⁰ Strauss states that the *Lochner* Court acted defensibly in finding a liberty of contract within the Fourteenth Amendment.²⁵¹ Strauss points out that even after *Lochner* was “interred” for finding rights not specifically enumerated in the Constitution, the Supreme Court continued to do so.²⁵² Thus, the problem with the *Lochner* decision was not that it found such a right but that it went too far in defending that right against legislation.²⁵³

In 2003, David Bernstein wrote that *Lochner* should be re-evaluated as “the progenitor of modern substantive due process cases such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*.”²⁵⁴ This argument reflects the dilemma that some scholars have had with *Lochner*: how to criticize *Lochner* as inappropriately expounding upon unenumerated rights under the Fourteenth Amendment, while still supporting those later substantive due process cases. Bernstein does not so much solve this dilemma as point out that it exists, despite the claims of other scholars that *Lochner* should be cordoned off as a case concerned not with fundamental liberties, but with an opposition to class legislation.²⁵⁵

Bernstein states that one of the latest cases to rely on the liberty interest protected by the Fourteenth Amendment, *Lawrence v. Texas*,²⁵⁶ is the clearest example of a modern court echoing (perhaps

248. See Mayer, *supra* note 199, at 224.

249. *Id.*

250. Strauss, *supra* note 200, at 375.

251. *Id.*

252. *Id.*

253. *Id.*

254. Bernstein, *supra* note 205, at 12–13.

255. *Id.* at 59–60 (citing Howard A. Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994)); Mayer, *supra* note 199, at 218–19.

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

even relying on without citation) the analysis set forth in *Lochner*.²⁵⁷ Where the earlier fundamental rights cases, like *Griswold v. Connecticut*²⁵⁸ and *Roe v. Wade*,²⁵⁹ spoke specifically of a right to privacy found in the penumbra of rights that are contained in the Bill of Rights and incorporated into the Fourteenth Amendment, *Lawrence* paid no deference to that framework.²⁶⁰ It was simple and clear in its approach, like the courts of the *Lochner* era. It identified a liberty interest being curtailed by legislation—the right to intimate contact with an adult person of one’s choosing—and asked the state to justify that legislation. Finding no satisfactory justification, the *Lawrence* Court ruled that the restriction on liberty in that case simply violated the liberty interest guaranteed by the Fourteenth Amendment.²⁶¹

Randy Barnett also discusses the liberty of contract jurisprudence of *Lochner* and its transition into modern Supreme Court opinions.²⁶² Barnett argues that the liberty interest described in *Lochner* was actually rehabilitated in *Planned Parenthood v. Casey*, where the Court spoke of a liberty interest and not only of the right to privacy found in the penumbra of rights contained in the Bill of Rights.²⁶³

Barnett goes further in his analysis of the *Lawrence* case than did Bernstein. Barnett views the *Lawrence* Court as not only defending a general liberty interest of the Fourteenth Amendment, but also re-invigorating the presumption of liberty that the *Lochner* courts employed.²⁶⁴ “[W]ith liberty as the baseline, the majority places the onus on the government to justify its statutory restriction.”²⁶⁵ The *Lawrence* Court found no justification for its prohibition on sexual intimacy between same-sex partners beyond moral approbation,

257. Bernstein, *supra* note 205, at 60.

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

259. *Roe v. Wade*, 410 U.S. 113 (1973).

260. Bernstein, *supra* note 205, at 60.

261. *Lawrence*, 539 U.S. at 564.

262. Randy Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 22–24 (2003).

263. *Id.* at 33.

264. *Id.* at 35.

265. *Id.*

which was not sufficient to warrant upholding the statute.²⁶⁶ The *Lawrence* Court cited back to the dissent in *Bowers v. Hardwick*, the 1986 case that upheld a Georgia statute making sodomy illegal for any person, stating affirmatively that morality “is not a sufficient reason for upholding a law.”²⁶⁷ The *Lawrence* Court also quoted from *Planned Parenthood v. Casey*, the 1992 case addressing when restrictions on the right to an abortion are constitutional, reaffirming that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”²⁶⁸ Barnett goes on to explain that morality alone should never be a sufficient justification for a statute lest it forever be invoked to immunize legislation from constitutional review.²⁶⁹ Barnett calls for a “robust ‘presumption of liberty’” to protect individual rights across the political spectrum.²⁷⁰

B. A Revised Framework with a Shifting Presumption

As Justice Peckham, who wrote the majority opinion in *Lochner*, might have said, basic notions of liberty are contingent upon liberty of contract, without which liberty itself is illusory. The ability to enter freely into contracts allows people to achieve their personal desired balance of all that life has to offer. Starting with this premise and building off of the *Lochner* opinion and the subsequent scholarship of the neo-Lochnerians such as Mayer, Bernstein, and Barnett described above, this article advocates a return to the robust Lochnerian presumption of liberty. All legislative restrictions on such liberty interest should be evaluated critically.

However, this call for a return to Lochnerian thought and analysis is not and should not be thought of as any sort of absolutist bar to social legislation that restricts freedom of contract. In addition, it is not and should not be considered a call for a laissez-faire approach to

266. *Lawrence*, 539 U.S. at 582–85. For a thorough and insightful discussion of *Lawrence*’s prohibition on the use of morality as the sole justification for government regulation, see Michael P. Allen, *The Underappreciated First Amendment Importance of Lawrence v. Texas*, 65 WASH. & LEE L. REV. 1045, 1050–59 (2008).

267. *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

268. *Id.* at 571 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

269. See Barnett, *supra* note 262, at 38.

270. *Id.* at 41.

government. As discussed above, these have been the primary critiques of the *Lochner* case and its progeny.²⁷¹ Indeed, Justice Holmes, in his famous dissent in *Lochner*, criticized the majority for just that reason.²⁷² He claimed that the majority was adopting a laissez-faire social and political theory and foisting that model onto the states in a particularly noxious brand of judicial activism that overturned much social legislation of the day.²⁷³ As scholars are beginning to point out, however, that may have been a convenient argument with which to rebut the *Lochner* opinion and its progeny.²⁷⁴ It may also have been somewhat disingenuous and misleading since *Lochner* itself was careful to explain that appropriate exercises of the police power of the state would be upheld.²⁷⁵

This article agrees with the neo-Lochnerians that the Lochnerian model did, and would have continued to, allow for much legislation that would encroach on the liberty of contract.²⁷⁶ In fact, it would undoubtedly allow for regulations that ban certain contracts all together based on their impact on the public welfare (possibilities include, for example, gambling, prostitution, or polygamy though this article is not taking a position on any of those issues). The legislation simply must pass the critical analysis test. According to the *Lochner* Court, restrictions are only allowed to impinge on personal liberty of contract if they have a direct relation, as a means to an end, which is appropriate and legitimate.²⁷⁷ To state it differently, restrictions should be narrowly tailored to achieve an appropriate and legitimate goal. To allow too much deference to legislation is to trample on the rights of individuals to order their own affairs.²⁷⁸

As we have seen in *Lawrence* and elsewhere, a blanket statement that the restriction is designed to protect the moral character of the populace is insufficient. There must be more. Thus, for the examples

271. *See supra* Part II.C.

272. *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

273. *Id.*

274. *See Mayer, supra* note 199.

275. *Lochner*, 198 U.S. at 56.

276. *Mayer, supra* note 199.

277. *Lochner*, 198 U.S. at 57.

278. *See id.* at 56.

previously set forth (gambling, prostitution, or polygamy), the state would need to defend the restrictions on a more compelling basis than simply immorality. They must, in some way, be detrimental enough to the health, for example, or financial well-being of the populace to warrant regulatory intrusion on the liberty interest.

In addition, the proposal set forth here advocates for a modification, perhaps simply an explicit nuance, to the Lochnerian model that is more easily understood and incorporated in light of the development of contract law over the past 100 years. That nuance to the basic Lochnerian presumption in favor of liberty of contract is that the presumption should shift and run to the benefit of the regulation where the regulation can be seen as an attempt to address structural or procedural flaws in the very nature of the contracts at stake. Thus, where a regulation addresses the fairness of the contracting process, the presumption in favor of freedom of contract and against the restrictions should shift, and the judiciary should be deferential to the regulation itself.

The very legislation at stake in *Lochner*, maximum working hours for employees, might well have been upheld under this modified paradigm. The statute was designed, arguably, to address a drastic imbalance in the bargaining power that existed in 1905 between the owners of bakeries and their employees. The structural problem with the contracting process itself in that context makes the liberty of contract at stake in that case illusory. There is no liberty of contract for employees who are in a “take it or leave it” situation. Therefore, there is no liberty of contract interest to protect. The employees might be said to be under economic duress²⁷⁹ and forced to accept whatever terms and conditions of employment are handed to them. Where the liberty interest is illusory due to some defect in conditions necessary to make the consent involved in the contract meaningful, the presumption in favor of that liberty interest should shift in favor of the regulation.

279. Duress is a concept that is much more familiar to contract law scholars in 2009 than it ever could have been in 1905.

The *Lochner* case itself failed to describe any sort of shifting presumption or to recognize that in certain circumstances the theoretical liberty of contract at stake simply does not exist.²⁸⁰ It is this oversight, intentional or otherwise, that was the *Lochner* decision's biggest flaw. Perhaps it was just this oversight that caused scholars like Roscoe Pound, when responding to the *Lochner* era jurisprudence, to advocate for more legal realism.²⁸¹

The *Lochner* Court overturned a legislative enactment that was designed to help make the bargain involved in the contracts being regulated closer to what would be bargained for if the bargain were indeed a free one. This notion may well resonate with law and economic scholars since the regulations that would be given deference are those that attempt to recreate bargains that parties would enter into if the bargaining process was truly fair, with consent being meaningfully given by both parties. Where parties are able to negotiate freely for their own wealth maximizing position, the law should not interfere with the parties' liberty to do so.

The basis of a contract is always consent, and the true consent of the parties involved was at issue in *Lochner* and many cases confronting similar social legislation. The legislature believed that the workers (the bakers in the *Lochner* case) had little ability to actually freely bargain or truly consent to the working conditions that were thrust upon them.²⁸² The regulation in *Lochner*, which created maximum permitted working hours for the bakers, could be seen as an attempt to create contracts that likely would have resulted if the parties to those contracts were able to bargain freely and to give meaningful consent to the terms of their arrangement.

Another problem with the historical use of the Lochnerian analytical framework and one of the reasons why the framework is often criticized is that the doctrine was not applied consistently or, in some cases, accurately.²⁸³ Thus, far from being uniform in their adherence to Lochnerian principles, many cases decided during the

280. *Lochner*, 198 U.S. at 45.

281. Roscoe Pound, *The Call for A Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

282. *Lochner*, 198 U.S. at 69 (Harlan, J., dissenting).

283. See Strauss, *supra* note 200, at 375–76.

Lochner era were incongruous.²⁸⁴ Certain restrictions on labor contracts were allowed to remain, and others were not with no clearly principled justification.²⁸⁵ The Court should have articulated the standard more clearly, so it could have been applied more easily and consistently. Still, intelligent and well-intentioned judges may disagree about the outcomes in certain cases where there are close calls. Notwithstanding that inevitable result, it is possible to define the nuanced *Lochnerian* framework for analysis clearly and urge uniform application of that framework.

Under the nuanced version of the *Lochnerian* analysis proposed here, the basic presumption is in favor of liberty of contract and against regulations that infringe on that liberty. Any regulation infringing on that liberty interest would be subject to critical scrutiny. In accord with *Lochner*, regulations are only allowed to impinge on personal liberty of contract if they have a direct relation as a means to an end, which is appropriate and legitimate.²⁸⁶ However, that “robust” presumption in favor of liberty of contract shifts and favors upholding the regulation where the regulation is designed to address structural or procedural flaws in the contracts involved.

In attempting to identify regulations that address structural or procedural flaws in the contracting process itself, courts should be conscious of doctrinal developments in the law of contract that exist to safeguard against procedural and substantive unfairness. Included in these doctrines are equitable concepts of fraud, misrepresentation, lack of capacity, duress, undue influence, and unconscionability. These doctrines exist in contract law in effect as *ex post* regulation. They exist to buttress the sanctity and stability of contract and the fairness of the resulting bargains that parties enter. Being mindful of such doctrines and the susceptibility of contracting to flaws, courts should be deferential to restrictions that attempt to correct for such

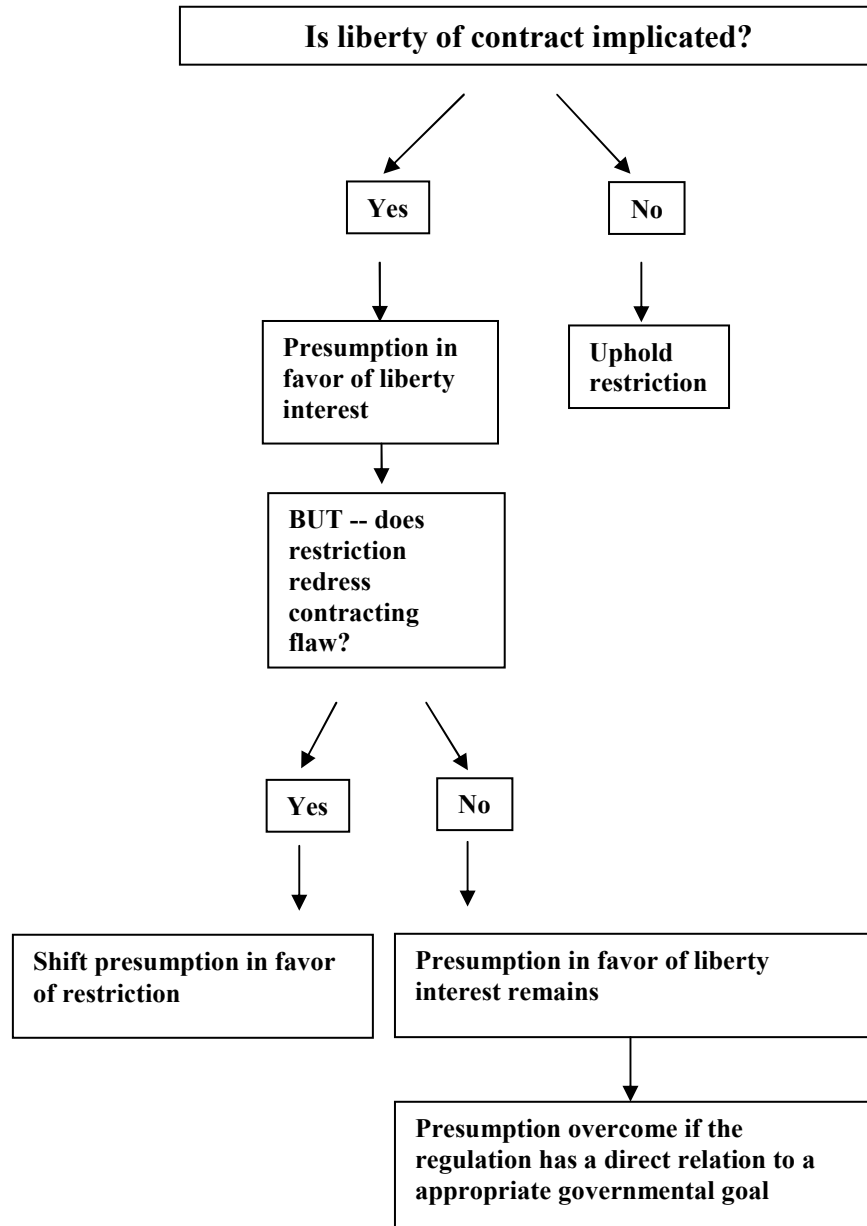
284. See, e.g., *Holden v. Hardy*, 169 U. S. 366 at 395.

285. In contrast to *Lochner*, for example, is *Muller v. Oregon*, 208 U.S. 412 (1908), a case that upheld a statute mandating certain maximum working hours for women. The Court in *Bunting v. Oregon*, 243 U.S. 426 (1917), upheld a statute mandating maximum working hour for both men and women.

286. The language of existing constitutional levels of scrutiny (rational basis, intermediate, or strict) is specifically avoided here because this new paradigm is wholly different and avoids the three-levels of scrutiny that have been established for Fourteenth Amendment claims.

flaws. Such restrictions should be seen as nothing more than *ex ante* equitable measures designed to work in tandem with the jurisprudential contract doctrines that are applied in litigation *ex post* to buttress the sanctity and stability of contracting and the fairness of the contractual results. The nuanced Lochnerian framework proposed here is set forth in the following flow chart.

**Modified Lochnerian Framework
for
Liberty of Contract Analysis**



C. Applying the New Paradigm to Gay Rights to Family

Applying the intellectual tradition of *Lochner* and the nuanced Lochnerian framework proposed here to the panoply of gay rights to family, some regulations that are crucial to protect the contracting process would be given deference and likely found to be constitutional, but blanket prohibitions on gay people entering into certain types of contracts would likely not be upheld. For example, regulations affecting the age or capacity of the parties involved in any family related contract would likely be upheld. Such regulations protect the integrity of the contracting process by ensuring adequate capacity of the parties involved. However, regulations that completely disenfranchise any group of people from participating in contracts that help create families²⁸⁷ would receive critical scrutiny and most likely be deemed unconstitutional. This is a new approach and demands a more searching analysis of the restrictions at stake than the deferential rational basis being used now for regulations that burden an individual's liberty to contract.

1. Marriage

The statutes and state constitutional provisions that ban gay marriage would likely be struck down under the new framework. Applying the new paradigm requires three logical steps: (1) identify whether liberty of contract is at stake; (2) determine whether the restriction impermissibly impinges on that liberty interest; in doing this there should be a beginning presumption that the restriction is not constitutional, and this presumption can be overcome if the restriction has a direct relation to an appropriate governmental goal; (3) assess whether the restriction is designed to redress some structural or procedural flaw in the contract process under consideration; if so, then the presumption of unconstitutionality should shift and the

287. It may be worth noting that contracts in and of themselves surely do not create families. It is this author's view, just for the sake of clarity, that people create families with or without contracts through their personal bonds with other people, related or not. However, certain important legal rights pertaining to family are accessible and recognizable only through contract.

restriction should be presumed to be constitutional and subjected only to a deferential rational basis type of review.

Tickling through these steps—first, is there a liberty of contract interest in the ability to freely enter into a marriage contract? The answer is plainly yes. For many years the Supreme Court has discussed the primacy of marriage as a fundamental liberty interest. Moreover, one of the benefits of the Lochnerian analytical framework is moving away from the challenges of characterizing certain liberties as fundamental. Regardless of whether there is a fundamental liberty interest in marriage as an institution, there is clearly a contract involved in marriage. Two people agree with each other to be bound together in marriage and all that the institution entails legally, including property and inheritance rights. Thus, there is a liberty interest in individuals being able to enter into such contracts without undue interference from government.

Second, do the statutory and constitutional bans impermissibly impinge on that liberty of contract? As was mentioned above, this test is not designed to bar all restrictions on any liberty interest. This test starts with the presumption in favor of the liberty interest and against the constitutionality of the restriction. That presumption is overcome if the restriction has a direct relation, as a means to an end, which is appropriate and legitimate.

Here the outright ban on marriage does not regulate aspects of a marriage contract between gay people that are appropriate and within the traditional regulatory powers of the state. The ban completely takes away the liberty of gay people to get married. Under no circumstances is a marriage allowed in states where such activity is banned. Recall that morality as a justification for government regulatory action should not be enough. Is there another compelling reason for a ban on gay marriage? Is the health or financial welfare of the population at stake? Again, the answer is no. Some have argued that allowing gay marriage hurts or diminishes the sanctity of marriage generally. That argument seems to be nothing more than the morality argument and should not be given any merit. Accordingly, it would seem that such an outright ban on entering into contracts for

marriage would not trump the presumption in favor of the liberty interest and would not be allowed to stand.

The analysis is not through until the third question is asked—does the restriction represent an attempt to redress some flaws in the contracting process? If so, the presumption in favor of the liberty interest and against the restrictions should shift. But here, the answer is clearly no. While the social legislation at stake in *Lochner* could be seen as an attempt to empower a group that had no contracting leverage whatsoever, the ban on gay marriage does no such thing. On balance, after applying this three-pronged *Lochnerian* framework, the ban on marriage should fail.

2. Adoption

The analysis is similarly straightforward when it comes to the restrictions on gay adoption. This section uses the Florida and Utah laws as examples.²⁸⁸ Florida, similar to Mississippi, represents the extreme position of an outright ban on gay people adopting, while Utah, similar to Arkansas and Michigan, restricts gay couples from adopting by stating a preference for married people and prohibiting unmarried couples from adopting.

Turning to the three-pronged test, first, there is certainly a liberty of contract interest in entering into contracts for adoption. Again, cases throughout the history of the United States enshrine the liberty to have and raise children. Once again, however, the *Lochnerian* analysis need not even go that far. For that purpose, it is clear that there are contracts involved in the adoption process. Prospective parents agree with biological parents, an adoption agency, and/or the state to become the legal parents of the child or children involved, with all the rights and obligations that such parenthood entails. Those prospective parents, therefore, have a liberty of contract interest in entering into those contractual arrangements without undue government interference.

288. See *supra* Part I.B.2.

Of course that liberty is not absolute, and the second step asks whether the restrictions in question are reasonable and therefore permissible. The presumption is in favor of the liberty interest and against the restrictions. That presumption can be overcome if the state can show that its restrictions have a direct relation, as a means to an end that is appropriate and legitimate. If the restrictions were designed to protect the best interests of the child, such restrictions would likely be upheld as appropriate and legitimate. With the Florida blanket prohibition on gay people adopting regardless of the best interests of the child, however, the restrictions go too far in limiting the liberty interest at stake.

Once again, we still have to address the third prong of the test to see whether the presumption in favor of the liberty interest should shift. Can the gay adoption restriction be seen as a way to redress some flaw in the contracting process that is involved with adoption? There seems to be no plausible way to answer that question affirmatively. Thus, the outright ban on adoption would seem to be unconstitutional.

The Utah standard is more complicated. Recall that in Utah, the statutory restrictions call for an adopted child to be placed with a married couple if at all possible and not with single people unless absolutely necessary. Moreover, the statute forbids couples who live together but are unmarried from adopting. This framework involves two restrictions that need to be assessed separately.

The first prong of the test is the same for both restrictions. There is a liberty of contract interest involved with entering into contractual arrangements to adopt. Thus, there is a presumption that restrictions will be unconstitutional unless they can be shown to have a direct relation to an appropriate government goal.

With respect to the strong preference that children be placed with married couples instead of singles, this presents a potentially difficult case. One can imagine arguments that children's best interests are served by placing them in a home with two parents, rather than just one. There are likely to be more resources available for the children and more guardians available to care for them. Further, the restriction is not an outright ban on single people adopting but rather just a

presumption. Thus, even with the restriction, a court could rule that an adoption go forward with a single parent, assuming it was in the best interests of the child. Thus, this restriction may be allowed to pass the critical analysis phase and be upheld as constitutional, despite the starting presumption that it is unconstitutional.

With respect to the ban prohibiting couples that are not married from adopting, this restriction is tougher to justify and would likely not overcome the presumption of unconstitutionality. This restriction appears to be nothing more than an outright ban on certain people adopting, regardless of what is in the best interests of the child. Such an outright ban does not appear to have direct relation to a legitimate governmental goal. Indeed, this restriction appears to be motivated solely by some sense of morality (that couples living together should be heterosexual and married), which the *Lawrence* case has stated is simply impermissible as a justification.²⁸⁹

Moving to the third prong of the test, with respect to both of these restrictions—the preference for married couples over single people and the ban on unmarried couples—there seems to be no possible explanation that either regulation is attempting to redress structural or procedural defects with the contract. Accordingly, the presumption in favor of the liberty interest should remain. Still, the preference for married couples may be able to overcome that presumption, while the outright ban on unmarried couples would likely not.

3. *Surrogacy*

Surrogacy contracts are likely to get constitutional protection under the new analytical framework. Again, applying the three-pronged framework, the first question is whether there is a liberty of contract interest. Here again, the answer is yes. In addition to the Supreme Court for many years expounding upon the fundamentality of the liberty interest in having and raising children, surrogacy is an arrangement that is created through contract. There are contracts between the intended parents and the surrogate, potentially an egg

289. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

donor, and perhaps a service that coordinates the surrogacy. Thus, there is a liberty of contract interest and, in accordance with the new framework being introduced here, a presumption against any restrictions.

The primary restriction that prevents gay people from entering into surrogacy contracts is the marriage requirement imposed by many states, discussed in Part I.B.2. That restriction would be able to overcome the presumption against it if it has a direct relation to an appropriate governmental goal. Here, however, the marriage requirement essentially forbids gay people categorically from engaging in the regulated activity. Once again, if the ban had appropriate justifications beyond morality, it might be allowed to overcome the presumption of unconstitutionality. However, it is difficult to conceive of any compelling arguments. The most common argument is likely based on a notion that relationships bound by marriage are more enduring than those that are not, and thus, almost by definition, having married parents is in the best interest of a prospective child. However, there is no clear evidence of such a claim. Indeed, one of the Florida courts that overturned the gay adoption ban went to great lengths to refute such a contention.²⁹⁰ Thus, once again, the restriction should likely be found impermissible.

Finally, the third prong of the test asks whether the restrictions are meant to redress some flaw in the contracts involved with surrogacy. There are some limits on surrogacy that can be understood this way. For example, the Illinois statute that mandates that the surrogate receive both psychological and legal counseling is surely a restriction that is designed to make the bargaining process between the surrogate and the intended parent(s) a fair one. In that case, the new framework for analysis would be deferential to the restriction and likely allow it to stand.

290. *In re Adoption of Doe*, 2008 WL 5070056 at *15–17 (Fla. Cir. Ct. Aug. 29, 2008) (setting forth the testimony of trial experts that having same-sex parents is not in any way detrimental to a child's upbringing).

On the other hand, the marriage requirement, which represents a blanket prohibition on all single or unmarried people from entering into a surrogacy contract, does not in any way seem to redress a bargaining imbalance or any problems involved in the relevant contracts. Accordingly, that particular restriction would not get the benefit of the shifting presumption and would be evaluated critically. It should be found to be overreaching and struck down.

CONCLUSION

As the quote set forth at the beginning of this article states, legislative and constitutional restrictions on liberty of contract are generally said to be in the public interest but are often passed for other motives. In the case of the restrictions that absolutely prevent gay people from marrying, adopting, or having children via a surrogate, the rationale seems clear. Just as Senator Peterson said in 1977, it is a message to gay people to “get back in the closet.”²⁹¹

Current arguments that attack the restrictions on gay rights to family have had some success, but that success has been limited. The states still largely forbid gay marriage, and many states limit the ability of gay people to have children through adoption or surrogacy arrangements.

This article has presented a new framework for analysis that might be employed by advocates and courts alike. The framework moves away from emotional pleas to give gay people the heightened protection accorded to victims of gender or racial discrimination. Those arguments have been met frequently with skepticism or even contempt based on religious or moral convictions that gay behavior should not be condoned as a normative matter. The new framework offered here turns away from polarizing arguments defending or condemning any particular kind of life style or religious position. The framework is built off a platform of economic liberty—the liberty of contract that was the predominant analytical framework of the *Lochner* era.

291. *Gay Bills Pass Both Chambers*, *supra* note 71, at B2.

This new framework calls for courts to begin with the working presumption that the liberty interest should prevail over any attempts to curtail it. That presumption can be overcome if the restriction is directly related to an appropriate governmental purpose. However, the presumption in favor of the liberty interest should shift in favor of any regulations that attempt to ensure the integrity of the contract involved. If the contract at stake is either structurally or procedurally flawed, there should be no deference given to it.

In accord with this new framework, untold motives based on religious or moral convictions will be insufficient to provide constitutional cover for regulations and restrictions that infringe on liberty of contract. In this way, it is this author's hope that liberty itself can be better protected.

APPENDIX A
STATE MARRIAGE AND RELATIONSHIP LAWS

I. States that have legalized gay marriage:²⁹²

California (2010)²⁹³
Connecticut (2008)
District of Columbia (2010)
Iowa (2009)
Massachusetts (2004)
New Hampshire (2010)
Vermont (2009)

II. States that have statutes against gay marriage:²⁹⁴

Delaware
Hawaii
Illinois
Indiana
Maryland
Minnesota
North Carolina
Pennsylvania
Washington
West Virginia
Wyoming

III. States that have constitutional amendments against gay marriage:²⁹⁵

Alabama (2006)
Alaska (1998)
Arizona (2008)
Arkansas (2004)
California (2008)
Colorado (2006)

292. Human Rights Campaign, Marriage Equality, *supra* note 32.

293. California has been included here as a result of the recent decision in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

294. Human Rights Campaign, Statewide Marriage Prohibitions, *supra* note 28.

295. *Id.*

Florida (2008)
 Georgia (2004)
 Kansas (2005)
 Idaho (2006)
 Kentucky (2004)
 Louisiana (2004)
 Michigan (2004)
 Mississippi (2004)
 Missouri (2004)
 Montana (2004)
 Nebraska (2000)
 Nevada (2002)
 North Dakota (2004)
 Ohio (2004)
 Oklahoma (2004)
 Oregon (2004)
 South Carolina (2006)
 South Dakota (2006)
 Tennessee (2006)
 Texas (2005)
 Utah (2004)
 Virginia (2006)
 Wisconsin (2006)

IV. States that permit civil unions, according some marriage-like rights:²⁹⁶

New Jersey

V. States that permit domestic partnerships or civil unions, according some marriage like rights:²⁹⁷

Nevada
 Oregon
 Washington

296. Human Rights Campaign, Marriage Equality, *supra* note 32.

297. *Id.*

APPENDIX B
STATE ADOPTION LAWS

All states proceed in the best interests of the child with the following exceptions:

Michigan: no one cohabiting outside of marriage may adopt
See MICH. COMP. LAWS. ANN. § 710.24.

Mississippi: same gender couples may not adopt
See MISS. CODE ANN. § 93-17-3(5).

Utah: presumption that children should be adopted by married people and no one cohabiting outside of marriage may adopt
See U.C.A. § 78B-6-117.

APPENDIX C
STATE SURROGACY LAWS CATEGORIZED

I. States with surrogacy statutes but marriage requirement:

Florida
Nevada
New Hampshire
Oklahoma
Texas
Utah
Virginia

II. States with surrogacy statutes where no marriage requirement:

California
Connecticut
Illinois
Kentucky
Massachusetts
New Jersey
New Mexico
North Carolina
Oregon
Washington
West Virginia

III. States where surrogacy is illegal:

Delaware
Washington D.C.
Indiana
Louisiana
Michigan
Nebraska

New York
North Dakota

IV. States where the legal status of surrogacy is unclear:

Alabama
Alaska
Arizona
Arkansas
Colorado
Georgia
Hawaii
Idaho
Iowa
Kansas
Maine
Maryland
Minnesota
Mississippi
Missouri
Montana
Ohio
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Vermont
Wisconsin
Wyoming