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MORE THAN A PIECE OF PAPER: SAME-SEX PARENTS AND THEIR ADOPTED CHILDREN ARE ENTITLED TO EQUAL PROTECTION IN THE REALM OF BIRTH CERTIFICATES

SHOHREH DAVOODI*

INTRODUCTION

Both the proponents and opponents of same-sex marriage have kept the controversial topic in the United States spotlight for several years. The beam of that spotlight widened further after the Supreme Court decided both *United States v. Windsor* and *Hollingsworth v. Perry* in the 2012 term. While the inequalities experienced by gays and lesbians have begun to appear on the front page with increasing regularity, the public is paying less attention to the struggles of their children.

The patchwork of laws regarding the status of same-sex relationships in the United States can be difficult to traverse for gay parents and their children.¹ The number of gay and lesbian parents in the U.S. continues to increase, making the lack of uniformity in laws particularly problematic.² In the United States, it is estimated that there are at least 125,000 same-sex couples raising nearly 220,000 children.³ Of those, more than 16,000 same-sex couples are raising approximately 22,000 adopted children.⁴ In fact, same-sex couples with children are four times more likely to raise an adopted child than heterosexual couples with children.⁵

* The author would like to thank Professor Kathy Baker for suggesting this topic and supplying numerous ideas and revisions throughout the writing process. The author would also like to thank Jason Cairns for his unwavering love and support.

1. See Lissette Gonzalez, Comment, "*With Liberty and Justice for All [Families]*": *The Modern American Same-Sex Family*, 23 ST. THOMAS L. REV. 293, 322 (2011) ("The law as it pertains to same-sex parents is made up of complications, inconsistencies, and an inadequate body of legal rights. Although today gay parentage remains at the forefront of the legal arena, there remains widespread unwillingness among courts and legislatures to stray from traditional notions of parentage, as well as stern opposition to treating same-sex families with the same level of respect and equality as heterosexual or 'normal' families").

2. *Id.*

3. Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. 1, 3 (Feb. 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

4. *Id.*

5. *Id.*

The absence of consistent adoption laws in the United States has resulted in states making their own adoption determinations.⁶ Many states only allow adoptions by married couples or single unmarried persons, precluding unmarried couples from jointly adopting children.⁷ This is the current state of adoption law in Louisiana.⁸

In 2006, Louisiana's Registrar of Vital Records and Statistics (the Registrar) refused to reissue an accurate birth certificate for a Louisiana-born child adopted by same-sex parents residing in New York.⁹ The adoptive parents wanted their child's birth certificate to reflect both of their names. However, the Registrar insisted she could only include one of the parents' names since they were not married and Louisiana law does not permit joint adoption of a child by unmarried parents.¹⁰ This led to *Adar v. Smith*, a case in which the Fifth Circuit upheld the Registrar's birth certificate policy, and the court decided that both the Full Faith and Credit Clause and Equal Protection Clause claims brought by the adoptive parents failed.¹¹

This Comment seeks to demonstrate how the Fifth Circuit incorrectly analyzed the adoptive parents' equal protection claim and wrongly held that the Registrar's policy was constitutional. By denying accurate birth certificates to out-of-state parents with legal parental status, Louisiana is unnecessarily revisiting valid parentage determinations for no justifiable reason. Louisiana has no legitimate interest in undermining the strength of out-of-state parent-child relationships, but refusing to issue birth certificates with the names of both adoptive parents does just that. Consequently, such a policy is constitutionally impermissible.

Part I of this Comment will detail the *Adar* court's decision and the circumstances that led up to its issuance. Part II will explain the importance of birth certificates and the potential consequences that could come to the adoptive children of same-sex parents who cannot obtain an accurate birth certificate that includes the names of both parents. Finally, Part III will

6. Katherine A. West, Comment, *Denying a Class of Adopted Children Equal Protection*, 53 SANTA CLARA L. REV. 963, 968 (2013). However, there is a Uniform Adoption Act (UAA) drafted by the Uniform Law Commission. The UAA lays out a set of proposed adoption laws, and many states have modeled their adoption laws based on them. *Adoption Act (1994) Summary*, UNIF. LAW COMM'N, [http://www.uniformlaws.org/ActSummary.aspx?title=Adoption%20Act%20\(1994\)](http://www.uniformlaws.org/ActSummary.aspx?title=Adoption%20Act%20(1994)) (last visited Jan. 22, 2015).

7. West, *supra* note 6, at 968.

8. LA. CHILD. CODE ANN. art. 1221 (1991).

9. *Adar v. Smith (Adar II)*, 639 F.3d 146, 149 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011).

10. *Id.*

11. *Id.* at 150.

explore two different ways that the Registrar's policy could be unconstitutional under the Equal Protection Clause: (1) the policy may burden a fundamental right stemming from family autonomy, or (2) it may discriminate against out-of-state same-sex parents.

I. *ADAR V. SMITH* — LOUISIANA'S REGISTRAR REFUSES TO ISSUE A BIRTH CERTIFICATE WITH THE NAMES OF BOTH SAME-SEX ADOPTIVE PARENTS OF A LOUISIANA-BORN CHILD

Infant J was born in Shreveport, Louisiana in 2005.¹² In April 2006, Oren Adar and Mickey Ray Smith, a same-sex couple residing in Connecticut, obtained an adoption decree for Infant J through a New York family court.¹³ The adoptive parents sought to have Infant J's birth certificate amended in Louisiana, substituting their names for those of the biological parents.¹⁴ As advised by the State's Attorney General, the Registrar refused to honor their request and update the certificate.¹⁵ The Registrar cited a Louisiana statute that said new records of birth could be issued to "adoptive parents," which the Registrar took to mean *married* parents.¹⁶ She interpreted the statute this way because Louisiana law dictates that only married couples can jointly adopt a child.¹⁷ The Registrar did, however, offer to put one of the parents' names on the birth certificate because Louisiana allows single-parent adoptions.¹⁸

Mickey and Oren sued the Registrar in federal court. They alleged that the Registrar's refusal to issue Infant J a new birth certificate violated both the Full Faith and Credit Clause and the Equal Protection Clause of the United States Constitution.¹⁹ The district court found for the adoptive parents under the Full Faith and Credit Clause.²⁰ On appeal, the Fifth Circuit affirmed the district court's decision, finding that Louisiana law required the Registrar to reissue the birth certificate.²¹

12. *Adar v. Smith (Adar I)*, 597 F.3d 697, 701 (5th Cir. 2010), *rev'd en banc*, *Adar v. Smith (Adar II)*, 639 F.3d 146 (5th Cir. 2011).

13. *Id.*

14. *Adar II*, 639 F.3d at 149.

15. *Adar I*, 597 F.3d at 701.

16. *Id.* at 701–02; *Adar II*, 639 F.3d at 149–50; see LA. REV. STAT. ANN. § 40:76(a), (c) (2012) (“When a person born in Louisiana is adopted in a court of proper jurisdiction . . . the state registrar may create a new record of birth” and “the state registrar shall make a new record in its archives, showing . . . [t]he names of the adoptive parents.”).

17. *Adar I*, 597 F.3d at 701–02.

18. *Adar II*, 639 F.3d at 150.

19. *Id.* at 151.

20. *Id.* at 150.

21. *Id.*

However, the Fifth Circuit then agreed to rehear the case en banc and vacated their previous decision.²² In the court's new decision, it reasoned that amending Infant J's birth certificate would not constitute recognition of the adoption, but enforcement of it, and held that Mickey and Oren's valid New York adoption did not have to be "enforced" by the Registrar.²³ Put differently, while the Registrar claimed to acknowledge Mickey and Oren as Infant J's legal parents, that parentage did not give them a right to Louisiana's primary method of parental identification—a birth certificate.²⁴ The court reasoned that "birth certificates are merely 'identity documents that *evidence* . . . the existing parent-child relationships, but do not create them.'"²⁵ The court further stated that "no right created by the New York adoption order . . . has been frustrated, as nothing in the order entitles Appellees to a particular type of birth certificate."²⁶ Finally, the court concluded that "Louisiana has a right to issue birth certificates in the manner it deems fit," which under current Louisiana law, does not include issuance to unmarried adoptive parents.²⁷

On October 11, 2011, the United States Supreme Court denied the adoptive parents' petition for writ of certiorari.²⁸ This closed the door, at least for now, on Infant J's chance of receiving an accurate birth certificate. The next part of this Comment will assess the implications of a policy that prevents Infant J from acquiring an updated birth certificate inscribed with both of his parents' names.

II. AN ADOPTIVE CHILD'S BIRTH CERTIFICATE — WHAT'S IN A PIECE OF PAPER?

The average person probably does not think much about her birth certificate. Other than the rare instance where a person may need a second form of identification, such as applying for a driver's license,²⁹ her birth certificate is likely tucked away in a drawer collecting dust. But for chil-

22. *Id.*

23. *Id.* at 159 (citing *Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998): "The states' duty to 'recognize' sister state judgments . . . does not compel states to 'adopt the practices of other states regarding the time, manner, and mechanisms for enforcing judgments.'").

24. *Adar II*, 639 F.3d at 159.

25. *Id.*

26. *Id.*

27. *Id.* at 161.

28. *Adar v. Smith*, 132 S. Ct. 400 (2011).

29. See, e.g., *Applying for a New License (Drivers 18+) in Louisiana*, DMV.ORG <http://www.dmv.org/la-louisiana/apply-license.php> (last visited Jan. 22, 2015) ("The [Office of Motor Vehicles] recommends your birth certificate as a primary form and your Social Security card and a payroll stub as secondary forms [of identification for applying for a driver's license].").

dren of same-sex parents, not having an accurate birth certificate can cause unexpected complications.³⁰ Some problems have already presented themselves to Mickey and Oren, such as issues with “[Mickey’s] ability to enroll his son on his company health plan,” “the couple’s ability to enroll their son [in] school,” and an incident where the couple was “stopped at an airport when airport personnel wanted proof of their relationship with the child.”³¹

A. Birth Certificates Generally

Birth certificates are government-issued documents³² that are “universally recognized as reliable proof of a child’s identity and parentage.”³³ The website for the Louisiana State Registrar & Vital Records describes birth records as being “essential for just administration of [Louisiana] law and for the protection of individual rights.”³⁴ The birth certificates of adopted children in Louisiana and other states must include the adopted child’s name, date and place of birth, and the names of the adoptive parents.³⁵

According to Professor Annette R. Appell of the Washington University Law School, “[b]y presenting the facts of birth, the birth certificate creates and protects rights and disabilities for adults and children. It is proof of a life and the rights that flow from that life.”³⁶ She goes on to say that a birth certificate creates “legal truth because it is the official record of one’s identity. Attributes of this certificate of birth include belonging—citizenship and family membership, with all of the attendant rights and privileges and limitations.”³⁷ She states that, “[m]ost fundamentally, the birth certificate certifies and proves parenthood: the person or persons on the birth certificate are the child’s legal parents.”³⁸ Further, Appell asserts

30. See discussion below in Parts II.A and II.B.

31. *Adar v. Smith Case Background*, LAMBDA LEGAL (Sept. 26, 2011), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_adar-v-smith-case-background_1.pdf.

32. Camilla Taylor, *Accurate Birth Certificates Make Families Less Vulnerable*, LAMBDA LEGAL (Dec. 9, 2010), http://www.lambdalegal.org/news/oc_201012_accurate-birth-certificates.

33. Brief of Amici Curiae Professors of Law Joan Heifetz Hollinger, Courtney G. Joslin, Rhonda Wasserman, et al. in Support of Petitioners at 3, *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (No. 09-30036), 2011 WL 3533772, at *3 (hereinafter Brief of Amici Hollinger (2011)).

34. *About Vital Records*, STATE REGISTRAR & VITAL RECORDS, <http://new.dhh.louisiana.gov/index.cfm/page/648/n/234> (last visited Feb. 6, 2015).

35. See Brief of Amici Curiae Joan Heifetz Hollinger et. al. in Support of Plaintiff’s-Appellees Oren Adar and Mickey Ray Smith and in Support of Affirmation at 6–7, *Adar v. Smith*, 591 F.Supp.2d 857 (E.D. La. 2008) (No. 09-30036), 2010 WL 5778048 (hereinafter Brief of Amici Hollinger (2010)).

36. Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 390 (2014).

37. *Id.* at 391.

38. *Id.* at 396.

that “[t]he birth certificate assigns, memorializes, and codifies the parent-child relationship as the law constructs it. This creates a range of protections, freedoms, benefits, and obligations for the parents and the child.”³⁹

Children with inaccurate birth certificates can face challenges in establishing their identity and parentage.⁴⁰ Birth certificates are routinely required as identification for children in a variety of situations. For example, schools often need birth certificates for new student registration.⁴¹ Financial institutions may require a birth certificate to conduct a financial transaction for a minor child, such as setting up a bank account.⁴² Furthermore, in the event of a separation or divorce between the adoptive parents, a birth certificate may help determine the future care, custody, and support of the child.⁴³

A birth certificate can also be important for traveling. The U.S. State Department requires a birth certificate to issue a passport for children under fourteen.⁴⁴ Some countries even require a parent traveling with a minor child to provide a birth certificate in addition to a passport.⁴⁵

Additionally, birth certificates are often required to confirm the existence of a parent-child relationship in order for either party to receive various kinds of financial benefits. For instance, the U.S. government may require a birth certificate to determine eligibility for surviving child Social Security benefits.⁴⁶ Insurance companies may need a birth certificate to verify a child’s entitlement to a parent’s pension or other retirement benefits, or their eligibility as a beneficiary of a parent’s estate.⁴⁷ As Mickey and Oren experienced, a birth certificate may even be needed for a child to gain the benefit of a parent’s health insurance plan.⁴⁸

The above list is not exhaustive, but it paints a picture of the kinds of struggles adoptive parents and children alike may suffer if an accurate birth certificate is not obtainable. While it is true that, in most situations, adoptive parents have the option of establishing parentage through other means, such as an adoption decree,⁴⁹ the use of birth certificate alternatives can

39. *Id.* at 395.

40. *Id.* at 393, 394.

41. Brief of Amici Hollinger (2011), *supra* note 33, at 12–13.

42. *Id.*

43. See *Adar v. Smith Case Background*, *supra* note 31.

44. Brief of Amici Hollinger (2011), *supra* note 33, at 12–13.

45. *Id.*

46. *Id.*

47. *Id.* at 12–14.

48. See *Adar v. Smith Case Background*, *supra* note 31.

49. Adoptions are finalized through a court order or adoption decree, which “establishes the legal relationship between the child and his or her adoptive parent(s) and severs the legal relationship be-

create additional problems.⁵⁰ First, they may prevent a child from keeping his or her adoption private and confidential, forcing them to “repeatedly explain the circumstances of their adoption and the reasons why their birth certificates are incomplete.”⁵¹ It is not a stretch of the imagination to assume that such explanations may have a negative impact on the affected child. Not having an accurate birth certificate may also make a child feel as if they are different from their peers since the vast majority of children and parents have birth certificates.⁵² Moreover, “alternatives are more likely to result in potentially harmful delays, bureaucratic complications and increased costs.”⁵³ Birth certificates are universally recognized, whereas adoption decrees may raise questions.⁵⁴ Perhaps the most detrimental problem stemming from depending on birth certificate alternatives is that they may be unavailable or unreliable in emergency situations where time is of the essence, potentially causing physical harm to the child.⁵⁵

B. In Case of Emergency

A law or policy that keeps a child of same-sex parents from having an accurate birth certificate could have grave consequences for that child’s safety and well-being.⁵⁶ Harm might come to such a child if it takes additional time in a critical situation to determine parentage, delaying treatment that could be lifesaving.⁵⁷ Lambda Legal states that “[p]arents who don’t have accurate birth certificates for their children have extra reason to dread medical emergencies, fearing that doctors will delay a child’s emergency treatment while trying to figure out whether a parent has authority to consent.”⁵⁸ While such scenarios may seem farfetched, at least two cases reached the courts after same-sex adoptive parents experienced precisely this kind of heart-wrenching situation.⁵⁹

tween the child and his or her biological parents. The decree also guarantees that the adoptive parent(s) ‘will be treated as parents for all legal purposes.’” West, *supra* note 6, at 970–71.

50. See Brief of Amici Hollinger (2011), *supra* note 33, at 14.

51. *Id.* at 12.

52. *See id.* at 11.

53. *Id.* at 14.

54. Brief of Amici Hollinger (2010), *supra* note 35, at 10.

55. *See id.*

56. *See id.* at 8–9.

57. *Id.*

58. Taylor, *supra* note 32.

59. *See* discussion in Parts B.1 and B.2.

1. *Finstuen v. Crutcher*—Only the Mother Can Ride in the Ambulance

In *Finstuen v. Crutcher*, three same sex-couples and their adopted children challenged an Oklahoma statute that prohibited the state from recognizing adoptions “by more than one individual of the same sex from any other state or foreign jurisdiction.”⁶⁰ Lucy and Jennifer Doel were one of these couples.⁶¹ They adopted their Oklahoma-born child, “E,” in California.⁶² Oklahoma issued them a supplemental birth certificate listing only Lucy as E’s parent, and denied their request to add Jennifer’s name to the certificate.⁶³

The Doels had a scary experience when E needed to be transported to the emergency room via ambulance.⁶⁴ The emergency medical technicians said only the “mother” could ride in the ambulance, so Jennifer was not allowed to ride with Lucy and E.⁶⁵ Similarly, at first the emergency room personnel would only allow Lucy in the room with their sick child.⁶⁶ Jennifer was eventually allowed to be with E in her hospital room once the hospital personnel understood that both she and Lucy were E’s parents.⁶⁷

The Tenth Circuit in *Finstuen* found the challenged Oklahoma adoption statute unconstitutional, holding that the Full Faith and Credit Clause required the Oklahoma State Department of Health to issue an updated birth certificate to the Doels containing both parents’ names.⁶⁸ The court reasoned that, in recognizing the California adoption decree, Oklahoma was required to give the Doels the same rights to which all Oklahoma adoptive parents are entitled.⁶⁹ Thus, “[i]f Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the Doels could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate.”⁷⁰ However, because Oklahoma *did* have such a statute in place, the state was required to issue the Doels an

60. *Finstuen v. Crutcher (Finstuen II)*, 496 F.3d 1139, 1142 (10th Cir. 2007).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Finstuen v. Edmondson (Finstuen I)*, 497 F. Supp. 2d 1295, 1301 (W.D. Ok. 2006), *aff’d in part, rev’d in part sub nom., Finstuen II*, 496 F.3d at 1139.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Finstuen II*, 496 F.3d at 1156.

69. *Id.* at 1154.

70. *Id.*

updated birth certificate just as they would do for any other adopting couple residing in Oklahoma⁷¹

The Fifth Circuit in *Adar*, recognizing that *Finstuen* was a similar case, attempted to distinguish it. The Fifth Circuit insisted that *Finstuen* and *Adar* are different because *Finstuen* dealt with a challenge to a statute and *Adar* involved a challenge to the actions of an executive official.⁷² However, most believe that the *Adar* decision created a circuit split, including the *Adar* dissenters.⁷³ The dissent in *Adar* stated that the Full Faith and Credit Clause requires states to accord the judgments of sister states full faith and credit, regardless of which branch of state government is involved.⁷⁴

The alleged circuit split was created when the Fifth Circuit decided in *Adar* that amending a birth certificate is considered an *enforcement* of a sister state's final judgment of adoption; doing so was only required if Louisiana would have issued the adoption under its own laws.⁷⁵ Like Louisiana, Oklahoma does not permit joint adoption by unmarried persons.⁷⁶ But the Tenth Circuit found that amending a birth certificate according to Oklahoma's law is *recognition* of another state's judgment as required by the Full Faith and Credit Clause.⁷⁷ Under the Tenth Circuit's reasoning, when the Fifth Circuit in *Adar* claimed to honor the parentage of Oren and Micky, but only put one parent's name on the birth certificate, the *Adar* court awarded only "half faith and credit" to their valid adoption decree.⁷⁸

2. *Gartner v. Iowa Department of Public Health*—An Exhausting Vigil

Similarly, in *Gartner v. Iowa Department of Public Health*, Heather Martin Gartner and Melissa Gartner challenged the state of Iowa's refusal

71. *Id.*

72. *Adar v. Smith (Adar II)*, 639 F.3d 146, 182 (5th Cir. 2011).

73. See, e.g., Drew Lambert, *What Happens in Vegas New York, Stays in Vegas New York: A Criticism of Adar v. Smith*, 9 MOD. AM. 59 (2013); Joseph A. Fraioli, Note, *Having Faith in Full Faith & Credit: Finstuen, Adar, and the Quest for Interstate Same-Sex Parental Recognition*, 98 IOWA L. REV. 365 (2012); Lauren Lombardo, Note, *Does Heather Have Two Mommies?: The Importance of Full Faith and Credit Recognition for Adoptions By Same-Sex Couples*, 39 FORDHAM URB. L.J. 1301 (2012).

74. *Adar II*, 639 F.3d at 182 (Wiener, J., dissenting).

75. *Id.* at 160–61.

76. OKLA. STAT. ANN. tit. 10, § 7503.1-1 (West 2013).

77. *Finstuen v. Crutcher (Finstuen II)*, 496 F.3d 1139, 1156 (10th Cir. 2007).

78. *Adar II*, 639 F.3d at 180 (Wiener, J., dissenting).

to issue an accurate birth certificate to their daughter, MacKenzie, which listed both women as parents.⁷⁹

Heather is MacKenzie's biological mother, having conceived her through anonymous donor insemination.⁸⁰ The day after MacKenzie was born, Heather and Melissa completed a hospital form for MacKenzie's birth certificate, but when they received the birth certificate it had only Heather's name.⁸¹ Heather and Melissa asked the Iowa Department of Public Health (the Department) to reissue the birth certificate with both of their names, but the Department denied their request.⁸² The Department reasoned: "The system for registration of births in Iowa currently recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father"⁸³

Lambda Legal describes Heather and Melissa's experience in 2010 when MacKenzie became seriously ill and was hospitalized in an intensive care unit:

Heather maintained an exhausting vigil at Mackenzie's bedside day and night because Heather and Melissa both feared that, without an accurate birth certificate, the hospital would not recognize Melissa as a parent and permit her to make decisions or even remain with Mackenzie if an emergency occurred in Heather's absence. Later, when Mackenzie needed a surgical procedure, Heather had to take time off from work to be present during the procedure and Mackenzie's complete recovery even though Melissa, as the stay-at-home parent, was available to care for Mackenzie and the couple would have preferred to avoid having Heather miss as much work. These stresses and frustrations compounded the anxiety the family already felt over their infant's terrifying illness.⁸⁴

The Iowa Supreme Court in *Gartner* found that, under Iowa's equal protection clause, the statute allowing only "the name of the husband" to appear on the birth certificate was unconstitutional when applied to a married lesbian couple who had a child born to them during their marriage.⁸⁵

In the emergency situations the Doels and Gartners faced, what if the legally recognized parent had not been present? The parent whose name

79. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 341–42 (Iowa 2013).

80. *Id.* at 341.

81. *Id.*

82. *Id.* at 341–42.

83. *Id.* at 342.

84. Taylor, *supra* note 32.

85. *Gartner*, 830 N.W.2d at 354. However, it is important to note that in making their decision in *Gartner*, the Iowa Supreme Court considered the special protections they had previously afforded to homosexuals in Iowa. Specifically, the court in *Varnum v. Brien* held that classifications based on sexual orientation must be analyzed under a heightened level of scrutiny and determined that same-sex couples could not be excluded from civil marriages in Iowa. 763 N.W.2d 862, 896, 907 (Iowa 2009).

was not listed on the birth certificate may have been unable to exercise her parental right to make medical decisions on behalf of her minor child. This frightening reality is one no parent should ever have to face, and yet Mickey and Oren are doing just that each day Infant J goes without an accurate birth certificate.

III. DENYING RECOGNIZED PARENTS ACCURATE BIRTH CERTIFICATES FOR THEIR ADOPTIVE CHILDREN RESULTS IN A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

Many papers have focused on the circuit split created by the *Adar* court regarding its interpretation of the Full Faith and Credit Clause as that clause relates to adoption judgments. But few have examined the ways in which Mickey and Oren were denied equal protection when they could not obtain an accurate birth certificate for Infant J. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws.”⁸⁶ Equal protection issues can arise either when a law discriminates against or disadvantages a class of individuals, or when a law interferes with the exercise of a fundamental right.⁸⁷ Legal challenges based on equal protection require the government to identify a sufficiently important objective for its discriminatory law.⁸⁸ What is sufficient depends on the type of discrimination involved.⁸⁹

When analyzing equal protection claims, courts traditionally apply one of three levels of review.⁹⁰ The level of review applied depends on the type of classification used, though in the case of fundamental rights courts typically use the least deferential level of review.⁹¹ The lowest level of review, and the most deferential to the legislature, is the rational basis test.⁹² Under the rational basis test, the challenged law will be upheld as long as it is rationally related to any legitimate government interest.⁹³ With such a low

86. U.S. CONST. amend. XIV, § 1.

87. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 685, 812 (4th ed. 2011).

88. *Id.* at 685.

89. *Id.*

90. *Id.* at 687–88.

91. *Id.* at 687, 812.

92. *Id.* at 688.

93. *Id.*

bar, laws are rarely declared unconstitutional for failure to show a rational basis.⁹⁴

In certain situations, courts will apply one of the two more exacting levels of scrutiny. The middle level of review is intermediate scrutiny.⁹⁵ Under intermediate scrutiny, a law will be upheld only if it is substantially related to an important government interest.⁹⁶ Courts have applied this level of review in cases dealing with discrimination based on classifications of gender and discrimination against nonmarital children (previously referred to as illegitimacy).⁹⁷

The highest and least deferential level of review is strict scrutiny.⁹⁸ To survive strict scrutiny, a law must be necessary to achieve a compelling governmental interest, and it must be narrowly tailored to achieve its intended result.⁹⁹ One of the most difficult challenges for the government is that it must show it could not achieve its objective through less restrictive alternatives.¹⁰⁰ Courts apply strict scrutiny when there is discrimination based on race or national origin, or when the government burdens a fundamental right, such as the right to access the courts.¹⁰¹ When a fundamental right is at issue, the question involves whether the government has a sufficient purpose for discrimination as to who can exercise the right.¹⁰²

A. The Adar Majority and Dissent Disagree Over How to Analyze the Equal Protection Clause Claim

Although most of the *Adar* court's opinion focuses on the adoptive parents' full faith and credit claim, the court also ruled on their equal protection claim.¹⁰³ The court's characterization of the adoptive parents' argument was that "Louisiana treats a subset of children—adoptive children of *unmarried* parents—differently from adopted children with married

94. *Id.*

95. *Id.* at 687.

96. *Id.*

97. *Clark v. Jeter*, 486 U.S. 456 (1988); CHEMERINSKY, *supra* note 87.

98. CHEMERINSKY, *supra* note 87, at 687.

99. *Id.*

100. *Id.*

101. *Id.* at 687, 812.

102. *Id.* at 813.

103. *Adar v. Smith (Adar II)*, 639 F.3d 146, 161–62 (5th Cir. 2011). Note, however, that the dissent thought they should not have ruled on the equal protection claim considering the district court never addressed it. The dissent wrote, "The only time we should ever reach an issue that was not first decided in the district court is when such issue presents a pure question of law the 'proper resolution [of which] . . . is beyond any doubt.' [] I respectfully disagree with the en banc majority's conclusion that the proper resolution of Appellees' Equal Protection Clause claim is purely legal and its resolution is beyond doubt." *Id.* at 183 (Wiener, J., dissenting).

parents, and this differential treatment does not serve any legitimate governmental interest.”¹⁰⁴ The court did not adopt a form of heightened scrutiny and instead analyzed the claim under traditional rational basis review.¹⁰⁵ The court concluded that the Louisiana law did not run afoul of the Equal Protection Clause because Louisiana has a “legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children,” and “Louisiana may rationally conclude that having parenthood focused on a married couple or single individual . . . furthers the interests of adopted children.”¹⁰⁶

The dissent in *Adar* strongly disagreed with the en banc majority’s analysis of the equal protection claim.¹⁰⁷ The dissent noted that the adoptive parents were not challenging Louisiana’s adoption laws or policies, but were challenging the Registrar’s policy of denying them an accurate birth certificate.¹⁰⁸ Because of this, the dissent argued, “the governmental interest served by [the Registrar’s] refusal to issue a birth certificate reflecting both unmarried out-of-state adoptive parents must extend beyond a defense of Louisiana’s adoption laws.”¹⁰⁹ The dissent further opined that because the Registrar did not deny the birth certificate until well after Infant J was adopted by Mickey and Oren, the Registrar’s action could not be rationally related to the potential stability of Infant J’s home.¹¹⁰

The dissent also took issue with the majority’s Equal Protection Clause comparator.¹¹¹ The majority deemed married non-biological parents to be the relevant comparator class to unmarried non-biological parents such as Mickey and Oren.¹¹² The dissent argued that the correct comparator should be unmarried *biological* parents.¹¹³ The dissent pointed out that, “[b]y statute, Louisiana recognizes and issues birth certificates to unmarried biological parents, irrespective of its proffered policy preference that children only have parents who are married to one another.”¹¹⁴ Further, the dissent noted that “nothing in this provision conditions issuance of such birth certificates on the biological parents’ maintaining a common

104. *Id.* at 161.

105. *Id.* at 161–62.

106. *Id.* at 162.

107. *Id.* at 183–86 (Wiener, J., dissenting).

108. *Id.* at 184.

109. *Id.* (emphasis removed).

110. *Id.*

111. *Id.* at 184–85.

112. *Id.*

113. *Id.* at 185 (Wiener, J., dissenting).

114. *Id.*

home.”¹¹⁵ Under Louisiana law, an unmarried couple is statutorily entitled to a birth certificate for their biological child that includes both parents’ names, regardless of whether they live together.¹¹⁶ The only prerequisite is that they verify the information on the birth certificate, which is parallel to Louisiana’s prerequisite of a certified copy of an out-of-state adoption decree for obtaining a corrected Louisiana birth certificate.¹¹⁷ The dissent’s contention was that Louisiana does not have a legitimate governmental interest for treating unmarried, non-biological adoptive parents and unmarried, biological parents differently for the purpose of issuing birth certificates with two parents listed.¹¹⁸

B. Mickey and Oren’s Equal Protection Claim can be Analyzed Based on Denial of a Fundamental Right or as Discrimination Based on Classification

To date, the Supreme Court has not held that gays and lesbians are a suspect class triggering strict scrutiny, but that does not mean Mickey and Oren’s equal protection claim automatically fails. This section presents two other ways a court could analyze the adoptive parents’ equal protection claim.

First, the Court has found in the past that state interference with family autonomy can infringe on a fundamental right, thus requiring some kind of heightened scrutiny.¹¹⁹ The rigid nature of the scrutiny question works well in some legal contexts, but it has been followed less stringently in the family law context.¹²⁰ Certainly, recent constitutional doctrine regarding same-sex couples reinforces the idea that the levels of scrutiny are less rigid when applied to family law.¹²¹ Because not having an accurate birth certificate may affect family decision-making and infringe on the parent/child relationship, the Registrar’s policy might fit into this category of case law.

Second, while the majority in *Adar* used traditional rational basis review, a very deferential legal standard, the dissent seemed to be hinting at something less deferential, even while using the language of rational ba-

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 185–86.

119. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

120. *See, e.g., Zablocki*, 435 U.S. at 388–89 (stating that “We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.”).

121. *See United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996).

sis.¹²² The Supreme Court has used this same approach before to strike down laws discriminating against gays and lesbians where the Court felt it was inappropriate to formally use a heightened level of scrutiny.¹²³ Even though the Registrar's policy is not discriminatory on its face, if it nonetheless effectively discriminates against gays and lesbians, it is likely unconstitutional.

Viewing *Adar* through either or both of these equal protection lenses leads to the conclusion that denying Mickey and Oren an accurate birth certificate for Infant J was a violation of their constitutional rights under the Equal Protection Clause.

1. Too Much State Interference with the Fundamental Rights That Flow From the Parent-Child Relationship Requires a More Rigorous Scrutiny

Louisiana's policy of refusing to provide accurate birth certificates to out-of-state parents who already have parental status denies those parents equal protection. Because anyone in Louisiana who has parental status can obtain an accurate birth certificate, the only people to whom this policy applies are out-of-state adoptive parents and their children.¹²⁴ The Fifth Circuit argued that denying Mickey and Oren a birth certificate with both their names did not affect their parental status.¹²⁵ But in everyday practice, birth certificates create a presumption of parent-child relationships.¹²⁶ This is particularly true for adoptive parents who have no biological link to their children and thus are keenly aware of how important the legal designation of parenthood is.¹²⁷ When Louisiana chooses not to issue accurate birth certificates to these out-of-state parents, Louisiana revisits valid parentage determinations and undermines them.

122. *Adar II*, 639 F.3d at 183–84 (Wiener, J., dissenting).

123. *See, e.g., Romer v. Evans*, 517 U.S. at 620.

124. Under Louisiana law, unmarried couples living in Louisiana cannot jointly adopt a child, which means they cannot obtain legal parental status. It thus follows that Louisiana's policy of not issuing birth certificates to unmarried parents *with* parental status can only apply to out-of-state parents.

125. *Adar II*, 639 F.3d at 159.

126. *See Appell, supra* note 36, at 390 (“[T]he birth certificate certifies and proves parenthood: the person or persons on the birth certificate are the child's legal parents.”).

127.

An adoption proceeding ends an initial legally-recognized (and enforceable) parent-child relationship and replaces it with an entirely new legal parent-child relationship. In the law, with the exception of step-child adoptions, the new parent-child relationship attaches to the adoptive parents and child as if the child were born of the adoptive parents. The former relationship (in most jurisdictions) is treated as if it had never existed.

Adoption Act (1994) Summary, supra note 6.

The Equal Protection Clause is usually invoked when a law interferes with a fundamental right,¹²⁸ and many rights associated with the family are characterized as fundamental. In 1923, the Supreme Court in *Meyer v. Nebraska* defined liberty in broad terms to include the rights “to marry” and “to establish a home and bring up children.”¹²⁹ In *Meyer*, the Court found that a statute that forbade teaching any language except English in schools interfered “with the power of parents to control the education of their own [children].”¹³⁰ Two years later, the Court similarly invalidated a state law that required children to attend public schools.¹³¹

In 1944, the Court heard *Prince v. Massachusetts*. In *Prince*, a child who was a Jehovah’s Witness distributed religious literature alongside her aunt and legal custodian, contrary to the Massachusetts child labor laws.¹³² The Court stated, “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹³³ Fast-forward to *Wisconsin v. Yoder* in 1972, where the Court considered whether Amish parents were required to send their children to school past the 8th grade in keeping with compulsory attendance laws.¹³⁴ Although the case was primarily about free exercise of religion, *Yoder* did discuss parental rights, expressing that it is “the fundamental interest of parents . . . to guide the religious future and education of their children.”¹³⁵

More recently, in *Troxel v. Granville*, a plurality of the Court discussed the long recognized “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹³⁶ Specifically, the *Troxel* Court held that a state cannot “infringe on the fundamental right of parents to make child rearing decisions simply because [someone acting on behalf of the] state [] believes a ‘better’ decision could be made.”¹³⁷

Even with the many examples available, the precise scope of fundamental rights dealing with family autonomy is not clear. It is unlikely that there is a fundamental right to an accurate birth certificate. However, the interference with the parent-child relationship caused by denying an accu-

128. CHEMERINSKY, *supra* note 87, at 812–13.

129. 262 U.S. 390 (1923).

130. *Id.* at 400–01.

131. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

132. 321 U.S. 158, 161–63 (1944).

133. *Id.* at 166.

134. 406 U.S. 205, 208–13 (1972).

135. *Id.* at 232.

136. 530 U.S. 57, 66 (2000).

137. *Id.* at 72–73.

rate birth certificate to recognized parents seems to fit within the familial rights that courts have already afforded some level of constitutional protection. Specifically, Louisiana's policy may burden fundamental rights associated with both parents and children.

a. The Constitutional Rights of the Adoptive Parents

Louisiana's policy is an unconstitutional restriction on the rights of out-of-state recognized parents. As discussed earlier in this Comment, not having access to an accurate birth certificate in emergency medical situations can lead to scenarios where a parent is unable to exercise her right to make medical decisions on behalf of her child.¹³⁸ In some instances, the parent may not even be allowed to be present with her child in an ambulance or hospital room.¹³⁹ These practices evidence a clear denial of quintessential parental decision-making "concerning the care, custody and control" of one's child.¹⁴⁰

More generally, adoptive parents who do not have accurate birth certificates for their children may feel as if they need to live their lives differently.¹⁴¹ They may worry about traveling across state lines or internationally, constantly calculating the risks of being in a situation where having a birth certificate with both parents' names might make a difference, even while taking the extra step to always have their adoption judgment on hand. By effectively requiring out-of-state recognized parents to go through this more onerous process to ensure that their decision-making regarding their child is honored, Louisiana's policy interferes with family autonomy.

Further, a parallel can be drawn between birth certificates and marriage licenses. When laws have interfered with a person's ability to obtain a marriage license, courts have routinely found a fundamental right triggering heightened scrutiny.¹⁴² For example, in *Zablocki v. Redhail*, a Wisconsin statute made it illegal for residents with support obligations to noncustodial children to obtain a marriage license unless they could show, among other things, that they were complying with those obligations.¹⁴³ The Supreme Court found that the state could not interfere with the plaintiff's ability to obtain a marriage license just because he was in arrears on

138. See Brief of Amici Hollinger (2010), *supra* note 35, at 8.

139. See, e.g., *Finstuen v. Edmondson (Finstuen I)*, 497 F. Supp. 2d 1295, 1301 (W.D. Ok. 2006).

140. See *id.*

141. See, e.g., Taylor, *supra* note 32.

142. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

143. *Zablocki*, 434 U.S. at 375.

his child support.¹⁴⁴ The Court held the ability to obtain a marriage license in the same esteem as other fundamental rights, including “decisions relating to procreation, childbirth, child rearing, and family relationships.”¹⁴⁵ Because the law interfered with a fundamental right, the Court invoked heightened scrutiny and decided that the statute was neither supported by sufficiently important state interests, nor closely tailored to effectuate those interests.¹⁴⁶

The Court has also been willing to protect the right to obtain a marriage license for prison inmates. In *Turner v. Safley*, prisoners at the Renz Correctional Institution in Missouri filed suit over a regulation that permitted an inmate to get a marriage license only with permission of the prison superintendent.¹⁴⁷ Permission would only be granted if there were compelling reasons to do so (e.g., a pregnancy or the birth of an illegitimate child).¹⁴⁸ Following *Zablocki*, the Court again found that denial of a marriage license warranted heightened scrutiny.¹⁴⁹ The Court looked to see if the prison’s marriage regulation was reasonably related to penological interests and found that it was not.¹⁵⁰

It is true that *Zablocki* and *Turner* are not perfect analogies for the case at hand. The plaintiffs petitioning for marriage licenses in *Zablocki* and *Turner* did not have marital status without a license whereas Mickey and Oren *do* have parental status without an accurate birth certificate. However, it is the pieces of paper themselves that are the key. Marriage licenses and birth certificates function in an analogous way. The state decision to issue a marriage license cements the spousal relationship. Similarly, the state decision to issue a birth certificate with the names of a child’s parents cements the parent-child relationship, perhaps especially for adoptive parents, who depend on the state to create and legalize their parentage in the first place.¹⁵¹

While states do need some freedom to restrict whose name can be on a birth certificate—for example, requiring proof of a genetic connection before including a name on a birth certificate¹⁵²—it does not make sense for a

144. *Id.* at 386.

145. *Id.*

146. *Id.* at 388.

147. *Turner*, 482 U.S. at 81–82.

148. *Id.*

149. *Id.* at 95.

150. *Id.* at 99.

151. *See Adoption Act (1994) Summary*, *supra* note 6.

152. *See, e.g.*, U.S. LEGAL FORMS, LOUISIANA PATERNITY FORMS, DOCUMENTS AND LAW, <http://www.uslegalforms.com/paternity/louisiana-paternity-forms.htm> (last visited Jan. 22, 2015) (“With science giving us more accurate testing, the matter of establishing paternity is easier and more

state to deny birth certificates to already recognized parents. States certainly have a legitimate interest in requiring some degree of proof of whose name should be included on a birth certificate. But once proof of parentage has been procured, states no longer have an interest in preventing a parent from putting his or her name on the certificate. Louisiana's policy infringes on the rights of out-of-state adoptive parents and should be subject to a more rigorous scrutiny for interfering with family autonomy.

Under heightened scrutiny, Louisiana's policy should be struck down. Denying out-of-state recognized adoptive parents access to accurate birth certificates for their children is not substantially related to Louisiana's purported government interest of family stability. As discussed, Louisiana's policy forces out-of-state parents to jump through additional hoops before making important decisions on behalf of their children. This has the ironic effect of undermining family stability instead of preserving it.

b. The Constitutional Rights of the Adoptive Children

Louisiana's policy is also an unconstitutional infringement on the rights of the adoptive children of out-of-state unmarried parents. Cases dealing with discrimination against nonmarital—"illegitimate"—children provide a useful comparison. It is important to note that the illegitimacy cases look at nonmarital children as a suspect class while this analysis is focusing on fundamental rights.¹⁵³ Despite that difference, there are important principles to derive from the illegitimacy cases.

In *Clark v. Jeter*, the Supreme Court held unconstitutional a state law that required that actions to establish paternity of a nonmarital child must be commenced within six years of birth.¹⁵⁴ The Court established that intermediate scrutiny is appropriate for cases dealing with discrimination of this type.¹⁵⁵ Their justification for scrutiny of that level was that it is unfair to penalize children for their parents' actions outside of marriage.¹⁵⁶ In *Weber v. Aetna Casualty & Surety Company*, the Court stated:

The statute of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But

reliable than in the past. DNA testing methods include SWAB Test and DNA Genetic Identity. . . . The Father will be shown on the birth certificate if he acknowledges paternity when or close in time to the birth, or the Court orders the birth certificate to be changed to reflect the Fathers name.").

153. As discussed earlier, there are two ways to trigger heightened scrutiny in an equal protection claim—either by arguing a fundamental right has been infringed upon, or where an equal protection question involves a suspect class. Here I am arguing that a fundamental right is at issue, not that Mickey and Oren are members of a suspect class. *See supra* Part III.

154. 486 U.S. 456 (1988).

155. *Id.* at 461.

156. *Id.*

visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.¹⁵⁷

The same line of reasoning is applicable when Louisiana uses its policy of refusing to issue accurate birth certificates to recognized out-of-state parents as a disincentive to adopt and raise children outside of marriage. First, as discussed above, Louisiana has a legitimate interest in regulating who is a parent in Louisiana, but Louisiana does not have a legitimate interest in undermining the parentage of an out-of-state couple. Second, Louisiana's policy could cause real harm to adopted children, effectively "penalizing" them for their parents' choice to adopt them without getting married first.

At the most basic level, not having an accurate birth certificate may cause adopted children to feel even more different than they already may feel as a result of being adopted. If a child's parents must use birth certificate alternatives, such as an adoption decree, to register the child for school, for instance, that draws attention to the child's adoption instead of keeping it confidential. Then there is the physical harm that may come to a child in an emergency, or the confusion and fear a child may feel if one of her parents is not allowed to accompany her in a scary ambulance ride or hospital room. The illegitimacy cases suggest that if Louisiana's policy leads to these kinds of consequences it should be subject to intermediate scrutiny.

Applying intermediate scrutiny, a policy that denies unmarried adoptive parents access to accurate birth certificates for their adoptive children is not substantially related to the important government interest of family stability for adopted children and their parents, contrary to Louisiana's claim. In the first place, as the illegitimacy cases indicate, courts are particularly concerned about policies that harm children for the sake of regulating the sexual behavior of their parents. Further, even if Louisiana's purported interest in family stability is important, denying birth certificates to out-of-state unmarried adoptive parents is not substantially related to such an interest because Louisiana is not capable of keeping anyone, except for Louisiana citizens, from becoming parents. Specifically, Mickey and Oren had already adopted Infant J at the time they applied for the corrected

157. 406 U.S. 164, 175 (1972).

birth certificate, so Louisiana's policy had no bearing on the supposed stability of Infant J's family.

Setting aside Louisiana's purported purpose, the only purpose left standing is to send a message to unmarried adoptive parents that they are unequal to married adoptive parents. If denial of an accurate birth certificate is important enough to rise to the level of constitutional protection, then a purpose to treat unmarried adoptive parents differently from married ones is not substantially related to the state interest of family stability, and the policy is unconstitutional.

2. Beneath the Surface, Louisiana's Policy Boils Down to Animus against Gays and Lesbians

Even if a court declines to analyze the ability to obtain an accurate birth certificate under a theory of fundamental rights, case law suggests that laws that treat gays and lesbians as second-class citizens are subject to a higher level of scrutiny than rational basis review.¹⁵⁸ For the sake of argument, assume that Louisiana may have a legitimate interest in not allowing same-sex couples that live in Louisiana to adopt. Historically, states have the power to regulate who gets to be a parent and how they can become one.¹⁵⁹ However, it is something entirely different to say that Louisiana has a legitimate interest in refusing to provide birth certificates to recognized same-sex parents from other states.

There have been times in the Supreme Court's history where the Court chose not to formally apply heightened scrutiny, but its equal protection analysis did not conform to the traditional, low-level rational basis scrutiny. This kind of analysis can be described as rational basis *plus*—though the Court uses the language of rational basis, the review has more bite to it.¹⁶⁰ Notably, the Court has applied versions of rational basis plus reasoning in two different cases dealing with discrimination against gays and lesbians—*Romer v. Evans* and *United States v. Windsor*.¹⁶¹

Romer challenged an amendment to the Colorado constitution that prohibited “all legislative, executive or judicial action . . . designed to protect . . . homosexual persons.”¹⁶² Justice Kennedy, writing for the majority,

158. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996).

159. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[D]omestic relations [is] an area [of law] that has long been regarded as a virtually exclusive province of the States”).

160. CHEMERINSKY, *supra* note 87, at 696.

161. *Windsor*, 133 S. Ct. at 2675; *Romer*, 517 U.S. at 620.

162. *Romer*, 517 U.S. at 623–24.

described the amendment as a sweeping change in legal status for gays and lesbians, stripping only them of “specific legal protection from the injuries caused by discrimination.”¹⁶³

The Court said it would only uphold the amendment if it bore a rational relation to some legitimate end, and then admonished that the amendment “fails, indeed defies, even this conventional inquiry.”¹⁶⁴ The main rationale Colorado offered for the amendment was “respect for citizens’ freedom of association, [particularly] the liberties of landlords or employers who have personal or religious objections to homosexuality.”¹⁶⁵ Regular rational basis review is so deferential to state objectives that under it, such a rationale would almost certainly have been acceptable.¹⁶⁶ But the Court refused to credit Colorado’s rationale as legitimate and held that the amendment “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”¹⁶⁷

The recent case *United States v. Windsor* seemed to apply a similar heightened rational basis review, at least in part. In 2007, Edith Windsor and Thea Spyer, residents of New York, traveled to Toronto to marry.¹⁶⁸ The couple’s home state of New York recognized their same-sex marriage.¹⁶⁹ In 2009, Thea passed away, leaving her entire estate to Edith.¹⁷⁰ However, because Section 3 of the Defense of Marriage Act (DOMA) defined marriage as being between a man and a woman only, Edith was required by law to pay taxes on the estate that she would have been exempt from if she were in a heterosexual marriage.¹⁷¹ In 2010, Edith filed suit in federal district court, seeking a declaration that Section 3 of DOMA was unconstitutional because it violated the Equal Protection Clause.¹⁷²

The district court found for Edith and the Second Circuit affirmed.¹⁷³ The Supreme Court, in an opinion also authored by Justice Kennedy, upheld the Second Circuit’s decision, but laid out different reasoning.¹⁷⁴ The

163. *Id.* at 627.

164. *Id.* at 631–32.

165. *Id.* at 635.

166. *Id.* at 640–41 (Scalia, J., dissenting) (“It is unsurprising that the Court avoids discussion of [whether there was a legitimate rational basis for the substance of the constitutional amendment], since the answer is so obviously yes.”).

167. *Id.* at 635.

168. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 2684.

174. *Id.* at 2693–96. The Second Circuit laid out its analysis under the Equal Protection Clause, finding that gays and lesbians are a quasi-suspect class deserving of heightened scrutiny. Using inter-

Court used a combination of federalism, liberty, and equal protection arguments in holding that Section 3 of DOMA was unconstitutional.¹⁷⁵

Much like in *Romer*, the Court's equal protection arguments applied a less deferential form of rational basis to invalidate DOMA.¹⁷⁶ Justice Kennedy wrote:

DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.¹⁷⁷

Unlike the statute in *Romer*, DOMA was not discriminatory on its face, as it sought to traditionally define marriage without mentioning gays and lesbians at all.¹⁷⁸ Yet the majority seemed to believe DOMA's discriminatory purpose and effects were so egregious that they required a more rigorous scrutiny than traditional rational basis review.¹⁷⁹

Romer and *Windsor* suggest that gays and lesbians, as a class, are deserving of some kind of special protection, even though that protection has not yet risen to the level of officially labeling gays and lesbians as a suspect class. The question, then, is whether Louisiana's birth certificate policy is making an inappropriate distinction between gays and lesbians and everyone else. Louisiana's denial of accurate birth certificates does not apply to any Louisiana couples that have established parentage. The policy only denies birth certificates to out-of-state couples who have already adopted a child and been granted parentage by a different state. Refusing to issue birth certificates to recognized parents creates "second-class" parental status for these individuals and "humiliates tens of thousands of children now being raised by same-sex couples," which the *Windsor* majority already found to be impermissible.¹⁸⁰

On its face, Louisiana's policy appears to have nothing to do with discrimination against gays and lesbians and everything to do with ensuring only married individuals can jointly adopt children. Louisiana focuses on

mediate scrutiny, the court held that DOMA was not substantially related to an important governmental interest, and thus was unconstitutional. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

175. *Windsor*, 133 S. Ct. at 2693–96.

176. *See id.* at 2706–07 (Scalia, J., dissenting) (“[E]ven setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid . . . justifying rationales for this legislation. Their existence ought to be the end of this case.”).

177. *Id.* at 2696.

178. *See* 1 U.S.C.A § 7 (1996).

179. *See Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

180. *Id.* at 2693–94.

the fact that the Registrar's policy equally affects unmarried heterosexual couples. In doing so, however, Louisiana ignores the reality that heterosexual individuals have the opportunity to marry under Louisiana law (and indeed, under the laws of every state), thus giving heterosexual couples the option to circumvent the policy.¹⁸¹ Same-sex couples, on the other hand, are not permitted to marry under Louisiana law.¹⁸² Because out-of-state adoptive parents who are heterosexual and married have their adoptions recognized, gays and lesbians are left feeling that the Louisiana law is punishing them as parents.

A belief in family stability and the superiority of bi-gender parenting may be an acceptable rationale for Louisiana's government in creating policies that solely govern citizens of Louisiana. But Mickey and Oren do not live in Louisiana, and the birth certificate policy is only ever applied to out-of-state parents. Denying such parents accurate birth certificates is a completely ineffective way to ensure that children are raised in heterosexual households or to keep gays and lesbians from becoming parents. Louisiana generally cites family stability as a legitimate state interest for its policy, but by the time couples like Mickey and Oren contact Louisiana's Registrar for birth certificates, they have already been legally deemed the parents of their adoptive child. Family stability cannot possibly be rationally related to this policy when Louisiana is incapable of keeping any other state's citizens from becoming parents. Additionally, Louisiana certainly cannot argue that there is a legitimate state interest in undermining the strength of out-of-state parent-child relationships (the only thing this policy seems to actually accomplish).

Stripped of its façade, the Registrar's policy boils down to nothing but animus against gays and lesbians, the only class of parents who are denied a birth certificate under its policy. It is well established that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."¹⁸³ Under a more biting rational basis review, such as the type of scrutiny employed by the Supreme Court in both *Romer* and *Windsor*, the Registrar's policy unconstitutionally discriminates against gay and lesbian parents in general and specifically denies Mickey and Oren equal protection of the laws.

181. Out-of-state unmarried straight couples can choose to get married and have those marriages recognized under Louisiana law. Out-of-state unmarried same-sex couples lack this option. See LA. CONST. art. XII, § 15.

182. *Id.* ("Marriage in the state of Louisiana shall consist only of the union of one man and one woman.")

183. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

CONCLUSION

Birth certificates are more than mere pieces of paper to the adopted children of same-sex couples. In deciding *Adar*, the Fifth Circuit should have kept in mind the unique importance that an accurate birth certificate can have for adopted children and their parents. The fundamental rights that stem from the parent-child relationship and the established need to protect gays and lesbians from laws aimed to deny them dignity suggest that laws that infringe on the parental rights of gays and lesbians should be subject to some form of heightened scrutiny.

Even if neither equal protection argument made in this Comment is persuasive standing alone, the two arguments taken collectively indicate that something is just not right with Louisiana's birth certificate policy. There is precedent for this kind of global approach in *Windsor*. Justice Kennedy used the language of equal protection, due process, and federalism in describing why Section 3 of DOMA was unconstitutional.¹⁸⁴ While Justice Kennedy seemed hesitant to anchor his holding in any one of the three doctrines alone, he made clear that something was amiss with DOMA.

“Under DOMA,” he wrote for the majority, “same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.”¹⁸⁵ Viewing Louisiana's policy through a wider, more comprehensive lens leads to the same conclusion—denying accurate birth certificates to recognized out-of-state adoptive parents impermissibly burdens the families involved, affecting them in a variety of ways, and is of no legitimate interest to the state.

184. *Windsor*, 133 S. Ct. at 2675.

185. *Id.* at 2694.

