DENYING A CLASS OF ADOPTED CHILDREN EQUAL PROTECTION

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INTRODUCTION

Baby J was born in Shreveport, Louisiana in 2005. Shortly thereafter, Oren Adar and Mickey Ray Smith, an unmarried same-sex couple residing in Connecticut, traveled to Louisiana, where the child’s mother agreed to give the child up for adoption. In April 2006, the Ulster County Family Court in Kingston, New York approved the adoption and issued an adoption decree declaring Adar and Smith J’s legal parents. The couple forwarded the adoption decree to the
Louisiana Registrar of Vital Records and Statistics, requesting that the Registrar issue an amended birth certificate for J. This new birth certificate would show J’s new name and identify Adar and Smith as his legal parents. The Registrar, however, denied their request.

In a letter, Darlene W. Smith, the Louisiana State Registrar (the “Registrar”), stated that since Louisiana law does not authorize adoptions by unmarried couples, the Registrar was unable to create a new birth certificate listing both men’s names. In 2007, Adar and Smith challenged the Registrar’s refusal in a lawsuit against the Registrar in her official capacity. The couple alleged that the Registrar’s actions violated the Full Faith and Credit Clause and the Equal Protection Clause of the United States Constitution. Despite their legal attempts, Adar and Smith were unsuccessful in receiving a court order requiring the Registrar to issue an accurate birth certificate.

The couple’s legal battle ended in October 2011 when the Supreme Court of the United States denied Adar and Smith’s petition for writ of certiorari. To date, J does not have a birth certificate listing both his parents’ names.

An accurate birth certificate is universally recognized, “readily accepted, and often required in many legal contexts,” including registering the child for school, obtaining a social security card and passport for the child, and making medical decisions on behalf of the child. Failing to have an accurate birth certificate denies a child access to these rights and benefits, and compromises his or her well being. In J’s case, having an inaccurate birth certificate has impeded his parent’s ability to enroll J in school and complicated Smith’s ability to enroll J on his company health plan. J is not the only child a state registrar has denied an accurate birth certificate based on the state’s disapproval of the parents’ marital status. Oklahoma, Mississippi, and Virginia have also denied birth certificates to children adopted out-of-state by unmarried same-sex couples.

While these instances raise several questions under the United States Constitution, this Comment focuses solely on the equal protection question. Through the lens of Adar and Smith’s case, this Comment addresses the unconstitutionally unequal treatment of a subset of children adopted by unmarried and/or same-sex couples. Specifically, it discusses the proper level of judicial scrutiny courts that should apply in such cases and proposes necessary action towards eliminating this unequal treatment.

Part I of this Comment addresses the current landscape of adoption and the adoption process in the United States. It discusses in detail the Adar v. Smith case, and summarizes the necessary
background information for evaluating equal protection questions. Part II identifies the equal protection problem arising from a state registrar’s failure to issue an accurate birth certificate to a particular group of adopted children. Part III analyzes the equal protection claim in *Adar v. Smith*—specifically, it discusses the application of intermediate scrutiny and the United States Supreme Court’s rationale in illegitimacy cases. Part IV proposes the level of review courts should apply in evaluating state registrars’ refusal to issue accurate birth certificates to children adopted by unmarried and/or same-sex couples. In addition, Part IV proposes attacking the discrimination against adopted children of unmarried and/or same-sex couples by making changes at the legislative level.

Joint adoption by unmarried couples, especially same-sex couples, is becoming more prevalent. Without proper action, state registrars will continue to deny children adopted by these couples the same rights and benefits of having an accurate birth certificate that states grant to children adopted by married couples, as well as all other children.

**I. BACKGROUND**

**A. Adoption in the United States**

**1. Adoption Generally**

For many children, especially those in foster care, adoption is the “path to a safe, loving, permanent family.” Adoption is the “[l]egal transfer of parenthood from one to another parent or couple.” This “legal transfer of parenthood” completely terminates the parental rights and relations between the parent and child, and bestows on the adoptive parent(s) all the rights and responsibilities of a legal parent. For the child, adoption confers the legal rights and responsibilities of a family member.

It is estimated that 120,000 children are adopted each year in the United States. Many of these adoptions take place outside the foster care system, via private domestic or international adoptions. Other adoptions occur when a child welfare agency, such as foster care, determines that a child will not be returning home to his or her parent(s). In 2009, an estimated 421,000 children were in foster care. Of those 421,000 children, about 114,000 were awaiting adoption, meaning they had a goal of adoption and/or had their parental rights terminated. While quite a few children are awaiting adoption, this figure shows a “substantial decline” from 2000 when an estimated 131,000 children were awaiting adoption.
Researchers at the Urban Institute and the Williams Institute of the UCLA School of Law speculate that the decline is the result of the Adoption and Safe Families Act (ASFA) of 1997. ASFA pressures states to find permanent homes for children in foster care in a timely manner. In addition, it placed stricter timelines on agencies to terminate parental rights. Following the enactment of AFSA, the number of adoptions significantly increased. Since 2000, the number of children adopted out of foster care has remained at roughly 50,000 per year.

In general, state law determines who may adopt. Because there is no uniform adoption law, adoption practices vary from state to state. Historically, states preferred to place children with married couples. While adoption laws have become more flexible, many states solely permit adoptions by married couples or single unmarried adults over the age of eighteen. Some states, however, do not permit unmarried couples to adopt jointly.

Joint adoption allows both parents to simultaneously adopt a child not biologically related to either parent. Such adoptions allow unmarried couples to adopt a child together. In many states, laws prohibiting unmarried couples from jointly adopting affect opposite- and same-sex couples alike. Currently, California, Colorado, Oregon, Vermont, Illinois, Indiana, Massachusetts, Maine, New York, New Jersey, Pennsylvania, and the District of Columbia allow unmarried couples, including same-sex couples, to adopt jointly. In addition, California allows married same-sex couples to adopt jointly, while Connecticut, New Hampshire, Oregon, and Vermont allow unmarried partners who have civil unions to adopt jointly. On the contrary, Mississippi and Utah statutorily prohibit joint adoption by same-sex couples. Nebraska, Ohio, and Wisconsin prohibit via appellate case law joint adoptions by same-sex couples. The twenty-eight unlisted states, however, fall somewhere between explicitly permitting and prohibiting joint adoption by same-sex couples.

2. Adoptions by Gay Men and Lesbians

Researchers at the Urban Institute and the Williams Institute of the UCLA School of Law estimate that gay and lesbian parents are raising at least four percent of all adopted children in the United States; this equates to roughly 65,000 children. In addition, estimates show that approximately two million gay men and lesbians report an interest in adopting a child. Reports show that gay men and lesbians may be more willing to adopt children with special needs then heterosexual adults.
DESKTOP PUBLISHING EXAMPLE

3. Adoption Process and the Birth Certificate

Individuals who choose to adopt may do so domestically or internationally. In general, domestic adoptions are broken down into two classifications, private or public adoptions. Private domestic adoptions are adoptions in which the child’s birth parents select the adoptive parents with whom their child will be placed. Such adoptions may be done through a private agency or through a lawyer. Public domestic adoptions, on the other hand, are adoptions completed through a state child welfare agency and involve adoption of children who have been placed in the custody of the agency. Private or public agencies that have custody over a child usually do so through voluntary relinquishment or involuntary termination of the birth parents’ rights.

Individuals interested in adopting are not required to adopt a child who resides in the same state in which they reside. Interstate adoption allows for the adoption of a child who lives in a state other than the state in which his or her prospective adoptive parent(s) reside. The Interstate Compact on the Placement of Children (ICPC) governs such adoptions. Every state in the United States is a member of this compact. The compact’s purpose is to “ensure protection and services to children who are placed across state lines for foster care and adoption.”

While the adoption process varies depending on the type of adoption and the state in which the adoption takes place, all adoptions must be certified and finalized by the court. The court finalizes the adoption through an adoption decree. A judge will usually sign and issue an adoption decree as long as the necessary prerequisites for adoption are satisfied and the adoption is in the best interest of the child. The decree establishes the legal relationship between the child and his or her adoptive parent(s) and severs the legal relationship between 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 including “custody, the authority to enroll the child in school, participate in health-care decision-making, travel with the child, and receive benefits for and through the child, and impart benefits to the child.” After the court has entered the decree and the time for challenging it has passed, “the adoption cannot be challenged, ignored, or revoked.” In general, courts, government agencies, and other states should recognize the adoption decree as establishing, for all legal purposes, the parenthood of the adults named in the decree.

Once the court finalizes an adoption, the state or county office responsible for issuing birth certificates normally will seal the child’s original birth certificate and issue a revised birth certificate reflecting
the new parent-child relationship established by the adoption decree.\textsuperscript{78} Prior to 1930, a state did not amend a child’s birth certificate upon completion of an adoption.\textsuperscript{79} In 1930, however, states began issuing new birth certificates when a child was adopted, substituting the adoptive parent(s) name(s) for the birth parents’ names.\textsuperscript{80}

Today, every state requires the state in which the child was born to issue a new birth certificate upon submission of a certified copy of the adoption decree.\textsuperscript{81} The new birth certificate retains the information regarding the child’s place and date of birth from the original birth certificate and replaces the names of the child’s original parents with the names of the child’s adoptive parent(s).\textsuperscript{82} This new birth certificate carries the same legal effect and serves the same functions as all other valid birth certificates.\textsuperscript{83}

Each individual state is responsible for registering a child’s birth via a birth certificate.\textsuperscript{84} The registration of a child’s birth serves as a permanent and official record of the existence of a person before the law.\textsuperscript{85} The birth certificate is a personal document issued to an individual or his or her parents as proof of the birth registration.\textsuperscript{86} The certificate includes the child’s name, date of birth, and parents’ names and addresses.\textsuperscript{87} The state government vital records office for the state in which the individual is born is responsible for issuing the birth certificate.\textsuperscript{88} While this certificate serves as proof of the child’s birth, it also serves as the child’s legal and personal identification.\textsuperscript{89}

The birth certificate is “[u]niversally recognized as reliable proof of a child’s identity and parentage.”\textsuperscript{90} Both public and private entities require the submission of a birth certificate to verify a child’s legal parentage in virtually every circumstance in which parentage must be shown.\textsuperscript{91} For example, a birth certificate is required to register a child for school, to establish who can be listed as the child’s emergency contact, and to permit an individual to pick the child up from school or childcare.\textsuperscript{92} Furthermore, a birth certificate is required to establish authorization to make emergency medical decisions for a child and to sign for medications distributed by a school nurse.\textsuperscript{93}

A birth certificate is also generally required to conduct legal or financial transactions on behalf of a minor, such as establishing a bank account in the child’s name or for the child’s benefit.\textsuperscript{94} In addition, a birth certificate is required if a child inherits personal or real property, as well as to establish a child’s status in an intestate distribution or as part of a class of children or heirs named in an individual’s will.\textsuperscript{95} Furthermore, a child must produce a copy of his or her birth certificate when applying for Social Security benefits as a surviving child.\textsuperscript{96} Also, a birth certificate is generally required to collect on insurance policies
in which the child is a named beneficiary, as well as to verify a child’s entitlement to a parent’s pension or other retirement benefits.97 A birth certificate is also required to obtain a passport.98 Beginning April 1, 2011, the United States Department of State began requiring the full names of applicants’ parent(s) to be listed on all certified birth certificates to be considered as primary evidence of U.S. citizenship for all passport applicants, regardless of the applicant’s age.99 The U.S. Department of State will not accept as evidence of citizenship certified birth certificates lacking this information.100

B. Adar v. Smith

Under Louisiana law,101 “when a child who was born in the state is adopted in another state, the child’s adoptive parents are entitled to obtain a new Louisiana birth certificate for their child listing them as the child’s parents.”102 In 2006, pursuant to this statute, Adar and Smith, an unmarried same-sex couple, requested a new birth certificate for their adopted child J.103 The Louisiana State Registrar, however, denied the couple’s request.104

In 2007, Adar and Smith filed suit against the Registrar in her official capacity in the Eastern District of Louisiana for her failure to issue an accurate birth certificate identifying both Adar and Smith as J’s legal parents.105 The couple requested that the court enter an injunction requiring the Registrar to issue a birth certificate identifying both Adar and Smith as J’s parents.106 The couple’s complaint alleged that the Registrar’s refusal to issue an accurate birth certificate violated both the Full Faith and Credit Clause107 and the Equal Protection Clause108 of the United States Constitution.109

Adar and Smith’s equal protection claim alleged that the Registrar, in refusing to issue accurate birth certificates to children adopted by unmarried couples, denies a class of adopted children the same rights available to children adopted by married couples.110 Furthermore, Adar and Smith contended that the Registrar’s refusal penalizes children adopted by unmarried parents solely based on their parents’ marital status.111 According to Adar and Smith, the Registrar’s policy called for the court to apply intermediate scrutiny, the same level of review applied by the United States Supreme Court in illegitimacy cases.112 Under this level of review, Adar and Smith argued that the Registrar’s policy violated the Equal Protection Clause.113

In response, the Registrar argued that its actions did not violate the Equal Protection Clause because it was simply upholding and enforcing Louisiana law.114 Under Louisiana adoption law, only
married couples may adopt. Louisiana’s policy is based on its preference for providing adopted children the stability of having married parents. According to the Registrar, Louisiana birth certificate law flows from its policy favoring adoption by married couples. As a result, the Registrar could not issue a birth certificate listing both parents’ names. The Registrar further maintained that her enforcement of Louisiana laws did not deprive Adar and Smith of their rights and did not violate the Equal Protection Clause.

In 2008, U.S. District Court Judge Jay Zainey ruled against the Registrar, finding that her actions violated the Full Faith and Credit Clause. In his decision, Judge Zainey did not address the equal protection claim because Adar and Smith were entitled to summary judgment on their full faith and credit claim. The court subsequently entered judgment ordering the Registrar to issue an accurate birth certificate identifying both Adar and Smith as J’s parents.

The state appealed the district court ruling, and in 2010, a three-judge panel of the Fifth Circuit Court of Appeals unanimously affirmed the district court’s decision. Again, the court did not address the equal protection claim. The Registrar petitioned the Fifth Circuit for a rehearing en banc. The court granted the petition and vacated the panel decision. After reviewing the case, the en banc court reversed the district court ruling and remanded the case for dismissal of Adar and Smith’s claims. In its decision, the court held that the Registrar did not violate the Full Faith and Credit Clause. In addition, the court held that Louisiana’s birth certificate law did not deny equal protection to adopted children of unmarried couples.

The court based its denial of the equal protection claim on two grounds. First, the court disagreed that “the law discriminates on the basis of illegitimacy – and that it therefore triggers heightened scrutiny – because Infant J’s birth status is irrelevant to the Registrar’s decision.” Second, the court found that Louisiana has a legitimate interest in “encouraging a stable and nurturing environment for the education and socialization of its adopted children.” This interest, the court held, provides a rational basis for Louisiana’s adoption law and its corresponding birth certificate policy.

C. Similar Cases

Several other courts have addressed contests regarding the issuance of accurate birth certificates to children adopted in states other than the one in which they were born. In Davenport v. Little-Bowser, three same-sex couples filed suits seeking to compel the Virginia Registrar to issue accurate birth certificates to their adopted children.
The adopted children were born in Virginia but adopted in Washington, D.C. The Virginia Registrar denied the couples’ requests because, under Virginia law, birth certificates can only list the name of a mother and father—i.e., Virginia does not permit same-sex couples to jointly adopt in Virginia.

Similarly, in Perdue v. Mississippi State Board of Health, a Mississippi trial court addressed a case in which the Mississippi Bureau of Public Health Statistics refused to issue a birth certificate to a four-year-old boy adopted by a lesbian couple. The child was born in Mississippi but adopted by Cheri Goldstein and Holly Perdue in Vermont. The state denied the couple’s request because same-sex couples may not jointly adopt children in Mississippi.

Lastly, in Finstuen v. Crutcher, Oklahoma government officials refused to issue accurate birth certificates reflecting the adoptions for three same-sex parent adoptive families. The couples filed suit in response to an Oklahoma statute prohibiting the state from recognizing adoptions by same-sex couples from any other state or foreign jurisdiction. As a result, Oklahoma “categorically reject[ed]” a class of out-of-state adoption decrees.

The Equal Protection Clause and Equal Protection Analysis

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” In essence, the clause requires the government to treat each individual equally, but does not require every law to equally apply to all individuals. Equal protection issues arise when a law discriminates against or disadvantages a class of individuals, or impinges upon the exercise of a fundamental right.

In evaluating equal protection challenges, courts apply one of three levels of review or scrutiny. The level of review applied differs depending on the type of discrimination. The rational basis test is the lowest level of review. At a minimum, all laws challenged under the equal protection clause must survive rational basis review. Under this test, a court will uphold a law so long as it is “rationally related to a legitimate governmental purpose.”

The middle level of review is intermediate scrutiny. In general, courts apply intermediate scrutiny in cases dealing with discrimination based on gender and discrimination against nonmarital children. Under intermediate scrutiny, a court will uphold a law so long as it is “substantially related to an important government purpose.” In essence, the means used by the government must have a “substantial relationship to the end being sought.”
The highest and most “exacting” level of review is strict scrutiny. Under strict scrutiny, a court will uphold a law so long as it “necessary to achieve a compelling government purpose.” In general, courts apply strict scrutiny in cases where the government discriminates based on race or national origin, or where the government impinges upon a fundamental right.

E. United States Supreme Court Decisions Addressing Classifications of Nonmarital Children

Historically, children born out of wedlock or conceived prior to marriage—i.e. nonmarital or illegitimate children—suffered legal and social discrimination. State laws often denied nonmarital children the same rights available to marital children, including the right to inherit, and to receive paternal support and government benefits. Since 1968, the United States Supreme Court has held laws denying nonmarital children rights and benefits based solely on the state’s disapproval of their parents’ marital status to be unconstitutional.

In one such case, Clark v. Jeter, the Supreme Court held a Pennsylvania state law requiring nonmarital children to prove paternity within six years of the child’s birth in order to seek support from his or her father unconstitutional. The state law permitted marital children to seek support from their parents at any time, but limited the time during which an “illegitimate” child could do the same. The Court reasoned that “the six-year limitations period was impermissible because financial needs may not emerge until later and because it did not offer the child a sufficient opportunity to present his or her own claims.”

The Court’s decision in Clark expressly articulated intermediate scrutiny as the level of review applied to discriminatory classifications based on nonmarital status. In such cases, the court will uphold statutory distinctions between marital and nonmarital children so long as they are “substantially related to permissible state interests.” For the Supreme Court, penalizing children because of the status of their parents is not substantially related to a permissible state interest.

The Supreme Court’s decisions regarding nonmarital children’s rights share several common themes: “[c]hildren are not responsible for the circumstances of their birth or for the legal status or conduct of their parents; . . . children of unmarried parents deserve as much legal and economic protection as other children; and [ ] states may not seek to influence the behavior of adults by penalizing their children.”

While the Supreme Court has utilized these common themes to
Invalidate laws discriminating against nonmarital children, it has also utilized them to invalidate a Texas law that discriminated against undocumented aliens.\textsuperscript{171} In Plyler \textit{v}. Doe,\textsuperscript{172} the Court declared unconstitutional a Texas law that required undocumented aliens to pay for public school, but provided free public education for children of citizens and documented aliens.\textsuperscript{173} The Court held that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”\textsuperscript{174}

\section*{II. Identification of the Problem}

In Adar \textit{v}. Smith, the Fifth Circuit, sitting \textit{en banc}, addressed whether denying an accurate birth certificate to children adopted by unmarried couples violates the Equal Protection Clause.\textsuperscript{175} The issue arose in the context of the Louisiana Registrar’s refusal to provide an accurate birth certificate to J, a child born in Louisiana but adopted out-of-state by an unmarried couple.\textsuperscript{176} The Louisiana Registrar denied the couple’s request based solely on its disapproval of the couple’s marital status.\textsuperscript{177}

This particular issue is not unique to Adar and Smith, or to Louisiana.\textsuperscript{178} In several other states, state registrars have denied accurate birth certificates to children adopted by unmarried and/or same-sex couples through interstate adoption.\textsuperscript{179} As a result, these children have been denied the same rights and benefits of having an accurate birth certificate enjoyed by children adopted by married couples.\textsuperscript{180} This unequal treatment raises the question as to whether the failure to extend equal rights to a class of children adopted by unmarried couples violates the Equal Protection Clause. In addition, it poses the question as to what level of review courts should apply in analyzing these questions.

\section*{III. Equal Protection Analysis of Adar \textit{v}. Smith and Proposed Application of Intermediate Scrutiny}

\subsection*{A. Birth Certificate}

A birth certificate plays a crucial role in a child’s life.\textsuperscript{181} It serves not only as the child’s primary form of personal identification, but entitles him or her to various benefits.\textsuperscript{182} Failing to provide a child with an accurate birth certificate denies the child access to these benefits, and compromises his or her safety and well being.\textsuperscript{183} In the instance of
an emergency, any difficulty or delay in verifying a parent’s legal status may place the child’s health at risk. This risk is especially high in situations in which parental consent for medical treatment of a child is required. Doctors, nurses, and other health care personnel are trained to expect and accept birth certificates as proof of legal parentage. Not having an accurate birth certificate could delay treatment.

Although alternative means of proving parentage exist, such as the adoption decree, requiring a child to produce his or her adoption records prevents the child from keeping his adoption confidential. Furthermore, the experience of having to explain who their parents are, and the circumstances of their adoption may be especially upsetting or embarrassing. Having an accurate birth certificate prevents such occurrences from happening and protects the child’s privacy.

The Louisiana Registrar’s policy against issuing birth certificates to children adopted by unmarried couples has already presented various obstacles for Adar and Smith. In particular, it has complicated Smith’s ability to enroll J on his company health plan, impeded the couple’s ability to enroll J in school, and resulted in the couple being stopped at an airport when airport personnel wanted proof of the couple’s relationship to their son. Unfortunately, the family will continue to face such obstacles so long as the Registrar denies their request for an accurate birth certificate.

B. Equal Protection Analysis of the Louisiana Registrar’s Policy

The Louisiana Registrar’s policy denies children adopted by unmarried couples the same rights available to children adopted by married couples. Under the Louisiana “Record of Foreign Adoptions” statute, the state registrar shall issue a new birth certificate to a child born in Louisiana and adopted out-of-state so long as the applicant presents a properly certified copy of the adoption decree. The statute, however, does not address whether the couple adopting must be married. Despite this, the Registrar issues accurate birth certificates to children adopted by married couples, but does not for children adopted by unmarried couples. The Registrar contends that it cannot issue an accurate birth certificate to a child adopted by unmarried parents because Louisiana does not permit unmarried couples to jointly adopt and its birth certificate laws flow from this policy. The Registrar’s policy, however, violates the Equal Protection Clause by denying a class of adopted children the same rights available to other adopted children.

The Registrar’s policy against issuing accurate birth certificates to
a class of adopted children is “constitutionally indistinguishable” from the laws invalidated by the Supreme Court in illegitimacy cases. The Supreme Court has traditionally held that unequal treatment of nonmarital children based on the conduct or status of their parents violates the Equal Protection Clause. According to the Court, a child is not responsible for his or her birth and “[p]enalizing the illegitimate child is an ineffectual – as well as unjust – way of deterring the parent . . . .” Similarly, a child has no control over whether his or her adopted parents are unmarried. Therefore, penalizing the adopted child is also an “ineffectual and unjust way” of deterring unmarried parents from adopting or expressing disapproval of such conduct. By singling out and penalizing a class of adopted children, the Registrar violates the Equal Protection Clause in the same way as those statutes that denied benefits to illegitimate children. The Registrar’s policy, like the law challenged in illegitimacy cases, should be analyzed using intermediate scrutiny.

The Fifth Circuit wrongly concluded that intermediate scrutiny does not apply to cases involving discrimination against children adopted by unmarried couples. According to the Fifth Circuit, the Supreme Court’s decisions in illegitimacy cases focus on the child’s illegitimate birth status. Because J’s birth status was “irrelevant” to the Registrar’s decision, the Fifth Circuit concluded that the Supreme Court’s illegitimacy cases could not support the conclusion that J belonged to a suspect classification protected by heightened scrutiny. The Fifth Circuit, however, ignored the Supreme Court’s rationale for applying intermediate scrutiny in cases discriminating against nonmarital children—a state cannot penalize children for their parents’ status or conduct because children are not responsible for their parents’ status or conduct. Statutes that penalize children on these grounds do not bear a substantial relationship to a permissible state interest. In addition, the Fifth Circuit ignored the Supreme Court’s extension of this rationale, as well as intermediate scrutiny, to a case not addressing discrimination based on a child’s illegitimate birth status. In Plyer v. Doe, the Supreme Court invalidated a Texas law that denied free public education to children of undocumented immigrants. The Court held that a state could not impose disabilities on children of undocumented immigrants because of their parents’ status. Under Supreme Court precedent, the Registrar’s policy cannot survive intermediate scrutiny. To survive intermediate scrutiny, a law must be substantially related to an important government purpose. The Registrar’s policy serves no such purpose.
have no control— their parent’s marital status. According to the Registrar, “marriage provides a more stable basis for raising children together than relationships founded on something other than marriage.” However, the Supreme Court has held that encouraging marriage is not a permissible justification for denying nonmarital children specific rights.

Furthermore, the Registrar’s policy against issuing birth certificates to children adopted by unmarried couples serves no legitimate purpose because it operates only after the adoption has taken place. The Registrar’s policy “[h]as no effect on who may adopt a child born in Louisiana, nor can it affect the validity of adoption laws or decrees from other states.” Rather, the Registrar’s policy denies proof of identity to a class of children already adopted by unmarried parents.

In addressing the equal protection question in Adar v. Smith, the Fifth Circuit sitting en banc wrongly held that the Registrar’s policy does not violate the Equal Protection Clause. Had the court applied intermediate scrutiny, it could not have rationally concluded that the Registrar’s policy is substantially related to a legitimate government purpose. The Registrar’s policy has no relationship to its birth certificate law. Rather, it penalizes a subset of adopted children for their parents’ status. Such discrimination serves no substantial purpose, and therefore violates the Equal Protection Clause.

IV. PROPOSAL

A. Courts Should Apply Intermediate Scrutiny Analysis

Courts addressing the denial of accurate birth certificates to children adopted by unmarried and/or same-sex couples should apply intermediate scrutiny. Cases such as Adar deny children adopted by unmarried parents equal rights solely based on their parents’ marital status. Similarly, cases such as Davenport, Finstuen, and Perdue deny children adopted by same-sex couples equal rights solely based on their parents’ sexual orientation. The Supreme Court, however, has repeatedly held that penalizing a child for the status or conduct of his or her parents is an unjust and ineffectual way of deterring parents. Children adopted by unmarried and/or same-sex parents cannot change, and are not responsible for, the status of their parents. Despite this, state registrars continue to penalize this class of adopted children. As a result, children adopted by unmarried parents continue
to be disadvantaged and exposed to unnecessary risk. Applying intermediate scrutiny will ensure that a class of adopted children is no longer treated differently than all other adopted children.

**B. Additional Proposal: Remedying the Problem Outside the Courts**

While applying intermediate scrutiny attacks discrimination against children adopted by unmarried and/or same-sex couples at the judicial level, society should take steps outside the courtroom to remedy this problem. State registrars denying accurate birth certificates to children adopted by unmarried and/or same-sex couples are doing so based on disapproval of the parents’ marital status and/or sexual orientation. Enacting legislation at the state and federal level prohibiting discrimination against unmarried and/or same-sex couple adoption will attack the root of this problem.

Currently, an estimated 421,000 children in the United States are in foster care. Of this 421,000, over 114,000 cannot return home and are “legally free for adoption.” While there is no shortage of children available for adoption, there is a shortage of qualified individuals willing to adopt or foster a child in the child welfare system. Estimates show that approximately two million gay men and lesbians are interested in adopting a child. State laws precluding unmarried and/or same-sex couples from adopting keep children in need of homes and individuals willing to adopt from becoming families. States should therefore enact legislation that includes unmarried and/or same-sex couples as permissible adopters, or, alternatively, bar the exclusion of applicants for adoption solely based on marital status and/or sexual orientation. Child welfare advocates at the state and national level should work together to add such language to state laws.

Legislators are taking steps to enact such legislative change at the federal level. In October 2009, United States Representative Pete Stark introduced before Congress the Every Child Deserves a Family Act. The bill withholds funding from “[s]tates that discriminate against prospective adoptive or foster parents based on marital status, sexual orientation, and gender identity.” The goal of the bill is to open more homes to foster children by eliminating sexual orientation, gender identity, and marital status discrimination against prospective adoptive and foster care parents. On May 3, 2011, a committee hearing was held on the issue. Passing legislation like the Every Child Deserves a Family Act will only help in taking the necessary steps to end discrimination against adopted children based solely on the status of their parents.
CONCLUSION

The state registrars with policies against issuing accurate birth certificates to children adopted by unmarried and/or same-sex couples deny this group of adopted children the same rights available to children adopted by married parents. The policies penalize the child for a status that he or she cannot change. Just as a child cannot control his or her birth, he or she has no control over the adoption. This makes such cases indistinguishable from illegitimacy cases, which the Supreme Court has already held that the state cannot penalize a child for the status or conduct of his or her parents.

The only remedy for courts is to apply intermediate scrutiny. Had the Fifth Circuit applied intermediate scrutiny in Adar v. Smith, it would have concluded that the Registrar’s policy violates the Equal Protection Clause. Other courts applying the same level of review will find that similar policies fail under the same terms. Therefore, the necessary judicial course of action is to apply intermediate scrutiny so children in similar situations as J will not have to suffer the same burdens.

Furthermore, while courts can attack such discrimination by utilizing intermediate scrutiny, states and welfare agencies can attack the problem by enacting legislation directed at prohibiting discrimination in adoption based on marital status, sexual orientation, or gender identity. Such legislation would serve to make unlawful the very basis for state registrars’ discrimination against children adopted by unmarried and/or same-sex couples. Removing the legislative barriers against unmarried and same-sex joint adoption may encourage more couples to provide loving homes for children in need.

1. Id. at 5.
2. Id. at 6-7.
3. Id. at 7.
4. Id.
5. Id.


10. Adar, 591 F. Supp. at 858


17. See infra pp. 21-25.

18. See infra pp. 21-25.

19. See infra pp. 4-11.

20. See infra pp. 11-18.


22. See infra pp. 21-25.


26. Id. at 4.

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28. Id. An adoption also terminates the relations between the child and the terminated parent’s family, including the child’s siblings, grandparents, aunts, uncles, and cousins. Id.


30. Adoption Media, LLC, What is Adoption?, supra note 29.


32. Private domestic adoptions are adoptions in which the birthparents are presented with several potential adoptive families and select from those the family in which their child will be placed. HARVEY J. MAKADON ET AL., THE FENWAY GUIDE TO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH 454 (2008).

**DOCUMENT 38 – AUTHOR’S COPY**


**DOCUMENT 5 – found at: http://www.urban.org/publications/411437.html (Click to View PDF)**

34. Id.


According to 45 C.F.R. § 1355.57, “foster care” is defined as, “24-hour substitute care for children outside their own homes.” (Title 45, Volume 4, Part 1355, Section 57). Foster care settings include nonrelative foster family homes, relative foster homes, emergency shelters, residential facilities, and preadoptive homes. CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS 2009 at 2 (2011).

36. AFCARS TRENDS, supra note 35 at 1. In defining “waiting children,” the Adoption and Foster Care Analysis and Reporting System (AFCARS) included children who are 16 years or older, whose parents’ rights have been terminated, and who have a goal of emancipation. Id. at 2.

37. GATES ET AL., supra note 32 at 1.

38. Id.

39. Id.

44. See id.

45. Appell, supra note 27 at 38.

46. Id. at 39.

47. Id. at 42


49. See id. In the 1980s, lower courts in the San Francisco Bay Area began permitting same-sex couples to adopt children jointly and simultaneously. Since then, courts have been allowing same-sex couples to jointly adopt. Id.

50. Appell, supra note 27 at 42.

51. EVAN B. DONALDSON ADOPTION INST., supra note 25 at 20.

52. Id.

53. Appell, supra note 27 at 55-57.

54. Id.

55. Id. [See Table 3.1 in Text]

56. EVAN B. DONALDSON ADOPTION INST., supra note 25 at 5.

57. Id. at 13.

58. Id. at 5.

59. MAKADON ET AL., supra note 32, at 454.

60. See id. at 454-55.

61. Id.; see also Hollinger, supra note 43 at 37.


63. MAKADON ET AL., supra note 32, at 454-55.

64. Hollinger, supra note 43 at 37.

66. Id.

67. Id.

68. Id.


70. See Hollinger, supra note 4, at 38.

71. See id. at 38.

72. Id. at 38.

73. Appell, supra note 27, at 50.

74. 2 Am. Jur. 2d Adoption §163.

75. Appell, supra note 27, at 50.

76. Id.

77. Id.

78. Id. at 51.


80. Id.

81. Brief of Amici Curiae Hollinger, supra note 12, at 6-7. Every state has adopted some form of Article 3, Part 8 of the Uniform Adoption Act of 1994. The Act provides that “upon receipt of a certified decree of adoption from another jurisdiction, the state registrar shall issue a new birth certificate for an adoptee born in that state.” Id. at 7.

82. Id.

83. Id.


86. Id.
87. Id.


89. Id.

Source Does Not State This. Replace w/: see generally D3, supra note 12, at 6-8.


91. Id. at 8. These entities include schools, welfare departments, Passport Services, Social Security Administrations, and Veterans Administration. See id.

92. Id.

93. Id.

94. Id. at 9.

95. Id.

96. Id.

97. Id.

98. Id.


100. Id. Although a person may submit secondary evidence in the event that he or she cannot satisfy subsection (a). 22 C.F.R. 51.42(b) (2011).


104. Id.

105. Id. at 88-89.

106. Id. at 89.

107. The Full Faith and Credit Clause of the United States Constitution provides, in relevant part, “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.” U.S. CONST. art. IV, § 1. Adar and Smith’s full faith and credit claim specifically argued that the Constitution mandates the Registrar to enforce the New York adoption decree and issue an amended birth certificate without regard to Louisiana’s public policy. *Adar*, 591 F. Supp. 2d at 859.

108. The Equal Protection Clause of the Fourteenth Amendment to the United State Constitution provides that no state shall deny any person equal protection of the laws. U.S. CONST. amend. XIV, § 1.


112. See id.

113. See id.


115. Id. at 23.

116. Id.

117. See id.

118. See id.

119. Id. at 24.

120. Adar v. Smith, 591 F. Supp. 2d 857, 864 (E.D. La. 2008), vacated, 639 F.3d 146 (5th Cir. 2011), cert. denied, 132 S. Ct. 400(2011). The court held that Louisiana’s out-of-state adoption statute authorizes the state registrar to issue a birth certificate upon receipt of a valid adoption decree, even if Louisiana adoption law would not permit the adoption. The court further found that the Registrar’s arguments that her discretion to issue a new birth certificate is limited lacked merit. Id. at 863-64.

121. Id. at 862 n.8.

122. Id. at 864.

123. Adar v. Smith, 597 F.3d 697, 719 (5th Cir. 2010), rev’d enbanc, 639 F.3d 146 (5th Cir. 2011).

124. See id. at 703.


126. Id.

127. Id.

128. Id. at 161.

129. Id. at 162.

130. Brief in Opposition, supra note 114, at 7.

131. Id. at 23.

132. Id.

133. Appell, supra note 27, at 51.

134. Id.

135. Id. at 51-52.

136. Press Release, Lambda Legal, Goldstein Perdue v. Mississippi State Board of Health: Mississippi Punishes Four Year Old Because He Has Lesbian Moms (Oct. 25,
2013 DESKTOP PUBLISHING EXAMPLE


DOCUMENT 30 - ONLINE
137. Id.
138. Id.
139. Appell, supra note 27, at 52.
140. Id.
141. Id.


DOCUMENT 11 - HEIN ONLINE

DOCUMENT 8 – HEAFEY – STACKS – KF543.K7

DOCUMENT 31 – WESTLAW [Internal Pagination]
146. Hedges, supra note 143, at 897.

DOCUMENT 32 – WESTLAW [Internal Pagination]

149. Id.
150. Id.
151. Clark, 486 U.S. at 461.
152. Id.

153. CHEMERINSKY, supra note 148, at 671.
154. Id.
155. Clark, 486 U.S. at 461.

156. CHEMERINSKY, supra note 148, at 671.
157. Clark, 486 U.S. at 461; CHEMERINSKY, supra note 148, at 671.

158. KRAUSE, supra note 144, at 10-11.

160. Id. at 346-47.

161. In 1968, the United States Supreme Court held unconstitutional in Levy v. Louisiana a law that denied nonmarital children the right to file a wrongful death suit for losses because of a mother’s death. The law permitted marital children to sue but did not permit nonmarital children to do so. Hedges, supra note 143, at 898; see also Chemerinsky, supra note 148, at 671.

162. See Maldonado, supra note 159, at 351.


164. Clark, 486 U.S. at 457; see also Chemerinsky, supra note 148, at 777.

165. Clark, 486 U.S. at 457.

166. Chemerinsky, supra note 148, at 777.

167. Chemerinsky, supra note 148, at 777; see also Clark, 486 U.S. at 461.


169. See Brief of Amici Curiae Hollinger, supra note 12, at 11-12; see also Chemerinsky, supra note 148, at 777.


171. Chemerinsky, supra note 148, at 775-76.


176. Id. at 149.

177. See Brief of Amici Curiae Hollinger, supra note 12, at 4-5.

178. See supra p. 15.

180. See Brief of Amici Curiae Hollinger, supra note 12, at 14.

181. See id. at 7-9.

182. See id.

183. Id. at 9.

184. Id. at 8.

185. Id.

186. Id. at 9.

187. Id. at 8.

188. Id. at 10.

189. Id. at 11.

190. Id.

191. Adar v. Smith Case Background, supra note 1.

192. Id.


194. Id. at 5.

195. Id.

196. See id. at 7.

197. Id. at 16; see also Adar v. Smith, 639 F.3d 146, 161 (5th Cir. 2011) (en banc), cert. denied, 132 S. Ct. 400 (2011).


199. Id. at 14.

200. Id. at 11-12.

205. Id. at 54-55.


207. Id.

208. Id.

209. See id.


211. Petition for Writ of Certiorari, supra note 102, at 34.


213. Plyer, 457 U.S. at 230; see also Chemerinsky, supra note 148, at 775.

214. Plyer, 457 U.S. at 230; see also Chemerinsky, supra note 148, at 776.


217. Id.

218. Id.

219. Id.

220. Id. at 17.

221. Id. at 16.


223. Id.

224. See id. at 14.

225. See id. at 16.

226. Id.

227. Id. at 15.


229. See infra p. 15-16.


231. See Brief of Amici Curiae Hollinger, supra note 12, at 4.

232. See generally Appell, supra note 27, at 38.

234. AFCARS TRENDS, supra note 35, at 1.


236. H.R. 1681 at § 2(a)(1).


238. See H.R. 1681 at § 2(a)(10)(A).


240. Id. at 20.

241. See infra p. 28.


243. Id.

244. H.R. 1681.

245. ALTERNATIVES TO MARRIAGE PROJECT, supra note 242.

246. See Brief of Amici Curiae Hollinger, supra note 12, at 16.

247. See id. at 15.

248. Id.

249. Id. at 11-12.

250. Id. at 14.

251. Evan B. Donaldson Adoption Inst., supra note 25, at 18; see also H.R. 1681.

252. See H.R. 1681 at § 3(a)(1)(A)-(C).

253. Id. at § 2(b).

254. Id. at 20.