Think of the Children: Advancing Marriage Equality by Renewing the Focus on Same-Sex Adoption Litigation

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THE FOCUS ON SAME-SEX ADOPTION LITIGATION

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About fifteen minutes past eleven o’clock on November 6, 2012, with the mood in the room naturally upbeat after the networks had declared President Barack Obama’s reelection victory, the senior staff of the Human Rights Campaign (HRC) awaited the results in several state races across the county. In addition to a handful of endorsed congressional and gubernatorial candidates, the staff of HRC, the nation’s largest lesbian, gay, bisexual, and transgender (LGBT) rights advocacy organization, had their eyes on four state ballot initiatives. Three of those, in Maryland, Washington, and Maine, sought to legalize same-sex marriage, while a fourth, in Minnesota, would have written a ban on same-sex marriage into the state constitution.1

While six states had legalized same-sex marriage by Election Day 2012,2 never before in U.S. history had marriage equality been ratified by popular vote.3 Additionally, all 31 attempts to

2 See id.
explicitly ban the practice through referendum had heretofore succeeded. But shortly before midnight, major news made its way into the HRC “war room”: the networks were projecting that the initiatives in both Maine and Maryland had been approved. The communications team, which had been poised to congratulate the first state in the nation to approve marriage equality at the ballot box through social media, wondered aloud: “Which one was first?”

This was no doubt a problem the team did not mind having. Not one, but two states had staked out their position in history as marriage equality pioneers. Early the next morning, two more items of good news would arrive: voters in Washington had approved their initiative as well and Minnesotans became the first to reject an attempt to write marriage discrimination into their constitution. After years of resounding defeat, the marriage equality movement had won its first, second, third, and fourth electoral victories, all in one night. A clean sweep.

The 2012 election was a watershed for LGBT equality overall. In addition to the ballot measure victories, Wisconsin elected the first openly gay United States Senator in history, Tammy Baldwin. LGBT representation in the U.S. House grew to six members. Iowa Supreme

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Court Justice David Wiggins, the fourth justice on the unanimous court that legalized same-sex marriage in the state to stand for retention, became the first to withstand the efforts to oust him for his vote. And the first U.S. President in history to endorse marriage equality was re-elected with a second electoral landslide. While the LGBT rights movement had seen victories before this election, never before had it appeared to have the backing of a majority of voters.

With the election now over, the short-term focus for the LGBT movement turns back to the courts. Two high-profile cases involving same-sex marriage were recently granted certiorari by the Supreme Court. One of these cases challenges an application of the Defense of Marriage Act (DOMA), a federal bill that provides significant obstacles for same-sex couples to achieve equal protections even where they have a legally recognized marriage in their state. A victory on this issue would not legalize same-sex marriage nationwide; it would merely remove the federal impetus. But the other case to be considered challenges California’s Proposition 8, an amendment to the state constitution banning recognition of same-sex marriage, and could have broader consequences.

As the list of states adopting marriage equality grows, challenging the burdensome DOMA seems a logical choice. On the other hand, pressuring the Court to consider the larger issue of marriage equality at this time is a more difficult strategic question. As only nine out of

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8 Eckholm, supra note 1.
9 See infra notes 47-51 and accompany text.
11 See infra note 34 and accompanying text.
12 See infra note 52-59 and accompanying text.
fifty states have adopted it, a decision to force same-sex marriage upon the rest of the country at this point could be seen as an overreach.\textsuperscript{13} It may therefore behoove LGBT rights advocates to hope the Court chooses to issue a narrow ruling on Proposition 8 and to then consider alternative strategies as the next step forward.

Assuming the Court opts not to broadly rule in favor of marriage equality in this term, one such possible litigation strategy for advocates could be to momentarily turn some attention away from marriage and onto an issue that has rarely seen the national spotlight: adoption. While not all make the process easy, some states allow same-sex couples to adopt children.\textsuperscript{14} Many others place burdensome restrictions on same-sex couples, but at least allow one of the partners to adopt.\textsuperscript{15} But just a few remaining states stand out from the rest: their laws ban same-sex couples from adopting children altogether.\textsuperscript{16}

These laws are ripe for a constitutional challenge. They are likely to lack public support and thus can be struck down with far less controversy. Doing so, in addition to providing potential parents the opportunity to adopt, would also undermine one of the most prominent arguments for same-sex marriage bans, the purported “optimal” environment for child-rearing provided by heterosexual couples.

This Paper will argue that LGBT activists should pursue a litigation strategy that includes adoption. Part II of this Paper will describe the origins of the current legal debate over same-sex marriage and evaluate where the litigation currently stands on the issue. It will also provide a background of adoption law generally, laws regarding same-sex adoption, and legal challenges to

\textsuperscript{13} \textit{See infra} Part III.A.2.
\textsuperscript{14} \textit{See infra} Part II.B.
\textsuperscript{15} \textit{See infra} Part II.B.
\textsuperscript{16} \textit{See infra} Part II.B.
adoption restrictions. Part III will discuss the three major reasons why the proposed litigation strategy is wise. First, it will compare the politics of the issues of marriage equality and adoption. It will look at public opinion and the current legal landscape of the two issues, and the reasons why a court, specifically the Supreme Court, might prefer to deal with adoption before delivering an opinion on whether the Constitution requires universal marriage equality. Second, it will look at the legal argument advanced by proponents of marriage equality and examine why the argument that a same-sex adoption ban violates the Equal Protection Clause would be on stronger legal footing. Third, it will show why a win on this issue would undermine the argument for same-sex marriage bans and provide a weapon in the arsenal of activists for advancing their legal case. Finally, Part IV will conclude that LGBT civil rights activists should renew the push for same-sex adoption equality and pursue it as a strategy parallel to the fight for marriage equality.

II. BACKGROUND

A. MARRIAGE IN AMERICA

Marriage as an institution is deeply rooted in America’s history, so much so that it has been deemed a “fundamental” right by the Supreme Court.17 The nation has, throughout its existence, wrestled with questions surrounding the contours of this right and what it ought to encompass. In 1862, President Abraham Lincoln signed a law banning plural marriage, the

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Morrill Anti-Bigamy Act. In 1879, the Court upheld the Act against an attack based on First Amendment religious liberty grounds. In 1967, in Loving v. Virginia, the Supreme Court weighed in on interracial marriage, finding that bans on miscegenation violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. The Constitution, the Court wrote, “requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”

Today, the country is engaged in a debate over whether couples of the same sex ought to have the ability to enter into marriages. The New York riots that ignited after the June 28, 1969 police raid of the Stonewall Inn are largely considered the birth of the modern gay rights movement. In the years following the event, the gay and lesbian community began to organize politically and come out from the shadows. On the first anniversary of Stonewall, as it has come to be known, the first Pride marches were organized in Los Angeles, New York, and Chicago.

Following these events, throughout the early 1970s, substantial numbers of gay men, lesbians, and bisexuals, many of whom were in committed relationships, began to come out of the closet. Some activists, recognizing the need to demand an end to state-sponsored discrimination, determined that they ought to seek legal recognition of their relationships on the

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20 See Loving, 388 U.S. at 11-12.
21 Id. at 12.
same terms as opposite-sex couples. On May 18, 1970, Jack Baker and Michael McConnell applied for a marriage license in Hennepin County, Minnesota. The clerk denied their request on the sole ground that they were of the same sex, and the couple decided to sue the clerk in state court. The case made it up to the Minnesota Supreme Court, which upheld the denial as a fair reading of the statute, and further found that the denial did not violate the U.S. Constitution. The U.S. Supreme Court refused to take up the case, determining that it raised no “substantial” federal question. Shortly thereafter, similar cases arose in Washington, Kentucky, Alaska, Florida, Hawaii, Illinois, Iowa, New Hampshire, South Dakota, and Utah, all reaching the same result.

Perhaps predicting that a major push would eventually be made to legalize same-sex marriage, the state of Maryland became the first to affirmatively ban the practice in 1973. Several other states followed, but it was not until the mid-1990s when the debate over same-sex marriage began in earnest. The year 1996 saw major movement by federal and state governments on the issue. President Bill Clinton signed into law the Defense of Marriage Act (DOMA), which, among other things, denied federal recognition of same-sex marriages

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26 Id.
29 Id. at 187.
regardless of individual state recognition; the states followed, passing 24 anti-gay marriage laws in 1996 and 1997.\textsuperscript{34}

This tidal wave came after a court in Hawaii became the first to declare that its own state constitution prohibited the denial of marriage licenses to same-couples in 1993.\textsuperscript{35} The case did not end up legalizing same-sex unions, however, because Hawaii passed a constitutional amendment overriding the decision.\textsuperscript{36}

In 2003, the Massachusetts Supreme Court issued a similar opinion and Massachusetts subsequently became the first state to issue marriage licenses to same-sex couples in 2004.\textsuperscript{37} That launched a second backlash, resulting in the passage of 13 state constitutional amendments through voter-approved ballot measures in the 2004 general election.\textsuperscript{38} At this point, it appeared clear that the national sentiment was on the side of same-sex marriage opponents.

Even so, marriage equality proponents pushed on and began to see success in enacting other forms of relationship recognition such as domestic partnerships\textsuperscript{39} and civil unions,\textsuperscript{40} but experienced another wave of losses at the ballot box in the 2006 mid-term elections.\textsuperscript{41} Eventually, some state legislatures were able to pass full marriage equality.\textsuperscript{42} In 2011, New York

\textsuperscript{34} Sean Cahill, \textit{The Anti-Gay Marriage Movement, in The Politics of Same-Sex Marriage} 168 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).
\textsuperscript{35} Baehr v. Lewin, 74 Haw. 530 (1993).
\textsuperscript{36} The amendment actually gave the legislature the power to ban same-sex marriage, which \textit{Baehr} had said it did not have. \textit{HAW. CONST.} art I § 23. \textit{See also NCSL, supra} note 3.
\textsuperscript{38} NCSL, \textit{supra} note 3.
\textsuperscript{39} \textit{See, e.g., Oregon Family Fairness Act, 2007 Or. Laws ch. 99} (codified at \textit{OR. REV. STAT.} 106.300-106.340 and other scattered statutes) (domestic partnerships in Oregon).
\textsuperscript{40} \textit{See, e.g. Act of Dec. 21, 2006, 2006 N.J. Sess. Law Serv. Ch. 103} (West) (civil unions in New Jersey).
\textsuperscript{41} Nine more constitutional amendments were passed. \textit{See NCSL, supra} note 3.
\textsuperscript{42} Vermont was the first state in the Union to legalize same-sex marriage by legislative vote. David Abel, \textit{Vermont Legalizes Same-Sex Marriage}, \textit{BOSTON GLOBE} (Apr. 8, 2009).
became the largest state in the nation to enact full marriage equality after a major push by the state’s Governor Andrew Cuomo and New York City Mayor Michael Bloomberg.\footnote{See Matt Sledge, \textit{How New York Legalized Gay Marriage}, HUFFINGTON POST (June 25, 2011, 3:03 PM), http://www.huffingtonpost.com/2011/06/25/new-york-gay-marriage_n_884527.html.}

Then came the watershed election of 2012. President Barack Obama, engaged in a tough re-election fight, had become the first sitting U.S. President in history to endorse same-sex marriage in an interview in May 2012.\footnote{Jackie Calmes & Peter Baker, \textit{Obama Says Same-Sex Marriage Should Be Legal}, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all&_r=0.} But on the night of November 6, 2012, Obama was still reelected handily and marriage-equality proponents claimed victory in nearly every race and measure on the ballot with which they were engaged.\footnote{See Eckholm, \textit{supra} note 8, at P7. Before the election, six states had marriage equality; after the election, there were nine. \textit{See id.}}

With the election now over, advocates are turning their focus back to the judiciary as the Supreme Court prepares to hear the two most high profile LGBT civil rights cases in American history, both concerning marriage. The Court now has the opportunity to decide the ultimate issue of whether or not the Constitution compels all states to recognize same-sex marriage; or, it could choose to resolve these cases in narrower decisions and leave that larger question for another day. If the Court elects to punt, then advocates will have to decide whether it is wise for marriage to continue as the top LGBT litigation issue, or whether a short-term strategic shift is in order, as this Paper will argue.

The two major cases before the Court now are of two types: one was chosen from a group of cases challenging and seeking to overturn the federal, marriage-defining DOMA; the other
challenges a state ban on same-sex marriage and has the potential to legalize same-sex marriage nationwide.

Despite the large number of DOMA-related cases pending throughout the country, the Supreme Court has yet to examine the bill’s constitutionality.\(^{46}\) In its conference on December 7, the Court met to consider whether to hear any of several different DOMA cases before it.\(^{47}\) It ultimately chose to hear *Windsor v. United States*,\(^{48}\) the case of a widow named Edith Winsor who was forced to pay $363,053 more in estate taxes after the death of her wife—whom she was legally married to under New York state law—that she would not have had to pay had she been a man.\(^{49}\) She argues that DOMA, which forbids the federal government from recognizing her same-sex marriage and therefore makes her ineligible for the estate tax break,\(^{50}\) unconstitutionally discriminates on the basis of sexual orientation in violation of the Fifth Amendment’s Equal Protection component.\(^{51}\)

The second case, *Hollingsworth v. Perry*,\(^{52}\) challenges Proposition 8, a California ballot initiative that amended the state constitution to define marriage as between one man and one woman.\(^{53}\) California, which has a domestic partnership law providing same-sex couples all of the same benefits without the title of “marriage,” sought to overturn a decision by the California

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\(^{48}\) 669 F.3d 169 (2d Cir. 2012).

\(^{49}\) See *id.* at 176. The couple married in Canada, but, according to the court, New York would have recognized that marriage at the time of her wife’s death. *See id.*

\(^{50}\) See *id.* at 175.

\(^{51}\) See *id.* at 188 (Straub, J., dissenting).

\(^{52}\) Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012)(petition for certiorari, as *Hollingsworth v. Perry*, is now pending).

\(^{53}\) See *id.*
Supreme Court in *In re Marriage Cases*, the Ninth Circuit Court of Appeals found Proposition 8 to be unconstitutional under the federal constitution. In doing so, however, the court provided a rationale that could limit the effects of the ruling to California or only the states within the Ninth Circuit’s jurisdiction. The Supreme Court, in turn, could limit its ruling as such. Alternatively, the Court could either overrule the decision below or rule in such a way as to make marriage equality the law of the land for all fifty states.

While legislation is pending in Congress that would overturn DOMA, it is unlikely to pass in the near term with a Republican-controlled House of Representatives. Unlike the possible outcome of *Perry*, a decision striking DOMA would not have the immediate effect of legalizing same-sex marriage nationwide.

B. ADOPTION IN AMERICA

Adoption in the United States, unlike marriage, has not generally been a cultural battleground. Beginning in 1851 with the passage of the first adoption statute in Massachusetts, states became involved in the process of ensuring stable and healthy homes for children whose

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54 43 Cal.4th 757 (Cal. 2008).
55 *See Perry*, 671 F.3d at 1065-67 (describing the enactment of domestic partnership laws and the California Supreme Court’s decision).
56 *Id.* at 1096.
58 *See id.*
59 *See id.*
61 *See* Tribe, *supra* note 57, at 477.
parents were unwilling or unable to properly care for them. While laws governing how children can be adopted and who can adopt vary from state to state, most issues that arise generally are looked at under the “best interests of the child” doctrine. Like with child custody cases, courts usually place primary consideration on what would best serve a child’s individual needs in most adoption disputes. Most state laws and regulations on the subject, therefore, tend to be aimed at protecting the welfare of adoptive children above all other considerations.

Courts have been reluctant to elevate other considerations that could interfere with the best interests determination; they have therefore found no fundamental right to adopt nor have found there to be a marital privacy right in adopting a child. Courts have even gone as far as to say that “[b]ecause of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas.”

Same-sex couples looking to adopt children in the U.S. have long faced a messy patchwork of statutory and common law across the fifty states. Some states have developed

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64 See, e.g., Brunt v. Watkins, 101 So.2d 852, 856 (Miss. 1958) (considering the child’s best interests in finding that a 53-year-old man and his 51-year-old wife should be denied the adoption of a three-year-old in part because of their ages).
65 See, e.g., ALASKA STAT. ANN. §25.23.005 (West 2012)(“This chapter shall be liberally construed to the end that the best interests of adopted children are promoted.”); N.J. STAT. ANN. 9:3-37 (West 2012)(“This act shall be liberally construed to the end that the best interests of children be promoted and that the safety of children be of paramount concern.”); IOWA CODE ANN. § 600.1 (West 2012) (“The best interest of the person to be adopted shall be the paramount consideration in interpreting this chapter.”).
66 See Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 2007) (“Because the adoption process is entirely conditioned upon the combination of so many variables, we are constrained to conclude that there is no fundamental right to adopt. We also decline to find that the interest in adopting a child falls within the marital privacy right.... Thus, we can find neither a fundamental right nor a privacy interest in adopting a child.”).
67 Lofton v. Sec’y of the Dep’t of Children and Family Servs., 358 F.3d 804, 810 (11th Cir. 2004).
explicit avenues that allow both same-sex partners to become adoptive parents of a child. Some have little or nothing to say on the issue. Some have statutes and common law that make it difficult or impossible for more than one partner to adopt an individual child. And some have passed explicit, affirmative bans targeting same-sex couples looking to adopt.

The vast majority of states fall into one of the first three categories. This means that unlike with same-sex marriage, where most states have at one time acted affirmatively to thwart the practice, only a handful of states have ever taken direct action to stop same-sex couples from adopting. Those few that have have taken several approaches: (1) banning adoption by unmarried couples, (2) banning adoption by same-sex couples explicitly or (3) banning adoption by any individuals who are lesbian, gay, or bisexual.

1. Explicit Ban on LGB Adoption: Florida

Florida is ground zero of the LGBT adoption fight. As the gay rights movement was getting off the ground in the 1970s, a counter movement of religious conservatives began to

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68 The states that provide access to adoption for same-sex couples do so in several different ways. They may have a form of relationship recognition (marriage, civil unions, or domestic partnerships) that allows couples to be treated just as a married opposite-sex couple would for the purposes of adoption. Or they may offer joint adoption, second-parent adoption, or both. Joint adoption allows both partners to petition jointly to adopt a child who is not biologically related to either. Second-parent adoption allows one partner to petition individually to adopt a child that is either biologically related to or already adopted by the other partner. See Ann K. Wooster, Annotation, Adoption of Child by Same-Sex Partners, 61 A.L.R.6th 1 § 2.

69 See Jason N.W. Plowman, Note, When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality, 11 SCHOLAR 57, 72 (2008) (discussing the unclear status of second-parent adoption in most states).

70 See generally Wooster, supra note 68 (explaining the cases and statutes restricting same-sex couples from taking advantage of the possible options for adopting as a couple). See also ACLU, STATES WHERE SAME-SEX COUPLES ARE BARRED FROM DOING JOINT AND/OR SECOND PARENT ADOPTIONS STATEWIDE, https://www.aclu.org/files/assets/aclu_map3.pdf.
emerge as well.\textsuperscript{71} In 1977, Anita Bryant, a former beauty queen and singer, launched a campaign in Dade County, Florida that spread across the country.\textsuperscript{72} “Save Our Children,” as it was called, fought to repeal laws protecting the LGBT community and was largely successful.\textsuperscript{73} The movement led to the passage of the first explicit ban on adoption by gay and lesbian individuals in the country.\textsuperscript{74} The law was eventually challenged in court in 2004, but the Eleventh Circuit upheld it as not violating the Constitution in \textit{Lofton v. Secretary of the Department of Children and Family Services}.\textsuperscript{75} Four years later, however, a successful challenge in state court brought down the onerous restriction in \textit{In Re Gill}.\textsuperscript{76} The state attorney general decided not to appeal the decision, thus effectively ending the ban.\textsuperscript{77}

\textbf{2. Explicit Bans on Adoption by Unmarried Couples: Arkansas, Utah}

Two states—Arkansas and Utah—have taken affirmative steps that exclude same-sex couples from adoption, but have done so more indirectly. Rather than singling out gays and lesbians, the Utah law prohibits unmarried couples from adopting children,\textsuperscript{78} because Utah also explicitly bans same-sex marriage, same-sex couples are effectively prohibited from adopting

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\textsuperscript{71} TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM xii-xv (2008).
\textsuperscript{72} Id. at xii.
\textsuperscript{73} Id. at xiii.
\textsuperscript{74} Carlos A. Ball, The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men, 38 LOY. U. CHI. L.J. 379, 383 (2007).
\textsuperscript{75} 358 F.3d 804, 827 (11th Cir. 2004) (holding that the Constitution did not forbid Florida’s “policy judgment” that “individuals who ‘engage in current, voluntary homosexual activity’” should not be allowed to adopt children).
\textsuperscript{76} Fl. Dep’t of Children and Families v. Adoption of X.X.G., 45 So.3d 79 (Fl. Dist. Ct. App. 2010). The case is most commonly referred to as \textit{In re Gill}.
\textsuperscript{78} UTAH CODE ANN. § 78B-6-117 (West 2012).
\end{flushright}
while opposite-sex couples must only first obtain a marriage certificate.\textsuperscript{79} In Arkansas, the restriction went further. In 2008, voters approved Act 1, which prohibited unmarried individuals who are “cohabitating with a sexual partner outside of a marriage” from adopting or fostering children.\textsuperscript{80} While this law also did not target gays and lesbians explicitly, it effectively prohibited any LGB person in a relationship from adopting. In 2011, the Arkansas Supreme Court declared the new cohabitating adult adoption ban unconstitutional as burdening the fundamental right to privacy found in the Arkansas Constitution.\textsuperscript{81} The court did not reach the state equal protection issue.\textsuperscript{82}

3. \textit{Explicit Ban on Adoption by Same-Sex Couples: Mississippi}

Finally, there is one state that stands out from the rest in openly preventing same-sex couples from forming adoptive families: Mississippi. The Magnolia State has a unique statute that prohibits same-sex couples from adopting children.\textsuperscript{83} Beginning in 2000, the Mississippi Code contained a provision stating simply: “Adoption by couples of the same gender is prohibited.”\textsuperscript{84} On its face, this law appears only to be a ban on joint or second-parent adoption, leaving open the possibility that one partner in a same-sex relationship may adopt a child. However, Mississippi also has a regulatory policy that prohibits unmarried individuals from

\begin{itemize}
\item \textsuperscript{79} See supra note 4.
\item \textsuperscript{80} ARK. CODE ANN. § 9-8-304 (West 2012).
\item \textsuperscript{82} Id.
\item \textsuperscript{83} MISS. CODE ANN. § 93-17-3 (5).
\item \textsuperscript{84} Id. Unlike the now-defunct Florida statute, which targeted LGB individuals, see supra note 74, the Mississippi statutory ban only applies to couples.
\end{itemize}
adopting if they are cohabitating with a non-relative. Together, this leaves same-sex couples completely excluded from the possibility of adopting or fostering children in Mississippi. Neither the law nor the regulation prohibits opposite-sex couples, even if unmarried, from adopting children; thus, Mississippi singles out homosexual couples for different treatment.

4. Another Piece of the Same-Sex Adoption Landscape: Birth Certificate Issues

Because only a handful of courts have ever addressed the constitutionality of excluding same-sex couples from the adoption process, an assessment of the legal landscape on this issue must include an examination of related, though not directly on point, case law. In two states, Oklahoma and Louisiana, cases have arisen where same-sex couples sought to amend the birth certificates of their legally adopted children to include both parents’ names; the states refused, citing their own statutes that would not have permitted the adoption in the first place. The Tenth and Fifth Circuits, faced with similar but not indistinguishable issues, reached different results. In Finstuen v. Crutcher, the Tenth Circuit ruled that Oklahoma’s refusal to recognize the legal out-of-state adoption violated the Full Faith and Credit Clause and ordered the state to issue a revised birth certificate as requested. In Adar v. Smith, the Fifth Circuit held that Louisiana was not constitutionally required to issue a revised birth certificate with both

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85 In Mississippi, prospective adoptive or foster parents are referred to as “Resource Parents” and must be licensed by the state. Miss. DFCS Policy sec. F (I)(A). Among the basic requirements for licensure is that the applicant be either a legally married couple or a legally single individual, meaning someone who is not cohabitating. Miss. DFCS Policy sec. F (II)(A). While waivers of these basic requirements are available in special circumstances, they are only available to relatives of the child. Miss. DFCS Policy sec. F (III)(E)(1).
86 Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).
87 Adar v. Smith, 639 F.3d 146 (5th Cir. 2011).
88 Finstuen, 496 F.3d at 1156. The court did not reach the Equal Protection issue. Id.
parents’ names to the adopted child of an unmarried same-sex couple from New York. The court first found no violation of the Full Faith and Credit Clause and distinguished Finstuen, arguing that unlike in the Oklahoma case, Louisiana was not contesting recognition of the adoption, only refusing to grant a new birth certificate; further, the issuance of the birth certificate to enforce an adoption decision is legally required in Oklahoma but not in Louisiana. The court therefore reached the Equal Protection issue as well but found no violation, as “adoptive children of unmarried parents” are not a suspect classification, and both the adoption regime and vital statistic registry are rationally related to the state’s goal of “ensur[ing] stable environments for adopted children.”

III. DISCUSSION

With the recent electoral victories confirming a favorable trend for LGBT rights, advocates are now faced with a series of tactical decisions on how best to proceed. In addition to determining how to allocate resources among various important issues, they must also consider which avenues of government—legislative, executive, judicial, or direct popular referendum—they wish to concentrate on. Much has been written, for example, on the comparative strengths and weakness of advancing civil rights through the courts or through the more democratic

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89 Adar, 639 F.3d at 150.
90 See id. at 157 (distinguishing Finstuen on two grounds). See also Finstuen, 496 F.3d at 1154 (explaining why the issuance of a new birth certificate is required by Oklahoma law to enforce an adoption decree even though the Full Faith and Credit Clause does not itself require it).
91 Adar, 639 F.3d at 162.
The movement for marriage equality has now reached this juncture: it can continue to push state by state, through legislative enactments and ballot initiatives, or it can proceed to the Supreme Court and fight to have marriage equality confirmed as a right that all states must grant immediately.\footnote{See, e.g., John Valery White, \textit{Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Right Law}, 28 OHIO N.U. L. REV. 303, 317-19 (2002) (discussing the modern view that the judiciary is limited in its capacity to promote social change).}

Rather than continuing to push marriage equality cases (other than DOMA-related cases\footnote{With the \textit{Perry} case already before the Court, LGBT rights proponents do not really have complete control over which of these paths are taken. But assuming \textit{Perry} leads to full marriage equality nationally at this juncture, they will be able to decide whether to push for consideration of other marriage equality cases or focus on the state efforts.}) through the courts at this time, LGBT rights proponents should take up a different litigation focus—adoption—while proceeding with marriage efforts on the state level. This would be a wise move for three primary reasons. First, a litigation approach to adoption coupled with a legislative approach to marriage is a politically savvy strategy; it places a less controversial and less publicized issue in the hands of the courts, which are better arenas for such issues, and keeps the more contentious and more visible issue in the hands of democratic bodies, helpfully guarding against potential backlash. Second, the legal argument that can be made against same-sex adoption bans is stronger than the argument against same-sex marriage bans; thus far, the strength of the former has been understated while the strength of the latter has been overstated. Third, successfully challenging same-sex adoption bans in court would bolster the legal argument for marriage equality because doing so would necessarily entail undermining a core argument put forward by same-sex marriage opponents: that opposite-sex couples

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necessarily provide the optimal environment for raising children. Taken together, these considerations illustrate that the adoption-litigation/marriage-legislation approach would be advantageous for both issues independently and for the LGBT rights movement as a whole.

For the purposes of this Paper, a challenge to the Mississippi adoption statute will be examined as an example of potential litigation on the subject of same-sex adoption. The Mississippi statutory and regulatory scheme presents the cleanest case; that is, it is the one most likely to require a court to actually decide whether the Equal Protection clause permits a state to completely bar same-sex couples from adopting children. This is so for at least three reasons. First, unlike others, the statute actually targets couples “of the same gender” and cannot be said to merely differentiate between married and unmarried couples.\(^95\) Second, the regulatory policy excludes the possibility of one partner adopting, thereby dismissing the argument that same-sex couples can still effectively adopt children.\(^96\) Third, because the statute excludes same-sex couples rather than LGB individuals as in Florida, the precise issue in this hypothetical case has never before been considered by a federal or state court.\(^97\)

Additionally, while the *Perry* case will be considered as an example of same-sex marriage challenges because of its current relevance, the Paper will take note of the unique features of the case and how other broader challenges might differ.

A. POLITICAL CONSIDERATIONS: WAITING FOR THE RIGHT TIME

1. *The Wisdom of Waiting*

\(^95\) See supra note 84.
\(^96\) See supra note 85 (discussing the “legally single” requirement for individual Resource Parents).
\(^97\) See supra note 75.
Since Marbury v. Madison\textsuperscript{98} and Fletcher v. Peck,\textsuperscript{99} few question the power of the Supreme Court to strike down a law deemed contrary to the Constitution. But the wisdom of when and how the Court should exercise that power is another matter. Some argue that the judicial branch, and democracy as a whole, is best served by courts that exhibit some deference toward the popular consensus of the moment:

\begin{quote}
[T]he courts, often derided as the least democratic branch of government, have maintained their legitimacy over time when they have been more rather than less democratic in their constitutional views. By contrast, throughout American history, the least effective decisions have been those in which courts unilaterally try to strike down laws in the name of a constitutional principle that is being actively and intensely contested by a majority of the American people.\textsuperscript{100}
\end{quote}

This theory is not without its critics.\textsuperscript{101} As the branch of government with the independence the founders deemed “an essential safeguard against the effects of occasional ill humors in the society,” there is a fair case to be made that the judiciary ought to act whenever it feels the Constitution is being undermined, regardless of the timing.\textsuperscript{102} Even so, civil rights advocates ought to be looking at a more important question: not whether popular consensus \textit{should} influence the courts, but whether it \textit{does} in practice.

This is a much easier question; the answer is yes. From decisions on the death penalty\textsuperscript{103} to assisted suicide,\textsuperscript{104} the Court’s opinions leave no doubt that at least in some situations,

\begin{footnotesize}
\textsuperscript{98} 5 U.S. 137 (1803).
\textsuperscript{99} 10 U.S. 87 (1810) (striking down a state statute as unconstitutional).
\textsuperscript{100} JEFFERY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA at xiii (2006).
\textsuperscript{101} See Kevin J. Doyle, \textit{How Far Should Courts Go? Jeffery Rosen on Democracy and Courts}, 35-FALL VT. B.J. 64, 65 (reviewing Rosen’s book and finding his “solutions to these issues are vague and ultimately not very satisfying”).
\textsuperscript{102} THE FEDERALIST No. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).
\textsuperscript{103} See, \textit{e.g.}, Atkins v. Virginia, 536 U.S. 304, 314-17 (2002) (discussing the emerging national consensus on the question of whether executing the mentally retarded was constitutionally permissible).
\end{footnotesize}
particularly those involving rights-based determinations, the current state of national consensus is a factor worthy of consideration. Further, the current make-up of the Court suggests that political considerations are of particular importance right now. Justice Anthony Kennedy, widely considered to be the key “swing” vote on issues of LGBT rights, has developed a reputation for seeking to resolve these issues on narrow grounds, favoring incremental change over major leaps forward.\textsuperscript{105} Even Ninth Circuit Judge Stephen Reinhardt, in drafting his opinion in \textit{Perry}, seemed to recognize this inclination, crafting an argument aimed squarely at Justice Kennedy that provided a narrow rationale without the sweeping consequences that some might prefer.\textsuperscript{106}

Therefore, there are at least two possible advantages to pursuing a litigation strategy that accounts for the current political climate (public opinion and legislative consensus): (1) popular acceptance of the favorable policy outcome with a lessened chance of backlash and (2) a greater likelihood of a favorable judicial resolution of the issue. Not surprisingly, these represent the dual concerns of a civil rights movement: achieving the equal rights victory and doing so in a way that ensures a lasting impact and greater acceptance of the community as a whole.

2. \textit{First Comes Adoption, Then Comes Marriage}

The current political climate suggests that a litigation strategy focused on, or at least including, a constitutional challenge to same-sex couple adoption bans, is superior to one that


\textsuperscript{105} Lisa K. Parshall, \textit{Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights}, 69 ALB. L. REV. 237, 271 (2005) (“Justice Kennedy has not been a frequent or loquacious champion for individual rights; he generally displays a cautious, incremental approach to the law that is difficult to reconcile with his depiction as a jurist guided by some broad, roving notion of judicial romanticism or moral good.”)

focuses on pushing to have same-sex marriage recognized as a constitutionally required right for the entire country. Adoption bans are less likely to have popular support than same-sex marriage bans. Additionally, the vast majority of states and the federal government have explicitly banned same-sex marriage; even amongst those states that have not, only a few have actually approved same-sex marriage. In contrast, only a handful of states have ever actually acted to prohibit same-sex couples from adopting and recent court decisions have narrowed that number even further. Courts, including the Supreme Court, considering the political realities, are therefore more likely to be willing to act to strike a same-sex adoption ban than a same-sex marriage ban. Furthermore, any decision striking a same-sex adoption ban is likely to be met with less popular backlash than any decision requiring a state, or all states, to allow same-sex marriages.

To begin with, the American public seems more open to a decision mandating that same-sex couples be allowed to adopt children. While the Court is unlikely to directly consider public opinion polls in the way it might consider the current consensus of state laws, it is nevertheless important to acknowledge that in terms of public opinion, same-sex adoption has consistently tracked ahead of same-sex marriage. As the marriage equality issue heads to the highest court for the first time, public support for same-sex marriage is at an all-time high. The most recent poll, conducted by ABC and the Washington Post after the 2012 election, found that Americans supported same-sex marriage by a 51%-47% margin. The Gallup organization, which has been asking the question since 1996, has found support steadily increasing, from 27%-68% that year.

107 See supra note 45.
108 See supra Part II.B.
to 42%-55% in 2004, to finally reaching majority support in 2011. Even so, public support for marriage equality has only barely reached a majority. On the other hand, while polls vary significantly as to the exact level of support LGBT adoption rights currently receive, they generally find the public supports same-sex adoption by larger margins than they support same-sex marriage. Among voters in Virginia, for example, supporters of same-sex adoption outnumber opponents 55%-35%, while same-sex marriage supporters only barely edge opponents 47%-43%.

Perhaps more importantly, the national legislative consensus is further behind on same-sex marriage than the public opinion would suggest. Marriage equality proponents would undoubtedly like to eventually ensure that same-sex couples can legally marry in every U.S. state; however, considering the level of intensity with which many states have passed same-sex marriage bans—the measures in Tennessee, Mississippi, and Alabama passed with over 80% of the vote, for example—it is fair to say that the prospect of reaching that goal through

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111 For example, one recent survey showed support as high as 71%, see Camille Beredjick, 71 Percent of People support Adoption By Same-Sex Couples, Study Finds, ADVOCATE (July 17, 2012, 5:59 PM), http://www.advocate.com/society/modern-families/2012/07/17/survey-shows-support-gay-couples-adopting, but others generally find support only in the low 50s, see, e.g., infra note 112.


114 Election 2006: State Laws on Same-Sex Marriage, MINN. STAR TRIB. at 18A (Nov. 8, 2006).

115 Miss., Ark. OK ban on gay unions -- Amendment passes easily with support of religious community in both states, MEMPHIS COMMERCIAL APPEAL at B6 (Nov. 3, 2004), available at 2004 WLNR 9650992.

116 Anna Velasco, Voters approve amendment banning marriages of gays, BIRMINGHAM NEWS 1 (June 7, 2006), available at 2006 WLNR 9814877.
ballot measures and legislative enactments alone is highly daunting. Therefore, the issue is probably not whether, but when, to push the issue of marriage equality up to the Supreme Court.

If the Court were to now decide that the Constitution mandates that same-sex couples be allowed to marry, same-sex marriage would instantly transform from an infant experiment of just nine states to the unanimous law of all fifty states. According to the “backlash thesis,” judicial decisions that are seen as widely unpopular tend to generate “political reactions that undercut their effectiveness.” The thesis points to the legacy of Brown v. Board of Education as its core support and posits that “racial liberalism was gradually but steadily advancing before the Court clumsily intervened, sparking a resurgence of white supremacy and thus undermining the very cause the justices were hoping to promote.” Two of the theory’s most prominent backers, Michael Klarman and Gerald Rosenberg, also contend that a similar pattern can be gleaned from same-sex marriage litigation. Others have evaluated the theory as it pertains to same-sex marriage and has found it wanting, arguing that, for example, “the reasons for backlash have less to do with deficient legal strategy and judicial overreaching than with the unpredictability of events and the implacability of opposition to marriage for same-sex couples.”

117 See supra note 45.
120 Keck, supra note 118, at 152.
122 Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. REV. 1235, 1240 (2010). For a thorough argument against the backlash theory in the context of marriage equality, see generally Keck, supra note 118. See also generally Cummings, supra note 122.
neither proponents nor opponents of the theory discount entirely the benefit of crafting a litigation strategy that takes into account the level of progress thusfar achieved.\footnote{Cummings, supra note 122, at 1329 ("[T]he model of lawyering in the marriage equality context is not one of avoiding backlash, but managing its inevitable onset by influencing its form and intensity."). See also Keck, supra note 118, at 182 ("Rosenberg and Klarman are right that courts usually will not act until some progress has been made in the culture at large....")}{\footnote{478 U.S. 186 (1986).}}\footnote{539 U.S. 558 (2003).}{\footnote{See id. at 578 (overruling Bowers).}}{\footnote{Id. at 573.}}

This lesson may be further evidenced by the Court’s major encounters with LGBT rights in the sodomy cases, \textit{Bowers v. Hardwick}\footnote{478 U.S. 186 (1986).} and \textit{Lawrence v. Texas}.\footnote{539 U.S. 558 (2003).} In less than twenty years, the Court did an about-face on the issue, first upholding Georgia’s sodomy statute and then overruling its decision in striking down Texas’s statute.\footnote{See id. at 578 (overruling Bowers).}{\footnote{Id. at 573.}} At the time of the first decision in 1986, 25 states had laws banning sodomy; but by 2003, as the Court acknowledged in its opinion, only 13 statutes remained, and most were very rarely enforced.\footnote{See Marybeth Herald, \textit{A Bedroom of One’s Own: Law and Sexual Morality after Lawrence v. Texas}, 16 \textit{YALE J.L. & FEMINISM} 1 (2004) (considering Justice Kennedy’s tendency to emphasize “emerging recognition” and “pull the outlier jurisdictions into the fold”).} Justice Kennedy, the author of the \textit{Lawrence} opinion and the likely king-maker now that marriage equality has reached the Court, clearly exhibited his preference for rulings that bring the last remaining hold-out states into conformance with the general national mood rather than those that cause sweeping national change.\footnote{See Lawrence, 539 U.S. at 578 (noting that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).} In fact, while the narrow opinion makes brief mention of the issue, it avoids providing an answer on the constitutional question of marriage equality.\footnote{See Lawrence, 539 U.S. at 578 (noting that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).} The other opinions of the Court, however, chose to take on the issue more directly. In her concurrence, while stopping short of answering the question herself, Justice O’Connor makes clear that the marriage issue is distinguishable from the case at bar:
Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.\textsuperscript{130}

In his dissent, Justice Scalia claims that the \textit{Lawrence} decision “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples” as it dismisses moral disapproval as a legitimate state interest.\textsuperscript{131} Viewed against this backdrop, the majority’s avoidance supports the contention that it viewed the issue as too immature at the time to address, rather than believing the Constitution allowed same-sex marriage bans; otherwise, it might have chosen to distinguish marriage, as did Justice O’Connor.\textsuperscript{132} \textit{Lawrence} is therefore illustrative of both the general preference of addressing issues on the back-end of cultural shifts and the specific belief amongst the justices that the marriage issue was one that should be addressed according to this principle.

The adoption issue, on the other hand, is one that looks much more like sodomy at the time of \textit{Lawrence}. If a court were to strike down the Mississippi statute, no other statutory schemes would directly fall.\textsuperscript{133} Subsequent cases applying the decision may doom the other few statutory bans on LGBT adoption, but would leave the rest of the country largely unaffected, except in the unlikely event that a court chose to rule more broadly that same-sex couples must

\textsuperscript{130} \textit{Id.} at 585 (J. O’Connor, concurring).
\textsuperscript{131} \textit{Id.} at 601 (J. Scalia, concurring).
\textsuperscript{132} It is certainly true that public opinion on same-sex marriage has advanced dramatically since 2003, making it possible that the Court’s views on the issue’s maturity have changed as well. However, the point remains that on this issue the Justices are likely considering the national consensus. Because the public only now barely favors same-sex marriage and because the number of states with marriage equality is not even near a majority, they are still likely to have significant reservations.
\textsuperscript{133} As noted, \textit{see supra} note 83 and accompanying text, the Mississippi statutory scheme is unique for a variety of reasons. A determination that the law is unconstitutional would therefore only directly affect Mississippi; any other state law would be subject to court review under the decision, but may have a chance of surviving because of its differences.
be provided a way for both partners to adopt a child.\textsuperscript{134} So, unlike the tectonic shift that would occur with a universal marriage equality ruling, an adoption ruling, while still highly consequential, would merely bring a few outlier states in line with the rest of the country.

Public opinion and legislative consensus are by no means dispositive factors when determining an appropriate course of action for a movement looking to advance equality on several fronts. Still, they can serve as helpful guides in allocating resources and crafting strategy. From a political perspective, same-sex adoption would likely be a good issue for the LGBT movement to pursue in court, as it is more popular with the public and has behind it the consensus of the vast majority of the states.

\textbf{B. LEGAL CONSIDERATIONS: PUTTING THE BEST FOOT FORWARD}

In assessing litigation strategy, the LGBT movement must also be mindful of the relative strengths of the legal arguments they are seeking to advance. This is especially true where, as here, the two issues are interrelated and the outcome of one will undoubtedly affect the outcome of the other. The next section of this Paper will explore these potential consequences. Assuming that this interrelatedness is true, the smarter strategy is to lead with the stronger argument; once that effort has succeeded, it will boost the prospects of the other. Here, the argument against same-sex adoption bans like that of Mississippi is stronger than that against same-sex marriage bans, even if both arguments are likely to eventually succeed. This is true first because \textit{stare decisis} poses greater obstacles for same-sex marriage cases than for a challenge to Mississippi’s

\textsuperscript{134} This is because courts are unlikely to find an explicit “right” to adopt, only that same-sex couples may not be completely excluded from adoption. This point will be explored further in the next section of the Paper.
adoption statute. Second, the marriage cases are complicated by the existence of several proposed legitimate state interests, which must all be overcome in order to mount a successful challenge; in contrast, the “best interests” standard ensures that a Mississippi statutory challenge would center on but one purported justification. Finally, despite prior rulings suggesting the contrary, the “best interest of the child” standard provides a compelling reason that the Mississippi statute is irrational; the standard is not applicable in the marriage context, so the argument would not be able to have the same impact in a marriage case.

1. The Road to Equality is Paved with Bad Precedent

To be successful, both same-sex adoption and same-sex marriage cases will have to overcome some significant contrary precedent. There are certainly strong arguments to be made that both can overcome these hurdles, but the task is more difficult for marriage equality. Challengers to the Mississippi law must overcome two cases, Lofton and Adar, but neither ever reached the Supreme Court, neither is binding in Mississippi, and both are factually distinguishable. Marriage Equality advocates, however, must first deal with a case, Baker, that technically reached the Supreme Court and is arguably both binding and on point. They must also deal with the decisions of the many federal courts that have rejected the Equal Protection argument in the past and cannot merely be distinguished factually.

Adoption Precedent: Lofton and Adar: In challenging the Mississippi law, an advocate will find no case law that directly addresses the main issue in the case because Mississippi’s law is unique. Further, because the Supreme Court has never taken up the issue of same-sex adoption in any capacity, most precedent would be merely persuasive, not binding, on the Fifth Circuit. This
includes *Lofton*, whose persuasive authority has been undermined by subsequent decisions and whose factual basis is also distinguishable. The one case that is both binding and related to the issue at hand, *Adar*, can be distinguished without considerable difficulty.

As noted earlier, the Mississippi law is distinguishable from every other state law, past or present, because it is the only one explicitly banning same-sex couples (as opposed to individuals or unmarried couples) from adopting.135 Thus, only a case involving that statute, of which there are none, would be directly on point. *Lofton*, however, provides the closest set of facts.

In *Lofton*, the 11th Circuit upheld the Florida LGB adoption ban as not violating the Equal Protection Clause of the U.S. Constitution.136 As a decision of a different circuit, it is not binding on the courts of the Fifth Circuit where Mississippi is located. Further, the Supreme Court’s denial of certiorari in the case only made the decision mandatory authority in that circuit and created no binding precedent.137 As persuasive authority in a challenge to the Mississippi law, a court would be remiss to not first consider that the very same law challenged in *Lofton* was eventually overturned by a state court in *In re Gill* as a violation of the equal protection clause of the state constitution.138 While this decision did not overrule *Lofton*—a state court cannot overturn a federal court’s decision on a federal question—it undercut the argument that the law was rationally related to a legitimate government interest through the use of an extensive factual record.139 Whatever persuasive impact remains from *Lofton* after *In re Gill* is further undermined by the factual differences between that case and a Mississippi statutory challenge. *Lofton*, in

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135 See supra Part II.B.
136 See supra note 75.
138 See supra note 76.
upholding Florida’s ban on adoption by homosexual *individuals,* relied heavily on the notion that Florida had an interest in promoting stable “married homes.” While it is true that the court also stressed the importance of having a “mother and father,” a court considering the issue today would have to take into account the undeniable fact that same-sex couples have an increased ability to form married homes. Overall, little remains of *Lofton* today that should give comfort to opponents of same-sex adoption.

The other important precedent to consider is *Adar.* As a Fifth Circuit case, *Adar* would be binding on any court considering a federal constitutional challenge to the Mississippi statute, with the exception of the Supreme Court. While this case could therefore provide some difficulty for a Mississippi same-sex adoption challenge making its way up to the Supreme Court, *Adar* can be distinguished in several ways. In *Adar,* the Fifth Circuit heard the case of Mickey Smith and Oren Adar, an unmarried couple that legally adopted a Louisiana-born child in New York in 2006 and sought to have the state of Louisiana issue a revised birth certificate containing both parents names. They challenged this refusal as a violation of the Full Faith and Credit Clause and the Equal Protection Clause, but the court rejected both theories.

While the case did involve an adoption by a same-sex couple, the issue in *Adar* was not whether or not the couple could constitutionally be denied the ability to adopt in the first place; rather, the sole issue was whether or not the U.S. Constitution compelled the state of Louisiana

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140 *Lofton,* 358 F.3d at 821.
141 *Id.* at 819.
142 At the very least, a court would have to acknowledge that nine states now grant same-sex couples the ability to get married; while Mississippi may not, that fact is certainly relevant because potential same-sex adoptive parents can still get married in many jurisdictions.
143 *Adar* v. Smith, 639 F.3d 146, 149 (5th Cir. 2011).
144 *Id.* at 150.
to issue a revised birth certificate that included both parents’ names.\textsuperscript{145} The state pointed to its own statutory scheme, which does not permit the issuance of a revised birth certificate with both parents’ names to the child of unmarried parents, as justification for the denial.\textsuperscript{146} The Equal Protection issue therefore centered on whether the children of unmarried couples could be treated differently.\textsuperscript{147} The court determined that this distinction was permissible because it supported the state’s overall adoption scheme, permitting adoption only by single individuals or married couples, and the state’s legitimate interest in promoting stable families.\textsuperscript{148} The Mississippi challenge is therefore clearly different in the following ways: (1) \textit{Adar} contends that unmarried couples offer a less stable home than married couples or single individuals, while Mississippi would have to argue that same-sex couples have less stable homes than opposite-sex couples;\textsuperscript{149} (2) the \textit{Adar} court may correctly apply mere rational basis review because there is no compelling reason why children of unmarried couples are a suspect class, but a court considering the Mississippi statute would at least have to deal with the legitimate contention that discrimination based on sexual orientation is subject to some form of more rigorous review under \textit{Lawrence} and \textit{Romer v. Evans};\textsuperscript{150} (3) the Louisiana scheme merely denied the child a document, while the

\textsuperscript{145} See \textit{supra} note 90 and accompanying text.
\textsuperscript{146} See \textit{Adar}, 639 F.3d at 161.
\textsuperscript{147} See id.
\textsuperscript{148} See id. at 162.
\textsuperscript{149} The distinction between married couples/single individuals and unmarried couples is arguably reasonable, because for at least heterosexual unmarried couples, the choice not to have yet gotten married may indicate an unwillingness to commit. While same-sex couples are also unmarried, they are forced into the situation by the statutory scheme that does not allow marriage; it can therefore be presumed that if same-sex marriage was legal, at least some of the same-sex couples would be able to adopt under the Louisiana statutory scheme (but not the Mississippi scheme).
\textsuperscript{150} The fact that the Mississippi statute discriminates based on sexual orientation on its face makes it difficult to avoid the type of more rigorous (if still “rational basis”) review conducted in the two leading sexual orientation Supreme Court cases.
Mississippi scheme denies the child potential parents and denies the potential parents a child, and (4) relatedly, the “best interests” standard is far more central to the question of who is allowed to adopt than it is to the issuance of a revised birth certificate.

**Marriage Equality Precedent: Baker and Beyond:** While *Adar* and *Lofton* provide some slight difficulty for a same-sex adoption case, same-sex marriage cases will have to overcome more worthy adversaries in the form of *Baker*, its progenies, and a host of other cases that deny a constitutional right to same-sex marriage. Unlike the Mississippi challenge, any marriage equality case will inevitably run headfirst into a case that both had at its core the same issue and arguably created binding precedent throughout the country. Both *Baker*’s precedential value and continued relevance after subsequent cases can be discounted, but not without significant effort.

The issue considered by the Minnesota Supreme Court in *Baker* was whether or not the Constitution compelled a state to issue marriage licenses to same-sex couples as it did for opposite-sex couples; the case addresses both the fundamental right to marry and the Equal Protection arguments, among others. *Baker* was appealed to the U.S. Supreme Court, which dismissed it “for want of a substantial federal question.” Unlike a denial of certiorari, a dismissal for want of a substantial federal question is a decision on the merits and is binding on

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151 The question of whether a purported justification is rational is certainly related to the action being taken; denying a document and denying an adoption altogether are vastly different outcomes.

152 See *supra* note 64. The denial of an updated birth certificate with both parents’ names may not be in a child’s best interests, but outside of the adoption / custody context, that is but one of the relevant considerations.

153 See *supra* note 29.


all lower courts. But the authority is narrow in scope, affirming only the precise issues decided and not the court’s reasoning. Further, “[i]t remains a decision on the merits of the precise questions presented ‘except when doctrinal developments indicate otherwise.’”

The briefs of the parties in Perry demonstrate that legitimate arguments can be made both for and against Baker as a binding decision. Many courts have accepted the argument that Baker is no longer binding law. A 2012 decision by a New Jersey court reinstating a federal Equal Protection claim in a marriage equality suit lays out a compelling case for overcoming Baker: just as Loving illustrated a shift in societal understanding of interracial relationships and Frontiero v. Richardson demonstrates a rejection of sex discrimination once considered conventional, the major doctrinal developments of Lawrence and Romer “support the conclusion that the issues raised in Baker would no longer be considered unsubstantial.” On the other hand, a 2012 federal district court decision upholding Hawaii’s same-sex marriage ban presents the case for Baker’s continued relevance: Lawrence cannot be read as having undermined Baker

158 Hicks, 422 U.S. at 344-45 (1975) (quoting Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 260 n. 3 (2d Cir. 1967)).
159 See Brief in Opposition at 22-24, Hollingsworth v. Perry, No. 12-144 (U.S. Aug. 12, 2012) (arguing that Baker is not controlling in brief opposing grant of certiorari); Reply Brief for Petitioners at 5-7, Perry, No. 12-144 (U.S. Sept. 4, 2012) (arguing that Baker is controlling in brief supporting grant of certiorari).
160 See, e.g. Smelt, 374 F.Supp.2d at 872-73 (finding that the DOMA-related challenge is not bound by Baker because of the differences in the underlying issue, but also “[d]octrinal developments show it is not reasonable to conclude the questions presented in the Baker jurisdictional statement would still be viewed by the Supreme Court as ‘unsubstantial.’”)
because it explicitly limited the scope of its decision so as not to include relationship recognition and Romer, by applying only rational basis review, did nothing to change court doctrine.\textsuperscript{163}

Overcoming the potential \textit{stare decisis} impact of Baker is in itself a larger hurdle than any that a Mississippi adoption statute challenge may face, as there is no case that even arguably binds a court considering that challenge before it can reach the underlying merits. Furthermore, same-sex marriage cases must also navigate lower court cases that have relied on Baker in upholding same-sex marriage bans\textsuperscript{164} as well as other cases that have upheld marriage bans on their merits.\textsuperscript{165} Most notably, the Sixth Circuit, the only federal appeals court to have ruled on same-sex marriage other than the Ninth Circuit, considered and rejected the Equal Protection claim (among others) in \textit{Citizens for Equal Protections v. Bruning}.\textsuperscript{166} While Bruning was never taken to the Supreme Court like Baker, it nevertheless offers directly relevant, and at least persuasive, authority for courts taking up the marriage issue.

2. \textit{The Merits of the Cases}

Below the surface of the negative case law are the actual contrary arguments that proponents of same-sex marriage and same-sex adoption must contend with in order to be successful. Here too, an adoption challenge has the advantage. In the context of adoption, the

\textsuperscript{164} See, \textit{e.g.}, Wilson v. Ake, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005) (dismissing a challenge to Florida’s same-sex marriage ban on the grounds that Baker is still controlling).
\textsuperscript{165} See, \textit{e.g.}, Citizens for Equal Protections v. Bruning, 455 F.3d 859 (8th Cir. 2006) (reaching the merits of the case and upholding Nebraska’s same-sex marriage ban).
\textsuperscript{166} Bruning, 455 F.3d at 863. It should be noted that Bruning does not consider the fundamental right to marry issue, the second major issue in Perry. See Perry v. Brown, 671 F.3d 1052, 1076 (9th Cir. 2012) (summarizing the grounds for the district court’s holding).}
“best interests of the child” standard reigns supreme. In justifying its prohibition on same-sex adoption, the only “rational basis” that could be offered by a state is that the law is in a child’s best interests (or at the very least, does not effect the child). It therefore follows that if the law can be show to be adverse to the best interest of the child, the law would fail; there is just one simple argument to be made.

In contrast, same-sex marriage opponents can offer up any number of purported justifications—promoting the biological family structure, ensuring “responsible procreation,” “protecting religious liberty,” and preventing public school children from being taught about same-sex marriage, to name a few—that must all be dispatched in order to strike down a ban on same-sex marriage under the rational basis standard. While many of these purported justifications are without much merit, Bruning demonstrates that some courts may find the stronger ones persuasive.

The Eighth Circuit found that Nebraska could reasonably offer marriage and its benefits to only opposite-sex couples because of the “traditional notion that two committed heterosexuals are the optimal partnership for raising children” and because inducing heterosexual couples into marriage lessens the chance that children will accidentally be born out of wedlock, an impossible

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167 See supra note 64.
168 A law concerning “who may adopt” obviously must have a non-zero effect. If the effect is negative, then both concerned parties—the prospective adoptive parents and adoptive child—would be experiencing a harm; it is difficult to see how, considering the “best interests” standard, the law could still be found rational in such a situation.
169 See Perry, 671 F.3d at 1086.
170 Bruning, 455 F.3d at 867.
171 See Perry, 671 F.3d at 1091.
172 See id.
173 See id. (considering only briefly justifications based on religious liberty and educational concerns).
situation for same-sex couples. These same arguments were rejected by the Ninth Circuit in *Perry*, but only because of the existence of an important factual difference: California’s Proposition 8 took away same-sex marriage rights but had no effect on heterosexual couples, making those justifications irrelevant in the specific situation. While the Ninth Circuit did not concluded either way whether the proposed justifications themselves were valid, rational basis review may not allow for the sort of searching evaluation that would be necessary in order to undermine the entire case for exclusion of same-sex couples from marriage. Therefore, it is quite possible that same-sex marriage proponents will have to make the additional case that some heightened form of review applies.

3. *The Best Interests Standard: Adoption’s Secret Weapon*

Challengers to the Mississippi statute have a simpler path: demonstrate that beyond being just discriminatory against same-sex couples, the law actually harms children on balance. One of the key legal differences between the arguments concerning same-sex marriage and those concerning same-sex adoption is the existence of the “best interests of the child” standard. This principle, also not applicable in the context of Equal Protection issues concerning LGBT individuals, has been wielded by courts as a tool to uphold same-sex adoption bans even in the

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174 *Bruning*, 455 F.3d at 867.
175 See *Perry*, 671 F.3d at 1086-87 (“As we have by now made clear, the question is whether there is a legitimate governmental interest in withdrawing access to marriage from same-sex couples.”). The argument could be made that same-sex marriage bans themselves suffer from this same deficiency, as they generally did little to actually alter the law. However, even assuming this to be true, the most that could be achieved from this argument is striking down the bans, not mandating that same-sex marriage be allowed.
176 See *Perry*, 671 F.3d at 1086 (“We need not decide whether there is any merit to the sociological premise of Proponents' first argument....”).
177 See supra note Part II.B.2.
178 See supra note 64.
face of new precedent like *Romer* and *Lawrence*.\(^{179}\) The argument is simple; because the best interests of the child are of utmost concern here, the state ought to be given additional leeway in determining how best to meet that standard for each child, even if that leeway leads to adverse outcomes for other interested parties. In other words: the child’s interests outweigh those of any potential parents.

This point is persuasive in the context of individual adoption decisions, but falls apart when examining a broad statutory ban like that of Mississippi. In an individual case, the use of the marital status of the prospective parents may be in the best interests of the child because it allows a less restrictive evaluation of the appropriateness of the placement. Prohibiting an agency from considering any possible factor could be harmful; or, at least, there is a rational basis to believe so. This is further evidenced by the fact that courts still allow even race to be considered as a factor in adoption decisions.\(^{180}\)

On the other hand, the “best interests of the child” standard should almost certainly have the opposite effect on a broad categorical ban on certain potential adoptive parents. Just as an outright prohibition on consideration of sexual orientation places an undue burden on an agency’s ability to determine a child’s best interests, an automatic exclusion of a certain class of individuals from adopting creates a similar burden. It does so in one obvious way—it lessens the pool of available adoptive parents for an agency to choose from in finding an appropriate family for a child—and one not so obvious way—it prevents an agency from finding the best home for a child who may actually benefit from having same-sex adoptive parents. This situation is actually

\(^{179}\) *See supra* note 75 and accompanying text.

\(^{180}\) *See* Drummond v. Fulton County Dep’t of Family and Children’s Servs., 563 F.2d 1200, 1205 (5th Cir. 1977)(holding that while applicants to be adoptive parents cannot be automatically rejected because of their race, race may be used as a factor, even a decisive one, in adoption determinations).
not very hard to imagine: consider a struggling gay teenager whose rejection from his family has left him homeless and in need of a loving role model with whom he can identify. The Mississippi statute does nothing more than bind the hands of those tasked with choosing the best place for a child; this inflexibility certainly cannot be in the best interests of any child. Even the Mississippi Supreme Court has recognized this principle: “Children are not cards to be placed in slots. Their needs require imaginative flexibility, not slavish categorization. We simply cannot engage in tunnel vision when a child's welfare is at stake; every reasonable option must be available.”

Advocates in same-sex adoption cases have focused on the rights of LGBT people to be treated equally under the law in regard to consideration as potential parents. But while this is obviously the ultimate issue in an Equal Protection challenge, the courts have routinely identified the child’s interests as being paramount on issues of adoption. Therefore, rather than allowing the cases to be framed as a balancing of adoptive parent Equal Protection rights against the rights of the child to find a suitable home, advocates can and should make the case that the violation of same-sex couples’ rights actually hurts the child’s best interests in every case. Certainly, if all relevant parties’ interests are harmed, there can be no rational basis for the law.

C. ENDGAME: HOW AN ADOPTION WIN CAN PROPEL MARRIAGE EQUALITY TO VICTORY

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182 See Brief of Appellant at 27-38, Lofton v. Sec’y of the Dep’t of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD) (rejecting purported justifications as not sufficient for denying equal protection to same-sex couples).
183 See supra note 64.
For a civil rights movement, pursuing a more politically savvy litigation strategy is obviously beneficial. But when it comes to legal considerations—that is, which possible issues have the best chance of winning in the courts on their merits—it is less clear what the benefits are of choosing to push one issue before another. Here, there is a good reason why the stronger legal argument, on adoption, should be pushed before the comparatively weaker argument, on marriage: achieving victory on the former would bolster the case for the latter.

Striking down a same-sex adoption ban like that of Mississippi would instantly strengthen the case for marriage equality because it would necessarily require a court to recognize that same-sex parents are not always inferior to opposite-sex couples when it comes to rearing children, as a matter of law. While this recognition would not completely undermine the main rationale put forward by same-sex marriage opponents, it would weaken the argument that the supposed interest is rational.

As it stands, a state may claim that in its judgment, committed opposite-sex couples provide the optimal environment for rearing children. Unless evidence can be presented to show that such a judgment is “irrational”—a high bar—a court may find that offering marriage only to opposite-sex couples has a rational basis. But defeating a same-sex adoption ban would involve a court legally recognizing that such a premise is false because opposite-sex families are not always the optimal environment. A state would therefore be forced to fall back on a weaker argument: that opposite-sex couples usually or almost always provide the optimal environment.

This slight change is actually a big concession. With the state forced to recognize that in even just one instance an individual same-sex couple may offer a superior child-rearing environment to one other individual opposite-sex couple, it must now answer a new question: on

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184 See supra note 174.
what basis is it rational to exclude that same-sex couple from marriage but not the opposite-sex couple? Same-sex marriage opponents would thus find themselves in a weaker situation, similar to that of Proposition 8 defenders in *Perry*, forced to explain the rationale for denying marriage from one group rather than for offering it to another.  

IV. CONCLUSION

With LGBT rights a major hot topic on court dockets and legislative agendas around the country, advocates must carefully decide what steps to take to advance their mission. While same-sex marriage is clearly the issue at the forefront, the way forward on the issue is not entirely clear. Recent successes in legislatures and on the ballot indicate that they may be able to advance marriage equality through more democratic means for the time being; but with courts around the country entertaining Equal Protection challenges to same-sex marriage bans, they also have the opportunity to push the Supreme Court to expedite the process. LGBT rights advocates should choose to continue with the democratic push, for now, and embrace another focus for litigation right now: LGBT adoption. Bans on same-sex couples adopting are rare but ripe for a constitutional challenge. Looking at Mississippi’s statute as an example, it is clear that such a challenge is more politically palatable right now and legally stronger on the merits than challenges to same-sex marriage bans. Additionally, a victory on this issue would undermine the case against marriage-equality and therefore bolster that case. If advocates were to pursue this strategy, LGBT adoption rights and marriage rights would be advanced, as would the entire agenda of the movement.

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See supra note 175.