Taking Lochner Out of the Closet

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Taking *Lochner* Out of the Closet

*or*

Liberty of Contract as a Basis for Gay Rights

by

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

-The Court in Lochner v. New York (1905)

Introduction

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

This article presents and defends a new analytical framework based on liberty of contract to advance gay rights. While the framework is applied here contextually to the area of gay rights, the framework should also be applicable to the full panoply of regulations that affect private orderings (from regulations directly affecting economic

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2 See infra Part I. A, B, and C.
3 One trial court has even reasoned that one such piece of legislation is an impermissible bill of attainder, and that it violates the separation of powers doctrine. See In re Adoption of John Doe, 2008 WL 5070056, at*22-25 (Fla. Cir. Ct.). See also infra note 80 (finding a legislative ban on gay adoption violative of the separation of powers doctrine).
4 The author uses the term “gay” throughout this article expansively to include all people who are in, are pursuing, or are inclined toward same gender intimate relationships, thus picking up gay men, lesbian women, and people who might otherwise be referred to as bisexual. I use the term expansively because of the difficulty of exactly categorizing people as specifically or only homosexual in their inclination. See generally Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 STNLR 353 (2000) (discussing the paradox of gay nomenclature and the difficulties presented by attempts to categorize people as definitely or only of one sexual orientation .)
relations to those affecting marijuana, gambling or prostitution, just to name a few examples).  

This alternative analytical framework is more neutral and less emotional than either the pleas for equal protection or privacy that advocates of gay rights advance, or the religious fervor with which some opponents respond to those pleas. The framework is based on the neutral economic principles embodied in historic notions of liberty of contract. Those principles were prevalent during what has become known as the Lochner era, an era named for the infamous case of *Lochner v. New York*, quoted above. The *Lochner* case and the era named for it were dominated by a simple presumption that people should be allowed the liberty to order their own affairs through contract and that regulatory encroachments on that liberty interest should be evaluated critically. This article will argue that it is with just such a presumption that restrictions denying individuals the liberty to pursue and have a family should be evaluated and, most likely, found to be unconstitutional.

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

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5 Application of the framework to other contexts, however, will be left for subsequent articles.
Moreover, even in situations that are not clearly or primarily economic in nature, if there
is a private ordering the answer to this foundational question will typically be yes. In the
areas of marriage, adoption, and surrogacy (probed in more depth in this article) contracts
dictate each arrangement. Thus, liberty of contract is implicated even in those social
orderings.

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

The final question that the framework presented here asks is whether the
regulation is designed to counter a significant structural defect in the contracts subject to
the regulation in question. If so, the presumption in favor of the liberty of contract
interest should shift in favor of the regulation. In these cases, the regulation is more
likely than not to be warranted and appropriate, allowing the parties involved to better
achieve outcomes that would be achieved if the structural defects to contracting in that
context did not exist. Further, where there are structural defects in the contracts that are the subject of regulation, the very notion of a liberty interest in protecting those contracts is illusory and indeed oxymoronic. There is no genuine liberty interest involved in entering into a contract whose structure is flawed, one where either party is subject to duress, for example, or where one of the parties is likely to be fraudulently induced into the bargain. Thus, in areas where there seems to be inherent unfairness in bargaining, ex ante regulations that impinge on the liberty of contract should be acceptable. As this article further develops below, the *Lochner* case itself provides a good example of this type of situation. If a court were to determine that the employees of bakeries in 1905 had little or no bargaining ability with their employers, then government intervention to set fair employment conditions between those parties (conditions that would be achieved if the bargaining process was fair) likely would be warranted and appropriate. In such a case under this new framework, the presumption should be in favor of the regulation.

The context for the new paradigm analyzed in this article is the area of gay rights to family. Thus, this article will begin in Part I by presenting a survey of the primary encroachments on the liberty of gay people to enter into arrangements to have a family. In addition, the section will survey the primary challenges that have been made to those restrictions and the successes and failures of those arguments to change the landscape.

Part II of this article will discuss the *Lochner* decision and develop its potential for renewed application. Part II will also discuss the philosophy and history that led up to that decision and certain other decisions from that era to explain the meaning of the Lochnerian liberty of contract interest. Finally, Part II will present critical analyses of the downfall of *Lochner* and its analytical framework.
Part III will explain that many of the traditional criticisms of *Lochner* are unfounded and are currently being re-considered by scholars. Part III will admit to certain shortcomings of the traditional *Lochner* framework, but will set forth more fully the modification to that framework outlined briefly above that will make the framework more clear and useful to modern courts. Part III will then apply that approach to gay rights to family, hypothesizing the results in each of the three main areas under inquiry here: rights to marry, to adopt, and to enter into surrogacy arrangements.

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

I. The Systematic Denial of Gay Rights to Family.

As much of the literature surrounding rights to family explains, the Supreme Court has on many occasions expressed the view that the Constitution does protect individuals’ basic liberty interest in having a family, including raising children. Stretching back to the landmark case of *Meyer v. Nebraska*,

6 Interestingly a case decided during the *Lochner* era, the basic notion of the liberty interest in having a family was spelled out clearly.

7 In *Meyer*, the Court considered and ruled as unconstitutional a state statute that mandated that English be the only language taught in school.

8 The Court did not need to express its view with respect to the wide array of liberties protected by the 14th Amendment but it took the occasion to do so, stating that,

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7 See also *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as “the most important relation in life” and “the foundation of the family and of society, without which there would be neither civilization nor progress”).
8 *Meyer*, 262 U.S. at 399.
Without doubt . . . [the 14th Amendment’s due process liberty interest]
denotes … the right of the individual to contract, to engage in any of the
common occupations of life, to acquire useful knowledge, to marry,
establish a home and bring up children, to worship God according to the
dictates of his own conscience, and generally to enjoy those privileges
long recognized at common law as essential to the orderly pursuit of
happiness by free men.9

Notwithstanding the strong Supreme Court support for the notion that the United States
Constitution protects the rights of people generally to marry and have children, gay
people in the United States have and are still systematically denied those basic rights.10

A. **The Right to Marry.**

Many U.S. Supreme Court cases over the years have specifically found
Constitutional support for the liberty to marry. More recent than Meyer cited above, but
still decades old, is the landmark Loving v. Virginia.11 While Meyer was decided during
the Lochner era, Loving was decided in the wake of Lochner and at a time when Lochner
had been widely discredited. Still, Loving was as clear as Meyer in its support of the
liberty of people to marry when, in 1967, it struck down Virginia’s legislation that made
inter racial marriage illegal.12 Regardless of the rhetoric discrediting Lochner and its
support of liberty of contract, Loving stands as testimony to the fact that the liberty to
marry was still guarded dearly in the post-Lochner period.

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

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9 Id. at 399.
10 See infra Parts I. A, B, and C.
12 Id.
Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.\textsuperscript{13}

The ease with which the trial court was able to invoke religion and morality as a basis for its decision is shocking. As shocking as it may seem, however, many modern arguments opposing gay rights to family are similarly premised, though perhaps slightly more disguised.\textsuperscript{14} In overturning the trial court’s conclusion, the Supreme Court denounced the trial court’s reasoning and again reiterated its support for the general liberty interest of people of all kinds to marry. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{15}

Ultimately, the \textit{Loving} Court declared that the prohibition on interracial marriage violated both the equal protection and due process clauses of the 14th Amendment of the Constitution for reasons that “reflect the central meaning of those constitutional commands.”\textsuperscript{16} The prohibition violated the equal protection clause by impermissibly denying individuals the right to marry the person they chose based solely on their racial classifications.\textsuperscript{17} The Court found “patently no legitimate overriding purpose independent of invidious racial discrimination” to justify the legislation.\textsuperscript{18} The prohibition violated the liberty interest of the due process clause on similar but slightly

\textsuperscript{13} Id. at 3.
\textsuperscript{14} See, e.g., Lynn D. Wardle, \textit{The Attack on Marriage as the Union of a Man and a Woman}, 83 N.D. L. REV. 1365, 1369 (arguing the legalization of same-sex marriage alters the meaning of heterosexual marriage through “the transformative power of inclusion,” and “constitutes a very real and dangerous attack upon the institution of conjugal marriage”).
\textsuperscript{15} Id. at 12.
\textsuperscript{16} Id. at 2.
\textsuperscript{17} Id. at 12.
\textsuperscript{18} Id. at 11.
broader grounds—it generally denied individuals the basic liberty to marry.\textsuperscript{19} As the Court put it, “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\textsuperscript{20}

Still other, more recent cases reflect this same strong support for the rights of people to marry. In 1978, the Supreme Court decided \textit{Zablocki v. Redhail},\textsuperscript{21} striking down a Wisconsin statute requiring individuals who have child support obligations to get court permission to marry. The Court found the statute to be an unconstitutional limitation on the liberty to marry, “reaffirming the fundamental character of the right to marry.”\textsuperscript{22} Still, the Court did state that reasonable restrictions on marriage may be imposed provided that those restrictions do not significantly interfere with the right to marry.\textsuperscript{23}

In contrast to these cases that illustrate the importance of the right to marry in constitutional law jurisprudence, it is well known today that many states have enacted legislation and even constitutional amendments restricting marriage to a union between one man and one woman.\textsuperscript{24} Thus, no gay couple can enter into a marriage contract in those states, despite the strong Supreme Court support for the fundamental liberty interest.

\textsuperscript{19} \textit{Id.} at 12.
\textsuperscript{20} \textit{Id.} (citing \textit{Skinner v. State of Oklahoma} 316 U.S. 535, 541 (1942) and \textit{Maynard}, 125 U.S. 190).
\textsuperscript{22} \textit{Id.} at 386.
\textsuperscript{23} \textit{Id.}

\textsuperscript{24} Most recently, Florida and California have enacted such amendments. On November 4, 2008, citizens of Florida passed Proposition 2, which amended the Florida constitution to include the following language, “This amendment protects marriage as the legal union of only one man and one woman as husband and wife and provides that no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.” \textit{FLA. CONST.} art. 1, § 27. On the same day, the citizens of California passed Proposition 8 pursuant to which a new section (7.5) was added to Article I of the California constitution, stating: "Only marriage between a man and a woman is valid or recognized in California." \textit{CAL. CONST.} art. 1, § 7.5. Interestingly, on May 26\textsuperscript{20}, 2009, the California Supreme Court ruled that the ballot initiative was constitutional but that the 18,000 homosexual marriages that pre-dated the constitutional amendment would remain valid. \textit{See} John Schwartz, \textit{California High Court Upholds Gay Marriage Ban}, \textit{N.Y. TIMES}, May 26, 2009, at A1.
in choosing whether and whom to marry. Twenty-nine states currently have constitutional provisions that restrict marriage to one man and one woman. Eleven states have statutes that do the same thing.

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

By contrast, there are now six states that have legalized same-sex marriages. Further, another five states have some form of same sex relationship recognition, in the form of either domestic partnerships or civil unions.

(i) Cases Supporting the Marriage Ban

One of the earliest cases to present a constitutional claim of a right to gay marriage was Baker v. Nelson in 1972. In that case, the Minnesota Supreme Court acknowledged that Loving stood for limited government intrusions into the right to

25 For a chart of the status of gay marriage in the states, see app. A: State Marriage and Relationship Laws infra p. 59.
28 Defense of Marriage Act, 28 U.S.C. § 1738C.
31 California (domestic partnerships), District of Columbia (domestic partnerships), Nevada (domestic partnerships), New Jersey (civil unions), Oregon (domestic partnerships) and Washington (domestic partnerships). Id.
marry, but reasoned that the gay marriage ban was completely different from the
interracial marriage ban, and did not merit constitutional protection. The U.S. Supreme
Court dismissed the appeal, claiming that there was no federal question presented and
that the issue was one solely of state law. 

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

33 The court in Baker described the distinction between interracial and same-sex marriage as both “commonsense
and constitutional.” Id. at 315.
35 See, e.g., Wilson v. Ake, 354 F.Supp. 2d 1298, 1307 (2005) (finding no fundamental right to marry a person of the
same sex); Hernandez v. Robles, 855 N.E.2d 1, 9–10 (2006) (finding marriage to be a fundamental right, but not
same-sex marriage because it is not “deeply rooted”); Andersen v. King County, 138 P.3d 963, 976–979 (2006)
(finding that same-sex marriage is not included in the fundamental right to marry because it is not in the state’s
history and tradition).
36 See, e.g., Wilson v. Ake, 354 F.Supp. 2d 1298, 1307 (2005) (specifically deciding that both DOMA and the
Florida gay marriage ban warranted only rational basis review, despite the litigants appeal that Lawrence dictated a
higher level of scrutiny.)
37 Id. at 1308 (explaining that when rational basis review is being used the plaintiff has the burden of negating every
possible basis upon which the legislation might have been passed.) See also Andersen v. King County, 138 P.3d
963 (2006). In Andersen, the plaintiffs claimed that the driving animus behind Washington’s DOMA was anti-gay
sentiment.

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

Id. at 980. Despite these motivations, the Andersen Court went on to reason that there had to be some legitimate
reasons for passing the act, those reasons being related to the stability of a traditional family.
reasoned that protecting traditional marriage and family is a sufficiently rational basis for the ban.\(^{38}\)

The federal DOMA is currently being challenged in federal court in the case of *Smelt v. The United States*.\(^{39}\) The U.S. Department of Justice filed a motion to dismiss the challenge in that case as recently as June 11, 2009.\(^{40}\) In the memorandum supporting that motion, the United States used the traditional reasoning, arguing vehemently that DOMA does not violate any provisions of the U.S. Constitution because the ban on gay marriage meets the rational basis review.\(^{41}\) Currently, DOMA is also being challenged in Massachusetts, where the Commonwealth of Massachusetts itself has filed a suit against the federal government.\(^{42}\)

(ii) Cases Against the Marriage Ban

Some recent state court cases have been ardent in their positions that bans on gay marriage violate their state constitutions. Among those recent cases are California and Massachusetts Supreme Court cases. In *Goodrich v. Massachusetts Department of Public Health*\(^{43}\) the Massachusetts Supreme Court ruled that any prohibition on gay marriage violated their state constitution’s equal protection and due process clauses. The Massachusetts court declined to find that the restrictions warranted heightened strict

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\(^{38}\) See, e.g., Andersen v. King County, 138 P.3d 963, 983 (2006) (stating, “Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”)


\(^{40}\) United States’ Motion to Dismiss and Memorandum of Points and Authority in Support of Defendant United States’ Motion to Dismiss, *Smelt v. United States*, No. 09-00286 DOC (D. Cent. Cal. S. Div. filed June 11, 2009).

\(^{41}\) Id. at 32-37.


\(^{43}\) 798 N.E.2d 941 (2003).
scritiny review\(^{44}\) (as discrimination based on race, for example, would). Still, even applying the lower rational basis review, the court found the justifications for the ban against gay marriage to have no rational basis at all. As the Court explained, “The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”\(^{45}\) The Court further stated, “That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.”\(^{46}\) The restrictions were thus struck down.\(^{47}\) As a result, gay marriage is now legal in Massachusetts.

In California, a more complicated landscape has emerged. In the summer of 2008, the Supreme Court of California overturned an appellate court decision to uphold the ban on gay marriage in California.\(^{48}\) The appellate court had reasoned that (1) the legislature had a reasonable interest in promoting the traditional definition of marriage; and (2) that the legislature had spoken by passing the ban, which represented the widely held views of Californians that gay marriage should be banned.\(^{49}\) The California Supreme Court rejected these arguments and instead applied the heightened strict scrutiny test to the discrimination against gay people represented by the marriage ban.\(^{50}\)

Under strict scrutiny, the marriage ban must have been necessary to achieve a compelling

\(^{44}\) Id. at 961 (“We conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.”)

\(^{45}\) Id. at 948.

\(^{46}\) Id. at 949

\(^{47}\) Id.

\(^{48}\) In re Marriage Cases, 183 P.3d 384 (2008).

\(^{49}\) In re Marriage Cases, 49 Cal. Rptr. 3d 675, 718-726 (2006).

\(^{50}\) In re Marriage Cases, 183 P.3d at 446.
state interest. The California Supreme Court could not find the ban on gay marriage necessary or at all related to a compelling state interest and struck it down.

Nonetheless, Californians were presented with a constitutional amendment in November of 2008 to include the ban on gay marriage in their state constitution. The measure passed, restoring the ban on gay marriage that the California Supreme Court had rejected. A subsequent court challenge to the constitutional amendment was unsuccessful.

Even though the California Supreme Court was unsuccessful in removing the ban against gay marriage in their state, two other states have very recently followed the California Supreme Court’s lead and used heightened scrutiny to find their state’s ban on gay marriage unconstitutional. In 2008, the Connecticut Supreme Court found, among other things, that discrimination against gay people warrants the heightened strict scrutiny standard of constitutional review and that a ban on gay marriage cannot meet that standard. Then, in early 2009, the Iowa Supreme Court did the same.

51 In re Marriage Cases, 183 P.3d at 452.  
52 Id.  
53 See supra note 24 (discussing the language and effect of the constitutional amendment).  
55 Schwartz, supra note 24.  
56 Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 476–482 (2008) (stating, “[a]lthough we acknowledge that many legislators and many of their constituents hold strong personal convictions with respect to preserving the traditional concept of marriage as a heterosexual institution, such beliefs, no matter how deeply held, do not constitute the exceedingly persuasive justification required to sustain a statute that discriminates on the basis of a quasi-suspect classification”).  
57 Varnum v. Brien, 763 N.W.2d 862, 896, 906 (2009) (stating, “[w]e are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination”).
B. The Right to Have Children.

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

(i) Adoption.

Most of the states in the United States have adoption statutes that are dictated by proceeding in the “best interests” of the child.58 In Arkansas, Florida, Michigan, Mississippi and Utah, however, the best interests of the child are ignored, or largely subordinated, if the intended parents are gay.59 The Florida law is the most stark in discriminating against gay people. In Florida it is patently illegal for a gay person to enter into an adoption contract notwithstanding any other qualifications that person might have as an adoptive parent or the best interests of the child involved.60 The statute reads simply, “No person eligible to adopt under this statute may adopt if that person is a homosexual.”61

That statute was motivated by a surprisingly clear and expressed intention to keep gay people in the closet. One of the senators who led the passage of the legislation back

59For a chart outlining the adoption restrictions in the states, see app. B: State Adoption Laws, infra p. 62.
60FLA. STAT. §63.042(3).
61Id.
in 1977 stated, “We’re trying to send a message telling them, ‘We’re really tired of you. We wish you’d go back in the closet.’” 62

Like Florida, Mississippi also targets gay people, prohibiting adoption by gay couples. 63 Unlike Florida, however, it seems that single gay people in Mississippi are not specifically prohibited from adopting. 64

Arkansas, Michigan and Utah each forbid unmarried couples from adopting though single people are allowed to do so. In Arkansas voters approved a ballot measure to create a law making it illegal for unmarried couples to adopt. 65 Similarly, Michigan’s law simply makes adoption by unmarried people illegal. 66 Utah also prohibits an individual from adopting if that person is cohabitating with a partner (of either the same or opposite sex) and is not married. 67

In each of these states (Arkansas, Michigan and Utah) a gay person living together with a same sex partner would be prohibited from adopting. However, each of those states does allow single people to adopt. Arguably, then, a single gay person in those states could adopt, but one who is in a committed relationship (with more resources

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62 Gay Bills Pass Both Chambers, FLORIDA TIMES UNION (Jacksonville, Fla.), June 1, 1977, at __. Senator Peterson’s remarks were even more extensive and outrageous. He explained in this article that, “The problem in Florida has been that homosexuals are surfacing to such an extent that they’re beginning to aggravate the ordinary folks who have a few rights of their own . . . .[t]hey are trying to flaunt it.” Id. When asked about the potential difficulty in indentifying who is a homosexual when trying to enforce the legislation, Senator Peterson responded, “I have no problem knowing what a homosexual is . . . and the judge or whoever makes the decision on adoption . . . will [also just] know.” Transcript of Senate Floor Debate on SB 354, May 11, 1977 (Sen. Peterson), at 21-22. At the same time the adoption ban for gay people was being considered, Senator Peterson was also attempting to pass legislation to ensure that clothing stores had separate changing rooms for men and women. Gay Bills Pass Both Chambers, at __. Of this he said, “We’re trying to stop men from trying on women’s clothes… [its becoming] a real problem in Tallahassee, Lakeland and Miami.” Id.

63 Adoption by couples of the same gender is prohibited. MISS. CODE ANN. § 93-17-3(5) (2007).

64 Any unmarried person or married person with spouse may adopt a minor. MISS. CODE ANN. § 93-17-3 (2007).

65 On Nov. 4, 2008, Arkansas voters approved a ballot measure to create a law providing that an individual “cohabiting with a sexual partner outside of a [valid] marriage” may not adopt or serve as a foster parent. This means gay couples may not jointly petition to adopt and second-parent adoption is also not available to them. Single gay people can adopt. ARK. CODE ANN. § 9-9-204 (2009).

66 Single people and married couples may adopt. Unmarried couples may not jointly petition for adoption. MICH. COMP. LAWS. ANN. § 710.24 (2009).

67 UTAH CODE ANN. § 78B-6-117(3).
and more help for child care) cannot. 68 Utah’s statute goes further and creates a presumption that it is in the best interests of the child to be placed with a married couple and only under exceptional enumerated circumstances would that rule be broken. 69

Restrictions such as these on the freedom of individuals to structure their own personal life arrangements through contracts and thereby to pursue their own vision of a happy and fulfilled life are justified as regulations that are meant to promote public welfare. 70 Scholars and litigants alike have attacked such restrictions as unconstitutional for violating both the equal protection and due process provisions of the 14th Amendment. However, in part because gay people are generally not part of a group that has traditionally been afforded heightened protection under the Constitution, the challenges have failed. 71

In the federal circuit court case addressing the Florida ban on gay adoption, Lofton v. Secretary of the Department of Children & Family Services, the federal court accepted the promotion of traditional families as a legitimate state interest that was advanced by the ban. 72 In what could be viewed as a tacit approval of the discriminatory intent of the statute, the court then went as far as to say that the specified rationale need

68 Id. at § 78B-6-117(2)(b).
69 Id. at § 78B-6-117(4).
70 See Lofton v. Sec’y Dept. Children & Family Serv., 358 F.3d 804, 819–820 (11th Cir. 2004). In that case, Florida’s ban on gay adoption was challenged. “Florida argues that the statute is rationally related to Florida’s interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers.” Id. at 818. “Florida also asserts that the statute is rationally related to its interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families. Appellants respond that public morality cannot serve as a legitimate state interest. Because of our conclusion that Florida’s interest in promoting married-couple adoption provides a rational basis, it is unnecessary for us to resolve the question.” Id. at 819, n.17.
71 A few state decisions have been exceptions to this rule. See In re Marriage Cases, 183 P.3d 384 (2008), Kerrigan v. Comm’r of Public Health, 957 A.2d 407 (2008), and Varnum v. Brien, 763 N.W. 2d 862 (2009). These are discussed supra Part I.A.(ii).
72 Lofton, 358 F.3d at 819.
not have actually been the intent of the statute as long as the rationale provides a plausible purpose.\(^{73}\)

In an even more recent Florida state court case coming out of Monroe County (home to the free thinkers of Key West), the ban on gay adoption was challenged again.\(^{74}\) In that case, the trial court accepted three theories upon which it found the ban on gay adoption to be inconsistent with the Florida Constitution.\(^{75}\) First, the court found the ban to be a special law pertaining to adoption that is prohibited by the Florida Constitution.\(^{76}\) A special law in Florida is one that impermissibly classifies people or groups in a way that does not relate to the primary purpose of the statute.\(^{77}\) The court found that treating gay people uniquely and forbidding them from adopting made the statute an impermissible special statute.\(^{78}\) Second, the court found the ban to be an unconstitutional bill of attainder, as it acts punitively against the people who are forbidden to adopt.\(^{79}\) Third, the court reasoned that the legislation usurped the power of the court in determining the best interest of the child in a violation of the separation of powers that had been spelled out in the Florida Constitution.\(^{80}\) These novel arguments allowed the circuit court to find, differently from \textit{Lofton}, that the ban on gay adoption was impermissible.

Yet another recent Florida circuit court case has challenged \textit{Lofton} head-on. In that case, coming out of Miami-Dade County, the court ruled that there was absolutely no

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

\(^{74}\) In re Adoption of John Doe, Minor, 2008 WL 4212559, at *1.

\(^{75}\) \textit{Id.} at *21–23.

\(^{76}\) \textit{Id.} at *21.

\(^{77}\) \textit{Id.}

\(^{78}\) \textit{Id.} at *22.

\(^{79}\) \textit{Id.} at *22, *26.

\(^{80}\) The court referred to Article II, Section 3 of the Florida Constitution. \textit{Id.} at 53 - 65.
rational basis for the discrimination against gay people in the Florida adoption statute.\textsuperscript{81} Further, the court stated, citing \textit{Lawrence v. Texas},\textsuperscript{82} that morality alone was not a sufficient basis for the ban.\textsuperscript{83}

(ii) Surrogacy.

Surrogacy arrangements are, for many people, the only way to have genetically related children. Surrogacy arrangements have been controversial throughout the United States for many years, but are now legally permitted in about half of the states.\textsuperscript{84} States that upheld surrogacy agreements do so because surrogacy allows people who otherwise could not have their own biological children to have and enjoy that basic human experience. Still, in many states where surrogacy agreements are permitted and upheld, gay people are still carved out and categorically forbidden from pursuing this avenue to having children.\textsuperscript{85}

In a surrogacy arrangement, a woman carries a baby for another intended parent or parents and relinquishes any claim to custody when the child is born. There are two basic forms of surrogacy, traditional and gestational.\textsuperscript{86} In a traditional surrogacy arrangement, the surrogate’s egg is used and is fertilized by the sperm provided by the intended parent or parents.\textsuperscript{87} The traditional surrogate then carries the baby and, though genetically related to her, she relinquishes custody pursuant to the surrogacy agreement.

\begin{footnotesize}
\textsuperscript{81} In re the Adoption of John Doe and James Doe, 2008 WL 5006172, at *25–29 (Fla. Cir. Ct. Nov. 25, 2008).
\textsuperscript{82} 539 U.S. 558 (2003).
\textsuperscript{83} \textit{Id.} at *29.
\textsuperscript{84} See app. C: Surrogacy Laws by State \textit{infra} p. 63.; app. D: State Surrogacy Laws Detailed \textit{infra} p. 65.
\textsuperscript{85} See \textit{infra} Part I.B(ii)(a) describing states that have a marriage requirement as a pre-requisite for a binding surrogacy contract.
\textsuperscript{87} The terms “traditional” and “gestational” surrogacy are used commonly. See, e.g., Richard Storrow, Parenthood \textit{by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage}, 53 HASTINGS L.J. 597, 604 (advocating for the elimination of a marriage restriction on parenthood).
\end{footnotesize}
to the intended parent or parents. Alternatively, in a gestational surrogacy, the egg used to create the embryo is not the surrogate’s, but is provided, as is the sperm, by the intended parent or parents. Thus, in a gestational surrogacy agreement, the surrogate is not biologically related to the child born, but is the gestational carrier.

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

One of the difficulties of surrogacy arrangements is what to do if the surrogate refuses to relinquish custody after the birth of the baby. Upholding surrogacy agreements (pursuant to which the surrogate had agreed to relinquish custody) has, to some states, seemed like upholding a contract whereby the surrogate sells her baby to the intended parents for the fees paid under the contract. This form of “baby selling” has seemed inappropriate and against public policy in many states.  

The most celebrated case in this area is the case of In re Baby M in 1988. That case involved a traditional surrogacy arrangement. After the surrogate decided to violate the traditional surrogacy agreement and keep custody of the child, the case went to court.

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89 537 A. 2d 1127 (1988).
to consider whether the surrogacy agreement was enforceable. The New Jersey Supreme Court, in this landmark case, refused to uphold the agreement, for the very reason specified above, that the arrangement seemed like paying for a child and was against the public policy of the state of New Jersey. The case has become the touchstone for debates about the ethics of surrogacy and whether such arrangements should be permitted or whether they essentially create a market for babies and commodify women in a way that is repugnant to modern society and the public policy of the states.

More than twenty years have passed since the Baby M case and now 18 states in the United States clearly permit and regulate surrogacy, with only 8 states clearly making it illegal. In the remaining states, the law regarding surrogacy arrangements is unclear. Advances in technology that make artificial insemination safer, more reliable, and more commonplace combined with the growing use and demand for surrogacy have pushed states to recognize that there is a need and a place for surrogacy in society. The trend toward allowing surrogacy, albeit with safeguards and restrictions, seems to indicate that more states will likely move in this direction as well.

(a) States with a Marriage Requirement

Notwithstanding the widespread availability of surrogacy in the United States, some of the states which expressly permit surrogacy, including Florida, Nevada, New

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90 Id.
91 Id. at 1240.
94 This is indicated by the wide number of states that now do permit surrogacy agreements to be entered into and enforced. See app. C: Surrogacy Laws by State infra p. 63; app. D: State Surrogacy Laws Detailed infra p. 65.
Hampshire, Oklahoma, Texas, Utah and Virginia, have closed off this avenue to gay people. Those states have all passed legislation to make surrogacy contracts binding only if the intended parents are married.\(^95\) Thus, in states where gay marriage is prohibited (all but one of the states listed above), gay people will be unable to avail themselves of surrogacy as an option.

The marriage requirement for surrogacy contracts was actually challenged in 2000 in Florida in *Lowe v. Broward Co.*\(^96\) The Florida courts were clear. The appellate court declared that gay couples in a committed domestic partnership simply are not entitled to the same benefits reserved exclusively for married couples under Florida state law, including the right to enter into a valid and binding surrogacy agreement.\(^97\) Despite the clear discrimination recognized by the court in this case, the law was vigorously defended and upheld.\(^98\)

The status of the surrogacy law in New Hampshire will be interesting to observe since gay marriage will be allowed beginning in January 2010. Thus, the marriage requirement for surrogacy contracts in New Hampshire will presumably no longer restrict gay couples from entering into those contracts. Still, as with the other states that insist on marriage as a requirement to enter into a surrogacy statute, any single people, gay or otherwise, will be foreclosed from this option. Note that these particular statutes discriminate not only against gay people, but all unmarried people generally.\(^99\)

\(^{95}\) In addition, there are many other requirements for surrogacy agreements in states that permit them. In Florida, for example, the intended mother must be either infertile or at high risk for injuring her own or the baby’s life. In Utah, the intended parents must be married, but there are also additional requirements including that the surrogacy must proceed from assisted reproduction and not sexual intercourse. *Utah Code Ann.* § 78B-15-801(3), (5).

\(^{96}\) 766 So. 2d 1199 (Fla. 4th Dist. Ct. App. 2000).

\(^{97}\) *Id.* at 1205.

\(^{98}\) *Id.*

\(^{99}\) For an extensive discussion of the detrimental impact of marriage requirements in adoption and surrogacy arrangements, see Richard Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital*
arguments advanced in this article should apply equally to defend against that
discrimination as well.100

The result of the surrogacy legislation in these states that require the intended
parents to be married is slightly complicated. It is not that gay people (or single people)
cannot enter into surrogacy contracts and proceed to attempt to have biological children
through that route. It is simply that, if there is a dispute under the contract (about the
ultimate custody of the child or anything else) the courts of those states will not uphold or
enforce the surrogacy contract. Thus, a single gay person or couple entering into a
surrogacy arrangement would be risking the surrogate keeping custody of the resulting
child, despite having agreed not to do so. This was exactly the situation presented in the
Baby M case. In that case, the surrogate decided to breach her agreement to give custody
of the child to the intended parents. The court was then faced with a custody battle
between the biological mother who birthed the child, and the biological father who had
commissioned the surrogate’s services. The court ultimately did award custody to the
biological father (the intended parent under the contract) and not the surrogate but did so
in accordance with typical custody considerations—the best interests of the child—and
not with deference to the surrogacy agreement.101 Had the surrogate in the Baby M case
been awarded custody, she also would have had legal rights to claim child support from
the biological parent(s) despite having intentionally breached her agreement.102

101 In re Baby M., 537 A.2d at 1255–1261.
102 This was also contemplated in the case of In re Baby M., 537 A.2d 1127 (1988).
(b) States Without A Marriage Requirement

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

As the foregoing discussion has shown, strident restrictions still abound
preventing gay people from marrying and having children, just as their heterosexual
counterparts can, and have throughout history. Generally, courts addressing

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for surrogacy agreements in Illinois).
105 Id. at 47/25.
106 Id. at 47/20, 47/50.
107 Id. at 47/20(a)(1).
108 Id. at 47/20(a)(4), (5).
109 Id. at Section 47/50(b).
constitutional challenges to these restrictions have used the lowest level of constitutional scrutiny to find that the bans are justified.\footnote{This was the case in \textit{Lofton}, and continues to be the position of the executive branch of the federal government, as reflected in the 2009 Department of Justice memorandum submitted in the case challenging DOMA. State courts have largely followed suit, though with some notable exceptions where a heightened level of scrutiny was found not to be met by courts in California, Connecticut, and Iowa.}{110}

In light of the Supreme Court’s opinion in \textit{Lawrence v. Texas}\footnote{539 U.S. 558 (2003).}{111} (overturning a Texas law that made homosexual sodomy illegal) there is some indication that federal courts could impose a heightened level of scrutiny to such cases. In this author’s opinion, that heightened level of scrutiny is appropriate, however, it still remains controversial, and has yet to be fully embraced by any U.S. federal court.\footnote{Evangelos Kostoulas, \textit{Comment, Ask, Tell, and be Merry: The Constitutionality of “Don’t Ask, Don’t Tell” Following Lawrence v. Texas and United States v. Marcum}, 9 U. PA. J. CONST. L. 565, 585–588 (2007) (stating homosexuals as a group have both traits necessary for an application of heightened scrutiny as suggested by the Supreme Court). \textit{See also} Witt v. Dep’t of Air Force, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to a claim that the “Don’t Ask Don’t Tell” policy violated plaintiff’s right to substantive due process).}{112} In the meantime, there are still prohibitions and restrictions in the United States, as described above, that simply forbid or significantly impede the ability of gay people to marry and have children.

\textbf{II. Lochnerian Liberty of Contract as Basis for Protecting Liberty Generally.}

This article has just described the variety of ways that state legislation and constitutional provisions restrict the liberty of gay people to enter into arrangements to create families. In that discussion, it became apparent that many arguments have been used in attempts to protect the liberty interest of gay people in having family.\footnote{Those arguments typically hinge on affording gay people protection from discriminatory restrictions under the equal protection and due process clauses of the 14th amendment of the U.S. Constitution or similar provisions of state constitutions. Heightened protection under those clauses has typically been reserved for categories of discrimination that relate to race or gender, but not sexual orientation. Although, as we have seen, some state courts have applied heightened scrutiny to discrimination based on sexual orientation. \textit{See also} Lawrence v. Texas, 539 U.S. 538 (2003) which may well represent a heightened level of scrutiny on the federal level for sexual orientation. \textit{See supra} note 107. Arguments based on equal protection and due process have been successful in some states (e.g.}{113}
Despite the intellectual merit of the arguments being used to prevent discrimination against gay people, the vast majority of the states still prevent gay people from marrying\textsuperscript{114} and many states restrict gay people from entering into contracts to adopt\textsuperscript{115} or to enter into surrogacy arrangements.\textsuperscript{116} These restrictions are often the result of historically strong religious and moral sentiments that are skeptical of accepting gay people and granting gay people the same rights accorded to heterosexual people. Those sentiments are often set forth directly in the opinions on point.\textsuperscript{117} There are fears of the normative consequences of effectively sanctioning gay nature and behavior. Nowhere has this been clearer than in the statements cited above from legislators regarding the adoption ban in Florida specifically stating that the legislation was meant to tell gay people to get back in the closet.\textsuperscript{118} Some claim that allowing gay marriage threatens heterosexual marriage.\textsuperscript{119} There are claims that traditional relationships must be given primacy and held up as the only truly acceptable norm.\textsuperscript{120} Neither the high divorce rate for traditional marriage, nor the number of high profile politicians having extra-marital affairs seem to weaken the force of these arguments.\textsuperscript{121} The arguments are filled with religious and moral zeal and come in direct conflict with the constitutional arguments.

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\textsuperscript{114} See supra Part I. A. \\
\textsuperscript{115} See supra Part I.B(i) \\
\textsuperscript{116} See supra Part I.B.(ii). \\
\textsuperscript{117} See, e.g., Lofton, 358 F. 3d 819 n. 17. \\
\textsuperscript{118} See supra note 49. \\
\textsuperscript{119} See, e.g., Lynn D. Wardle, supra note 14. \\
\textsuperscript{120} Id. at 1377–1378. \\
\textsuperscript{121} “If the country needs any Defense of Marriage Act at this point, it would be to defend heterosexual marriage from the right-wing “family values” trinity of Sanford, Ensign, and Vitter [referring to Congressmen Sanford, Ensign, and Vitter, each of whom had recently committed adultery, with Vitter being identified as a regular client of a prostitution service in Washington D.C.].” Frank Rich, 40 Years Later, Still Second-Class Americans, N.Y. TIMES, June 28, 2009, at WK8.
based on well accepted understandings of the equal protection and due process clauses of the 14th Amendment.

Furthermore, the traditional framework for analysis under the 14th Amendment has grown to involve a threshold step of categorizing the type of interest or the category of people involved and then applying a level of scrutiny to legislation based on that interest or that category. This categorization process has results in the rights of certain interests and groups getting greater protection than other interests or groups and has thus created a system of double standards depending on the issues and people involved. The existing levels of scrutiny have been criticized as creating double (or perhaps even triple) standards.

Under the current paradigm, for example, discrimination against gay people typically receives the lowest of the three levels of scrutiny, rational basis.\textsuperscript{122} By contrast, discrimination against women receives the intermediate level of scrutiny while discrimination against people based on race receives the highest level of scrutiny. Further, scholars have posited that the outcome of challenges is typically determined by what level a scrutiny is applied. The lowest level typically means regulations and discrimination will be upheld. The highest level typically means that the regulation or discrimination will be struck down. The intermediate level, however, is not as clearly predictive. Nowhere in the Constitution was such a system devised or contemplated.

As was described in the Introduction, the purpose of this article is to reframe the discussion of how civil liberties should be protected and to provide another lens through which courts can evaluate legislative restrictions. This new framework is one that is somewhat separate from the emotional arguments regarding the advancement of gay

\textsuperscript{122} See supra, note 34.
rights, on the one hand, and the religious and moral arguments used to protect the status quo, on the other hand. The basis for this new framework is economic and even-handed. It does not create the double standards or different levels of scrutiny for legislation that depends on the issues or groups affected. The framework focuses on and defends the liberty of contract of all people. The liberty interest is implicated across the full spectrum of life’s many aspects, not specifically or only sexual orientation, though that is the focus for application here.

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

A. The Lochner Decision and Framework.

Beginning with the case itself, Lochner v. New York was decided in 1905 and confronted the constitutionality of legislation limiting the number of hours a person could work in a bakery. As is well known by students and scholars of Constitutional Law, the Lochner Court struck down this piece of legislation as an unconstitutional limitation on the liberty of individuals to enter into contracts of their choosing. Justice Rufus

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123 See, Cass R. Sunstein, Lochner’s Legacy, 87 COLUM. L. REV. 873, 885 (1987) (arguing that Lochner can be interpreted as the Judiciary attempting to take a neutral position with respect to the existing common law in the sense that it did not want to change the status quo, nor did it think it was appropriate for it to do so).
124 198 U.S. 45.
125 The limits of the statute were not particularly extreme. The statute mandated that no one work in a bakery for more than sixty hours a week, or ten hours a day. Id. at 46 n.†.
Peckham, writing for the majority of the *Lochner* Court, reiterated a principle that was already found in federal and state court cases,\(^{126}\) that “the general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”\(^{127}\)

The Court was not without balance in its defense of liberty of contract. It went to great lengths to expound upon the notion that a state can legitimately interfere with the liberty interest of the individual if that interference is within the appropriate police powers of the state.\(^{128}\) “The question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty. . . .”\(^{129}\) The Court was careful to explain that it was not trying to substitute its judgment for the legislative judgment of the state, but strictly assessing the regulation to see if it is appropriately within the power of the state to enact.\(^{130}\)

Of course, deciding whether a piece of legislation is within the police power of the state mandates defining the police power of the state. Without going into much

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\(^{126}\) *Id.* at 46 (citing *Allgeyer v. Louisiana* 165 U.S. 578 (1897)). For state court cases defending the liberty of contract see *Ritchie v. People*, 40 N.E. 454 (1895) (an Illinois case striking down a statute regulating the number of hours a woman could work in any factory or workshop); *In re Jacobs*, 98 N.Y. 98 (1885) (a New York case striking down a statute restricting where tobacco could be manufactured; the court described such a restriction as an infringement on the right of an individual to earn a living, and *People v. Marx* 2 N.E. 29, 33 (1885) (ruling unconstitutional an act that prohibited the manufacture of butter substitutes and stating “The term ‘liberty,’ as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties.”)) Interestingly, the language that Justice Peckham used in *Allgeyer* to advance liberty of contract as a Constitutional interest was taken *verbatim* from the *Jacobs* case (though it did not cite to *Jacobs*) when *Allgeyer* defined liberty as “not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.” *Allgeyer* at 589. *Marx* also cited to this language from *Jacobs*. *Marx* at 33.

\(^{127}\) *Id.* at 46 (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)).

\(^{128}\) *Id.* at 53-56.

\(^{129}\) *Id.* at 56.

\(^{130}\) *Id.* at 56-57.
detail, the *Lochner* court described the traditional police powers of the state as those powers that “relate to the safety, health, morals, and general welfare of the state.”\(^{131}\) The Court was wary, however, that any piece of legislation might easily be said to relate to such areas, effectively making any state legislation immune from challenge under the Constitution. That approach, however, would have been out of line with the very notion of judicial review enunciated by the infamous Chief Justice John Marshall back in the seminal case of *Marbury v. Madison* in 1803.\(^{132}\) Thus, the *Lochner* Court declared that the standard of review had to be more critical and searching of legislative regulations than deferential.\(^{133}\) According to the *Lochner* Court, courts need to carefully evaluate any legislative act before allowing it to curtail liberty and survive.\(^{134}\)

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person. . .\(^{135}\)

Thus, the *Lochner* Court established a framework for the evaluation of whether legislative regulations are permissible under the Constitution. Legislative regulations are only allowed to impinge on personal liberty of contract if they have a direct relation, as a means to an end which is appropriate and legitimate.

In evaluating the legislation at issue in the case—the limitation on the hours a person could work in a bakery—the Court considered the possible justifications for the regulation.\(^{136}\) The *Lochner* Court concluded that the only possible justification was to

\(^{131}\) *Id.* at 53.
\(^{132}\) 5 U.S. 137 (1803).
\(^{133}\) *Lochner*, 198 U.S. at 57.
\(^{134}\) *Id.*
\(^{135}\) *Id.*
\(^{136}\) *Id.* at 58-59.
protect the health of the workers involved. While not rejecting the notion that the health of workers was a legitimate part of the police powers of the state, the Court rejected that justification, skeptical of any particular hardship that a bakery imposes on individuals. Using a slippery slope argument, the Court claimed that if such a regulation were allowed, regulations setting maximum working hours for employees in all fields of work could be set. The Court was not prepared to accept such regulations. A person “in almost any kind of business would. . . come under the power of the legislature, on this assumption.” The Court viewed the liberty interest of being able to work longer hours “to support himself and his family” as a liberty interest that the state could not arbitrarily limit.

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

137 Id.
138 Id. at 58.
139 Id. at 59-60.
140 Id. at 59.
141 Id. at 59.
143 Id.
144 Lochner, 198 U.S. at 54–55.
145 Id. at 57.
B. Other Cases Decided During the Lochner Era

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

The “liberty” mentioned in that [14th] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to carrying out. . . [those] purposes. . .

\[146\] 165 U.S. 578 (1897).
\[147\] Id.
\[148\] Id.
\[149\] Id.
\[150\] Id. at 589.
\[151\] Id. at 589.
The Supreme Court continued to follow the liberty of contract principles laid out in *Allgeyer* and *Lochner* until *West Coast Hotel Co. v. Parrish* was decided in 1937.\(^{152}\) In fact, the scholar, Benjamin Wright, wrote in 1942 that 184 cases decided during the *Lochner* era found state legislative regulations unconstitutional as violations of the liberty interest protected by the 14th Amendment.\(^{153}\) Those statutes involved everything from maximum working hours (as in *Lochner* itself), minimum wage requirements,\(^{154}\) and prohibitions on organizing unions,\(^{155}\) to laws requiring children to be raised in English-only schools.\(^{156}\)

In 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish*.\(^{157}\) In *West Coast Hotel*, the Court considered the constitutionality of a minimum wage law for women and minors. In its deferential finding, the Court reasoned that protecting women and minors from predatory commercial practices was surely within the police powers of the state and in the interest of the welfare of society as a whole.\(^{158}\)

*West Coast Hotel* overruled another Supreme Court opinion from just fifteen years earlier, *Adkins v. Children’s Hospital*, which followed *Lochner* and had found a statute prescribing a minimum wage for women and children to be unconstitutional.\(^{159}\) The *West Coast Hotel* Court found that the economic experience of the intervening fifteen or so years warranted renewed consideration of the question and a different

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\(^{152}\) 300 U.S. 379 (1937).
\(^{154}\) *Adkins v. Children’s Hospital*, 261 U.S. 525, 539 (1923).
\(^{155}\) *Coppage v. Kansas*, 236 US 1, 4-7 (1915).
\(^{156}\) *Meyer*, 262 U.S. at 396–397.
\(^{157}\) 300 U.S. 379 (1937).
\(^{158}\) *West Coast Hotel*, 300 U.S. at 397–400.
\(^{159}\) *Adkins*, 261 U.S. at 539.
finding, with more deference to the government regulation.\(^{160}\) Perhaps ironically, the Adkins case had rejected the results and reasoning of a case decided 15 years earlier, Muller v. Oregon.\(^{161}\) Like West Coast Hotel, Muller had upheld as constitutional a regulation protecting women in the workplace. In Muller the regulation mandated maximum working hours for women.\(^{162}\)

The West Coast Hotel Court spoke disparagingly of the freedom of contract trumpetet by the Lochner Court, asking almost facetiously, “What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty…”\(^{163}\)

Despite its critical tone toward freedom of contract, West Coast Hotel still essentially followed Lochner in the sense that it explained that the liberty interest of the 14th amendment surely existed but was subject to the police power of the state.\(^{164}\) It was in the application of the Lochner framework that the West Coast Hotel Court shifted gears away from Lochner’s critical assessment of regulation and toward a more deferential approach that gave latitude to the legislature to consider social and economic conditions when enacting regulations.

The West Coast Hotel Court explained that many states had been enacting employment regulations to protect their work forces.\(^{165}\) The Court then said, defiantly, “Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide.”\(^{166}\) In other words, the West Coast Hotel Court said that as long as the state legislature was not being arbitrary or capricious, it was acting within its

\(^{160}\) West Coast Hotel, 300 U.S. at 389–390.
\(^{161}\) 208 U.S. 412 (1908).
\(^{162}\) Id. (The statute in question was an Oregon statute that prohibited women from working in laundries for more than 10 hours per day.)
\(^{163}\) Id. at 391.
\(^{164}\) Id.
\(^{165}\) Id. at 392-393.
\(^{166}\) Id. at 399.
appropriate police power.\textsuperscript{167} This did indeed represent a more deferential standard of review than the more rigorous standard outlined in \textit{Lochner}.

Shortly after the \textit{West Coast Hotel} case was decided, the Supreme Court put the final nail in the \textit{Lochner} coffin with the \textit{Carolene Products}\textsuperscript{168} case, in which it confronted the constitutionality of the national Filled Milk Act.\textsuperscript{169} The \textit{Carolene Products} Court relied on precedent from some twenty years earlier to find that regulating food products is clearly within the police powers of the state in protecting the health of its citizens.\textsuperscript{170}

The \textit{Carolene Products} opinion went on aggressively to state that the presumption regarding legislation should be that “it rests upon some rational basis within the knowledge and experience of the legislators.”\textsuperscript{171} Attached to that sentence was the now-famous footnote 4. In that footnote 4, the Court continued to describe the “presumption of constitutionality” that should be accorded legislation.\textsuperscript{172} The Court went on to suggest a heightened degree of scrutiny for legislation which “appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”\textsuperscript{173} In this way, the Supreme Court formally enshrined a new judicial deference to general legislation, with potentially heightened scrutiny for legislation that appears to specifically

\textsuperscript{167} \textit{Id}.
\textsuperscript{170} \textit{Id}. at 148 (citing Hebe Co. v. Shaw, 248 U.S. 297 (1919) upholding the constitutionality of an Ohio statute that mandated that condensed milk be made from full cream milk).
\textsuperscript{171} \textit{Id}. at 152.
\textsuperscript{172} \textit{Id}. at 153, n. 4.
\textsuperscript{173} \textit{Id}.
violate the Constitution, legislation that might, for example, impact freedom of speech or
discriminate on the basis of race.\textsuperscript{174}

C. Criticisms of *Lochner*

The *Lochner* Court itself was divided on how to approach the maximum working
hours regulation under review in that case.\textsuperscript{175} Subsequent cases and scholars have joined
with the dissenters in decrying the logic and outcome of *Lochner* and by association the
other cases which were decided along similar principles.

Justice Holmes wrote a scathing dissent in *Lochner* that is often quoted by critics of the majority’s opinion. Holmes claimed that the majority decision was enforcing a
laissez-faire political philosophy upon society and that the Court was not acting within its
proper power in doing so.\textsuperscript{176} Holmes went further to suggest that Justices in the majority
were acting in accord with their preferences as legislators, but not as neutral interpreters of a constitution.\textsuperscript{177} He described a variety of encroachments on the liberty of contract that the Justices, as legislators might think injudicious, but which nonetheless rightly were held to be constitutional.\textsuperscript{178}

Justice Harlan, joined by Justices White and Day, dissenting, stated that
legislation ought to be left undisturbed “unless it be, beyond question, plainly and
palpably in excess of legislative power.”\textsuperscript{179} Justice Harlan went on to describe the
working conditions of bakers as being particularly brutal and therefore well within the

\textsuperscript{174} See also O’Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257–258 (1931) (showing the use of a
“presumption of constitutionality” by Justice Louis Brandeis to evaluate state regulations).
\textsuperscript{175} See generally *Lochner*, 198 U.S. 45 (1905).
\textsuperscript{176} Id. at 75.
\textsuperscript{177} Id.
\textsuperscript{178} Id. (citing a case that upheld a prohibition on selling stock on margin Otis v. Parker, 187 U. S. 606 (1903), and a
case that upheld a maximum eight-hour work day for miners, Holden v. Hardy, 169 U. S. 366 (1898)).
\textsuperscript{179} Id. at 68.
power of the New York legislature to regulate.\(^{180}\) “Nearly all bakers are pale faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living.”\(^{181}\) In their dissents, Holmes, Harlan and the Justices who joined them showed the great deference to state legislation that ultimately was echoed by the majority opinions in \textit{West Coast Hotel} and \textit{Carolene Products}.

There have been many caustic scholarly commentaries on the \textit{Lochner} decision and its aftermath.\(^{182}\) In 2003 David Strauss wrote that “\textit{Lochner v. New York} would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years.”\(^{183}\) Another scholar recently referred to \textit{Lochner} as a “\textit{bête noire} of modern constitutional scholarship.”\(^{184}\) Yet another scholar describes \textit{Lochner} as, for many years, an established element of the anti-canon of constitutional law.\(^{185}\) In other words, it is an opinion that was so wrong that it needed to be studied for its place in the historical development of the canon of cases that got the law and analysis correct. All the more scholarship and debate concerning \textit{Lochner} was generated at the centennial of the decision in 2005.\(^{186}\)

\(^{180}\) \textit{Id.}\n
\(^{181}\) \textit{Id.} at 70.\n
\(^{182}\) For a lengthy listing of scholars who have decried the \textit{Lochner} case as a glaring example of judicial activism and an attempt by those Justices to empower businesses at the expense of the working classes, see David N. Mayer, \textit{The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era}, 36 HASTINGS CONST. L.Q. 217, 218–219 (2009). Included in that listing are such heavy hitters as Roscoe Pound, Learned Hand, Charles Warren, and contemporary scholars such as Geoffrey Stone, Jesse Choper, Lawrence Tribe, and Robert Bork.\n
\(^{183}\) David A. Strauss, \textit{Why Was Lochner Wrong?} 70 U. CHI. L. REV. 373, 373 (2003).\n
\(^{185}\) Jack Balkin, “\textit{Wrong the Day it Was Decided}”: \textit{Lochner} and Constitutional Historicism, 85 B.U. L. REV. 677, 682 (2005).\n
\(^{186}\) See, \textit{e.g.}, the special issues of the Boston University Law Review (June 2005) and the New York University Journal of Law & Liberty (2005) dedicated to re-visiting the \textit{Lochner} case and decision.
Just as Holmes and Harlan had argued, critics have decried the *Lochner* Court for substituting a laissez-faire political philosophy for the policy preferences of the legislative bodies passing the regulations being reviewed.\textsuperscript{187} Indeed the political proclivities of the Lochnerian justices have been routinely described as demonically Darwinist, aware that their survival-of-the-fittest decisions favored the ruling class and sacrificed the working class, but content with that result.\textsuperscript{188} This, the scholars argue, was inappropriate, indeed inexcusable.\textsuperscript{189} It was in all of these commentaries and the subsequent cases that cited back to *Lochner* as an example of inappropriate judicial political activism, that, as Professor Howard Gillman expresses it, “*Lochner* had finally become Lochnerized” and became a touchstone for inappropriate judicial activism.\textsuperscript{190}

Arguments of this sort were given more credence by Justice Holmes’ claim in his dissent that the majority was relying on a famous laissez-faire political treatise of the era, Sir Herbert Spencer’s Social Statics.\textsuperscript{191}

There are also a variety of nuanced critiques of the *Lochner* decision that a mere label of judicial activism does not capture. Some argued that *Lochner* found a constitutional liberty of contract in the 14th Amendment where there simply was none.\textsuperscript{192}


\textsuperscript{188} For a survey of these arguments see David Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L. J. 1 n.6 (citing Derrick Bell, Loren Beth, Archibald Cox, Robert McCloskey and others, in a fierce condemnation of the Lochnerian justices and their support of the wealthier classes at the expense of the poor).


\textsuperscript{190} Id. at 861 (citing William Wiecek, *Liberty Under Law: The Supreme Court in American Life* 123 – 25 (1988)).

\textsuperscript{191} See *Lochner*, 198 U.S. at 75 (Holmes stated in his dissent, “The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.”).

\textsuperscript{192} See Charles Warren, *The New “Liberty” under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 449 (1926) (“Whatever may be pedigree of the *Allgeyer* case definition [of liberty], it is clear that the Court had departed from the original definition of “liberty” which prevailed in 1789, and which had been the definition adopted by the State Courts prior to 1868”); Robert H. Bork, *The Tempting of America* 44–46, 49 (1990) (“In his 1905 *Lochner* opinion,
While “liberty” is mentioned in that clause, “contract” never is. Charles Warren was particularly skeptical of *Lochner* for having embraced a Constitutional right to liberty of contract. Warren argued that this was completely out of line with the notion of framers that liberty meant freedom from physical restraint. With a similar perspective, the *West Coast Hotel* Court asked the public in its opinion, “What is this freedom?”

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

Other critics did not focus on whether or not liberty of contract existed in the Constitution, merely the extent to which it should trump social legislation deemed necessary by the majority (as reflected in a legislative enactment). Those critics find

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Justice Peckham, defending liberty from what he conceived to be ‘a mere meddlesome intereference,’ asked rhetorically, ‘Are we all . . . at the mercy of legislative majorities?’ The correct answer, where the Constitution is silent, must be ‘yes’;” Laurence H. Tribe, *American Constitutional Law* 574-78 (1988) (discussing the internal inconsistencies of the application of liberty of contract even during the *Lochner* era); John Hart Ely, *Democracy and Distrust: A theory of Judicial Review* 18-20 (1980) (arguing that substantive due process is an oxymoron and that the demise of *Lochner* was appropriate).

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194 300 U.S. at 391.
196 Id. at 874.
197 Id. at 885.
198 See, e.g., Strauss, supra note 183, at 376 (describing how judicial review was acceptable only to correct significant governmental errors).
Lochner objectionable in its overly-strong defense of that liberty interest and in its
sacrifice of the majoritarian regulations it defeated.\textsuperscript{199}

Another, perhaps more palliative critique was offered by the Supreme Court in its
opinion in \textit{Planned Parenthood v. Casey}.\textsuperscript{200} That opinion reflected the notion that the
Lochner Court was not wrong to find a liberty of contract interest in the Constitution, nor
was it wrong to defend the liberty of contract in 1905.\textsuperscript{201} According to the Casey Court,
at that time the Lochner Court simply was unaware of what an unregulated market might
mean for social welfare.\textsuperscript{202} As the Casey Court stated, the Lochner line of cases “rested
on fundamentally false factual assumptions about the capacity of a relatively unregulated
market to satisfy minimal levels of human welfare.”\textsuperscript{203} Awareness of those false
assumptions came later as the depression took hold.\textsuperscript{204} It is only in light of that new
awareness, that more modern courts could understand that regulations on social life
needed a more deferential constitutional approach.\textsuperscript{205}

A large part of Lochnerian scholarship has been devoted to the attempt to
harmonize Lochner’s demise with the rise of other unenumerated liberty interests that
have since been found in the Constitution.\textsuperscript{206} Criticizing Lochner’s support of a liberty
interest found in the due process clause of the 14th Amendment presents a challenge to
scholars who saw the growth of the right of privacy and all of the specific case decisions
based on that right as a positive development. Included in those cases are those

\textsuperscript{199} \textit{Id.} See also Bork, \textit{supra} n. 190.
\textsuperscript{200} \textit{Id.} at 860.
\textsuperscript{201} \textit{Id.} at 861-862.
\textsuperscript{202} \textit{Id.} at 861-862.
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{See also} Balkin, \textit{supra} note 185.
\textsuperscript{206} Bernstein, \textit{supra} note 188, at 12–13.
concerning: the right to use contraceptives,\textsuperscript{207} abortion,\textsuperscript{208} and even gay rights.\textsuperscript{209} In the 1970s, John Hart Ely coined the phrase “\textit{Lochnering}” in relation to the \textit{Roe v. Wade}\textsuperscript{210} abortion case to indicate that the \textit{Roe} Court had, like \textit{Lochner}, based its opinion on rights that were simply not present in the Constitution.\textsuperscript{211} Indeed, Robert Bork has argued that if one wishes to support unenumerated rights to privacy in the 14th Amendment, then one should go “all the way” and support \textit{Lochner} too.\textsuperscript{212} Bork was not advocating for that outcome. Quite the contrary, he was attempting to show why cases overturning restrictive legislation concerning contraception and abortion were, like \textit{Lochner}, inappropriate exercises of judicial authority.\textsuperscript{213}

\textbf{D. A Historical Perspective.}

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

\textit{Lochner}’s basic premise that people should have the liberty to structure their own lives, free of government interference echoes the trumpets of freedom that cried for independence from the monarchical social structure of Europe. The Declaration of Independence was clear in its guarantees of “life, liberty, and the pursuit of happiness.”\textsuperscript{214} Early Supreme Court jurisprudence emphasized that the federal courts were designed and

\textsuperscript{207} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{209} Lawrence v. Texas, 539 U.S. 558 (2003).
\textsuperscript{210} 410 U.S. 113 (1973).
\textsuperscript{212} Bork, \textit{supra} note 192 at 224-229.
\textsuperscript{213} Id.
\textsuperscript{214} \textit{THE DECLARATION OF INDEPENDENCE} para. 2 (U.S. 1776).
empowered by the structure of the new nation to review and keep a check on the legislative branch of both the federal and state governments.\textsuperscript{215} Cases like \textit{Lochner}, its predecessor, \textit{Allgeyer}, and cases decided in the same era, like \textit{Adkins}, all discussed above, reflect this suspicion of government intrusions into the liberty of individuals to structure their own arrangements and lives.

As the United States developed, so too did the strength of the liberty of contract philosophy. By 1866 that philosophy was expressly echoed in the Civil Rights Act passed that year, which gave “all citizens . . . of every race and color . . . [the right] . . . to make and enforce contracts.”\textsuperscript{216} Liberty of contract in that era was a metaphor for liberty itself.\textsuperscript{217} The 14th Amendment to the Constitution, complete with its guaranty of “liberty” was drafted in this context.

The pressures of the Great Depression, however, saw a call for more government intervention. There was growing distrust of the managerial classes and suspicion that the working classes were being abused and did not have the leverage in contract negotiations to represent their own interests adequately. This view was clearly manifested in the \textit{West Coast Hotel} opinion, in which the Court went to great lengths to discuss the possibility for abuse of women in the workforce and the necessity of government intervention and protection.\textsuperscript{218} “The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are, thus relatively defenceless against the denial of a living wage…casts a direct burden on the community.”\textsuperscript{219}

\textsuperscript{215} Marbury v. Madison, 5 U.S. 137 (1803).
\textsuperscript{217} \textit{Id.} at 61.
\textsuperscript{218} \textit{West Coast Hotel}, 300 U.S. at 399.
\textsuperscript{219} \textit{Id.}
The progressives of the depression era rejected the individualism espoused by the Lochnerian cases and their promotion of individual liberties. Such scholars, politicians and judges believed that more social regulation was appropriate and advocated accordingly. Roscoe Pound, Learned Hand, and Charles Warren all criticized Lochnerian liberty of contract as going too far in sacrificing public welfare for individual interests. Amazingly, Learned Hand actually advocated amending the Constitution to delete the due process clauses of the 5th and 14th Amendments as being too powerful in their ability to defeat social legislation.

President Franklin Roosevelt himself, upset with the Supreme Court’s decisions rejecting regulatory legislation, threatened to change the make-up of the Court to include twice as many Justices. Of course Roosevelt himself would have chosen the new Justices to achieve the results from the Court that he wanted. Suddenly, change was in the air and Lochnerian liberty had become a jurisprudential moment of the past, replaced by the judicial deference embodied by the rational basis test.

III. The Flaws of Lochner and the Solution: a Shifting Presumption

As Part II just described, by the late 1930s the Lochner framework had been discredited, and it continues to be largely out of favor. Many modern scholars

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220 See Roscoe Pound, Liberty of Contract, 18 YALE L.J. 454, 456–457 (1909) (arguing that the theorists advocating for liberty of contract were giving no consideration to actual industrial working conditions for much of the public and that individualist conceptions of the private right of contract were exaggerated at the expense of the public); Roscoe Pound, The Call for A Realist Jurisprudence, 44 HARV. L. REV. 697, 699–700 (1931); Learned Hand, Due Process and the Eight-Hour Day, 21 HARV. L. REV. 495 (1908); Charles Warren, The New “Liberty” Under the Fourteenth Amendment, 39 HARV. L. REV. 431 (1926).
222 It is impossible to resist citing the old adage that grew out of this historical moment, the famous “switch in time that saved nine.”
223 See generally Mayer, supra note 182 (discussing the orthodox view of Lochner and its reasoning).
continue to echo the writings and sentiments of the scholars and judges who criticized *Lochner* in the early part of the twentieth century.\(^\text{224}\)

Nonetheless, the logic and philosophy of the *Lochner* era still have great merit. As Part I indicated, there are still many ways in which government regulations restrict individual liberty of contract, the focus there being on the liberty of gay people to be married and have children. A return to a modified version of that Lochnerian framework would help safeguard the public against legislation that restricts individual liberty of contract, and consequentially individual liberty itself.

This Part will survey some of the neo-Lochnerian scholars who are defenders, in some way, of the *Lochner* decision and framework. It will then attempt to crystallize a modified Lochnerian framework that can be used by modern courts as a safeguard against encroachments on civil liberties. Finally, it will apply that framework to the restrictions on gay rights to family outlined in Part I.

### A. Recent Scholarship and Case law Supporting *Lochner*

Despite the strong criticism of *Lochner* over the past 100 years, there are a growing number of voices that are recognizing that the reaction to *Lochner* was overblown. Some of these voices suggest a Machiavellian attempt by progressive era scholars, judges, and politicians to demonize *Lochner* and its focus on individual liberty in order to advance a different agenda, one centered on the promotion of social legislation.\(^\text{225}\)

\(^{224}\) *Id.* at 218-219.

\(^{225}\) *Id.* at 219–220 (stating that the progressive critics of *Lochner* were not at all objective or neutral in their analysis). “Relying on the views of such partisans . . . [is like] relying on the views of the National Right to Life organization to interpret *Roe v. Wade.*” *Id.* at 220.
One of the most recent and comprehensive articles rehabilitating *Lochner* is David Meyer’s 2009 article, criticizing what he refers to as the commonly held “myths” about *Lochner*. Meyer claims that “the orthodox view is wrong in virtually all of its assumptions.” Meyer employs a historical approach to explain that the *Lochner* majority was not particularly laissez-faire in its prevailing ideology but focused on balancing what it perceived were the historic and well-grounded liberty guarantees against undue intrusion by government regulation. Meyer points out that if the Lochnerian courts were truly laissez-faire in their approach then no legislation would have ever passed constitutional muster. Quite the contrary, one of the major critiques of the *Lochner* era was that so many cases seemed out of line with each other. As much as there were many cases ruling that legislation was unconstitutional, there were others upholding legislative restrictions. Meyer is one scholar who criticizes the critics, claiming that the progressive era scholars who defamed *Lochner* had their own activist agenda for a broader governmental role in structuring society.

In a 2003 essay entitled, “Why Was *Lochner* Wrong,” David Strauss both criticizes and defends the *Lochner* Court. Strauss states that the *Lochner* Court acted defensibly in finding a liberty of contract within the 14th Amendment. Strauss points out that even after *Lochner* was “interred” for finding rights not specifically enumerated

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226 *Id.* at 224.
227 *Id.*
228 *Id.* at 258-263.
229 *Id.* at 252-258.
232 *Id.*
234 *Id.*
in the Constitution, the Supreme Court continued to do so. Thus, the problem with the *Lochner* decision was not that it found such a right, but that it went too far in defending that right against legislation.

In 2003 David Bernstein wrote that *Lochner* should be re-evaluated as “the progenitor of modern substantive due process cases such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*.” This argument brings us back to the dilemma that some scholars have had with *Lochner*: how to criticize *Lochner* as inappropriately expounding upon unenumerated rights under the 14th Amendment, while still supporting those later substantive due process cases. Bernstein does not so much solve this dilemma as point out that it exists, despite the claims of other scholars that *Lochner* should be cordoned off as a case concerned not with fundamental liberties, but with an opposition to class legislation.

Bernstein states that one of the latest cases to rely on the liberty interest protected by the 14th Amendment, *Lawrence v. Texas*, is the clearest example of a modern court echoing (perhaps even relying on without citation) the analysis set forth in *Lochner*. Where the earlier fundamental rights cases, like *Griswold v. Connecticut* and *Roe v. Wade*, spoke specifically of a right to privacy found in the penumbra of rights that are contained in the Bill of Rights and incorporated into the 14th Amendment, *Lawrence* paid no deference to that framework. It was simple and clear in its approach, like the courts

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235 *Id.*
236 *Id.*
237 Bernstein, supra note 188, at 12–13.
238 *Id.* at 59–60 (citing Gillman).
240 Bernstein, supra note 151, at 60.
241 381 U.S. 479 (1965).
243 Bernstein, supra note 151, at 60.
of the *Lochner* era. It identified a liberty interest being curtailed by legislation, the right to intimate contact with an adult person of one’s choosing, and asked the state to justify that legislation. Finding no satisfactory justification, the *Lawrence* Court ruled that the restriction on liberty in that case simply violated the liberty interest guaranteed by the 14th Amendment.\textsuperscript{244}

Randy Barnett also discusses the liberty of contract jurisprudence of *Lochner* and its transition into modern Supreme Court opinions.\textsuperscript{245} Barnett argues that the liberty interest described in *Lochner* was actually rehabilitated in *Planned Parenthood v. Casey*, where the Court spoke of a liberty interest and not only of the right to privacy found in the penumbra of rights contained in the Bill of Rights.\textsuperscript{246}

Barnett goes further in his analysis of the *Lawrence* case, than did Bernstein. Barnett viewed the *Lawrence* Court as not only defending a general liberty interest of the 14th Amendment, but also re-invigorating the presumption of liberty that the *Lochner* courts employed.\textsuperscript{247} “With liberty as the baseline, the majority places the onus on the government to justify its statutory restriction.”\textsuperscript{248} The *Lawrence* Court found no justification for its prohibition on sexual intimacy between same-sex partners beyond moral approbation, which was not sufficient to warrant upholding the statute.\textsuperscript{249} Barnett goes on to explain that morality alone should never be a sufficient justification for a statute lest it forever be invoked to immunize legislation from Constitutional review.\textsuperscript{250}

\textsuperscript{244} *Lawrence*, 539 U.S. at 564.
\textsuperscript{246} Id. at 33.
\textsuperscript{247} Id. at 35.
\textsuperscript{248} Id.
\textsuperscript{249} *Lawrence*, 538 U.S. at 582–585.
\textsuperscript{250} Id. at 37.
Barnett calls for a “robust ‘presumption of liberty’” to protect individual rights across the political spectrum.  

B. A Revised Framework With a Shifting Presumption

As Justice Peckham, who wrote the majority opinion in *Lochner*, might have said, basic notions of liberty are contingent upon liberty of contract, without which liberty itself is illusory. The ability to enter freely into contracts allows people to achieve their personal desired balance of all that life has to offer. Starting with this premise, and building off of the *Lochner* opinion and the subsequent scholarship of the neo-Lochnerians such as Meyer, Bernstein, and Barnett described above, this article advocates a return to the robust Lochnerian presumption of liberty. All legislative restrictions on such liberty interest should be evaluated critically. However, this call for a return to Lochnerian thought and analysis is not and should not be thought of as any sort of absolutist bar to social legislation that restricts freedom of contract. In addition, it is not and should not be considered a call for a laissez-faire approach to government. As has been illustrated, these have been the primary critiques of the *Lochner* case and its progeny. Indeed, Justice Holmes, in his famous dissent in *Lochner*, criticized the majority for just that reason. He claimed that the majority was adopting a laissez-faire social and political theory and foisting that model onto the states in a particularly noxious brand of judicial activism that overturned much social legislation of the day. As scholars are beginning to point out, however, that may have been a convenient argument with which to rebut the *Lochner* opinion and

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251 Id. at 41.
252 See *supra* Part II.C.
253 *Lochner, supra* notes 176–178.
254 Id.
its progeny.\footnote{See Mayer, supra note 182.} It may also have been somewhat disingenuous and misleading since \textit{Lochner} itself was careful to explain that appropriate exercises of the police power of the state would be upheld.\footnote{\textit{Lochner}, 198 U.S. at 56.}

This article agrees with the neo-Lochnerians that the Lochnerian model did and would have continued to allow for much legislation that would encroach on the liberty of contract.\footnote{Mayer, supra note 182, at 217.} In fact, it would undoubtedly allow for regulations that ban certain contracts all together based on their impact on the public welfare (possibilities include, for example, gambling, prostitution, or polygamy though this article is not taking a position on any of those issues). The legislation simply must pass the critical analysis test. In the words of the \textit{Lochner} Court, restrictions are only allowed to impinge on personal liberty of contract if they have a direct relation, as a means to an end which is appropriate and legitimate.\footnote{\textit{Lochner} at 57.} To state it differently, restrictions should be narrowly tailored to achieve an appropriate goal. To allow too much deference to legislation is to trample on the rights of individuals to order their own affairs.\footnote{\textit{Lochner} at 56.}

As we have seen in \textit{Lawrence} and elsewhere, a blanket statement that the restriction is designed to protect the moral character of the populace is insufficient. There must be more. Thus, for the examples set forth above—gambling, prostitution, or polygamy—the state would need to defend the restrictions on a more compelling basis than simply immorality. They must, in some way, be detrimental enough to the health, for example, or financial well-being of the populace to warrant regulatory intrusion on the liberty interest.
In addition, the proposal set forth here advocates for a modification, perhaps simply an explicit nuance, to the Lochnerian model that is more easily understood and incorporated in light of the development of contract law over the past 100 years. That nuance to the basic Lochnerian presumption in favor of liberty of contract is that the presumption should shift and run to the benefit of the regulation where the regulation can be seen as an attempt to address structural flaws in the very nature of the contracting process. Thus, where a regulation addresses the fairness of the contracting process, the presumption in favor of freedom of contract and against the restrictions should shift and the judiciary should be deferential to the regulation itself.

The very legislation at stake in *Lochner*—maximum working hours for employees—might well have been upheld under this modified paradigm. The statute was designed, arguably, to address a drastic imbalance in the bargaining power that existed in 1905 between the owners of bakeries and their employees. That structural problem with the contracting process itself in that context makes the liberty of contract at stake in that case illusory. There is no liberty of contract for employees who are in a “take it or leave it” situation. Therefore, there is no liberty of contract interest to protect. The employees might be said to be under economic duress\textsuperscript{260} and forced to accept whatever terms and conditions of employment are handed to them. Where the liberty interest is illusory due to some defect in conditions necessary to make the consent involved in the contract meaningful, the presumption in favor of that liberty interest should shift in favor of the regulation.

\textsuperscript{260} Duress is a concept that is much more familiar to contract law scholars in 2009 than it ever could have been in 1905.
Indeed, the *Lochner* case itself failed to describe any sort of shifting presumption, or to recognize that in certain circumstances the theoretical liberty of contract at stake simply does not exist.\textsuperscript{261} It is this oversight, intentional or otherwise, that, in this author’s opinion, was the *Lochner* decision’s biggest flaw. Perhaps it was just this oversight that caused scholars like Roscoe Pound when responding the *Lochner* era jurisprudence to advocate for more legal realism.\textsuperscript{262}

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

The basis of a contract is always consent and the true consent of the parties involved was at issue in *Lochner* and many cases confronting similar social legislation. The legislature believed that the workers (the bakers in the *Lochner* case) had little ability to actually freely bargain or truly consent to the working conditions that were thrust upon them.\textsuperscript{263} The regulation in *Lochner* (creating maximum permitted working hours for the bakers) could be seen as an attempt to create contracts that likely would have resulted if the parties to those contracts were able to bargain freely and to give meaningful consent to the terms of their arrangement.

\textsuperscript{261} *Lochner*, 198 U.S. 45 (1905).
\textsuperscript{262} Roscoe Pound, *The Call for A Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931).
\textsuperscript{263} *Lochner*, 198 U.S. at 69 (Harlan, J., dissenting).
Another problem with the historical use of the Lochnerian analytical framework and one of the reasons why the framework is often criticized is that the doctrine was not applied consistently or, in some cases, accurately. Thus, far from being uniform in their adherence to Lochnerian principles, many cases decided during the Lochner era were incongruous. Certain restrictions on labor contracts were allowed to remain, and others were not with no clearly principled justification. The Court should have articulated its standard more clearly so it could have been applied more easily and consistently. Still, intelligent and well-intentioned judges may disagree about the outcomes in certain cases where there are close calls. Notwithstanding that inevitable result, it is possible to define the nuanced Lochnerian framework for analysis clearly and urge uniform application of that framework.

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

264 Strauss, supra note 146, at 375-376.
265 See e.g., Holden, supra, note 142.
266 In contrast to Lochner, for example, is Muller v. Oregon, 208 U.S. 412 (1908), a case that upheld a statute mandating certain maximum working hours for women. The Court, in Bunting v. Oregon, upheld a statute mandating maximum working hour for both men and women. 243 U.S. 426 (1917).
267 I am specifically avoiding using the language of existing constitutional levels of scrutiny (rational basis, intermediate, or strict) because this new paradigm is wholly different and avoids the three-levels of scrutiny that have been established for 14th Amendment claims.
In attempting to identify regulations that address what I am referring to as structural flaws in the contracting process itself, courts should be conscious of doctrinal developments in the law of contract that exist to safeguard against procedural and substantive unfairness. Included in these doctrines are equitable concepts of fraud, misrepresentation, lack of capacity, duress, undue influence, and unconscionability. These doctrines exist in contract law in effect as *ex post* regulation. They exist to buttress the sanctity and stability of contract and the fairness of the resulting bargains that parties enter. Being mindful of such doctrines and the susceptibility of contracting to structural flaws, the court should be deferential to restrictions that attempt to correct for such flaws in the contracting process. Such restrictions should be seen as nothing more than *ex ante* equitable measures designed to work in tandem with the jurisprudential contract doctrines that are applied in litigation *ex post* to buttress the sanctity and stability of contracting and the fairness of the contractual results.

[continued on next page.]
MODIFIED LOCHNERIAN FRAMEWORK
FOR
LIBERTY OF CONTRACT ANALYSIS

I. Is liberty of contract implicated?

Yes

II. Presumption of unconstitutionality

No

Uphold restriction

III. BUT -- does restriction redress contracting flaw?

Yes

Shift presumption in favor of restriction

No

Presumption of unconstitutionality stands

Presumption overcome if the regulation has a direct relation to an appropriate governmental goal
C. Applying the New Paradigm to Gay Rights to Family

Applying the intellectual tradition of *Lochner* and the nuanced Lochnerian framework proposed here to the panoply of gay rights to family, some regulations that are crucial to protect the contracting process would be given deference and likely found to be constitutional, but blanket prohibitions on gay people entering into certain types of contracts would likely not be upheld. For example, regulations affecting the age or capacity of the parties involved in any family related contract would likely be upheld. Such regulations protect the integrity of the contracting process by ensuring adequate capacity of the parties involved. However, regulations that completely disenfranchise any group of people from participating in contracts that help create families\(^\text{268}\) would receive critical scrutiny and most likely be deemed unconstitutional. This is a new approach and demands a simply more searching analysis of the restrictions at stake than the deferential rational basis being used now for regulations that burden an individual’s liberty to contract.

(i) Marriage

The statutes and state constitutional provisions that ban gay marriage would likely be struck down under the new framework. Applying the new paradigm requires three steps: (1) identify whether liberty of contract is at stake; (2) if so, there is a presumption that the restriction is not constitutional; this presumption will be overcome if the

\[^{268}\text{It may be worth noting that contracts, in and of themselves, surely do not create families. It is this author’s view, just for clarity sake, that people create families with or without contracts through their personal bonds with other people, related or not. However, certain important legal rights pertaining to family are accessible and recognizable only through contract.}\]
restriction has a direct relation to an appropriate governmental goal; (3) however, if the restriction is designed to redress some structural flaw in the contract process under consideration, then it should be presumed to be constitutional and subjected only to a deferential rational basis type of review.

Ticking through these steps—first, is there a liberty of contract interest in the ability to freely enter into a marriage contract? The answer is plainly yes. For many years the Supreme Court has discussed the primacy of marriage as a fundamental liberty interest. Moreover, one of the benefits of the Lochnerian analytical framework is moving away from the challenges of characterizing certain liberties as fundamental. Regardless of whether there is a fundamental liberty interest in marriage as an institution, there is clearly a contract involved in marriage. Thus, there is a liberty interest in individuals being able to enter into such contracts without undue interference from government.

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

Here the outright ban on marriage does not regulate aspects of a marriage contract between gay people that are appropriate and within the traditional regulatory powers of the state. The ban completely takes away the liberty of gay people to get married. Under no circumstances is a marriage allowed in states where such activity is banned. Recall that morality as a justification should not be enough. Is there another compelling reason
for a ban on gay marriage? Is the health or financial well being of the population at stake? Again, the answer is no. Accordingly, it would seem that such an outright ban on entering into contracts for marriage would not trump the presumption in favor of the liberty interest, and would not be allowed to stand.

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

(ii) *Adoption*

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

Turning to the three-pronged test, first, there is certainly a liberty of contract interest in entering into contracts for adoption. Again, cases throughout the history of the United States enshrine the liberty to have and raise children. Once again, however, the Lochnerian analysis need not even go that far. For that purpose, it is clear that there are

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269 See *supra* Part I.B(ii).
contracts involved in the adoption process and that individuals, therefore, have a liberty of contract interest in entering into those contractual arrangements without undue government interference.

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

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

The Utah standard is more complicated. Recall that in Utah, the statutory restrictions call for an adopted child to be placed with a married couple if at all possible and not with single people unless absolutely necessary. Moreover, the statute forbids couples who live together but are unmarried from adopting. This framework involves two restrictions that need to be assessed separately.
The first prong of the test is the same for both restrictions. There is a liberty of contract interest involved with entering into contractual arrangements to adopt. Thus, there is a presumption that restrictions will be unconstitutional unless they can be shown to have a direct relation to an appropriate government goal.

With respect to the strong preference that children be placed with married couples instead of singles, this presents a potentially difficult case. One can imagine arguments that children’s best interests are served by placing them in a home with two parents, rather than just one. There are likely to be more resources available for the children and more guardians available to care for them. Further, the restriction is not an outright ban on single people adopting, but just a presumption. Thus, even with the restriction, a court could rule that an adoption go forward with a single parent, assuming that were in the best interests of the child. Thus, this restriction may be allowed to pass the critical analysis phase and be upheld as constitutional, despite the starting presumption that it be unconstitutional.

With respect to the ban on couples who are not married adopting, this restriction is tougher to justify and would likely not overcome the presumption of unconstitutionality. This restriction appears to be nothing more than an outright ban on certain people adopting, regardless of what is in the best interests of the child. Such an outright ban does not appear to have direct relation to a legitimate governmental goal. Indeed, this restriction appears motivated solely by some sense of morality (that couples living together should be heterosexual and married), which the Lawrence case has stated is simply impermissible as a justification.270

270 Lawrence, 539 U.S. at 560.
Moving to the third prong of the test, with respect to both of these restrictions, the preference for married couples and the ban on unmarried couples, there seems to be no possible explanation that either regulation is attempting to redress the contracting process to ensure its integrity. Accordingly, the presumption in favor of the liberty interest should remain. Still, the preference for married couples may be able to overcome that presumption, while the outright ban on unmarried couples would likely not.

(iii) Surrogacy.

Surrogacy contracts are likely to get constitutional protection under the new analytical framework. Again, applying the three-pronged framework, the first question is whether there is a liberty of contract interest. Here again, the answer is yes. In addition to the Supreme Court for many years expounding upon the fundamentality of the liberty interest in having and raising children, surrogacy is an arrangement that is created through contract. Thus, there is a liberty of contract interest and in accordance with the new framework being introduced here, a presumption against any restrictions.

The primary restriction that prevents gay people from entering into surrogacy contracts is the marriage requirement imposed by many states, discussed in Part I.B(ii) above. That restriction would be able to overcome the presumption against it if it has a direct relation to an appropriate governmental goal. Here, however, the marriage requirement essentially forbids gay people categorically from engaging in the regulated activity. Once again, if the ban had appropriate justifications beyond morality, it might be allowed to overcome the presumption of unconstitutionality. However, it is difficult to conceive of any compelling arguments. The most common argument is likely based on a notion that relationships bound by marriage are more enduring than those that are
not and thus, almost by definition, having married parents is in the best interest of a prospective child. However, there is no clear evidence of such a claim. Indeed one of the Florida courts that overturned the gay adoption ban went to great lengths to refute such a contention.\textsuperscript{271} Thus, once again, the restriction should likely be found impermissible.

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

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

\textbf{Conclusion}

As the quote set forth at the beginning of this article states, legislative and constitutional restrictions on the liberty of contract are generally said to be in the public interest but are often passed for other motives. In the case of the restrictions that

\textsuperscript{271} In re Adoption of John Doe, 2008 WL 5070056 at *15 - *17 (Fla. Cir. Ct.) (setting forth the testimony of trial experts that having same-sex parents is not in any way detrimental to a child’s upbringing).
absolutely prevent gay people from marrying, adopting or having children via a surrogate, the rationale seems clear. Just as Senator Peterson said in 1977, it is a message to gay people to “get back in the closet.”

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

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

This new framework calls for courts to begin with the working presumption that the liberty interest should prevail over any attempts to curtail it. That presumption can be overcome if the restriction is directly related to an appropriate governmental purpose. However, the presumption in favor of the liberty interest should shift in favor of any regulations that attempt to ensure the structural integrity of the contracting process. If the contract interest at stake is not truly a fair and structurally sound contracting process there should be no deference given to it.
In accord with this new framework, untold motives based on religious or moral convictions will be insufficient to provide constitutional cover for regulations and restrictions that infringe on liberty of contract. In this way, it is this author’s hope that liberty itself can be better protected.
Appendix A
State Marriage and Relationship Laws

I. States that have legalized gay marriage:

Connecticut (2008),
Iowa (2009),
Maine (effective Sept. 2009),
Massachusetts (2004),
New Hampshire (effective Jan. 2010) and
Vermont (effective Sept. 2009)

II. States that have statutes against gay marriage:

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

III. States that have constitutional amendments against gay marriage:

Alabama (2006),
Alaska (1998),
Arizona (2008),
Arkansas (2004),
California (2008),
Colorado (2006),
Florida (2008),
Georgia (2004),
Kansas (2005),
Idaho (2006),
Kentucky (2004),
Louisiana (2004),
Michigan (2004),
Mississippi (2004),
Missouri (2004),
Montana (2004),
Nebraska (2000),
Nevada (2002),
North Dakota (2004),
Ohio (2004),
Oklahoma (2004),
Oregon (2004),
South Carolina (2006),
South Dakota (2006),
Tennessee (2006),
Texas (2005),
Utah (2004),
Virginia (2006) and
Wisconsin (2006)

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

New Jersey

V. States that permit domestic partnerships, according some marriage like rights:

California,
District of Columbia,
Nevada,
Oregon, and
Washington
Appendix B

State Adoption Laws

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

Arkansas: - no one cohabiting outside of marriage may adopt
- 2008 ballot initiative prevents couples cohabitating outside of marriage from adopting.
- See ARK. CODE ANN. § 9-9-204

Florida: - no gay people may adopt
- See Fla. Stat. Section 63.042(3)

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

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

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

State Surrogacy Laws Categorized

I. States with surrogacy statutes but marriage requirement:
   a. Florida (statute that insists that the intended parents be married and
      infertile; see also Lowe v. Broward Co. case from 2000)
   b. Nevada (statute on point)
   c. New Hampshire (statute on point)
   d. Oklahoma (no specific statute on point, but indications from statute that
      surrogacy arrangement might be upheld, though likely for a married
      couple).
   e. Texas (statute on point)
   f. Utah (statute on point)
   g. Virginia (statute on point)

II. States with surrogacy statutes where no marriage requirement:
   a. California (no statute, but cases upholding surrogacy ag’ts)
   b. Connecticut (no statute but great case clearly allowing gay people to
   c. Illinois (comprehensive model statute allowing for any intended parent(s)
      to enter surrogacy ag’t).
   d. Kentucky (no statute but 1986 case that seems to indicate surrogacy is not
      prohibited)
   e. Massachusetts (no statute but case from 1998 outlining some specifics of
      when a surrogacy ag’t would be enforceable.
   f. New Jersey (cases indicate that surrogate can make decision to keep the
      baby after birth and cannot be compensated)
   g. New Mexico (statute on point)
   h. North Carolina (statute that indicates no compensation but med
      expenses)
   i. Oregon (case from 1994 on point)
   j. Washington (statute and case indicate that uncompensated ag’ts
      possible)
   k. West Virginia (statute excluding surrogacy arrangements from baby
      selling)
III. States where surrogacy is illegal:
   a. Delaware (1988 case saying contracts to terminate parental rights are illegal)
   b. Washington D.C. (illegal per statute?)
   c. Indiana (statute making surrogacy provisions illegal)
   d. Louisiana (statute on point)
   e. Michigan (statute on point)
   f. Nebraska (statute on point, but see Lambrose & Vyas…)
   g. New York (statute on point)
   h. North Dakota (statute on point)

IV. States where the legal status of surrogacy is unclear:
   a. Alabama (no statute, but one case, Brasfield v. Brasfield, involving a married couple where surrogacy ag’t upheld)
   b. Alaska (no cases or statute on surrogacy per se)
   c. Arizona (statute making surrogacy illegal ruled unconstitutional in Soos v. Superior Court)
   d. Arkansas (no statute but one case involving specifics that led to surrogate giving up custody)
   e. Colorado (no statute and no cases)
   f. Georgia (no statute and no cases)
   g. Hawaii (no statute and no cases)
   h. Idaho (no statute and no cases on surrogacy per se)
   i. Iowa (no statute or cases per se on point, though language indicating that surrogacy is not included in Iowa’s “sale of individuals”
   j. Kansas (no statute but case from 1996 that seems open to surrogacy arrangements)
   k. Maine (no statute or cases on point)
   l. Maryland (no statute or cases on point)
   m. Minnesota (no statute or cases but one case upholding surrogacy under IL choice of law)
   n. Mississippi (no statute or cases on point)
   o. Missouri (no statute or cases on point)
   p. Montana (no statute or cases on point)
   q. Ohio (no statute but one case that suggests a written surrogacy contract may be enforceable)
   r. Pennsylvania (no statute but cases indicate that surrogacy may be allowed)
   s. Rhode Island (no statute or case law on point)
t. South Carolina (no statute, but a case from 2003 that gave deference to a surrogacy ag’t)

u. South Dakota (no statute or case law on point)

v. Tennessee (statute does not specifically authorize surrogacy but does indicate that if respected, it would only be for a married couple).

w. Vermont (no statute on point but case law saying same sex couples get rights of heterosexual couples)

x. Wisconsin (no statute or case law exactly on point)

y. Wyoming (no statute or case law on point)

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### Appendix D

#### State Surrogacy Laws Detailed

<table>
<thead>
<tr>
<th>State</th>
<th>Statute(s)</th>
<th>Case(s)</th>
<th>Permissible?</th>
<th>Eligibility Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>ALA. CODE § 26-10A-33 (2009). It is a crime for a person, other than the Department of Human Resources or a licensed agency, to place a child for adoption. ALA. CODE § 26-10A-34 (2008). Unlawful for person or agency to pay for placement or adoption of a minor child. It is lawful to pay maternity-related medical or living expenses of the mother as an act of charity. Does not apply to surrogacy.</td>
<td>Brasfield v. Brasfield, 679 So. 2d 1091 (Ala. Civ. App. 1996). Where a custody dispute involved a minor child, born of a surrogate, that was biologically related to his father and was adopted by his mother, the court upheld the surrogacy contract and awarded custody to the mother at the recommendation of the appointed guardian ad litem.</td>
<td>Seemingly yes.</td>
<td>The only example involves a married couple. Though one court has recognized the rights of non-biological parents, it is unclear whether the law of this case would extend to same-sex couples.</td>
</tr>
<tr>
<td>Alaska</td>
<td>None dealing with surrogacy, but because of In re T.N.F., adoption statutes may be applicable, such as ALASKA STAT. § 25.23.070 (2008), which provides limits on withdrawal of consent to an adoption. It states that consent may not be withdrawn after the decree has been entered and before it has been entered, consent may be withdrawn within 10 days after consent is given and</td>
<td>In re T.N.F., 781 P.2d 973 (Alaska 1989). Where wife’s sister was inseminated with brother-in-law’s sperm, bore his child, consented to adoption by the wife, and subsequently sought to revoke consent by arguing that the adoption was not carried out in accordance with a federal statute governing Indian Tribes, the Court held that the adoption agreement was enforceable because the statute of limitations had passed.</td>
<td>Unclear.</td>
<td>May be able to apply adoption statutes to particular cases.</td>
</tr>
<tr>
<td>State</td>
<td>Statute(s)</td>
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<tr>
<td>Arizona</td>
<td>ARIZ. REV. STAT. ANN. § 25-218 - Surrogate parentage contracts; prohibition; custody; definition</td>
<td>See statute box for citation. In Soos, the court is discussing § 25-218(B) &amp; (C), which refer to determination of parentage and custody. § 25-218(A) &amp; (D) actually prohibit the agreements. Therefore, it is unclear whether the entire statute was held unconstitutional or just parts.</td>
<td>Unclear.</td>
<td>In my opinion, it seems that because the opinion only talks about parentage and custody determination, the prohibition on surrogacy agreements is still in place.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>ARK. CODE ANN. § 9-10-201</td>
<td>In re Adoption of K.F.H. and K.F.H., 844 S.W.2d 343 (Ark. 1993). Where a couple entered into a traditional surrogacy agreement with a woman from Michigan who decided to keep the children, after many jurisdictional disputes, the court, applying Arkansas law, held that the biological father and intended mother were the parents of the children and the surrogate had terminated her parental rights because she failed to communicate with the children for over one year, pursuant to an Arkansas statute.</td>
<td>Yes</td>
<td>Any married or unmarried woman may be a surrogate. Adoptive parents may include biological father only if he is unmarried. As a gay couple would not be married in Arkansas, partner of biological father would not be an intended parent. The child may be that of a woman intended to be the mother when an anonymous donor’s sperm was used for artificial insemination. Marital status of intended mother is</td>
</tr>
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</table>
 Relevant Cases and Statutes by State

<table>
<thead>
<tr>
<th>State</th>
<th>Statute(s)</th>
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<tbody>
<tr>
<td>California</td>
<td>CAL. FAM. CODE §7613 (2009) - Natural Father of Child Conceived by Artificial Insemination; Conditions If a woman undergoes artificial insemination with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of the child conceived - he must have given written consent signed by him and his wife.</td>
<td>K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (lesbian couple, both partners have parental obligations to child when one partner donated eggs to other partner who carried child). In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (1998) (husband who intended to bring about a child that was unrelated to him and his wife by way of surrogacy has a legal obligation to the child even after he files for divorce). Dunkin v. Boskey, 98 Cal. Rptr. 2d 44 (2000) (unmarried couple unrelated to child carried by surrogate still treated as married couple, and as such both have a legal obligation to the child they intended to create and raise). Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). Where a married, childless couple contracted with a surrogate who would carry a child genetically unrelated to her for compensation and that surrogate then refused to give the baby to the intended parents, the court held that the genetic parents were to receive custody under both the Uniform Parentage Act and constitutionally because the genetic mother provided the ovum necessary for the process. In re Marriage of Mochetta, 25 Cal.App.4th 1218 (1994). Where a married couple entered into a traditional surrogacy contract with a surrogate and then divorced, the court held the contract unenforceable not for public policy reasons, but because its enforcement was incompatible with the current parentage and adoption statutes.</td>
<td>Yes - no specific statute for surrogacy, but is permitted for a gay couple, if treated as married, it would seem as though if they were both the intended parents of the child carried by the surrogate, would both have a legal obligation to the child, even if neither partner was genetically related to the child. Even if unmarried, couple would be treated as a married couple for this purpose. Artificially inseminated surrogate could claim parentage if neither intended parent claimed maternity/paternity.</td>
<td>not addressed.</td>
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</table>

CAL. FAM. CODE §7540 (2008) - Conclusive presumption as a child of marriage; exceptions Unless proven otherwise by blood test pursuant to § 7541, the child born to a wife cohabitating with her husband, who is not impotent or sterile, is presumed the child of the marriage.
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<tr>
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<tr>
<td>Colorado</td>
<td>UNIF. PARENTAGE ACT §19-4-106(4) - deals with consent requirements when a married woman donates eggs for another woman to carry the child, or for a married man who donates sperm to another woman to carry a child for his wife.</td>
<td>None</td>
<td>Seems to be permitted, but no cases</td>
<td>Language of the closest relevant statute pertains to married (heterosexual) couples seeking reproductive assistance.</td>
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<td>Connecticut</td>
<td>None</td>
<td>Vogel v. McBride (FA 02 0471850S) - gay male couple had contracted with a surrogate to deliver an embryo developed from an egg fertilized by one of the men’s sperm. The Superior Court ordered the hospital to place the names of both men on the birth certificate. Court stated, “The egg donor agreement and the gestational carrier agreement (were) valid, enforceable, irrevocable and of full legal effect” under the laws of Connecticut.</td>
<td>Yes</td>
<td>Vogel seems to uphold surrogacy contracts involving homosexuals.</td>
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<tr>
<td>Delaware</td>
<td>No surrogacy statute.</td>
<td>Hawkins v. Frye 1988 Del. Fam. Ct. LEXIS 31 (Family Court proceeding - found that a contractual agreement to terminate parental rights is against public policy (child was biological child of both parents). Also found that the receipt of money in connection with an adoption is barred by Delaware law.</td>
<td>Seems to be prohibited.</td>
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<tr>
<td>D.C.</td>
<td>D.C. CODE ANN. § 16-402 (2008) - Prohibitions and penalties</td>
<td>None</td>
<td>No - punishable by up to $10,000 or imprisonment for not more than 1 year, or both.</td>
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<td>Florida</td>
<td>FLA. STAT. § 742.15 (2009) - Gestational surrogacy contract</td>
<td>Lowe v. Broward Co., 766 So. 2d 1199 (Fla. App. 4th DCA 2000).</td>
<td>Yes. Gestational and traditional permitted.</td>
<td>Contract must be entered into before the surrogacy. Contract is binding and enforceable if surrogate is 18 or older and the commissioning couple is married and over 18. The contract can only be entered into pursuant to medical limitations in the statute.</td>
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<td>FLA. STAT. § 742.13 (2009) - Definitions Subsections 2, 5-7.</td>
<td>Domestc partners do not enjoy the same benefits reserved exclusively to married individuals, including the right to enter into gestational surrogacy agreements.</td>
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<td>Hawaii</td>
<td>None</td>
<td>None</td>
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<td>Idaho</td>
<td>None</td>
<td>DeBernardi v. Steve B.D., 723 P.2d 829 (Idaho 1986)</td>
<td>Seemingly yes, although Idaho law does not specifically address it.</td>
<td>Based on DeBernardi, courts would apply adoption and contract law to such an agreement. Unless a court rigidly enforced the procedure, it seems that same-sex couples could participate.</td>
</tr>
<tr>
<td>Illinois</td>
<td>750 ILL. COMP. STAT. § 47 (2009) - Gestational Surrogacy Act § 10 “Gestational surrogacy” means the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution. § 15(b)(4)-(5) Parental rights shall vest in the intended parent or parents immediately upon the birth of the child and sole custody of the child shall rest with the intended parent or parents immediately upon the birth of the child. § 25 Contract requirements § 50(b) There shall be no specific performance remedy available for a breach by the gestational surrogate of a gestational surrogacy contract term that requires her to be impregnated. § 55(a)-(b) Except as expressly provided in the gestational surrogacy contract, the</td>
<td>No cases on point for gestational or traditional surrogacy. Other resource: <a href="http://www.surrogacy.com/Articles/cate_view.asp">http://www.surrogacy.com/Articles/cate_view.asp</a></td>
<td>Yes. Gestational surrogacy only (traditional is not provided for).</td>
<td>The statute requires at least one of the intended parents be related to the child. Half of same-sex couples would satisfy this requirement. Therefore, gays and lesbians can participate in this process. Those wishing to have a traditional surrogacy arrangement must comply with the Illinois Adoption Act, as the GSA does not apply. There is no Illinois residency requirement in the statute.</td>
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<td>Indiana</td>
<td>IND. CODE § 31-20-1; Provisions in surrogacy contracts that are</td>
<td>None</td>
<td>No.</td>
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<td>unenforceable because of public policy. Provisions listed are the ones</td>
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<td>necessary for a surrogacy arrangement.</td>
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<td>Iowa</td>
<td>No statute specific to surrogacy. Statute concerning &quot;sale of</td>
<td>No cases dealing with enforceability of surrogacy contracts.</td>
<td>Seemingly yes,</td>
<td>although no specific statute.</td>
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<td>individuals’ states it does not apply to surrogacy arrangements. IOWA CODE</td>
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<td>ANN. § 710.11 (2009).</td>
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<td>by court; criminal penalties</td>
<td>surrogacy is not a &quot;professional service&quot; and so payment cannot be</td>
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<td>exchanged for that. However, payment may be made for reasonable living</td>
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<td>expenses during pregnancy, but the opinion states that law in Kansas</td>
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<td>has not yet addressed if additional payments may be made for actually</td>
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<td>bearing a child for another person.</td>
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<td>1982 Kan. AG LEXIS 137 - State Attorney General opinion concludes that</td>
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<td>a contract which determines the custody of a child is void as against</td>
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<td>public policy.</td>
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<td>Kentucky</td>
<td>None</td>
<td>Surrogate Parenting Associates, Inc. v. Commonwealth, 704 S.W.2d 209 (1986) - When a married man gave sperm to a surrogate who then carried the resulting child to term and terminated her parental rights upon its birth, the court held that the company involved in providing this service was not violating a statute dealing with the sale of children. The surrogate parenting procedure was not foreclosed by any legislation.</td>
<td>Seemingly yes, although only when uncompensated.</td>
<td>Non-legal sources claim that same-sex couples have successfully parented through surrogacy arrangements - no cases though</td>
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<td>Louisiana</td>
<td>LA. STAT. ANN. § 2713 (2008) prohibits as contrary to public policy contracts for surrogate motherhood which are defined as &quot;any agreement whereby a person who is not married to the contributor of the sperm agrees for valuable consideration to . . . .&quot;</td>
<td>No case law concerning this statute.</td>
<td>Seemingly no.</td>
<td>There may be a question left as to whether an uncompensated surrogacy agreement would be enforceable or an agreement for gestational surrogacy.</td>
</tr>
<tr>
<td>Maine</td>
<td>None</td>
<td>None</td>
<td>Unclear</td>
<td>It is possible that with the new recognition of gay marriage, surrogacy laws may change in favor of same-sex couples.</td>
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<td>Maryland</td>
<td>No statute specifically deals with surrogacy agreements. MD. CRIM. CODE ANN. § 3-603 (2008) prohibits the sale of minors with a penalty of jail time and/or fine.</td>
<td>85 Op. Att’y Gen. 00-035 (2000).</td>
<td>Unclear</td>
<td>It is unclear whether the criminal statute would apply to surrogacy agreements. The attorney general's opinion seems to say that uncompensated agreements may be enforceable.</td>
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## Relevant Cases and Statutes by State

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<td>Massachusetts</td>
<td>No surrogacy statute - statutes about parenting rights after artificial insemination: MASS. GEN. LAWS ANN. § 4B (2008).</td>
<td>Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133 - Where (a) the plaintiffs are the sole genetic sources of an infant; (b) the gestational carrier agrees with the orders sought; (c) no one, including the hospital, has contested the complaint or petition; and (d) by filing the complaint and stipulation for judgment the plaintiffs agree that they have waived any contradictory provisions in the gestational surrogacy contract (assuming those provisions could be enforced in the first place), pursuant to the Massachusetts Probate and Family Court’s general equity jurisdiction under Mass. Gen. Laws ch. 215, 6, a trial judge has authority to consider the merits of relief that includes prospective designation of the plaintiffs as parents on the child’s birth certificate.</td>
<td>Yes, but unclear as to whether the contracts would be upheld if the intended parents were a gay couple</td>
<td>In addition to the elements listed in the cases, the following factors were considered relevant in determining the enforceability of the surrogacy contract: (a) the mother’s husband give his informed consent to the agreement in advance; (b) the mother be an adult and have had at least one successful pregnancy; (c) the mother, her husband, and the intended parents have been evaluated for the soundness of their judgment and for their capacity to carry out the agreement; (d) the father’s wife be incapable of bearing a child without endangering her health; (e) the intended parents be suitable persons to assume custody of the child; and (f) all parties have the advice of counsel. The mother and father may not, however, make a binding best-interests-of-the-child determination by private agreement. Best interest std.</td>
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<td>Michigan</td>
<td>MICH. COMP. LAWS ANN. § 722.855 Surrogate parentage contracts are void and unenforceable as contrary to public policy. MICH. COMP. LAWS ANN. § 722.853 does not define &quot;surrogate parentage contract&quot; as only with compensation. MICH. COMP. LAWS ANN. § 722.859 prohibits a person from forming or assisting another to form a surrogate parentage contract for compensation and outlines penalties including both misdemeanor and felony charges.</td>
<td>Doe v. Attorney General, 487 N.W.2d 484 (Mich. App. 1992). A contract that involves voluntary relinquishment of female parent's rights is void and unenforceable. Legislature had compelling government interests in preventing children from becoming mere commodities, protecting best interest of child, and preventing exploitation of women, sufficient to justify intrusion into procreation rights of infertile couples and prospective surrogate mothers in surrogacy context through the Surrogate Parenting Act, without violation of due process.</td>
<td>No.</td>
<td>All such contracts are void and unenforceable, seemingly regardless of whether there is compensation.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>None</td>
<td>Paternity and Custody of Baby Boy A v. J.M.A., 2007 WL 4304448 (Minn. App. 2007). UNPUBLISHED - MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3). Where an HIV-positive gay man made a contract for gestational surrogacy with an Illinois choice-of-law provision, traveled to Illinois for sperm-washing and signed numerous releases and disclosures in Illinois, the court upheld the choice-of-law provision and applied IL law because MN law does not address such agreements, IL law provides a clear statutory structure for interpreting GSAs, and there was no evidence of bad faith or intent to evade MN law; the court enforced the GSA is a valid contract and expresses the agreement of the parties, J.M.A. was not coerced into signing the agreement, and the agreement does not violate the public policy of MN.</td>
<td>Unclear under MN law. The only case applied IL law to the facts.</td>
<td>See IL, above.</td>
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<tr>
<td>Mississippi</td>
<td>None</td>
<td>None</td>
<td>Unclear</td>
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<td>Missouri</td>
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<td>Montana</td>
<td>None</td>
<td>None</td>
<td>Unclear</td>
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<td>Nebraska</td>
<td>NEB. REV. STAT. § 25-21.200 (2008) - surrogate parentage contract is void and unenforceable.</td>
<td>None</td>
<td>Unclear - uncompensated surrogacy contracts might be enforceable</td>
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<td>Nevada</td>
<td>NEV. REV. STAT. § 126.045 (2008) - a surrogacy contract may be valid only if it involves a couple whose marriage is deemed valid under Nevada law. Also, intended parents have to be one man and one woman.</td>
<td>None</td>
<td>Yes, but only for married couples, and the intended parents must be a man and a woman</td>
<td>Same-sex couples probably would not be eligible to form a valid surrogacy contract</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>N.H. REV. STAT. ANN. § 168-B:16 (2009). II. The procedure to impregnate a surrogate shall be performed only in accordance with rules adopted by the department of health and human services. III. No woman shall be a surrogate, unless the woman has been medically evaluated and the results, documented in accordance with rules adopted by the department of health and human services, demonstrate the medical acceptability of the woman to be a surrogate. IV. No person or entity shall promote or in any other way solicit or induce for a fee, commission or other valuable consideration, or with the intent or expectation of receiving the same, any party or parties to enter into a surrogacy arrangement. N.H. REV. STAT. ANN. § 168-B:1 (2009) - intended parents must be one man and one woman, whose marriage is valid in New Hampshire - seems to exclude same-sex parents.</td>
<td>No cases relating to these statutes</td>
<td>Yes, but only for married couples</td>
<td>The surrogate must undergo medical evaluation.</td>
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<td>New Jersey</td>
<td>None</td>
<td>A.H.W. v. G.H.B., 772 A.2d 948 (NJ 2000). A surrogacy agreement is valid if the surrogate agreed to it voluntarily, and receives no payment for the service. However, the agreement should not bind her to surrendering her child. J.B. v. M.B., 783 A.2d 707 (NJ 2001). Followed the reasoning and dicta of Davis, stating that when agreements regarding disposition of embryos should be presumptively valid and enforced according to the intent of the progenitors. In Re Baby M, 537 A.2d 1227 (N.J. 1988). In a traditional surrogacy case, the court invalidated the surrogacy contract claiming it was void against NJ public policy. The natural father retained custody, but termination of the natural mother’s parental rights was invalid, and therefore the father’s wife could not adopt the child. Stated that no offense to the present laws if a woman voluntarily and without payment agrees to act as a “surrogate” mother, provided that she is not subject to a binding agreement to surrender her child.</td>
<td>Yes</td>
<td>Must be a voluntary agreement, and must be uncompensated.</td>
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<td>New Mexico</td>
<td>N.M. STAT. ANN. § 32A-5-34 Prohibits compensation for terminating parental rights and for the service of carrying a child, but seems to permit surrogacy contracts and reasonable payments for medical expenses incurred.</td>
<td>No cases, but interesting article: 29 NMLR 407 (in Secondary Sources)</td>
<td>Yes, if uncompensated</td>
<td>Unclear</td>
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<tr>
<td>New York</td>
<td>N.Y. DOM. REL. LAWS ANN. § 122 (2009) - surrogacy contracts are void and unenforceable and contrary to public policy.</td>
<td>McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) - where the biological father fertilized a donor egg which was then carried by his wife as a gestational surrogate, the court found that the wife, the natural mother of the child since she gave birth to it, also had parental rights. In the Matter of the Adoption of Paul, 550 N.Y.S.2d 815 (Fam. Ct., Kings County 1990) - the surrogacy contract was void because there was a $10,000 surrogate fee. The court stated that the surrogate was probably influenced by the money to give up her parental rights to the child. It would have considered the matter differently if she provided a sworn statement claiming that best interests of the child lie with the intended parents, but the statute Court has been known to consider parental rights arising from surrogacy arrangements where there was no contract, but an actual surrogacy contract is unenforceable</td>
<td>No statutory requirements, as surrogacy contracts are invalid by statute</td>
<td>No statutory requirements, as surrogacy contracts are invalid by statute</td>
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<td>North Carolina</td>
<td>N.C. GEN. STAT. § 48-10-103 (2009) - cannot compensate for actual surrogacy or any termination of parental rights, but can provide reasonable medical and living expenses which may be contingent on the parents relinquishing their rights and allowing adoption.</td>
<td>None</td>
<td>Seemingly yes</td>
<td>Compensation can only be for reasonable medical and living expenses</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. CENT. CODE § 14-18-05 (2002) - surrogacy contracts are void and unenforceable. The surrogate is deemed the mother of the child, and if she has a husband, he is the father.</td>
<td>None</td>
<td>No</td>
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<td>Ohio</td>
<td>No statutes specific to surrogacy/surrogacy contracts</td>
<td>Decker v. Decker, 2001 Ohio App. LEXIS 4389 (Ohio Ct. App., 3d Dist. 2001) - where a man and his same-sex partner entered into an oral agreement with the man's sister who agreed to be artificially inseminated by an anonymous sperm donor and carry the child for her brother and his partner, and the sister later decided she did not want to give up rights to the child, the court held that the oral contract was not binding and it could not force the sister to give up her parental rights to the child. However, the court did discuss how, had proper adoption procedures been used, and had the contract been validly entered into, the outcome may have been different.</td>
<td>Seemingly yes</td>
<td>No statutory requirements or requirements established by case law. Closest requirement is that the contract conforms with regular contract requirements and, if it included relinquishment of parental rights, does so in an appropriate legal manner</td>
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<td>Ohio</td>
<td>(Ohio Ct. App., 7th Dist. 1999) - not specific to surrogacy contracts, but pertains more to establishing legal parentage after a child is born through surrogacy.</td>
<td>(Ohio Ct. App., 7th Dist. 1999) - not specific to surrogacy contracts, but pertains more to establishing legal parentage after a child is born through surrogacy.</td>
<td>Yes. Seems that uncompensated and compensated agreements would be permissible depending on the fee arrangement.</td>
<td>No requirement of marriage found. No law indicating this is inapplicable to same-sex couples.</td>
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<td>Oklahoma</td>
<td>OKLA. STAT. ANN. § 552, 554 (2009). Child born as the result of artificial insemination has the same legal status as one conceived as the legitimate child of a husband and wife.</td>
<td>No cases. James E. Henshaw, 15 Okla. Op. Att’y Gen. 277 (1983). Contracts that provide for compensation to induce adoption run afoul of the statutory ban on trafficking in children.</td>
<td>Seemingly yes.</td>
<td>Appears to be permitted for married couples only since the applicable statutes refer to “husband” and “wife.” Compensation for the surrogate is limited by statute in order to avoid the crime of trafficking in children.</td>
</tr>
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<td>Oregon</td>
<td>OR. REV. STAT. § 163.537 (2009) - Buying or selling a person under 18 years of age Exception for adoption fees associated with surrogacy agreements</td>
<td>Matter of Adoption of Baby A, 877 P.2d 107 (Or. App. 1994). Where a surrogate mother was inseminated with father’s sperm and gave birth to twins pursuant to a traditional surrogacy agreement for compensation in an amount that exceeded her medical expenses, the Court held that adoption of the twins by the intended parents was proper because the compensation did not violate</td>
<td>Yes. Seems that uncompensated and compensated agreements would be permissible depending on the fee arrangement.</td>
<td>No requirement of marriage found. No law indicating this is inapplicable to same-sex couples.</td>
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<td>Pennsylvania</td>
<td>None</td>
<td>Adoption statutes prohibiting compensation for procuring a minor child and the fee paid was reasonable.</td>
<td>Unclear</td>
<td>Formal agency agreements may be enforceable, but informal agreements may not. A compensated agreement would probably be unenforceable. Courts have only implicitly upheld surrogacy contracts' validity.</td>
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<td>Rhode Island</td>
<td>None specifically dealing with surrogacy.</td>
<td>None.</td>
<td>Unclear.</td>
<td>While hrc.org reports that as of 2002, the cloning statute mentions gestational surrogacy specifically in its exception, it no longer does so in 2008.</td>
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<td>South Dakota</td>
<td>None.</td>
<td>Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) where a married couple, upon divorce, did not have an agreement regarding disposition of their embryos, the court held the intent of the progenators must be weighed to protect the fundamental right to have children. In this case, the Court said that if the couple did have an agreement, the agreement should presumptively be enforced as it is an expression of their intent. While this case does not deal specifically with surrogacy, the Court treats contracts between married couples regarding embryos favorably, suggesting that such contracts would be upheld in analogous surrogacy arrangements.</td>
<td>Unclear</td>
<td>If permissible, it is restricted to married couples.</td>
</tr>
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<td>Tennessee</td>
<td>TENN. CODE ANN. § 36-1-102(48) (2008) refers to 'surrogate births' but states that this does not explicitly authorize the surrogate birth process in the state. If an agreement is in place, adoption process is not necessary. Also, the language of the statute indicates that this process is only available to married couples.</td>
<td>None.</td>
<td>Unclear</td>
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<td>Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) where a married couple, upon divorce, did not have an agreement regarding disposition of their embryos, the court held the intent of the progenators must be weighed to protect the fundamental right to have children. In this case, the Court said that if the couple did have an agreement, the agreement should presumptively be enforced as it is an expression of their intent. While this case does not deal specifically with surrogacy, the Court treats contracts between married couples regarding embryos favorably, suggesting that such contracts would be upheld in analogous surrogacy arrangements.</td>
<td>None.</td>
<td>Yes.</td>
<td>Intended parents must be married and terms of the agreements are heavily regulated.</td>
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<td>Texas</td>
<td>UNIF. PARENTAGE ACT, T.X. FAM. CODE ANN. § 160.001 (2001). T.X. FAM. CODE ANN. § 160.754(a) (2007) authorizes gestational surrogacy agreements and gives conditions. (b) requires the intended parents to be married. The intended parents and / or gestational mother may have the agreement validated by petition. T.X. FAM. CODE ANN. § 160.755 (2007). The agreement must be validated by hearing. T.X. FAM. CODE ANN. § 160.756 (2007) (laying out items to be proven at the hearing in order to validate the agreement such as a medical reason why the wife cannot carry the child).</td>
<td>None.</td>
<td>Yes.</td>
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<td>State</td>
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<td>Case(s)</td>
<td>Permissible?</td>
<td>Eligibility Requirements</td>
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<td>Utah</td>
<td>Found under the Utah Uniform Parentage Act, Gestational Agreement: U.C.A. 1953 § 78B-15, Part 8 &lt;br&gt; UTAH CODE ANN. § 78B-15-800 Gestational Agreement &lt;br&gt;Sets out requirements for the agreement and the parties.</td>
<td>None.</td>
<td>Yes - married couples only.</td>
<td>According to statute, the intended parents must be married and parties to the agreement, the pregnancy must have resulted from assisted reproduction and not sexual intercourse, and the gestational mother’s eggs must not be used, nor may the sperm of the husband of the gestational mother be used in the assisted reproduction.</td>
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<td>Vermont</td>
<td>None.</td>
<td>Baker v. State, 744 A.2d 864, 884 (Vt. 1999). Landmark case holding that same-sex couples should be afforded the same marriage benefits as heterosexual couples. In its reasoning, the Court says that extending marital benefits to same-sex couples will minimize legal complications for surrogacy agreements.</td>
<td>Yes.</td>
<td>Seems to apply to same-sex couples, based on Baker. No recent cases have addressed this point. Recent decision to allow same-sex couples to marry may make surrogacy laws more favorable to same-sex couples.</td>
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<td>parties regarding custody of the child, the party currently in possession</td>
<td>Attorney General Opinion summarizing the law on surrogacy agreements.</td>
<td>agreements are</td>
<td>the surrogate: must be</td>
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<td></td>
<td>of the child will keep it until the court rules. § 26.09.187(3) Factors test</td>
<td></td>
<td>permitted only</td>
<td>age of majority, an</td>
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<td>the court uses to determine custody of child. Applies to disputes between</td>
<td></td>
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<td>emancipated minor, and be</td>
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<td>surrogate mothers and the intended parents. Chapter 26.26 is the Uniform</td>
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<td>free of mental defect.</td>
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<td>Parentage Act. That act includes a section on surrogate parenting, which can</td>
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<td></td>
<td>RCWA 26.26.220.</td>
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<td></td>
<td>prohibited § 26.26.240. Surrogate parenting--Contract for compensation void.</td>
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<td>whether the intended</td>
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<td>Includes contracts entered into in other jurisdictions as well as those</td>
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<td></td>
<td>parents must be legally</td>
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<td>entered into in Washington. Contrary to public policy. § 9A.64.030. No</td>
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<td>married.</td>
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<td>purchase or sale of a minor. (f) The only consideration paid by the person</td>
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<td>receiving or to receive the child is intended to pay for the prenatal</td>
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<td>hospital or medical expenses involved in the birth of the child, or</td>
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<td>attorneys' fees and court costs involved in effectuating transfer of child</td>
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<td>custody.</td>
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<td>West Virginia</td>
<td>W. VA. CODE § 48-22-803(e)(3) (2009). This section prohibits the purchase</td>
<td>None.</td>
<td>Seemingly yes.</td>
<td>The statute specifically</td>
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<td>or sale of minor children, but specifically excludes agreements in which</td>
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<td>excludes fee arrangements</td>
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<td>women are compensated surrogates.</td>
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<td>for surrogate mothers,</td>
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<td></td>
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<td>making such agreements</td>
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<td>seem permissible in this</td>
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<td>state.</td>
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<td>None found.</td>
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<td>Wisconsin</td>
<td>WIS. STAT. ANN. § 69.14(1)(h) Surrogate Mothers Provides that the birth mother’s name shall be entered on the birth certificate of the child and the father’s information should be left blank until parental rights are determined.</td>
<td>None.</td>
<td>Unclear. The statute provides procedures for the birth registry regarding surrogate mothers, implying that it is permissible.</td>
<td>None found.</td>
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<tr>
<td>Wyoming</td>
<td>None.</td>
<td>None.</td>
<td>Unclear.</td>
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