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Searching for Harm: Same-Sex Marriage and the Well-Being of Children

Courtney G. Joslin*

I. INTRODUCTION

Many law review pages have been dedicated to discussing whether banning same-sex couples from the right to marry violates “thick”¹ constitutional principles. For example, numerous law review articles consider whether the fundamental right to marry includes the right to marry someone of the same sex.² Other articles discuss whether the exclusion of same-sex couples from the right to marry is a form of sex discrimination³ or whether classifications based on sexual orientation should be subjected to some form of heightened constitutional scrutiny.⁴ Ultimately, however, regardless of what standard of constitutional review is applied, courts must decide whether marriage bans appropriately further acceptable ends.⁵ This Article

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¹ In this piece, I borrow the term “thick” from Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996). Thick arguments, according to Massaro, are the “heavy” doctrinal constitutional arguments “that alter existing legal categories, extend the upper echelon tiers of review, or construct gay rights as such.” *Id.* at 47.

² See, e.g., R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839 (2008); Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989 (2005); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

³ See, e.g., Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461 (2007). But see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); Cass R. Sunstein, *Homosexuality and the Constitution*, in SEX, PREFERENCE, AND FAMILY 208 (David M. Estlund & Martha C. Nussbaum eds., 1997); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 WIS. L. REV. 187 (1998).

⁴ Some scholars have raised other doctrinal claims. See, e.g., Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1375 (2010) (arguing that the strongest argument in support of marriage equality is “conceptualized as a matter of equal access to government support and recognition, and . . . the doctrinal vehicle that most closely matches the structure of the right can be found in the fundamental interest branch of equal protection law”).

⁵ See, e.g., R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1279 (1994) (“Whenever a court reviews legislation under an equal protection, substantive due process, or free speech analysis, the

considers this part of the analysis⁶—a part of the analysis that has received much less attention in the existing scholarship. In particular, this Article offers a new and, I think, fruitful perspective on why courts should be suspicious of the asserted child welfare-related concerns that have been the mainstay of marriage equality opponents in recent years.

For the past two decades, claims related to the welfare and well-being of children have been invoked by those who seek to defend laws excluding same-sex couples from marriage. At first glance, one may assume that this repeated invocation of children indicates that the particular arguments of marriage equality opponents have remained constant, or at least consistent, over time. When one looks closer, however, one can see that while children have remained front and center in the arguments against same-sex marriage, the particular proffered interests have continued to mutate. Moreover, not only have the asserted interests shifted, but there is a deep underlying tension between the different proffered child-related rationales. Finally, and also tellingly, the child-related explanations offered in the context of litigation differ radically from the arguments offered to the public in the context of ballot initiative campaigns. In that context, the proffered explanations overtly display a much different underlying motivation. In this Article, I argue that these conditions strongly suggest that courts should be suspicious of the legitimacy of the proffered child-related rationales.⁷

This Article's focus on the credibility and persuasiveness of the proffered interests is deliberate. As noted above, regardless of the applicable level of constitutional scrutiny, advocates striving to achieve marriage equality for same-sex couples must convince courts that the purported interests are not permissible ends or that they are not sufficiently furthered by the means. Keeping the emphasis on the thick constitutional claims, that is whether or why heightened constitutional scrutiny is required, makes it easier for courts, and for the public, to avoid any serious engagement with these inquiries. It is much easier to repeat the refrain—the fundamental right to marry does not include the right to marry someone of the same sex—than it is to articulate what permissible interests or concerns are reasonably furthered by marriage bans. The case *Perry v. Schwarzenegger*⁸ provides a

court considers whether the fit between the legislature's chosen means and intended ends is sufficient to pass constitutional muster." (footnotes omitted)).

⁶ In choosing to focus on this part of the analysis in this piece, I do not mean to suggest that advocates and scholars should stop arguing that heightened scrutiny should be applied to laws that exclude same-sex couples from marriage, or that heightened scrutiny is not warranted in such challenges.

⁷ For an interesting discussion of why courts should be suspicious of marriage equality opponents' "tradition" justification, see Kim Forde-Mazrui, *Tradition as Justification: The Case of Different-Sex Marriage*, 78 U. CHI. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627446.

⁸ 704 F. Supp. 2d 921 (N.D. Cal. 2010). *Perry* is a federal court challenge to Proposition 8, California's ban on same-sex marriage. Proposition 8 added a provision to the California Constitution that states, "only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Approximately six months before Proposition 8 was

telling illustration of this point. During a hearing in the *Perry* case, Judge Vaughn Walker asked Charles Cooper, counsel for the parties defending the constitutionality of California's marriage ban (Proposition 8), how permitting same-sex couples to marry would "harm opposite-sex marriage." Cooper responded: "Your honor, my answer is: I don't know, I don't know."⁹ Mr. Cooper's response is a striking example of how difficult it is to articulate persuasive rationales, even for those dedicated to defending the bans.

Other scholars have considered the credibility of *particular, individual* government interests that have been asserted to explain or justify the marriage bans.¹⁰ For example, it has been argued that *particular* asserted interests are not supported by any persuasive evidence¹¹ or that there is no reasonable fit between the ban and a specific asserted governmental interest.¹² In contrast to the arguments made in this earlier scholarship, in this piece I offer a new perspective on the credibility of the asserted interests by considering these theories *collectively*, as they have evolved over time and across contexts.

I begin in Part II by setting forth the child-related claims of harm that have been raised to justify or explain why the state should be permitted to exclude same-sex couples from marriage, noting how these claims have mutated over time, and have differed across contexts. In Part III, I explain why this variegated history should cause courts to be skeptical of the explanations proffered by marriage equality opponents.

approved by a slim majority of voters in California, the California Supreme Court held that excluding same-sex couples from the right to marry violated the then-applicable California Constitution. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

⁹ Transcript of Proceedings at 23, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW), available at <http://www.equalrightsfoundation.org/wp-content/uploads/2009/12/2009-10-14-AFER-Hearing-Transcript-MSJ.pdf>.

¹⁰ See, e.g., Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J. L. & HUMAN. 1, 5 (2009) (arguing that the premise of the accidental-procreation argument "vastly oversimplifies the history of marriage and the Court's previous jurisprudence"); Samuel A. Marcossion, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense"*, 35 U. LOUISVILLE J. FAM. L. 721, 728 (1997) (arguing that the claim that gays and lesbians provide a burdened family structure is not plausible as a justification for marriage exclusion); Forde-Mazrui, *supra* note 7, at 9 (considering the permissibility of "tradition as justification"); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 435 (2009) (arguing that "the accidental procreation argument should . . . wither under both empirical and logical analysis . . . and [be] rejected by courts as not satisfying even the weaker form of rational review").

As explained below some courts have held that certain proffered child-related interests cannot withstand rational basis review. See *infra* note 38; see, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

¹¹ See, e.g., Marcossion, *supra* note 10, at 728 (arguing that there was "no credible evidence of the harm" the state of Hawaii claimed it sought to prevent).

¹² See, e.g., Stein, *supra* note 10, at 422-28 (pointing out a number of ways in which marriage bans do not further the goal of responsible procreation).

II. THE ASSERTED INTERESTS: OVER TIME AND ACROSS CONTEXTS

A. General Overview

Cases seeking the right to marry for same-sex couples have been litigated for over forty years.¹³ In the early marriage equality cases, the underlying constitutional claims¹⁴ were considered so weak that courts often concluded there was no need even to mention, much less evaluate, what governmental interests were furthered by the marriage bans.¹⁵ As Professor Carlos Ball explains, “[t]he primary rationale relied on by the courts in rejecting the claims was that the plaintiffs were seeking a remedy that was both legally and definitionally impossible to provide.”¹⁶ The Kentucky Court of Appeals’ decision in *Jones v. Hallahan*¹⁷ provides a useful example of this type of reasoning. The court there held: “It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.”¹⁸

The 1993 decision by the Hawaii Supreme Court in *Baehr v. Lewin*¹⁹ marked a new phase in the marriage equality movement. For the first time, a court held that excluding same-sex couples from marriage might be unconstitutional.²⁰ Specifically, the court concluded that Hawaii’s marriage ban classified on the basis of sex and, therefore, had to be subjected to strict constitutional scrutiny.²¹ Because the *Lewin* court resolved the thick constitutional issue, the focus progressed to an analysis of the proffered ends and means—that is, whether the asserted interests were permissible, and whether

¹³ See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

¹⁴ As alluded to earlier, the plaintiffs in same-sex marriage cases generally assert a number of constitutional claims, including that the marriage ban: (1) violates the fundamental right to marry; (2) discriminates on the basis of sex; and (3) discriminates on the basis of sexual orientation. See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412–14 (Conn. 2008).

¹⁵ See, e.g., Ruth Butterfield Isaacson, Comment, “Teachable Moments”: The Use of Child-Centered Arguments in the Same-Sex Marriage Debate, 98 CAL. L. REV. 121, 131 (2010) (stating that because the concept of “same-sex marriage” was considered at the time to be a “conceptual and legal impossibility,” “neither side of the debate raised any arguments about the effects of same-sex marriage on children”). Although the litigants did not emphasize alleged harms to children, some of the early decisions did assert a connection between marriage and procreation. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (“Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination ‘on account of sex.’”).

¹⁶ Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2751 (2008).

¹⁷ 501 S.W.2d 588 (Ky. Ct. App. 1973).

¹⁸ *Id.* at 589. The court went on to state that the case raised “no constitutional issue.” *Id.* at 590.

¹⁹ 852 P.2d 44 (Haw. 1993).

²⁰ *Id.*

²¹ See *id.* at 64–67. Under the Hawaii Constitution, classifications based on sex are subjected to strict scrutiny. *Id.* at 67.

there was a sufficient fit between the marriage ban and the furtherance of these purported interests.²² On remand, the State relied primarily on a child-related interest argument, contending that it should be permitted to exclude same-sex couples from marriage because, in essence, heterosexual parents are better than gay and lesbian parents.²³ Interests related to child welfare have been the mainstay of marriage equality opponents ever since.²⁴ As demonstrated below, however, while marriage equality opponents have continued to invoke alleged child welfare interests, the specific arguments as to how permitting same-sex couples to marry will harm, or at least disadvantage, children have not.

B. Evolution of Child-Related Interests

1. Optimal Development of Children (or, Gay People Make Bad Parents²⁵)

As noted above, the *Lewin* litigation in Hawaii was the first same-sex marriage case in which claims of harm to children took center stage. In 1993, the Hawaii Supreme Court ruled that the statutes excluding same-sex couples from the right to marry classified on the basis of sex.²⁶ The court remanded the case for a trial on the issue of whether the sex-based classification was justified.²⁷

²² While the court in *Lewin* held that heightened constitutional scrutiny was required, a court must make some inquiry into the appropriateness of the asserted governmental interests and the degree of fit between the enactment and these interests under any standard of review. See, e.g., Kelso, *supra* note 5, at 1279–80.

²³ See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996) (“It is the State of Hawaii’s position that, all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female . . .”). See also Defendant State of Hawaii’s Pre-Trial Memorandum at 4, *Miike*, No. 91-1394, 1996 WL 694235 (“[M]ale-female families [are] the environment believed to be best for conceiving and rearing children. This is so, not because of tradition but because if all things are equal, parenting by the mother and father is most likely to allow a child to reach its optimal potential.”).

²⁴ See, e.g., Ball, *supra* note 16, at 2753 (noting that “[t]he crucial shift to a child-based legal defense of the same-sex marriage bans came after the [*Baehr v. Lewin* decision]”); Isaacson, *supra* note 15, at 131 (“Although child-centered arguments played a role in historical campaigns to ban interracial marriage, same-sex marriage opponents have advanced these arguments with vigor not previously seen.”).

As others have noted, the same-sex marriage cases were not the first ones in which parties relied on alleged harms to children to support the denial of marriage to a class of people; states made similar claims in cases challenging anti-miscegenation statutes. See, e.g., Ball, *supra* note 16; Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537 (2004).

²⁵ I borrow this phrase from Edward Stein. Stein, *supra* note 10, at 408.

²⁶ *Baehr v. Lewin*, 852 P.2d. 44 (Haw. 1993).

²⁷ *Id.* at 583.

On remand, the primary interest asserted by the State was a purported interest in protecting the welfare of children.²⁸ Specifically, the State argued that the ideal or optimal setting for raising children is a home consisting of a married man and woman with their biological children.²⁹ Because same-sex couples are unable to provide this ideal setting, the State argued, their children would be burdened:

Based on the medical, biological, psychological, social, and other evidence, all else being equal, same sex couples cannot best parent a child in their household. . . . Hawaii appropriately subsidizes those parents who, all else being equal, are the best able to parent children, thereby protecting the welfare of those children as they grow up, as well as the welfare of those who associate with them.³⁰

At trial, the State put on experts who attempted to support these assertions. For example, one of their witnesses, Dr. Eggenbeen, suggested that children raised by lesbian and gay couples were at heightened risk of a number of difficulties, including: "(1) poverty or economic hardship; (2) poor academic performance; (3) behavior problems and conduct disorders; and (4) premarital or teenage birth for girls."³¹

When pressed, however, it became clear that the State had no persuasive evidence upon which to base its claim that lesbian and gay parents present a burdened environment for the raising of children. For example, during the trial, it was revealed that Dr. Eggenbeen based his conclusions that children raised by same-sex couples are at greater risk of a number of negative outcomes on research finding that children of intact families fare better than children raised by single parents or children raised in blended step-parent families.³² But Dr. Eggenbeen conceded that many same-sex parent families could not appropriately be compared to single-parent or

²⁸ For example, in its pretrial statement, the first of the State's list of asserted "compelling state interests" was as follows: "That the State has a compelling interest in protecting the health and welfare of children and other persons" *Miike*, 1996 WL 694235, at *3 (quoting Defendant's First Amended Pretrial Statement at 2-4).

²⁹ For a more in-depth discussion of the claims related to children made in *Baehr v. Miike* on remand, see, for example, Marcossion, *supra* note 10, and Newman, *supra* note 24.

³⁰ Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories at 6, *Miike*, No. 91-1394, 1996 WL 694235. See also Marcossion, *supra* note 10, at 728 ("The State claimed that it only wanted to see children raised in the best possible environment, and that being raised by same-sex couples is inimical to the development of happy, healthy, and well-adjusted children.").

³¹ *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *7.

³² *Id.*

blended step-parent families.³³ Unlike step-parent or blended families, he admitted, many same-sex couples create their families jointly.³⁴

With regard to what the evidence actually demonstrated about lesbian and gay people and their parenting ability, the State's experts conceded that "[s]ame-sex couples have the same capability as different-sex couples to manifest the qualities conducive to good parenting"³⁵ and that lesbian and gay people are capable of raising healthy children.³⁶

In the end, after a trial on the merits, the Hawaii trial court concluded that the State had "failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children."³⁷

Although arguments that children are harmed or burdened by being raised by lesbian and gay parents (or the contraposition, that heterosexual parents provide the optimal setting for the raising of children) continue to be raised in the marriage equality cases,³⁸ governmental entities have increas-

³³ *Id.* ("Dr. Eggenbeen conceded that there are some situations involving a same-sex couple which would not fit the classic step-parent scenario. For example, a situation involving a same-sex couple that sought and received reproductive assistance and in which the non-biological parent was fully involved from the beginning of the planning process, was present throughout the nine month period and at birth, and thereafter, raised the child as though they were the biological parents of the child.").

³⁴ Other than these comparative studies, the only other evidence presented to support the conclusion that gay and lesbian parents provide a more burdened environment for the raising of children was a poorly-supported assertion that lesbian and gay couples are less stable than heterosexual married couples. *See id.* ("Dr. Eggenbeen testified that cohabiting same-sex couples are less stable than married couples. However, the sole basis for Dr. Eggenbeen's conclusion is a chart taken from the book entitled *American Couples*, co-authored by Pepper Schwartz, Ph.D. The chart which summarizes approximately twenty-year-old information is Defendant's Exhibit Q, and depicts a comparison of the percentages of married, gay and lesbian couples, respectively, which had stayed together or broken up over periods of time.").

³⁵ *Id.* at *5.

³⁶ *Id.* at *7 (noting that it was "Dr. Eggenbeen's opinion that gay and lesbian couples can, and do, make excellent parents and that they are capable of raising a healthy child").

³⁷ *Id.* at *18. Further, the court also concluded that the "[d]efendant has not proved that allowing same-sex marriage will probably result in significant differences in the development or outcomes of children raised by gay or lesbian parents and same-sex couples, as compared to children raised by different-sex couples or their biological parents." *Id.*

³⁸ Despite the rejection of the argument by the Hawaii trial court, some courts have found the claim to pass muster, at least under rational basis review. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (plurality opinion) ("Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.").

Other courts, by contrast, have disagreed. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (finding that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful, and well-adjusted" and that "research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology"); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) ("But even if Congress believed . . . that children had the best chance for success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational

ingly disclaimed reliance on this argument. For example, in the litigation challenging California's statutory marriage ban, the California Attorney General stated that "certain alleged state interests" including the claim that "same-sex couples would place children at risk" and that "same-sex relationships are less committed or stable than are opposite-sex relationships," were "clearly inconsistent" with California law and public policy.³⁹ This development is at least in part a response to the fact that "[e]very mainstream health and child welfare organization—including the Child Welfare League of America, the American Academy of Pediatrics, and the American Psychological Association—has issued policies opposing restrictions on lesbian and gay parenting."⁴⁰ These developments, along with the State's defeat in the Hawaii trial court, suggested to marriage equality opponents that some new strategies were in order.⁴¹

2. Irresponsible (Heterosexual) Procreation

After the turn of the twenty-first century, a new argument emerged. This argument is sometimes referred to as the accidental- or irresponsible-procreation rationale.⁴² It suggests that because same-sex couples have to

basis for denying federal recognition to same-sex marriages."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (holding, under rational basis review, that the marriage ban did not "plausibly further" the policy goal of advancing the well-being of children).

³⁹ Appellants' Opening Brief at *34 n.22, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110463), 2005 WL 3263579. See also *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (noting that the federal government had "distanced itself from Congress' previously asserted reasons for DOMA" and that the federal government had cited numerous studies finding that "children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents").

⁴⁰ LESLIE COOPER & PAUL CRATES, *AM. CIVIL LIBERTIES UNION, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 15 (2d ed. 2006), available at http://www.aclu.org/files/images/asset_upload_file480_27496.pdf. See also Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 *PEDIATRICS* 1, 7 (2010) (finding not only that adolescent children of lesbians were well-adjusted, but also that they demonstrated "more competencies and fewer behavioral problems than their peers in the normative American population"); Charlotte J. Patterson, *Lesbian and Gay Parents and their Children: Summary of Research Findings*, AM. PSYCHOLOGICAL ASS'N, *LESBIAN AND GAY PARENTING* 5 (2005), available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf> ("As this summary will show, the results of existing research comparing lesbian and gay parents to heterosexual parents and children of lesbian and gay parents to children of heterosexual parents are quite clear: Common stereotypes are not supported by the data.").

⁴¹ See *Abrams & Brooks*, *supra* note 10, at 21 ("As the simple knee-jerk response that 'gay people make bad parents' became untenable, a new rationale was necessary . . .").

Consistent with the trend seen in marriage equality cases, courts deciding other types of cases involving lesbian and gay people have been increasingly likely to reject arguments that children are harmed by being raised by same-sex couples. See, e.g., *Fla. Dep't of Children & Families v. In re Adoption of X.X.G. & N.R.G.*, No. 3D08-3044, 2010 WL 3655782, at *6 (Fla. Dist. Ct. App. Sept. 22, 2010) (affirming the finding of the trial court that the "reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children").

⁴² See, e.g., *Abrams & Brooks*, *supra* note 10 for more detailed analysis of this claim; Stein, *supra* note 10.

engage in a deliberate, planned, and often expensive process to have children,⁴³ their relationships are more stable, as compared to those of heterosexual couples who can have unplanned pregnancies or, as others have stated, “accidental” pregnancies. Thus, because heterosexual parents are more likely to be in unstable relationships that are harmful to children, they are more in need of the crucial stabilizing benefits of marriage than are gay or lesbian parents. Accordingly, it is reasonable for the state to limit marriage to heterosexual couples, who need it most. The New York high court explains this view in more detail in its decision in *Hernandez v. Robles*:

The Legislature could . . . find that [heterosexual] relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.⁴⁴

Or, as stated more bluntly by Dan Savage: “[The New York high] court ruled in effect that irresponsible heterosexuals often have children by accident . . . gay couples, in contrast, cannot get drunk and adopt in one night—so the state can reserve marriage rights for heterosexuals in order to coerce them into taking care of their offspring.”⁴⁵

As others have explained, this rationale was first incorporated into a court holding in 2003 by Justice Cordy in his dissent in *Goodridge v. Department of Public Health*.⁴⁶ After its first appearance, the theory seemed to take hold, making its way into the majority, plurality, and concurring opin-

⁴³ As others have noted, it is of course possible for lesbian and gay people to have unplanned children. See Stein, *supra* note 10, at 423 (noting that same-sex couples “can, in various ways, wind-up [sic] having to take care of children without having planned to be parents”). Lesbian and gay people can also have sexual intercourse that results in an unplanned pregnancy.

⁴⁴ *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion).

⁴⁵ Dan Savage, Op-Ed., *Same-Sex Marriage Wins by Losing*, N.Y. TIMES, July 30, 2006, § 4, at 13.

⁴⁶ 798 N.E.2d 941, 995 (Mass. 2003). See also Abrams & Brooks, *supra* note 10, at 3; Stein, *supra* note 10, at 404, 416–17.

ions in a number of other subsequent appellate decisions, including *Morrison v. Sadler*,⁴⁷ *Hernandez v. Robles*,⁴⁸ and *Anderson v. King County*.⁴⁹

Unlike the “gay people make bad parents” argument, under the accidental-procreation argument, gay and lesbian people do not cause the potential harm to children. Rather, straight people harm when they irresponsibly procreate and then raise children in unstable relationships. In fact, gay and lesbian couples, the argument continues, “are better parents—more stable, more thoughtful, and wealthier—than opposite-sex couples.”⁵⁰ Accordingly, they do not need the stabilizing force that marriage provides as opposite-sex couples do.

Thus, under the accidental-procreation theory, the argument is, in at least some respects, the converse of the “gay people make bad parents” theory. Rather than arguing that marriage can be limited to heterosexual couples because heterosexual couples make better parents, the claim is essentially that marriage can be limited to heterosexual couples because, without the inducement of marriage, heterosexual couples are more likely to be unstable and unhealthy parents. In this way, the rationale “essentially pays a back-handed compliment to gay and lesbian couples by deeming them too responsible for marriage.”⁵¹

3. *Deinstitutionalization of Marriage*⁵²

While the accidental-procreation argument seemed to achieve some success, playing a leading role in appellate decisions out of New York⁵³ and Indiana,⁵⁴ in the *Perry v. Schwarzenegger* trial,⁵⁵ a third argument or emphasis moved to the fore. During the *Perry* trial, the main alleged harm identi-

⁴⁷ 821 N.E.2d 15, 24–25 (Ind. Ct. App. 2005).

⁴⁸ 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion).

⁴⁹ 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring). Not all courts, however, have accepted this argument. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 999–1000 (N.D. Cal. 2010) (“Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents.”); *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008) (rejecting the “responsible procreation” argument under heightened scrutiny).

⁵⁰ Abrams & Brooks, *supra* note 10, at 24.

⁵¹ *Id.* at 3. See also Kenji Yoshino, *Too Good for Marriage?*, N.Y. TIMES, July 14, 2006, at A19 (stating that the New York high court found that gay and lesbian couples were “too good for marriage”).

⁵² In this part, I intend merely to describe the argument as it has been asserted by marriage equality opponents. I do not intend my discussion to suggest that I agree that marriage is being “deinstitutionalized” or, if it is, that that is necessarily a negative development.

⁵³ *Hernandez*, 855 N.E.2d at 7.

⁵⁴ *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

⁵⁵ Throughout the discussion of the *Perry* case and Proposition 8 more generally, I reference the “state” and the “government.” Technically, however, Proposition 8 is being defended *not* by the state but instead by the official Proponents of Proposition 8. See, e.g., Lisa Leff, *Groundbreaking Gay Marriage Trial Starts in California*, AP DATASTREAM, Jan. 11, 2010, available at 1/11/10 APDATASTREAM 18:56:06 (“The sponsors of Proposition 8 . . . won permission to defend the law in court after Gov. Arnold Schwarzenegger and Attorney General Jerry Brown refused to.”).

fied by those defending exclusionary marriage bans was not based on claims that gay couples or straight couples are inherently unstable or irresponsible. The primary harm or problem⁵⁶ emphasized at trial was instead that marriage is being “deinstitutionalized,”⁵⁷ and, ultimately, this deinstitutionalization harms children.⁵⁸

Under the deinstitutionalization of marriage argument, the connection between permitting same-sex couples to marry and harm to children is even more attenuated and takes several steps to explain. As articulated by the expert witness testifying on behalf of same-sex marriage opponents in *Perry v. Schwarzenegger*, to say that marriage is being “deinstitutionalized” means that the “social institution” of marriage is “weaken[ing]” or that its “rules” are becoming “less clear.”⁵⁹ The manifestations of this alleged deinstitutionalization are: “Rising rates of divorce, non-marital cohabitation, and unwed child bearing, the loosening legal regulation of many aspects of marriage (such as divorce), the mainstreaming of third-party participation in procreation and assisted reproductive technologies, and the rising demand for and reality of same-sex marriage”⁶⁰

Opponents of equal marriage admit, however, that this allegedly negative process was not started or caused by lesbian and gay couples. To the contrary, opponents concede that it was heterosexual people who decades ago began “deinstitutionalizing” marriage.⁶¹ They also admit that the mani-

⁵⁶ The deinstitutionalization of marriage was not the only child-related claim made by those supporting California’s constitutional marriage ban. It was, however, a primary focus of the testimony of the marriage equality opponent’s only relevant expert witness. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 949 (N.D. Cal. 2010) (reviewing Blankenhorn’s testimony).

⁵⁷ See, e.g., Defendant-Intervenors’ Proposed Findings of Fact at para. 92, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (“Extending marriage to same-sex couples would entail the further, and in some respects full, deinstitutionalization of marriage.”). See also Declaration of David Blankenhorn, as Expert Witness for the Defendant at para. 40, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (“One of the most important marriage trends of our era is what scholars often call deinstitutionalization.”).

⁵⁸ Interestingly, this argument has largely been abandoned on appeal. On appeal, the main child-related argument made by those defending the marriage ban is the irresponsible-procreation argument. See Defendant-Intervenors-Appellants’ Opening Brief at 84, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Sept. 17, 2010), 2010 WL 3762119, available at <http://hunterforjustice.typepad.com/files/deft-brf-9th-cir-091710.pdf> (“While it is true, as the district court stated, that ‘[s]ame-sex couples can have (or adopt) and raise children,’ . . . they cannot ‘have’ them in the same way opposite-sex couples do—as the often unintended result of even casual sexual behavior. Thus, as even Plaintiffs’ counsel acknowledged, same-sex couples ‘don’t present a threat of irresponsible procreation On the other hand, heterosexual couples who practice sexual behavior outside their marriage are a big threat to irresponsible procreation.’”).

⁵⁹ See also Declaration of David Blankenhorn, as Expert Witness for the Defendant at para. 41, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (“Accordingly, to weaken a social institution—to deinstitutionalize it—is to take steps to dissolve or make less clear its rules, to disassemble its basic structures, and to seek to transfer its core meaning from the public to the private realm.”).

⁶⁰ *Id.*

⁶¹ Transcript of Proceedings at 2775–76, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (“And I meant to say, just for our purposes today, you know, heterosexuals, you know,

festations described above have been evident from times long before there was a serious debate about whether same-sex couples should be permitted to marry.⁶² The connection between this process, a process begun decades ago by heterosexuals, and marriage for same-sex couples is that if lesbian and gay couples are permitted to marry they might further contribute to this process to some unknown degree.⁶³

The next step in the argument is to connect this process to children and their well-being. The main connection to children that was emphasized in the *Perry* litigation was as follows: If marriage is further "deinstitutionalized," the cultural norms associated with marriage will be further weakened. Of note, marriage equality opponents claim, further deinstitutionalization will reinforce the message that "a child does not need both a mother and a father."⁶⁴ This, in turn, "would likely result in fewer men believing it is important for them to be active, hands-on parents of their children."⁶⁵

Thus, again, the problem is not gay people and their parenting abilities (or lack thereof). Instead, even more clearly than under the accidental-procreation argument, the problem is heterosexual people, and in particular, heterosexual men. The State must continue to prohibit same-sex couples from marrying because if the State permits same-sex couples to marry, this *might*⁶⁶ contribute in some small way to this process of "deinstitutionalization" that was started decades ago by heterosexual people. If this process continues, allegedly more and more heterosexual men will fail to be good parents to their children.⁶⁷

did the deinstitutionalizing. I mean, you know, if we go back and look at the trends I described, it's very clear that this—this was not—deinstitutionalization is not something that just cropped up a few years ago whenever we began discussing the possibility of extending equal marriage rights to gay and lesbian people. It predates all that.").

⁶² *Id.*

⁶³ Defendant-Intervenors' Proposed Findings of Fact at para. 86, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) ("Although it is impossible to identify with absolute certainty all the negative consequences that will flow from redefining marriage to include same sex couples, it is likely that such a redefinition would harm the institution and the vital interests it serves."). See also *id.* at para. 91 ("Because marriage is a complex institution, it may never be possible to isolate the causal consequences of same sex marriage on marriage rates, out of wedlock birth rates, divorce rates, and other aspects of family relations that are of vital importance to society.").

⁶⁴ *Id.* at para. 95.

⁶⁵ *Id.* at para. 97. See also Defendant-Intervenors' Answers to Questions for Closing Arguments at 8, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) ("All of these changes [to marriage] are likely to reduce the willingness of biological parents, especially fathers, to make the commitments and sacrifices necessary to marry, stay married, and play an active role in raising their children.").

⁶⁶ Transcript of Proceedings at 2780, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) ("It's impossible to be completely sure" of the effects of permitting same-sex couples to marry.).

⁶⁷ While the point of this piece is not to critique any individual claim, it is interesting to note that under the deinstitutionalization of marriage argument, marriage equality opponents concede that the allegedly negative process that they are worried about was started by and continues to be furthered by heterosexual people and that one of the primary negative manifestations of this process is the resulting lack of interest in parenting that will be exhibited by at least some heterosexual men. Despite the reality that it is heterosexuals who started this alleg-

4. Teaching Children About Gay Marriage

The sections above provide an overview of the three primary child welfare-related claims that have been made in the context of litigation. In this section, I consider the primary child-related claim that has been made in the context of voter initiative campaigns, that is, arguments made to the people rather than to the courts.⁶⁸

As is true in the context of litigation, child-related claims continue to be a prominent fixture of the campaign arguments against permitting same-sex couples to marry.⁶⁹ What is striking, however, is that while children continue to remain a focus, the particular asserted interests in the voter initiative campaigns are altogether different in kind from those made in litigation. Here, the claims are not related to the comparative parenting abilities of gay and straight people. Instead, the argument is that if same-sex couples are permitted to marry, children (presumably children of straight couples) will be harmed because they will be taught about gay people and their relationships in their public schools.

For example, in the campaign regarding California's Proposition 8, the main organization behind the campaign argued that "state recognition of same-sex marriage would, among other things, force public schools to include teaching same-sex marriage in their curriculum."⁷⁰ The same message was stressed in the campaign in Maine to repeal its statute permitting same-

edly negative cycle and who are the ones who allegedly fail to fulfill their obligations to children, marriage equality opponents do not propose excluding this group from marriage or otherwise directly regulating their conduct. Instead, marriage equality opponents are relying on this alleged deinstitutionalization of marriage as a basis for excluding gay people and only gay people from marriage.

⁶⁸ For a more detailed analysis of the Proposition 8 campaign, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357 (2009).

⁶⁹ See, e.g., Defendant-Intervenors' Proposed Findings of Fact at para. 118, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (listing advertisements, flyers, news releases, and other campaign materials specifically addressing this issue); *Perry*, 704 F. Supp. 2d at 988-90 (citing evidence to support the finding that the Yes on Proposition 8 campaign relied on claims that "children need to be protected from same-sex marriage").

⁷⁰ Isaacson, *supra* note 15, at 122-23. See also *id.* at 148 ("Many of these ads pertained to education, suggesting that same-sex marriage, if legal, would have to be taught in public schools. One ad suggested that same-sex marriage would be integrated not just into civics, but also into math, science, and reading lessons.").

In particular, one of the campaign's ads ended with a warning that "children will be taught about gay marriage unless we vote yes on Proposition 8." See *Finally the Truth*, PROTECTMARRIAGE.COM, <http://www.protectmarriage.com/video/view/8> (last visited Oct. 2, 2010). In another television advertisement entitled "It's Already Happening," Professor Richard Petteerson from Pepperdine Law School states that parents will have no right to object to their children learning about same-sex marriage in school. See *Yes on 8 TV Ad: It's Already Happened*, YOUTUBE, <http://www.youtube.com/watch?v=0PgjcqFYP4&feature=related> (last visited Oct. 2, 2010).

sex couples to marry. A television advertisement entitled "It's Already Happening," stated: "Don't be fooled, gay marriage will be taught in schools."⁷¹

More importantly, the concern was not just that teachers might mention the concept of gay marriage in class. The specific concern was that children would be taught that "gay marriage is acceptable."⁷² This concern was explicitly laid out and emphasized in the ballot materials that were sent to the voters by the State of California. The Proponents of Proposition 8 stated that the marriage ban: "*protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage."⁷³ The ballot materials continued: "If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage. We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay."⁷⁴

Thus, in the ballot initiative campaign, the claim was not related to parenting abilities or how irresponsible (or responsible) gay parents are as compared to straight parents. Instead, the explicitly stated interest was a desire to send a message that gay people and their relationships are less valuable or desirable⁷⁵ than those of straight people, and the concern was that *not* sending this message would harm the well-being of children. Although not explicitly stated as such, one inference that can be drawn from the campaign materials is that children would be harmed if this message were not sent because not sending this message would increase the likelihood that children would grow up to be lesbian or gay—a bad thing.⁷⁶

III. EVALUATING THE SHIFTING INTERESTS

Under any standard of constitutional review, the reviewing court must give at least some consideration to whether the legislative classification appropriately furthers permissible ends.⁷⁷ Here, I seek to offer some insights into the persuasiveness of the proffered child welfare related ends by exam-

⁷¹ *Vote Yes on Question One*, YOUTUBE, <http://www.youtube.com/user/YesOnOne#p/u/1/2T9TwrQ0hxg> (last visited Oct. 2, 2010).

⁷² *Myths about Proposition 8*, PROTECTMARRIAGE.COM, <http://www.protectmarriage.com/app/webroot/files/> (from this page, click "myths") (last visited Oct. 2, 2010).

⁷³ *Ballot Arguments*, PROTECTMARRIAGE.COM, <http://www.protectmarriage.com/about/ballot-arguments> (last visited Oct. 2, 2010).

⁷⁴ *Id.*

⁷⁵ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 990 (N.D. Cal. 2010) ("The campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.").

⁷⁶ See *id.* at 1003 ("[T]he advertisements insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should dread having a gay or lesbian child.").

⁷⁷ See *Kelso supra* note 5 and accompanying text. See also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 528 (2005) ("Regardless of the level of scrutiny applied, the first principle is invariably identified as preventing enforcement of class legislation.").

ining them over time and across contexts. As noted above, upon first glance, it may seem that marriage equality opponents have consistently asserted concerns about child welfare and child well-being to explain or justify provisions banning same-sex couples from the right to marry. As is illustrated above, however, a closer look reveals not only that the proffered child welfare-related theories have continued to change over time, but also that there is, at best, an underlying tension between the various asserted claims.

Before going further, it is necessary to address a potential retort to this Article's consideration of claims made over time and as articulated in different fora. Some may argue that this historical and cross-contextual view is inappropriate because some of the claims discussed above have been made by different speakers in different cases or with regard to different marriage bans. Accordingly, the argument continues, it is not appropriate to consider all of the rationales collectively. While it is true that the history of each individual marriage ban does not *always* include all four child-related arguments discussed herein, that is not a reason to ignore the historical progression examined above. First, with regard to some marriage bans, including California's recent constitutional provision, all four arguments—"gays are bad parents,"⁷⁸ irresponsible procreation,⁷⁹ deinstitutionalization of marriage,⁸⁰ and teaching children about gay marriage⁸¹—have been raised. Moreover, in any event, the arguments raised in prior cases or in support of similar laws are not irrelevant or outside the purview of the court's consideration, particularly if the law is being evaluated under a rational basis analysis.⁸²

⁷⁸ See, e.g., Defendant-Intervenors' Proposed Findings of Fact at para. 74, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) ("Social science research indicates that, on average, the ideal family structure for a child is a family headed by two biological parents in a low conflict marriage."); *id.* at para. 84 ("No meaningful conclusions can be drawn from social science research into the effect that being raised by same-sex parents has on children because of methodological flaws in the research.").

⁷⁹ See, e.g., Transcript of Proceedings at 3049, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (Mr. Cooper for Defendant-Intervenors) ("[I]t is only opposite-sex couples who uniquely, uniquely address this fundamental historic purpose and who present, most importantly, uniquely, the threat to the society's interests that marriage is designed to minimize, the threat of irresponsible procreation, the threat—the reality that when procreative sexual relationships between men and women are not channeled into marriage and these stable unions with these binding vows, then much more frequently the society has to—has to itself cope with the adverse social ramifications and consequences of that kind of irresponsible procreation.").

⁸⁰ For a more detailed analysis of the deinstitutionalization of marriage argument that was the primary thrust of Defendant-Intervenors' argument at trial, see *supra* Part II.B.iii.

⁸¹ For a more detailed analysis of the primary child-related argument that was made in the context of the campaign in support of Proposition 8, see *supra* Part II.B.iv.

⁸² Under rational basis review, the court is not limited to the interests asserted by the defendant. See, e.g., *Nguyen v. INS*, 533 U.S. 53, 77 (2001) (stating that rational basis review "permits a court to hypothesize interests that might support legislative distinctions"). See also *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) ("[T]he fact that the government has distanced itself from Congress' previously asserted reasons for DOMA does not render them utterly irrelevant to the equal protection analysis.").

As laid out in Section II *supra*, then, a historical review of the asserted interests reveals that even limited to the context of litigation, the particular claims regarding child welfare have continued to mutate. Initially, in the Hawaii litigation, the primary child-related claim was that married heterosexual parents provide the optimal setting for the raising of children.⁸³ Thus, under this theory, the harm to children was caused by lesbian and gay people, who, comparatively speaking, provided a more burdened setting for the raising of children.

In 1996, however, this argument was rejected by the Hawaii court after a trial on the merits.⁸⁴ Moreover, this claim increasingly has been rejected by government entities (as well as by mainstream child welfare organizations)⁸⁵ for being unsupported and inconsistent with existing government policy.⁸⁶

As courts and others began to reject the first child-related claim, new arguments emerged. These newer arguments were at odds with or, at best, in tension with the earlier "gays are bad parents" claim. Under the accidental-procreation argument, for instance, the purported harm to children is caused not by bad lesbian and gay parents, but instead by *heterosexual* parents.⁸⁷ Specifically, the argument is that the government is entitled to reserve marriage for heterosexual couples because (according to the theory) heterosexual relationships are "all too often casual and temporary" and without the assistance of marriage, these couples would provide an unstable and, ultimately, harmful setting for the raising of children.⁸⁸ The accidental-procreation argument is thus almost the opposite of the "gays are bad parents" claim.

Finally, as explained above, the argument that has risen to the fore most recently is the "deinstitutionalization of marriage" theory. According to this argument, same-sex couples must be banned from marriage because if they were permitted to marry, they would contribute to the weakening of marriage that has been ongoing for several decades. If the institution of marriage is further deinstitutionalized, the argument continues, more and more heterosexual men will be less actively involved in the raising of their children. So again, unlike the original "gays are bad parents" claim, under this

⁸³ See, e.g., *supra* Part II.B.i. (discussing the primary state interest asserted in the Hawaii proceedings on remand).

⁸⁴ *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *18 (Haw. Cir. Ct. Dec. 3, 1996) (holding that the State had "failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children").

⁸⁵ See *supra* note 40 and accompanying text.

⁸⁶ See *Abrams & Brooks*, *supra* note 10, at 21.

⁸⁷ See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion) ("The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples . . ."); *Abrams and Brooks*, *supra* note 10, at 3 (describing the "accidental procreation" argument as "essentially pay[ing] a back-handed compliment to gay and lesbian couples by deeming them too responsible for marriage").

⁸⁸ See *supra* Part II.B.ii.

argument, it is the heterosexual people who, in the end, are the ones who are more likely to provide suboptimal environments for the raising of children.⁸⁹

In sum, one can see that, over time, marriage equality opponents have continued to reinvent or repackage the interests purportedly furthered by the marriage ban. Moreover, not only have the asserted interests changed over time, but the more recent claims are inconsistent or at least in tension with the earlier arguments. This suggests that marriage equality opponents are working hard to find an explanation that makes sense. The fact that it has been so difficult for opponents to come up with an explanation that withstands the test of time suggests that the asserted child-related interests are not, in fact, the underlying motivation for the bans.

In other contexts, courts have applied similar logic to conclude that when a party has continued to change its explanations for the challenged action, and particularly where these explanations are in tension with one another, the trier of fact is entitled to infer that the party is lying to cover up an impermissible reason or motive for the action. For example, in the context of disparate treatment employment discrimination,⁹⁰ the plaintiff has to demonstrate that the reasons proffered by the employer to explain the action (the termination, demotion, etc.) are simply a pretext for the real, discrimina-

⁸⁹ Although analysis of individual claims is beyond the scope of this Article, I cannot help but note that, considered even in isolation, this rationale should arouse the court's suspicion. Under the deinstitutionalization of marriage argument, marriage equality opponents admit that heterosexual people were the initiators of and continue to contribute to this allegedly negative process. *See, e.g.*, Transcript of Proceedings at 2775–76, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (“And I meant to say, just for our purposes today, you know, heterosexuals, you know, did the deinstitutionalizing. I mean, you know, if we go back and look at the trends I described, it’s very clear that this—this was not—deinstitutionalization is not something that just cropped up a few years ago whenever we began discussing the possibility of extending equal marriage rights to gay and lesbian people. It predates all that.”). Moreover, the alleged harms to children that are eventually caused by this process are the result of the bad, irresponsible behavior of men, presumably heterosexual men. *See, e.g., supra* note 65 and accompanying text (explaining that the harm that allegedly may be caused by permitting same-sex couples to marry is the possibility that a greater number of men will not take an active, hands-on approach to raising their children). Although the main perpetrators under this theory are heterosexual people, rather than suggesting that straight people should be barred from marriage, the proponents of this theory suggest that the appropriate solution to the alleged problem is to preclude gay and lesbian people from marriage. *See, e.g.*, Transcript of Proceedings at 2775–76, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (Blankenhorn conceding that heterosexuals “did the deinstitutionalizing” but arguing that it should be permissible to exclude same-sex but not opposite-sex couples from marriage because permitting same-sex couples to marry might “further[] . . . accelerate[]” this process of deinstitutionalization).

⁹⁰ In a disparate treatment case, the plaintiff is required to prove that the employer intentionally acted upon an impermissible consideration. *See e.g.*, MICHAEL J. ZIMMER, ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 2 (7th ed. 2008) (“There are three basic elements to individual disparate treatment discrimination: (1) The employer intended to discriminate, that is, it intended to treat an individual differently because of her race, sex, or other prohibited ground; (2) the employer took an action that had an adverse effect on the individual’s employment; and (3) the employer’s action was linked to its intent to discriminate.”).

tory reason.⁹¹ Under established employment discrimination doctrine, one of the ways a plaintiff can do this is by showing that the employer asserted multiple, inconsistent justifications for its actions. Specifically, courts have held that where an employer offers “different and arguably inconsistent explanations,”⁹² that conduct is “probative of pretext.”⁹³ The reason this type of evidence can establish pretext is because a trier of fact may conclude that the fact that an employer continued to shift her explanation and has done so in conflicting ways is because she is lying. The employer is trying to come up with other explanations because she does not want to state the true, discriminatory basis for the action.

Consistent with the principle applied in the employment discrimination context, the conditions described above likewise suggest that the proffered child welfare explanations are unworthy of credence. When one views the asserted interests collectively, it appears that marriage equality opponents similarly have continued to offer shifting explanations. A proffered explanation is pressed until it loses its persuasiveness or supposed empirical support. When this point is reached, opponents put forth a new theory in hopes that it will be more credible than the last. As the courts in the employment discrimination context have concluded, the fact that it has been so difficult to come up with an explanation that can withstand the test of time and a more careful inquiry suggests that the purported concerns of marriage equality opponents may not actually be the purpose behind the marriage bans, and that their asserted theories may be a cover for an invidious end.⁹⁴

⁹¹ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. And in attempting to satisfy this burden, the plaintiff—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” (internal citations, quotations, and alterations omitted)).

⁹² *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) (“[W]hen a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual.”).

⁹³ *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 647 (4th Cir. 2002) (“The fact that an employer has offered inconsistent post-hoc explanations for its employment decisions is probative of pretext . . .”). See also *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) (“An employer’s changing rationale for making an adverse employment decision can be evidence of pretext.”), *opinion amended* by 97 F.3d 833 (6th Cir. 1996); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (concluding that reasonable juror could infer that employer’s inconsistent explanations were evidence of pretext); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992) (“A jury’s conclusion that an employer’s reasons were pretextual can be supported by inconsistencies in or the unconvincing nature of the decisionmaker’s testimony.”).

⁹⁴ Although an in-depth analysis of these issues is beyond the scope of this piece, other conditions also should prompt courts to be skeptical of the purported explanations of marriage equality opponents. In particular, it is beyond dispute that gay and lesbian people have been subject to a long history of discrimination in this country. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility . . . and such immediate and severe opprobrium . . . as homosexuals.” (citation and internal quotation marks omitted) (quot-

Although campaign materials in and of themselves may not be sufficient grounds for concluding that marriage bans are impermissible, they certainly are a source to which a reviewing court can look in assessing them.⁹⁵ Here, a review of the campaign materials from recent ballot initiative campaigns regarding same-sex marriage confirms the suspicion that the reasons asserted in the context of litigation likely are a pretext for impermissible discrimination.⁹⁶ As Professor Rebecca Brown has noted, “[w]hile the concept of intent is [at least] a bit elusive in the case of a public initiative,” the campaign materials from California’s Proposition 8 “suggest[] a motivation of animus at some of the levels of the enactment process.”⁹⁷ Specifically, in the context of the recent ballot initiatives in California and Maine, a primary thrust of the campaigns was the argument that if same-sex marriage were legal, schools would teach about gay people and their relationships in a positive and affirming way. Or, as stated in the ballot materials themselves, the passage of the marriage ban was necessary in order to ensure that children were not taught that gay people and their relationships are “acceptable.”⁹⁸ Ultimately, these campaign materials were based on the notion that “same-sex relationships are inferior to opposite-sex relationships.”⁹⁹ A desire to mark a group as less acceptable solely because of who they are, however, is an end that the Constitution does not permit.¹⁰⁰

In *Romer v. Evans*,¹⁰¹ the Supreme Court reaffirmed that there are some state interests that are impermissible, even under rational basis review. Specifically, the *Romer* Court reiterated that “if the constitutional conception of

ing *People v. Garcia*, 77 Cal. App. 4th 1269, 1279 (2000))). For a much more detailed examination of this issue, see, for example, Transcript of Proceedings at 356–567, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (testimony of historian George Chauncey discussing the history of discrimination experienced by gay and lesbian people).

It is also clear that the impact of marriage bans on same-sex couples and their families is profound. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.”). There are over 1,000 federal rights, protections, and responsibilities that are extended to people based on their marital status. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004) (“[A]s of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.”).

⁹⁵ See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (examining legislative history of challenged enactment).

⁹⁶ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010) (“The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.”).

⁹⁷ REBECCA L. BROWN, AM. CONSTITUTION SOC’Y, THE PROP 8 COURT CAN HAVE IT ALL: JUSTICE, PRECEDENT, RESPECT FOR DEMOCRACY, AND AN APPROPRIATELY LIMITED JUDICIAL ROLE 7 (June 2010).

⁹⁸ *Myths and Facts about Proposition 8*, PROTECTMARRIAGE.COM 1, <http://www.protectmarriage.com/files/myths.pdf> (last visited Oct. 2, 2010).

⁹⁹ *Perry*, 704 F. Supp. 2d at 930.

¹⁰⁰ See, e.g., *supra* notes 92–96 and accompanying text.

¹⁰¹ 517 U.S. 620 (1996).

'equal protection of the laws' means anything it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."¹⁰² While scholars have debated exactly what the *Romer* rule prohibits,¹⁰³ it is widely accepted that a "desire to demote or reduce the status of a disfavored group is the one purpose that is unalterably denied to any state in the exercise of its police powers."¹⁰⁴ But that is exactly what marriage equality opponents said was a core purpose of Proposition 8: Proposition 8 was necessary, marriage equality opponents said, to ensure that children were not taught that gay relationships were as worthy of respect as those of heterosexual people. Whether one views this type of goal as an expression of animus, a desire to treat a class of people as less worthy of respect,¹⁰⁵ or a desire to mark a class as outcasts,¹⁰⁶ this is the type of goal that "the Constitution does not permit."¹⁰⁷

¹⁰² *Id.* at 634 (internal quotation marks omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). See also *id.* at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.").

¹⁰³ See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 219 (1996) ("Under the nonattainder principle, there is a right not to be singled out by name in a law that, metaphorically speaking, paints one's private parts red."); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 267 (1996) (arguing that state action violates the Equal Protection Clause when it "brands [members of a group] as inferior and encourages others to ostracize them"); Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 438 (2003) (arguing that the problem with Amendment 2 was that it subjected gays and lesbians to a "disqualification from equal citizenship"); Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 79 (1996) (arguing that *Romer* stands for the provision that the "government ought not to be permitted to turn a morally irrelevant characteristic into a basis for second-class citizenship").

¹⁰⁴ Brown, *supra* note 97, at 3-4. See also *Romer*, 517 U.S. at 632 ("Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."). Cf. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

¹⁰⁵ Karst, *supra* note 103, at 438 ("Fear and animus may overlap, but they are not identical. Yet Justice Kennedy, when he wrote of animus, was not making a factual finding that half a million Coloradans voted for Amendment 2 because they hated their gay and lesbian co-citizens. Rather, he was drawing a legal conclusion that a state cannot subject a group to a disqualification from equal citizenship—a grave harm—with no purpose but maintaining the group's subordination. Animus may not be a perfect word to express this legal conclusion, but it will do."); Sunstein, *supra* note 103, at 79 ("In both cases[, *Romer* and *Virginia*], . . . the central equality concern is that the government ought not to be permitted to turn a morally irrelevant characteristic into a basis for second-class citizenship.").

¹⁰⁶ Farber & Sherry, *supra* note 103, at 258 (arguing that the Equal Protection Clause "forbids the government from designating any societal group as untouchable").

¹⁰⁷ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) ("What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. . . . And this the Constitution does not permit."). See also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010) ("Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.").

IV. CONCLUSION

This Article assesses the persuasiveness of the theories put forth by marriage equality opponents to explain the necessity of laws that exclude same-sex couples from marriage. While I am not the first to focus on the credibility of the theories that have been offered to explain or justify marriage bans, this Article offers a new approach to this inquiry. Specifically, this Article examines the asserted child welfare-related claims collectively, over time and across contexts.

As demonstrated above, a historical review of the arguments of marriage equality opponents itself suggests that their claims are unworthy of credence. This review reveals that marriage equality opponents have continued to reinvent or repackage the interests purportedly furthered by marriage bans. Moreover, not only have the asserted interests changed over time, but more recent claims are inconsistent with earlier arguments. That these parties cannot seem to produce a rationale that can withstand the test of time or reasoned inquiry suggests that these proffered explanations are not what is really motivating marriage bans. Moreover, a review of the child-related claim that drove the recent ballot initiative campaigns serves to corroborate these suspicions that animus is at play. This historical and cross-contextual perspective should thus lead courts—and the public—to seriously question the permissibility of same-sex marriage bans.

