

REDEFINING INFERTILITY AFTER
OBERGEFELL V. HODGES: WHY THE
FOURTEENTH AMENDMENT WARRANTS
INFERTILITY INSURANCE COVERAGE FOR
SAME-SEX COUPLES TO ACHIEVE
BIOLOGICAL PARENTHOOD

*Kristiana P. Boutell**

2017 MICH ST. L. REV. 595

ABSTRACT

Oppression comes in many shapes and sizes. Although various, noteworthy forms of oppression have plagued this nation for centuries, same-sex couples have experienced a type of oppression unlike any other. However, the Obergefell decision is a significant development toward the equalization of same-sex couples' rights, as the fundamental right to marry is now extended to the equally deserving homosexual community. Yet, an important aspect of marriage is the ability to grow a family, and same-sex couples cannot capitalize on that opportunity as easily as heterosexual couples. Blame science. Therefore, same-sex couples should be considered infertile, by definition, and should be afforded infertility insurance coverage to provide them with the ability to achieve biological parenthood. This Comment will explore the abundance of reasons why infertility insurance coverage for same-sex couples is imperative.

* Senior Notes Editor, *Michigan State Law Review*; J.D. 2018, Michigan State University College of Law; B.A.A. 2012, Central Michigan University. The author would like to thank Professor Cynthia Lee Starnes for her insight and guidance in writing this Comment. The author would also like to thank Marissa Kreutzfeld and Zoey Mayhew for their direction and enthusiasm throughout the entire writing process. Additionally, the author would like to thank her family—Tim, Beth, and Kendell Boutell—for always being her “biggest cheerleaders” in life, and John Reardon for his continued encouragement and patience over the last few years. Finally, the author would like to thank Judge Karen D. McDonald for her invaluable mentorship and inspiration, and the rest of 5C for their unwavering support throughout her law school journey. This Comment is dedicated to Aleigha Phillips and all individuals like her who long to become biological parents, but whose financial constraints may impede their ability to do so.

TABLE OF CONTENTS

INTRODUCTION.....	597
I. THE LEGAL LANDSCAPE.....	601
A. History and Evolution of Homosexual Rights: Pre- <i>Obergefell</i>	602
B. The <i>Obergefell v. Hodges</i> Decision.....	606
C. The Fourteenth Amendment’s Equal Protection and Due Process Clauses.....	610
1. <i>Equal Protection Framework</i>	612
a. <i>What Is the Classification?</i>	613
b. <i>What Is the Appropriate Level of Scrutiny?</i>	614
c. <i>Does the Government Action Meet the Level of Scrutiny?</i>	615
2. <i>Due Process Framework</i>	616
3. <i>Relevant Decisions Pertaining to Family and Reproductive Autonomy</i>	618
II. INFERTILITY AND INSURANCE OPTIONS.....	622
A. Structural Infertility, ART, and Associated Statistical Data.....	622
B. Available ART Options.....	625
C. Applicable Infertility Insurance Legislation and Statutes.....	628
1. <i>The Homosexually Inclusive State Statutes: California and Maryland</i>	629
2. <i>The State Statutes Embodying Heterosexual Exclusivity</i>	633
3. <i>The Vague and Indeterminate State Statutes</i>	636
III. THE NECESSITY OF REDEFINITION.....	639
A. Existing Statutory Structure and Heteronormative Definitions Offend <i>Obergefell</i>	640
1. <i>The Outdated Heteronormativity of Infertility Definitions</i>	641
2. <i>California Almost Got It Right— Follow California ... With One Exception</i>	644
B. Financial Implications of State Mandated Insurance Coverage.....	646
1. <i>Cost Versus Benefit: Does it Matter?</i>	647
2. <i>But, What About the Fathers?</i>	649
C. Redefinition After <i>Obergefell</i> : Why Equal Protection and Due Process Dictate Redefinition.....	651

1. <i>Equal Protection Necessitates Equal Opportunity for Infertility Insurance Coverage</i>	652
a. Utilizing <i>Lawrence</i> : Sexual Orientation as a Suspect Classification	653
b. Sexual Orientation as a General Classification ..	653
2. <i>Due Process Provides for Coverage Where it is Due</i>	655
CONCLUSION	657

INTRODUCTION

Erin and Marianne Krupa (the Krupas) are a same-sex married couple who, like many other married couples, want desperately to start a family.¹ However, the Krupas face barriers that set them apart from the vast majority of married couples—they cannot naturally conceive a child without the assistance of either an opposite sex counterpart or Assisted Reproductive Technology (ART).² Erin Krupa, the designated gestational carrier, was denied infertility insurance coverage because, by definition, she did not meet the statutory threshold.³ According to the denial letter that the Krupas received from their insurance company, a woman under the age of thirty-five is only eligible to receive infertility insurance coverage by participating in unprotected heterosexual intercourse for at least two years.⁴ The denial letter aligns with New Jersey’s insurance statute,

1. See Complaint at 4-5, *Krupa v. Badolato*, No. 16-CV-4637 (D.N.J. Aug. 1, 2016). This cause of action also involves two other same-sex couples—Sol Mejias and her wife, Yanassa Hernandez, as well as Sarah Mills and her partner, Gloria Torres. See *id.* at 3. All parties reside in New Jersey and are experiencing the same infertility struggles. See *id.* However, for the purpose of this Note, the Krupas’s story shall be the focus.

2. See *id.* at 2-3 (“Accordingly, because Plaintiffs are women in same-sex relationships and do not engage in sexual intercourse with men, notwithstanding the fact that their doctors have determined by way of noncontroversial, medically-accepted diagnostic techniques that they do indeed suffer from infertility, New Jersey law leaves them with no way to qualify as infertile for purposes of insurance coverage whatsoever.”).

3. See *id.* at 5. This denial was given notwithstanding the fact that Erin Krupa’s doctor determined she could not conceive without the use of infertility treatment. See *id.*

4. See *id.* (“[The] denial letter specifically stated, in relevant part, that ‘[i]nfertility means the disease or condition that results in the abnormal function of the reproductive system such that: . . . [a] female under 35 years of age is unable to conceive after two years of unprotected sexual intercourse,’ and ‘[t]o be labeled as

which limits infertility coverage to individuals who have been unsuccessful in getting pregnant after having unprotected sexual intercourse with a member of the opposite sex for a period of not less than two years.⁵ Because the Krupas are in a committed lesbian relationship, they are automatically disqualified from receiving infertility insurance coverage because they do not participate in sexual intercourse with a member of the opposite sex.⁶ The overarching purpose of the Krupas's lawsuit is to pursue "the right of all New Jersey women who dream of becoming mothers to access the reproductive health care they need to realize that dream on an equal basis."⁷

Like many Americans, the Krupas struggle with infertility—but the type of infertility experienced by the Krupas, and same-sex couples in general, is vastly different than that of heterosexual couples.⁸ Infertility experienced by heterosexual couples is medical infertility, which is generally defined as "infertility attributable to disease, condition, illness, or injury," and is what the majority of the population understands infertility to be.⁹ However, same-sex couples experience structural infertility, which describes those who are not structurally able to naturally conceive a child through unprotected sexual intercourse.¹⁰ The overwhelming majority of insurance

having infertility and being eligible for infertility treatments, [the insurance] policy based on the New Jersey mandate requires that a patient age less than 35 years fail to conceive after two years of trying").

5. See *id.* at 2-3; see also N.J. Stat. Ann. § 17B:27-46.1x(a) (West 2001); see also *infra* notes 260 and 261.

6. See Complaint, *supra* note 1, at 5. Notably, Erin Krupa had endometriosis and uterine cysts. See *id.* at 4. Typically, insurance providers cover infertility treatment for women with endometriosis. See *id.* However, since Erin failed to satisfy New Jersey's other requirement—having unsuccessful, unprotected sex with a male counterpart for a period of two years or more—her insurance provider denied infertility treatment insurance coverage. See *id.* at 5.

7. Michael Catalini, *Lawsuit in N.J. Sets Precedents for "Infertility"*, DENVER POST, Aug. 14, 2016, at 4A.

8. See *infra* Part II. Notwithstanding the fact that Erin Krupa had medical issues preventing her from conceiving, she and her partner were denied insurance coverage because they did not meet the threshold of having unprotected sexual intercourse with a person of the opposite sex. See Complaint, *supra* note 1, at 5. This, by definition, encompasses structural infertility. See *id.*

9. See Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283, 1286 (discussing how the legal field typically defines infertility).

10. See Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 LAW & CONTEMP. PROBS. 147, 149 (2009) ("[A]ssisted reproduction is also important to

statutes that provide infertility coverage do not extend the coverage to same-sex couples.¹¹ However, since the gravamen of *Obergefell v. Hodges* was to position same-sex couples on equal footing with heterosexual couples,¹² the decision raises challenging questions about what else needs to be done under the law to accomplish that equality.¹³

As Justice Kennedy so profoundly stated in *Obergefell*, the constitutional right to marry encompasses a multitude of aspects—one being childbearing.¹⁴ While strides have been made in recognizing the fundamental right to marry for same-sex couples, there are a variety of laws that require amendments to fully equalize the rights of same-sex couples.¹⁵ Particularly, as it pertains to the current definition of infertility in most insurance statutes, same-sex couples cannot claim infertility for the reason that they are anatomically incapable of naturally conceiving a child.¹⁶ Thus, notwithstanding their structural infertility, same-sex couples are essentially precluded from obtaining the necessary infertility insurance coverage to assist them in starting a family and to alleviate the financial burden associated with infertility treatments.¹⁷ Aside

those with ‘structural infertility’—that is, those who want to be parents but do not want to engage in heterosexual intercourse.”); see also Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1009, 1033 (1996) (coining the term “dysfertile” to define the type of infertility same-sex couples face).

11. See Erez Aloni & Judith Daar, *Marriage Equality: One Step Down the Path Toward Family Justice*, 57 ORANGE CTY. LAW. 22, 24 (2015) (discussing how same-sex family formation is essentially prohibited by statutory language). Only fourteen of fifty states have insurance statutes that offer or address infertility insurance coverage. See, e.g., Valarie Blake, *It’s an ART Not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J.L. SCI. & TECH. 651, 662 (2011) (discussing the effects of the fourteen states that provided infertility insurance at the time of the writing).

12. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

13. See generally Complaint, *supra* note 1.

14. *Obergefell*, 135 S. Ct. at 2601 (“The constitutional marriage right has many aspects, of which childbearing is only one.”).

15. See Aloni & Daar, *supra* note 11, at 22-23 (discussing that other issues need to be addressed after the legalization of same-sex marriage).

16. See, e.g., Jacoby, *supra* note 10, at 149 (“The traditional and common definition of infertility covers those who have not conceived after a designated period of unprotected heterosexual intercourse.”).

17. See Blake, *supra* note 11, at 653-54 (“Of the fourteen states with some form of insurance mandate, none explicitly excludes gay or unmarried persons from

from scant federal regulations, such as the Affordable Care Act (ACA), states are left to determine the insurance laws within their respective states.¹⁸ Therefore, federal regulations should be put in place to mandate that states, especially those that offer infertility insurance coverage for heterosexual couples, also offer coverage for structurally infertile same-sex couples.¹⁹ *Obergefell* is a major stride toward the equalization of homosexual rights, but in many ways it is just the beginning.²⁰ Where the next developmental focus will be is ultimately a mystery, but equal access to childbearing is undoubtedly on the horizon.²¹

Part I of this Comment discusses the history and evolution of same-sex couples' rights and provides a detailed outlook on the

coverage, but many serve to indirectly exclude these groups, raising distinct ethical and legal issues around what a state owes its citizens with respect to insurance coverage of ART.”) Structural infertility is also commonly used to define the infertility faced by single individuals, but single individuals are beyond the scope of this Comment. See Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 359 (2011).

18. See *Health Care Coverage Options for Same-Sex Couples*, HEALTHCARE.GOV, <https://www.healthcare.gov/married-same-sex-couples-and-the-marketplace/> [<https://perma.cc/ZQ3L-5Y6Y>] (last visited Oct. 9, 2017) (“An insurance company that offers health coverage to opposite-sex couples must do the same for same-sex couples.”). Note, the original material quoted has been removed as a result of the change in administration. For a summary of the removed material see Tami Luhby, *Trump Administration Starts Deleting Obamacare References from Sites*, CNN MONEY (Feb. 9, 2017 8:51 PM), <http://money.cnn.com/2017/02/09/news/economy/obamacare-hhs-trump/index.html> [<https://perma.cc/EJF5-RWMS>]. See also *Affordable Care Act*, NAT'L NETWORK LIBR. MED., <https://nnlm.gov/sea/guides/affordable-care-act> [<https://perma.cc/224O-MBTG>] (last visited Oct. 9, 2017) (“The Affordable Care Act put in place comprehensive health insurance reforms that have improved access, affordability, and quality in health care for Americans.”). However, while the ACA is still active at the time of this writing, with the election of President Donald Trump, the ACA may be repealed. See Alison Kodiak, *Trump: GOP Lawmakers Back Off from Immediate Obamacare Repeal*, NPR (Feb. 6, 2017, 12:40 PM), <http://www.npr.org/sections/health-shots/2017/02/06/513718166/trump-congressional-gop-back-off-from-immediate-obamacare-repeal> [<https://perma.cc/8BV5-G83W>]. Therefore, the ACA will not be a focus of this Comment.

19. See *infra* Part III.

20. See Aloni & Daar, *supra* note 11, at 24 (discussing that reform is imperative after the *Obergefell* decision).

21. See, e.g., Complaint, *supra* note 1, at 5; Alex Bollinger, *Lesbian Couple Crowdfunding Fertility Treatments After Government Refuses to Help*, LGBTQ NAT. (Feb. 8, 2017), http://lgbtqnation.com/2017/02/uk-lesbian-couple-crowdfunding-fertility-treatments/?utm_source=twitter&utm_medium=Sendible&utm_campaign=RSS [<http://perma.cc/ZT3Y-FENT>].

applicability of the landmark decision—*Obergefell v. Hodges*. It then concludes with the constitutional implications of the Fourteenth Amendment’s Equal Protection and Due Process Clauses in denying same-sex couples infertility services. Part II of this Comment examines the infertility treatment options—also known as ART—available to same-sex couples.²² It also explores state statutes that mention, provide for, or offer infertility insurance coverage generally, but explicitly or implicitly exclude same-sex couples. It then examines the two state statutes—California and Maryland—that do explicitly account for same-sex couples within their insurance codes. Part III of this Comment assesses the legal foundation pertaining to same-sex couples’ fundamental right to marry—and have a family—and evaluates the infertility hurdle they face. It then outlines the necessity of redefining infertility and why *Obergefell* and the Equal Protection and Due Process Clauses warrant redefinition.

I. THE LEGAL LANDSCAPE

Throughout history, same-sex couples have faced oppression and prejudice in their fight for equality.²³ The history and evolution of homosexual individuals’ rights has been marked by significant court considerations and legislation.²⁴ However, equalization in the eyes of the law is coming to fruition in the twenty-first century.²⁵ Notably, the *Obergefell* decision is the most recent case that has dramatically reshaped the landscape of homosexual rights under the law.²⁶ With this decision, same-sex couples have been afforded the right to marry through the Fourteenth Amendment’s Equal Protection and Due Process Clauses—the far-reaching implications of which have yet to be seen.²⁷

22. The treatments are applicable to individuals and heterosexual couples as well, but this Comment focuses on same-sex couples.

23. See *infra* Section I.A; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596-97 (2015) (outlining the evolution of homosexual rights).

24. See *infra* Sections I.A, I.B.

25. See *Obergefell*, 135 S. Ct. at 2604-05 (granting the fundamental right to marry to same-sex couples).

26. See *infra* Section I.B.

27. *Obergefell*, 135 S. Ct. at 2604-05 (implicating the possibility of more developments).

A. History and Evolution of Homosexual Rights: Pre-*Obergefell*

Homosexual individuals' rights have evolved significantly over the past hundred years.²⁸ The demise of homosexual discrimination is not yet comprehensive, but society and the law have significantly progressed from where they were well into the twentieth century.²⁹ Until the mid-twentieth century, homosexuality was categorized as criminal and immoral wrongdoing.³⁰ For much of the twentieth century, homosexuals were considered outcasts who had no dignity or value in society.³¹ This characterization caused many homosexuals to remain closeted in order to avoid the social discomfiture and condemnation associated with admitting their immutable sexual orientation.³²

Post-World War II, the criminalization of same-sex sexual activity persisted in the majority of states, and openly gay and lesbian individuals experienced discrimination within many facets of their lives.³³ During this post-World War II era, homosexuality was also classified as an illness,³⁴ such that it was listed as a mental

28. *See id.* at 2596-97; *see also* DOUGLAS ABRAMS ET. AL., CONTEMPORARY FAMILY LAW 82-84, 108 (West 4th ed. 2015) (providing a summary of the evolution of same-sex couples rights).

29. *See, e.g., Obergefell*, 135 S. Ct. at 2595-97 (discussing the pertinent cases that lead to the legalization of same-sex marriage).

30. *See id.* at 2596 (“Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law.”).

31. *See id.* (“For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.”).

32. *See id.*; *see also* Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 8-9, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574), <http://www.apa.org/about/offices/ogc/amicus/obergefell-supreme-court.pdf> [<https://perma.cc/FLF6-3MRJ>] (discussing the normalcy and immutability associated with homosexuality).

33. *See Obergefell*, 135 S. Ct. at 2596. This discrimination also included government employment, military service, immigration, and law enforcement, as well as a burden on homosexual individuals' right to associate. *Id.* Homosexual persons were also the targets of police during this post-World War II era. *Id.*; *see also* Brief for Organization of American Historians as Amicus Curiae Supporting Petitioners at 10-15, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, & 14-574), http://www.oah.org/site/assets/files/5849/obergefell--_oah_amicus.pdf [<https://perma.cc/7L29-QK9H>] (discussing the discrimination that homosexual individuals faced throughout the twentieth century).

34. *Obergefell*, 135 S. Ct. at 2596. *See The History of Psychiatry & Homosexuality*, LGBT MENTAL HEALTH SYLLABUS, <http://www.aglp.org/>

disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM).³⁵ It was not until the onset of the political and social reforms of the late-twentieth century that same-sex couples comfortably expressed and openly depicted their homosexual lifestyle.³⁶ Thus, the beginning of the twenty-first century brought momentous strides towards the equalization of same-sex couples' rights.³⁷

Initial legal decisions rationalized the denial of marriage equality for same-sex couples by interpreting the Constitution as offering no legal basis for same-sex marriage.³⁸ With a narrow interpretation of the Constitution, the breadth of marriage was limited to the unity of a man and a woman.³⁹ The first decision involving homosexual rights came in 1986 in *Bowers v. Hardwick*, which stemmed from a challenge to a state statute that criminalized homosexual sexual contact and conduct—specifically, homosexual sodomy.⁴⁰ In *Bowers*, the Supreme Court addressed the issue of

gap/1_history/ [https://perma.cc/8YCR-HZCY] (last visited Oct. 9, 2017) (“The American Psychiatric Association (APA) removed homosexuality from its official *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1973. This decision occurred in the context of momentous cultural changes brought on by the social protest movements of the 1950s to the 1970s: beginning with the African-American civil rights movement, then evolving on to the women’s and gay rights movements.”).

35. *Obergefell*, 135 S. Ct. at 2596; Brief for American Psychological Association et al., *supra* note 32, at 7 (elaborating on the DSM classification of homosexuality as a mental disorder in 1952).

36. *Obergefell*, 135 S. Ct. at 2596 (“In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families.”); *The History of Psychiatry & Homosexuality*, *supra* note 34.

37. *See Obergefell*, 135 S. Ct. at 2597 (stating that after Massachusetts invalidated same-sex marriage bans, other states followed suit).

38. *See id.* at 2612 (Roberts, C.J., Scalia, J., & Thomas, J., dissenting) (discussing how the Constitution does not provide a basis for the precedent set by the majority).

39. *See id.* at 2595 (majority opinion) (discussing how marriage was deemed a male–female partnership since this nation’s founding).

40. 478 U.S. 186, 188 (1986) (dealing with homosexual rights in terms of relationship autonomy). However, the first case addressing a homosexual-related claim generally was in the 1950s when the Ninth Circuit Court of Appeals and the Supreme Court considered an injunction against the Los Angeles, California, Postmaster, Otto K. Olesen, because of his refusal to mail a homosexual magazine through the mail. *See One, Inc. v. Olesen*, 241 F.2d 772, 773 (9th Cir. 1957), *rev’d*, 355 U.S. 371 (1958) (per curiam). The Ninth Circuit said that the magazine lustfully incited the homosexual reader and was obscene material. *Id.* at 778. However, the Supreme Court ultimately reversed the circuit court in a one-sentence opinion and

whether the Constitution confers a fundamental right upon homosexuals to participate in homosexual sexual activity.⁴¹ The Supreme Court reasoned that because homosexual sodomy is a non-procreative form of sexual intercourse, and the decision to engage in that sexual conduct is not for the purpose of marriage or family, homosexuals do not have the fundamental right to engage in homosexual sodomy.⁴² The Supreme Court arrived at that decision notwithstanding the fact that the conduct involved two consenting adults within the privacy of their own home.⁴³

Homosexual rights seemed to be on an upward trajectory, comparatively, upon the onset of the 1990s.⁴⁴ In 1996 in *Romer v. Evans*, the Supreme Court invalidated a state constitutional amendment that attempted to politically exile homosexual individuals strictly because of their sexual orientation.⁴⁵ Because the amendment did not further a legitimate state interest and instead discriminated on the basis of sexual orientation, the Supreme Court found that the law was at odds with the Equal Protection Clause and invalidated it.⁴⁶ Nevertheless, also in 1996 and during the Clinton regime, Congress ratified the Defense of Marriage Act (DOMA), which further restricted the acceptance of a homosexual lifestyle.⁴⁷

imposed the injunction, thus ordering the postmaster to deliver the magazine through regular mail. *See One, Inc.*, 355 U.S. at 371.

41. *See* 478 U.S. at 190. The Court specified that the case did not call for a determination about “whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable.” *Id.*

42. *See id.* at 191. Since there was “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other,” the Court found no legal basis for extending a sodomy right. *See id.*

43. *See id.* at 190-91. The Court further indicated that determining non-textual rights hinges upon the “Justices’ own choice of values on the States and the Federal Government.” *Id.*

44. *See generally* ABRAMS, ET. AL., *supra* note 28; *see also* *Gay Rights Movement*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Gay_rights_movement (last visited Oct. 9, 2017) (detailing the gay rights movement that began in the late 1980s and is still continuing today).

45. 517 U.S. 620, 634-35 (1996) (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

46. *See id.* at 635-36. Because a “general announcement” that homosexual individuals do not deserve general protections under the law conveys no “rational relationship to a legitimate governmental purpose,” the Court could not conclude that the Colorado legislation was legitimate. *See id.*

47. *See* Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996). DOMA defined marriage as a union between one man and one woman for the purposes of federal law; thus, the DOMA definition applied to all federal

However, in 2013, the Supreme Court ruled in *United States v. Windsor* that DOMA was unconstitutional to the extent that it served as an obstacle for federal recognition regarding the validity of same-sex marriages.⁴⁸ The Court stated that DOMA impermissibly targets same-sex couples and strips them of the dignity involved in their committed relationship, which forces even their own children to feel inferior.⁴⁹ The Supreme Court grounded its decision in the liberty granted to persons by the Fifth and Fourteenth Amendments and found that DOMA had an unconstitutional, disparate effect on lawful same-sex marriages.⁵⁰

In 2003, Massachusetts broke the mold and became the first state to make significant strides toward the equalization of same-sex marriage.⁵¹ In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court held that its state Constitution

laws, but not to state laws. See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 1-2 (1997). However, in 2013, the Court declared this provision of DOMA unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Critics suspect that DOMA was enacted as a response to the growing acceptance of a homosexual lifestyle. See ABRAMS, ET. AL., *supra* note 28, at 89. The two predominant objectives of DOMA were (1) to defend the sanctity of marriage by limiting it to and defining it as the union of one man and one woman, notwithstanding the marriage's lawfulness where it was performed, and (2) to authorize states with the right to refuse to recognize lawful marriages that were performed across state lines. See Koppelman, *supra* note 47, at 1-2.

48. 133 S. Ct. at 2695-96 (discussing the harm that DOMA creates to the extent that it impedes same-sex couples and their families and children). DOMA reform was facilitated, at least in part, by the Hawaii Supreme Court's ruling in *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), after it ruled that denying marriage licenses to same-sex couples facilitated sex discrimination and violated the Hawaii state Constitution. See Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992-2012 and Beyond*, 2013 MICH. ST. L. REV. 1621, 1632 (reviewing what ignited DOMA reform).

49. *Id.* at 2696. The Court found that no legitimate government purpose accompanied DOMA, as it disparaged and injured citizens who sought protection by state marriage laws that protected their "personhood and dignity." *Id.*

50. *Id.* at 2695 ("While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.")

51. See ABRAMS, ET. AL., *supra* note 28, at 82-83. Thus, Massachusetts amended its Constitution to ensure that the laws and procedures that govern marriages equally apply to same-sex couples and that no special procedures should be applied to a homosexual marriage that are not applied to a heterosexual marriage. See *Massachusetts Laws About Same-Sex Marriage*, MASS. CT. SYS., <http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-subj/about/gaymarriage.html> [<https://perma.cc/3UD5-67H8>] (last visited Oct. 9, 2017).

permitted same-sex couples to legally marry within the state;⁵² thus, Massachusetts became the first state to allow same-sex couples to marry.⁵³ Before 2004, when the first same-sex couple legally married within the state of Massachusetts, no state had entered this unchartered territory.⁵⁴ In some respects, *Goodridge* paved the way for other states to follow suit and enact similar same-sex marriage legislation.⁵⁵ Finally, in 2015, the Supreme Court addressed the issue of whether same-sex couples have a fundamental right to marry under the Constitution.⁵⁶

B. The *Obergefell v. Hodges* Decision

By the time *Obergefell* reached the United States Supreme Court, many state and federal courts had already considered same-sex marriage.⁵⁷ The *Obergefell* decision has done more than legalize

52. 798 N.E.2d 941, 948 (Mass. 2003). The Supreme Judicial Court of Massachusetts ruled that the Massachusetts state Constitution required the allowance of same-sex couples to civilly marry. *See id.* Using a rational basis test, the Court determined three legislative policy rationales that belie the prohibition of same-sex couples' right to marry. *Id.* at 961. First is the societal preference for "providing a 'favorable setting for procreation,'" second, that the ideal environment for childrearing encompasses a two-parent family; and third, marriage helps maintain the sparse financial resources of State and private institutions. *Id.*

53. *See* ABRAMS, ET. AL., *supra* note 28, at 83; *supra* text accompanying note 51. *See generally* *Goodridge*, 798 N.E.2d 941.

54. *See* Kailani Koenig, *Ten Years Ago, Massachusetts Introduced Us to Gay Marriage*, MSNBC (May 16, 2014, 6:02 PM), <http://www.msnbc.com/msnbc/ten-years-ago-massachusetts-introduced-us-gay-marriage> [<https://perma.cc/NPM8-2EDY>] (reflecting on how Massachusetts became the first state to legalize same-sex marriage, which led to nearly twenty other states legalizing same-sex marriage); *see also* ABRAMS, ET. AL., *supra* note 28, at 83.

55. *See, e.g.*, *Garden State Equal. v. Dow*, 79 A.3d 1036, 1045 (N.J. 2013) (holding that sex couples in New Jersey are permitted to enter into a civil marriage); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (holding that New Mexico's marriage laws had the effect of discriminating against same-sex couples' rights to marry); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481-82 (Conn. 2008) (holding that Connecticut General Statute § 46b-38nn was a violation of Connecticut's state Constitution to the extent that it permitted same-sex marriage).

56. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (addressing the issue of whether the fundamental right to marry should be extended to same-sex couples).

57. *See id.* at 2597 ("After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage."). For an exhaustive list of all of the prior state decisions relating to same-sex couples' right to marry or their efforts to have their out-of-state

same-sex marriage—the language within the Supreme Court’s opinion has laid a foundation for a multitude of same-sex equalization laws to captivate the legal landscape.⁵⁸ *Obergefell* addressed a circuit split regarding the legalization of same-sex marriage.⁵⁹ Ultimately, the Court held that the right to marry is a fundamental right that is extended to same-sex couples, as it is an integral part of the liberty granted to persons under the Equal Protection and Due Process Clauses.⁶⁰ *Obergefell* explored the plethora of reasons why marriage is of transcendent importance and quoted Cicero in saying that “[t]he first bond of society is marriage; next, children; and then the family.”⁶¹ In exploring those reasons, the Supreme Court concluded that because of the divine importance of marriage and its sanctity, same-sex couples seek its privileges and responsibilities.⁶²

Justice Kennedy enumerated four principles of marriage to demonstrate why, pursuant to the Constitution, marriage equality is a fundamental right that must also be afforded to same-sex couples.⁶³ First, precedential decisions signify that the decision to marry is embedded within personal autonomy.⁶⁴ Second, marriage represents

marriages recognized, see *id.* at 2608-11 (citing Appendix A to Opinion of the Court).

58. See generally Aloni & Daar, *supra* note 11 (discussing the other issues that need to be addressed after the recognition of same-sex marriage).

59. See generally *Obergefell*, 135 S. Ct. 2584. *Obergefell* involves fourteen plaintiffs who challenged laws within the states of Michigan, Kentucky, Ohio, and Tennessee. See *id.* at 2593.

60. See *id.* at 2604, 2593 (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”).

61. See *id.* at 2594; see also CICERO DE OFFICIIS, MORAL GOODNESS 57 (Walter Miller, trans., Woods & Sons, Ltd. 1913) (“For since the reproductive instinct is by nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state.”).

62. See *Obergefell*, 135 S. Ct. at 2594. Furthermore, because of the immutability associated with homosexuality, same-sex marriage is the only avenue for same-sex couples to attain the associated benefits that follow from the commitment of marriage. See *id.*

63. See *id.* at 2599 (“The four principles and traditions to be discussed demonstrate the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”).

64. See *id.* (“A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”).

a unique and committed two-person union that is incomparable to any other.⁶⁵ Third, marriage safeguards children and families, which is inherent in the interrelated rights of childrearing and procreation.⁶⁶ Lastly, marriage is the keystone of American social order, as it is embedded in this nation's history and tradition.⁶⁷

Regarding the third principle—that marriage safeguards children and families—Justice Kennedy highlighted the integral nature of the liberty granted to persons by the Due Process Clause.⁶⁸ Among other rights, the right to bring up children is at the core of due process.⁶⁹ Additionally, in extending the right to marry to same-sex couples, children will enjoy the integrity and love associated with their family, in conjunction with other families among them.⁷⁰ Moreover, allowing same-sex couples to marry provides the necessary permanency and stability associated with a child's best interest.⁷¹

Justice Kennedy further highlights that same-sex couples already provide loving homes to thousands of children—whether biological, adopted, or foster—which solidifies that homosexual persons are equally fit to parent in the eyes of the law.⁷² However,

65. *See id.* (“A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”).

66. *See id.* at 2600 (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”).

67. *See id.* at 2601 (“Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”).

68. *See id.* at 2600. There are two different types of due process—substantive and procedural—and here, Justice Kennedy is referring to substantive due process. *See id.* at 2600, 2616, 2632.

69. *See id.* at 2600 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)) (“[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”). *Zablocki* “directly connect[s] the right to marry with the ‘right to procreate.’” *See id.* at 2614.

70. *See id.* at 2600 (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013)). The protections and benefits that marriage provides to children are so material that preventing same-sex families from enjoying those protections and benefits does not serve anyone’s best interest. *See id.*

71. *See id.* (“Marriage also affords the permanency and stability important to children’s best interests.”).

72. *See id.* (“As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful

the Supreme Court does not want all married persons to feel the pressure to have children.⁷³ Rather, the Supreme Court recognizes that the fundamental right to marry encompasses a multitude of characteristics—*one* of which is childbearing.⁷⁴

The Supreme Court further identifies the vital role of the Equal Protection Clause in legalizing same-sex marriage.⁷⁵ Analyzing years of jurisprudence, the Supreme Court ultimately concluded that the Equal Protection Clause is the constitutional hook that has and will continue to correct inequities found within the institution of marriage.⁷⁶ Therefore, through the Equal Protection and Due Process Clauses, same-sex couples are granted the fundamental right to marry in all states.⁷⁷

In addressing a counterargument regarding destroying the sanctity of the marital union as it pertains to “natural procreation and marriage,” the Supreme Court further addressed the relationship between marriage and parenthood.⁷⁸ In recognizing that relationship, like many other decisions married couples encounter, same-sex couples are permitted to decide whether to have children.⁷⁹ All married couples arrive at that decision after significant personal, romantic, and practical considerations.⁸⁰ Pronouncing that no union

confirmation from the law itself that gays and lesbians can create loving, supportive families.”).

73. *See id.* at 2601 (“That is not to say the right to marry is less meaningful for those who do not or cannot have children.”).

74. *See id.* Thus, marriage is not just about procreation, but it often involves procreation, along with a multitude of other things. *See id.*

75. *See id.* at 2603-04 (discussing how the Equal Protection Clause has been used throughout history to accomplish equality).

76. *See id.* at 2603. The more that society transforms, the more inequities that are created that need to be corrected; thus, the Equal Protection Clause provides the legal basis for doing so. *See id.*

77. *See id.* at 2604-05. Because the right to marry is such a fundamental aspect of our system of ordered liberty, same-sex couples cannot be deprived of the right to marry any longer. *See id.* at 2604.

78. *See id.* at 2606-07 (“The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood.”).

79. *See id.*

80. *See id.* (“Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.”).

is more profound than the one experienced between two persons within a marriage, which exemplifies the paramount paradigms of love, fidelity, devotion, sacrifice, and family,⁸¹ the Supreme Court avowed that same-sex couples are no longer unequal in the eyes of the law.⁸² Since the modern interpretation of liberty allowed for the legalization of same-sex marriage,⁸³ the analytical framework of the Equal Protection and Due Process Clauses is essential to a full understanding of how courts utilize the Fourteenth Amendment to address constitutional protections.⁸⁴

C. The Fourteenth Amendment's Equal Protection and Due Process Clauses

The liberty granted under the Fourteenth Amendment continuously allows for the correction of inequities within the fundamental aspects of personhood.⁸⁵ The interpretation of liberty and what constitutes a fundamental aspect of personhood transforms as society continues to evolve.⁸⁶ Whether the issue involves “vindicating precepts of liberty and equality” or identifying personal beliefs, the Equal Protection and Due Process Clauses provide the textual support for such disputes.⁸⁷

The Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁸⁸ The former clause—known as the Due Process Clause—acts as a safeguard against unfair government practices;⁸⁹ whereas the essence of the latter clause—known as the Equal Protection Clause—is that states shall treat similarly situated

81. *Id.* at 2608 (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”).

82. *See id.* (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

83. *See generally Obergefell*, 135 S. Ct. 2584 (2015) (addressing the issue of whether the fundamental right to marry should be extended to same-sex couples).

84. *See infra* Section I.C.

85. *See Obergefell*, 135 S. Ct. at 2597, 2603 (discussing the various uses of the Equal Protection and Due Process Clauses).

86. *See id.* at 2604.

87. *See id.* at 2597, 2604.

88. U.S. CONST. amend. XIV, § 1 (ratified in 1868).

89. *See Timothy Sandefur, Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY, 115, 148-55 (2010) (detailing the functionality and uses of substantive due process).

persons equally, shall govern impartially, and shall not make distinctions against persons that are grounded in illegitimate governmental purposes.⁹⁰ Commonly used—either together or separately—to invalidate or uphold laws, the Equal Protection and Due Process Clauses are fundamental to American personhood and maintaining the fabric of our society.⁹¹

An analysis under the Equal Protection and Due Process Clauses is practically parallel in terms of safeguarding fundamental rights, as under either clause the Supreme Court must analyze whether an asserted liberty is sufficiently important so as to be classified as fundamental.⁹² The notable difference in safeguarding fundamental rights under Equal Protection or Due Process hinges upon how the constitutional arguments are formulated.⁹³ Under Due Process, the issue is whether the government is justified in infringing upon a fundamental right by an adequate purpose.⁹⁴ Conversely,

90. See *Equal Protection*, LEGAL INFO. INST. (LII), https://www.law.cornell.edu/wex/equal_protection [<https://perma.cc/D8M7-4V9Z>] (last visited Oct. 9, 2017) (discussing how the Equal Protection Clause is applied, interpreted, and utilized); see also Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 119 (1998) (stating that the Equal Protection Clause requires at least equal concern and respect for individuals).

91. See generally *Equal Protection*, *supra* note 90. See also David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARO. L. REV. 975, 995, 997 (1992) (noting that the Court has thus evidenced a marked tendency to use the Equal Protection Clause to perform, in a sometimes hidden way, the substantive due process function of protecting unenumerated fundamental rights). Equality, in other words, has been used to serve the cause of protecting liberty. *Id.* at 995, 997. Autonomy theorists, who believe that “liberty” means “autonomy,” have thus wished to use “equality” as a means of protecting “autonomy.” See *id.*

92. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW*, 934 (4th ed. 2013). Aside from the Bill of Rights, there are no rights explicitly enumerated in the Constitution. See *id.* Rather, the fundamental rights and constitutionally protected liberty interests that are accorded to and enjoyed by United States’ citizens are implicit in the Constitution through the ninth amendment, which provides “[t]he enumeration in the Constitution of certain rights, shall not be construed to disparage others retained by the people.” See *id.* at 935; see also U.S. CONST. amend. IX. While the Ninth Amendment does not grant any specific rights, it is utilized by the Supreme Court as textual justification for the recognition of non-textual rights implicit in this nation’s system of ordered liberty such that they shall be classified as fundamental. See CHERMERINSKY, *supra* note 92, at 935.

93. See CHERMERINSKY, *supra* note 92, at 934-35.

94. See *id.* at 935 (“If a right is safeguarded under due process, the constitutional issue is whether the government’s interference is justified by a sufficient purpose.”).

pursuant to Equal Protection, the issue is whether the governmental discrimination controlling who may or may not exercise a certain fundamental right is justified by an adequate purpose.⁹⁵ The Supreme Court utilized both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in *Obergefell* to invalidate laws that prohibited same-sex marriage.⁹⁶ Thus, the framework is imperative to understanding how the Supreme Court arrived at that decision.⁹⁷

1. *Equal Protection Framework*

Equal protection is the best constitutional ground to use to assert a challenge against a law that grants a right to some individuals while denying it to others.⁹⁸ Equal protection cases address whether the government's classification is justified by a sufficient purpose.⁹⁹ The overarching issue in equal protection cases is whether the government can identify a sufficient objective for its discrimination, which hinges upon the type of discrimination presented.¹⁰⁰ The type of discrimination defines the level of scrutiny, or what standard of review, the court will use to analyze the issue at

95. See *id.* (discussing what the Equal Protection Clause is generally used for).

96. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of [the] right and [the] liberty [to marry].”).

97. See generally CHEMERINSKY, *supra* note 92, at 933-39 (detailing the Equal Protection and Due Process framework).

98. See CHEMERINSKY, *supra* note 92, at 935.

99. See *id.* at 712. In the original draft of the United States Constitution, there were no provisions guaranteeing equal protection of the laws. See *id.* at 711. The lack of an Equal Protection Clause in the original draft of the Constitution was unsurprising, seeing as the document was first drafted during a time of slavery and subordination of women. See *id.* It was not until after the Civil War of 1861 when extensive discrimination plagued the nation that the Equal Protection Clause was drafted, but it was not until after *Brown v. Board of Education* in 1954 that the Supreme Court utilized it. See *id.*; see also 347 U.S. 483, 495 (1954). However, since the Fourteenth Amendment applies to the states, there is technically no provision within the Constitution that serves as a directive to the federal government that it may not deny equal protection of the laws. See CHEMERINSKY, *supra* note 92, at 711. To solve that problem, the Supreme Court ruled in *Bolling v. Sharpe* that the Equal Protection Clause applies to the federal government through the Fifth Amendment's Due Process Clause. See *id.*; see also 347 U.S. 497, 500 (1954).

100. See CHEMERINSKY, *supra* note 92, at 712 (“What constitutes a sufficient justification depends . . . on the type of discrimination. For instance, the Supreme Court has declared that it is . . . suspicious of race discrimination.”).

hand.¹⁰¹ In an equal protection case, three questions serve as guideposts for the analysis.¹⁰² First, “what is the classification?”; second, “what level of scrutiny should be applied?”; third, “does the particular government action meet the level of scrutiny?”¹⁰³

a. *What Is the Classification?*

The analysis starts with a determination of what the classification is, or how the government is distinguishing among individuals.¹⁰⁴ A classification can exist either on its face or as applied.¹⁰⁵ A facial classification simply means that the law, by its very language, draws a blatant distinction among people based on a specific characteristic.¹⁰⁶ Conversely, an as-applied challenge deals with a law that is neutral on its face, but has a discriminatory impact or effect on the classification.¹⁰⁷ Proving an as-applied challenge is more difficult than a facial challenge, as the challenger must prove that the law has a discriminatory impact or effect, but must also show that the law has a discriminatory purpose.¹⁰⁸

101. See *id.* at 712-14 (explaining the levels of scrutiny); see also Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CAL. L. REV. 1169, 1172 (1998) (discussing the three levels of scrutiny and how Equal Protection challenges trigger the varying levels of scrutiny).

102. See CHEMERINSKY, *supra* note 92, at 712 (explaining that a typical Equal Protection analysis follows a three-question analysis).

103. See *id.* 712-16 (detailing the framework for an Equal Protection analysis).

104. See *id.* at 712. Identifying the classification is not always simple, as sometimes that may be the focal point of the pending litigation. See *id.*

105. See *id.* at 712-13 (explaining that the first question is broken up into a two-part analysis to determine the next step in the analysis).

106. See *id.* (“For example, a law that prohibits blacks from serving on juries is an obvious facial racial classification. Likewise, a law that says that only those 16 and older can have drivers’ licenses is obviously a facial classification.”).

107. See *id.* at 713 (“For instance, a law that requires that all police officers be at least 5’10” tall and 150 pounds is, on its face, only a height and weight classification. Statistics, however, show that 40 percent of men but only 2 percent of women will meet this requirement. The result is that the law has a discriminatory impact against women in hiring for the police force.”).

108. See *id.* Therefore, “women challenging the height and weight requirements for the police force must show that the government’s purpose was to discriminate based on gender.” *Id.*

b. *What Is the Appropriate Level of Scrutiny?*

The level of scrutiny may be determined upon identification of the classification.¹⁰⁹ The three types of scrutiny are strict scrutiny, intermediate scrutiny, and rational basis scrutiny.¹¹⁰ Strict scrutiny is the highest level of scrutiny and is difficult to satisfy, as it places the burden on the government to show that the law is necessary to achieve a compelling government interest.¹¹¹ Additionally, under this standard, the government must prove that the law is the least discriminatory means available to achieve its compelling government interest, which is accomplished by narrowly tailoring the imposed legislation.¹¹²

The second level of scrutiny is intermediate scrutiny, which places the burden on the government to show that the law is substantially related to an important government objective.¹¹³ Consequently, the means, which is the law in question, and the end, or the objective that is being sought, must have a sufficiently significant connection such that it is considered important.¹¹⁴ Lastly, rational basis scrutiny is considered the default standard of review, so any law that is challenged based on a classification that does not

109. *See id.*; *see also* Skaggs, *supra* note 101, at 1172 (explaining the different suspect classifications and their applicable levels of scrutiny).

110. *See* CHEMERINSKY, *supra* note 92, at 713-14 (enumerating the scrutiny standards of review); *see also* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449-50 (1988) (“Means-end scrutiny has three components: (1) scrutiny of government interests; (2) scrutiny of the effectiveness of the means chosen to further the governments interests; and (3) scrutiny of alternatives to determine whether less restrictive methods are available for furthering the government interests.”).

111. *See* CHEMERINSKY, *supra* note 92, at 713. Strict scrutiny is applied to challenges involving race, national origin, and to cases involving aliens, unless the case deals with the democratic process or self-government. *See id.*

112. *See id.* By requiring the law to be the least discriminatory means, it requires narrow tailoring so that the law covers only what is necessary to accomplish the government’s objective. *See id.*

113. *See id.* Intermediate scrutiny is less stringent than strict scrutiny, but the burden still rests on the government to pass a more stringent standard that requires substantial justification for the legislation. *See* Skaggs, *supra* note 101, at 1178 (discussing the less demanding aspects of intermediate scrutiny). *See also* Herman D. Hofman, “*Exceedingly [Un]persuasive*” and *Unjustified: The Intermediate Scrutiny Standard and Single-Sex Education After United States v. Virginia*, 2015 MICH. ST. L. REV. 2047, 2058-59 (explaining intermediate scrutiny in more detail).

114. *See* CHEMERINSKY, *supra* note 92, at 713. Intermediate scrutiny applies to laws that discriminate on the basis of gender or against non-marital children. *See id.*

fall into a heightened scrutiny category must satisfy the minimal level of rational basis review.¹¹⁵ Per rational basis, the burden is on the challenger, rather than the government, to show that the law is not rationally related to a legitimate government objective.¹¹⁶ There is extreme deference accorded to the government within challenges made under rational basis, but under each standard the government has certain requirements it must satisfy.¹¹⁷

c. Does the Government Action Meet the Level of Scrutiny?

Within this prong, courts shall analyze and evaluate both the means and the end to determine if the law satisfies the applicable level of scrutiny.¹¹⁸ In doing so, the focal point of the analysis is the applicable level of scrutiny, which serves as the analytical guidepost and overarching rule of law for the challenge.¹¹⁹ Courts shall determine whether the end is compelling, important, or legitimate and whether the means are necessary and least restrictive, substantially related, or rationally related—depending on the level of scrutiny.¹²⁰ The applicable standard can be determinative in addressing the adequacy and legality of a challenged law.¹²¹

A determination of the applicable level of scrutiny is equally vital in a due process claim.¹²² Due process requires the government to have an adequate reason and to employ proper procedures when

115. See *id.* at 714 (“Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet.”).

116. See *id.*; see also Skaggs, *supra* note 101, at 1172 (referring to rational basis as the “so-called traditional approach”).

117. See CHEMERINSKY, *supra* note 92, at 714; see also Sandefur, *supra* note 89, at 160 (explaining that the leniency of the rational basis standard has permitted the government to enact irrational laws).

118. See CHEMERINSKY, *supra* note 92, at 715. An analysis is entirely different under all levels of scrutiny. See *id.*

119. See *id.*; see also Galloway, *supra* note 110, at 449-50 (“Means-end scrutiny is . . . the most common and important form of constitutional analysis. To grasp how means-end scrutiny works, one must understand the components of levels of the process.”).

120. See CHEMERINSKY, *supra* note 92, at 716; see also Galloway, *supra* note 110, at 449 (“Means-end scrutiny is an analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes.”).

121. See CHEMERINSKY, *supra* note 92, at 712; see also Galloway, *supra* note 110, at 449 (“Means-end scrutiny is a systematic method for evaluating the sufficiency of the government’s justification for its conduct.”).

122. See CHEMERINSKY, *supra* note 92, at 938.

infringing upon or restricting a fundamental right or constitutionally protected liberty interest.¹²³ While the four-question due process framework differs from the equal protection framework, much of the substance overlaps in both analyses.¹²⁴

2. Due Process Framework

The Due Process Clause is broken up into two categories: substantive due process and procedural due process.¹²⁵ Substantive due process queries whether the government has an adequate reason to deprive an individual of life, liberty, or property.¹²⁶ It requires the government to provide ample justification that the infringement upon the fundamental right at issue is adequately related to a sufficient justification.¹²⁷ Conversely, procedural due process denotes the proper procedures that the government shall follow when it does deprive an individual of life, liberty, or property.¹²⁸ The focal point of procedural due process tends to be the kind of notice and the type of a hearing that the government shall provide when it deprives an individual of life, liberty, or property.¹²⁹ Due process is generally the

123. See *id.* at 603, 935; see also Russell W. Galloway, *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625-26 (1992) (indicating that substantive due process came around in the late 1800s after the Supreme Court concluded that “deprivations of life, liberty, or property be substantively reasonable”).

124. See *supra* note 92 and accompanying text.

125. See CHEMERINSKY, *supra* note 92, at 603.

126. See *id.*; see also Sandefur, *supra* note 89, at 148 (“When a government action does not meet the[] standards, that action does not qualify as ‘law,’ and thus to enforce it in a way that deprives individuals of life, liberty, or property would by definition deprive them of these rights without due process of law.”).

127. See CHEMERINSKY, *supra* note 92, at 935. Substantive due process is the focal point of this Comment.

128. See *id.* at 603; see also *Due Process*, LEGAL INFO. INST. (LII), https://www.law.cornell.edu/wex/due_process [<https://perma.cc/DZ3K-AFYA>] (last visited Oct. 9, 2017).

129. See CHEMERINSKY, *supra* note 92, at 603; see also *Due Process*, *supra* note 128:

The clause also promises that before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting. Action denying the process that is ‘due’ would be unconstitutional.

Id.

best constitutional basis to challenge a law that denies a right to all individuals equally.¹³⁰

A due process analysis consists of four questions.¹³¹ First, does a fundamental right exist?¹³² If a right is deemed fundamental, the government must satisfy a strict scrutiny analysis in order to prevail.¹³³ However, rational basis—which is fairly easy for the government to satisfy—is generally applied when fundamental rights are not at issue.¹³⁴ Second, is the constitutional right infringed?¹³⁵ The infringement, however, must be more than minimal—it must be both direct and substantial.¹³⁶ Third, is there a sufficient justification for the government’s infringement of the right?¹³⁷ When a right has been deemed fundamental, there must be a valid, compelling governmental purpose for its infringement, which may be satisfied by the government showing that the law is essential.¹³⁸ Lastly, is the means sufficiently related to the purpose?¹³⁹ The analysis under this question depends upon the level of scrutiny that is triggered: The

130. See CHEMERINSKY, *supra* note 92, at 935.

131. See *id.* at 936. (“Litigation and judicial decision making in cases about individual rights can be understood as addressing one or more of four questions.”)

132. See *id.* at 936. A major aspect of the constitutional interpretation debate stems from how the Supreme Court should decide what a fundamental right is and whether non-textual rights should be deemed fundamental. See *id.*

133. See *id.* (“If a right is deemed fundamental, the government usually will be able to prevail only if it meets strict scrutiny.”)

134. See *id.* Courts generally defer to the lawmakers, but deference is not accorded where “there is discrimination against a ‘discrete and insular’ minority” or where a fundamental right is infringed. *Id.*

135. See *id.* at 937-38. A telltale sign of constitutional right infringement is if the right is prohibited. See *id.* at 938.

136. See *id.* at 938. Interestingly, the Supreme Court has given little direction about what constitutes a direct and substantial infringement. See *id.*; see also *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”)

137. See CHEMERINSKY, *supra* note 92, at 938. Like the direct and substantial requirement in question two, the Supreme Court has provided little to no direction about what constitutes a compelling purpose. See *id.*

138. See *id.* There is no clear directive for what constitutes a compelling interest. See *id.* However, an example of the stringency of the compelling interest requirement was articulated in *Korematsu v. United States*, where the government’s harsh actions against Japanese Americans was justified by national security and wartime necessity. 323 U.S. 214, 218 (1944).

139. See CHEMERINSKY, *supra* note 92, at 938. The fourth question requires a government showing that the challenged law is absolutely necessary to achieve the law’s ultimate objective. See *id.*

government must make a stringent showing that the law is necessary pursuant to strict scrutiny, whereas it only has to prove that the law is reasonable under rational basis review.¹⁴⁰

Both Equal Protection and Due Process are imperative in safeguarding vital constitutional liberties.¹⁴¹ Both clauses not only hold the government accountable when it infringes upon fundamental rights, but also have granted and will continue to safeguard some of the most vital individual liberties enjoyed by people within the United States.¹⁴² While the evolution of homosexual rights owes much of its current state to both of these clauses, there are certain aspects of same-sex couples' lives that have yet to be discussed and litigated—such as the inability to obtain biological parenthood due to structural infertility—which seemingly fits into the existing family and reproductive autonomy protections.¹⁴³

3. *Relevant Decisions Pertaining to Family and Reproductive Autonomy*

The Supreme Court recognizes the intrinsic importance of family and reproductive autonomy, which is evidenced by its continuous protection of the categorically related liberties and interests.¹⁴⁴ Additionally, while sexual orientation has yet to be expressly held as a protected class, the Supreme Court has implicitly foreshadowed the potential of its inclusion.¹⁴⁵ Furthermore, the

140. *See id.* at 938-39:

This requires that the government prove that it could not attain the goal through any means less restrictive of the right. In comparison, under rational basis review, the means only has to be a reasonable way to achieve the goal and the government is not required to use the least restrictive alternative.

Id.

141. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

142. *See, e.g., id.* at 2597, 2603 (discussing how the Equal Protection and Due Process Clauses have protected individual liberties and how both clauses are an integral part in safeguarding the ever-evolving societal liberties).

143. *See infra* Subsection I.C.3.

144. *See* CHEMERINSKY, *supra* note 92, at 939-61, 967-1000 (discussing the protections within the family autonomy and reproductive autonomy categories).

145. *See* *Lawrence v. Texas*, 539 U.S. 558, 567-70 (2003) (focusing on homosexual autonomy in making particular choices about the intimate conduct the individual participates in); *see also* Barbara B. Hill, *The Hunkiest Little Whorehouse in Town Is Looking for a Few Good Men, but Only to Work: The Constitutional Implications of Heidi Fleiss's Female Brothel*, 14 VILL. SPORTS & ENT. L.J. 77, 95

Supreme Court has stated that laws may not discriminate against an unpopular group of people based on such things as immutability, political powerlessness, and history of discrimination.¹⁴⁶ That tenet served as the basis for the Supreme Court's decision in *Romer v. Evans*, which invalidated a law that singled out homosexual persons and impermissibly discriminated against them because they were an unpopular group.¹⁴⁷ However, the Supreme Court has explicitly deemed four aspects of family autonomy as fundamental rights, including the right to marry,¹⁴⁸ the right to custody of one's children,¹⁴⁹ the right to keep one's family together,¹⁵⁰ and the right of parents to control the upbringing of their children.¹⁵¹ Collectively, the family autonomy cases stand for the principle that parents receive the

(2007) (stating that *Lawrence* may be interpreted as establishing homosexuals as a protected class); Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249, 1278 ("In some courts, classifications based on sexual orientation appear to have triggered a level of scrutiny in equal protection analysis that lies somewhere between rational basis review and intermediate scrutiny."). The analysis in the *Lawrence* decision focused on homosexual intimacy and stated that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." 539 U.S. at 567. The reasoning was that "intimate, personal choices, like those related to sexual intimacy, are central to an individual's dignity, autonomy, and liberty." Hill, *supra* note 145, at 95. Additionally, the Supreme Court highlighted that relationship autonomy lies at the core of an individual's freedom of choice, which shall exist absent fear of being punished for it. *See id.* at 95-96.

146. *See* CHEMERINSKY, *supra* note 92, at 714 ("[T]he Court has emphasized that immutable characteristics . . . warrant heightened scrutiny [because] [t]he notion is that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change.").

147. *See* 517 U.S. 620, 635 (1996) (invalidating a Colorado state statute that discriminated against homosexual persons and prevented laws or policies from granting them any preferential treatment or from asserting claims of discrimination).

148. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that a restriction on the freedom to marry runs afoul of Equal Protection).

149. *See* *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (finding that the denial of a parent's custody rights offends Equal Protection); *see also* *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (stating that a "natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property right") (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

150. *See* *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (establishing that the choice of relatives to live together, notwithstanding the degree of kinship, is a fundamental right pursuant to due process).

151. *See* *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (finding that parents retain the liberty to make decisions regarding the upbringing of their own children).

utmost reverence when it comes to all aspects of their children's lives and that the Constitution would be offended if parents' associated rights to their children were infringed without substantial reason.¹⁵²

Additionally, the Supreme Court has designated three aspects of reproductive autonomy—the right to purchase and use contraceptives,¹⁵³ the right for a woman to choose abortion,¹⁵⁴ and the right to procreate¹⁵⁵—as fundamental rights.¹⁵⁶ Particularly, the eminence of the right to procreate was recognized in the early 1940s in *Skinner v. Oklahoma*.¹⁵⁷ In *Skinner*, the Supreme Court utilized equal protection framework to invalidate an Oklahoma sterilization law and arrive at the holding that procreation is a fundamental right.¹⁵⁸ The Supreme Court stated that the Oklahoma law prevented

152. See CHEMERINSKY, *supra* note 92, at 946; see also *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (Stewart, J., concurring in judgment) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977)):

We have little doubt that the Due Process Clause would be offended “[i]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.

Id. See also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”).

153. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that the implicit right to privacy safeguards the right to use contraceptives); see also *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (extending the right to purchase and use contraceptives to all persons, both married and unmarried).

154. See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (holding that women have the fundamental right to choose abortion); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 878-79 (1992) (reaffirming the essential holding of *Roe* that women have the right to choose abortion, but overruling the trimester framework and narrowing the pertinent aspects of an abortion decision).

155. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that procreation is fundamental to the subsistence of mankind). *But see* *Buck v. Bell*, 274 U.S. 200, 207-08 (1927) (ruling that the sterilization of certain mentally handicapped individuals who may produce defective offspring is allowed, as it safeguards the general welfare of society). While *Buck* has never explicitly been overruled, *Skinner* can be said to implicitly do so. See CHEMERINSKY, *supra* note 92, at 969.

156. See CHEMERINSKY, *supra* note 92, at 967. However, for the purpose of this Comment, the reproductive autonomy focus shall be the right to procreate.

157. See 316 U.S. at 541 (holding that the right to procreate is a fundamental right). Consequently, *Skinner* also requires that involuntary, government mandated sterilizations receive a strict scrutiny analysis. See *id.* at 541.

158. See *id.* at 538.

the continuation of the human race by restricting who could and could not produce offspring.¹⁵⁹ According to the Supreme Court, the Oklahoma law had the effect of unequally punishing some criminals over others with a nuanced loophole in the law, which runs afoul of both human decency and the Equal Protection Clause.¹⁶⁰ Therefore, the Court further highlighted that not only marriage,¹⁶¹ but also procreation, are fundamental rights because of their intrinsic importance to the maintenance of mankind.¹⁶²

Summarily, the journey that the homosexual community had to endure to achieve equal rights to marriage provides erudition into the unjust imbalance of rights accorded to individuals based on sexual orientation.¹⁶³ However, the interpretation of the Fourteenth Amendment's Equal Protection and Due Process Clauses has and will continue to correct marital and societal inequities.¹⁶⁴ The Fourteenth Amendment is already credited with the declaration of marriage, procreation, and childbearing as fundamental rights.¹⁶⁵ Yet, procreation and childbearing are not as easily attainable for the homosexual community as they are for the heterosexual community.¹⁶⁶ Luckily, with the assistance of ART treatments,¹⁶⁷ family formation is still plausible; thus, examination of the available

159. See *id.* at 536. The Oklahoma act in question was titled the Oklahoma's Habitual Criminal Sterilization Act, which essentially allowed the state to sterilize individuals who met the state's definition of habitual criminal. See *id.* That is, any person who was convicted of two or more felonies concerning "moral turpitude." *Id.*

160. See *id.* at 541 ("But the instant legislation runs afoul of the equal protection clause.").

161. See generally *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that marriage is a fundamental right pursuant to Due Process).

162. See *Skinner*, 316 U.S. at 536 (discussing the importance of procreation in maintaining the human race).

163. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596-98 (2015) (discussing the pertinent cases involved in the evolution of marital equality for same-sex couples). See generally *ABRAMS ET. AL.*, *supra* note 28, at 89-92 (illuminating the evolution of same-sex couples' rights under the law).

164. See *Obergefell*, 135 S. Ct. at 2597, 2603 (detailing the uses of the Equal Protection and Due Process Clauses); Sandefur, *supra* note 89, at 148-56 (explaining the uses of substantive due process generally); Smolin, *supra* note 91, at 993-94 (discussing the corresponding uses of the Equal Protection and Due Process Clauses); *Equal Protection*, *supra* note 90 (explaining Equal Protection protections and the general applicability of the Clause).

165. See *supra* notes 148, 157-158 and accompanying text.

166. This is attributable to structural infertility and the associated economic barriers created by ART. See sources cited *supra* note 10.

167. See *Jacoby*, *supra* note 10, at 149 (explaining ART and how it can be used in the homosexual community).

ART treatments and their associated costs—which may or may not be covered by insurance—is imperative to understanding how same-sex couples can overcome their structural infertility barrier.¹⁶⁸

II. INFERTILITY AND INSURANCE OPTIONS

ART provides alternatives to procreation through scientific technology, and its usage and demand are nearly immeasurable.¹⁶⁹ Same-sex couples, both gay and lesbian, have a variety of infertility treatment options available to them, but the necessary expenditures associated with the treatments place a substantial encumbrance upon those options.¹⁷⁰ Yet, despite the available ART options, structural infertility combined with the high cost of the procedures exposes the degree of difficulty same-sex couples face in obtaining biological parenthood.¹⁷¹ However, that difficulty is further exacerbated by the lack of insurance options available to same-sex couples, which supplements the existing economic and social reasons why same-sex couples currently face unconquerable barriers to biological parenthood.¹⁷²

A. Structural Infertility, ART, and Associated Statistical Data

The term structural infertility denotes an operative barrier to biological procreation due to the scientific incompatibility of reproductive organs.¹⁷³ This term is used to define the immutable infertility that same-sex couples experience.¹⁷⁴ Because there is

168. See David Orentlicher, *Beyond Cloning: Expanding Reproductive Options for Same-Sex Couples*, 66 BROOK. L. REV. 651, 651-54 (2000) (discussing the applicability of ART treatments for same-sex couples to achieve family life).

169. See generally Jacoby, *supra* note 10 (explaining what ART is and how it is necessary to assist the parenthood market).

170. See I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 486 (2010) (explaining ART procedures and their associated costs).

171. See Jacoby, *supra* note 10, at 140-50. Even with these barriers, though, couples frequently exhaust all options to achieve “what to them is irreplaceable.” *Id.*

172. See Aloni & Daar, *supra* note 11, at 23-24 (“The hope that marriage equality will adjust existing inequalities in family formation through the use of ART is dashed by a spate of existing laws that structurally preempt inclusion of same-sex couples.”).

173. See Jacoby, *supra* note 10, at 149 (explaining that structural infertility affects those who do not participate in heterosexual intercourse).

174. See *supra* notes 10-11 and accompanying text.

currently no way around structural infertility, same-sex couples are conscripted into employing ART procedures to accomplish biological parenthood.¹⁷⁵

ART was developed in the latter portion of the twentieth century and, since 1978, has facilitated pregnancies for individuals who struggle with infertility.¹⁷⁶ ART is a term that encompasses a multitude of alternative measures, separate and apart from sexual intercourse, that result in conception.¹⁷⁷ By its very definition, ART serves as a substitute for conventional procreation, acting as a proxy for “reproductive systems that are either broken . . . or absent.”¹⁷⁸ Therefore, ART allows for the creation of families that otherwise may not exist and affords medically and structurally infertile individuals and families the prospect of parenthood.¹⁷⁹ Same-sex couples face infertility based upon their unassailable and immutable

175. See Orentlicher, *supra* note 168, at 653. While scientific technology is continuously changing, there are no other options for same-sex couples to achieve biological parenthood. See *id.* However, if same-sex couples could achieve biological parenthood, it may reduce the stigmatism associated with homosexual parenting. See *id.*

176. See *Assisted Reproductive Technology*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), <http://www.cdc.gov/art/index.html> [<https://perma.cc/XFV4-UUMP>] (last visited Oct. 9, 2017); see also *Assisted Reproductive Technology (ART) Timeline*, <http://www.artparenting.org/about/> (last visited Oct. 9, 2017). The first baby born via IVF occurred in England in 1978, but the first baby conceived via IVF in the United States was in 1981 in Norfolk, Virginia. See *id.*

177. See JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 474 (LexisNexis 2d ed. 2013) (“Assisted reproductive technologies, by definition, involve the separation of sexual intercourse and human conception.”); see also Noah Baron & Jennifer Bazzell, *Fifteenth Annual Gender and Sexuality Law: Annual Review Article: Assisted Reproductive Technologies*, 15 *Geo. J. Gender & L.* 57, 58 (2014) (“Assisted reproductive technologies involve combining sperm with ova that have been surgically removed from a woman’s body and returning the fertilized eggs to the woman’s body or donating them to another woman.”).

178. See DAAR, *supra* note 177, at 474.

179. See *id.*

Thus, ART opens up the prospect of parenthood not just to those who meet the clinical definition of infertility, but to those whose family structure is something other than a heterosexual couple. [S]ame-sex couples can look to ART to enable them to become parents, often fulfilling a dream of biological parenthood that was simply unavailable a generation ago.

characteristics; thus, same-sex couples must employ ART to facilitate biological parenthood and familial life.¹⁸⁰

ART is in high demand as of late. In 1996, the Center for Disease Control (CDC) began accumulating infertility treatment data from all fifty states, the District of Columbia, and Puerto Rico.¹⁸¹ In a 2008 study, 38,496 of the 2.7 million infants born in the United States were conceived via some form of ART.¹⁸² In 2013, the CDC confirmed that 190,773 ART procedures were performed in that year and that 1.6% of all children born in the United States during 2013 were conceived using some form of ART.¹⁸³ In 2014, the CDC confirmed that 208,604 ART procedures were performed, which yielded 57,323 live births.¹⁸⁴ The following year, an additional 17,857 ART procedures were performed, generating another 1.6% of children born in the United States in 2014.¹⁸⁵ However, there is a notable incongruity between the supply and demand for ART services—as the usage of ART is still a rarity in comparison to its need.¹⁸⁶

According to census data collected in 2010, there were 646,464 same-sex couples in the United States, of which 131,729 were

180. See *id.* (“[S]ame-sex couples can look to ART to enable them to become parents, often fulfilling a dream of biological parenthood that was simply unavailable a generation ago.”).

181. See Saswati Sunderam, *Assisted Reproductive Technology Surveillance*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6411a1.htm> [<https://perma.cc/6E59-6NV2>] (last visited Oct. 9, 2017).

182. See *ABA Approves Model Act for Assisted Reproduction Agencies*, INT’L FERTILITY L. GROUP (IFLG), <https://www.iflg.net/aba-art-agencies-model-act> [<https://perma.cc/72MG-VLSU>] (last visited Oct. 9, 2017); see also Richard B. Vaughn, *Model Act Governing Assisted Reproductive Technology*, A.B.A., <https://apps.americanbar.org/family/committees/artmodelact.pdf> [<https://perma.cc/WP6S-9GGD>] (last visited Oct. 9, 2017).

183. See generally Sunderam, *supra* note 181.

184. See *National Data 2014*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&ClinicId=9999&ShowNational=1 [<https://perma.cc/3SS7-JY64>] (last visited Oct. 9, 2017).

185. See *id.*

186. See *id.*; see also Jacoby, *supra* note 10, at 149. If states utilized their regulatory powers to mandate infertility insurance coverage, or if the federal government did so on its own, there would be a significant increase in individuals who employ ART and, therefore, achieve their dream of biological parenthood. See *id.* at 151-53.

married and 514,735 were unmarried.¹⁸⁷ As of 2013, the number of married same-sex couples nearly doubled—totaling 251,695.¹⁸⁸ And as of 2015, there are an estimated nine million lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals in the United States alone.¹⁸⁹ Additionally, increasing numbers of same-sex couples are employing ART to fulfill their desire to have a family.¹⁹⁰ Therefore, infertility insurance coverage for all ART treatments is increasingly important for same-sex couples.¹⁹¹

B. Available ART Options

There are a multitude of ART treatment options available to facilitate biological parenthood.¹⁹² One of the most prevalent treatment options is In-vitro Fertilization (IVF), which encompasses four stages to complete the procedure.¹⁹³ The first step requires a female to be administered ovulation-stimulating hormones, which cause egg-containing follicles to mature, allowing for an abundance of eggs to be collected for the purpose of one IVF cycle.¹⁹⁴ Next, prior to ovulation, the harvested eggs are surgically removed using a minimally invasive procedure.¹⁹⁵ Then, the sperm and the egg are

187. See DAAR, *supra* note 177, at 474. Lesbian same-sex couples account for 51% of the homosexual couple total, while male same-sex couples make up the remaining 49%. See *id.*

188. See Amy Roberts & Caitlin Stark, *By the Numbers: Same-Sex Marriage* (June 12, 2015, 7:13 PM), <http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage> [<https://perma.cc/PZ6Q-BUDB>].

189. *Id.*

190. See Ikemoto, *supra* note 10, at 1055, & n.170 (“[L]esbians and gay men do use procreative technologies to become parents.”).

191. See *id.* at 1055-56. Male and female same-sex couples both procreate through ART. See *id.* Thus, “mandated, or otherwise-expanded, insurance coverage resolves financial-access questions.” Jacoby, *supra* note 10, at 155.

192. See generally Baron & Bazzell, *supra* note 177, at 58 (discussing the various forms of ART treatment options).

193. See Cohen & Chen, *supra* note 170, at 490. IVF had its first success in 1978 in Oldham, England. See *id.*; see also Baron & Bazzell, *supra* note 177, at 58 (“IVF is the dominant form of ART.”).

194. See Cohen & Chen, *supra* note 170, at 490-91 (“First, the woman who will provide eggs is administered ovulation-stimulating hormones, which cause multiple egg-containing follicles to mature so that up to several dozen eggs can be harvested in a single treatment cycle.”).

195. See *id.* at 491 (“Second, just prior to ovulation the eggs are removed by a minor surgical procedure; today this is usually done by an ultrasound-guided needle inserted through the vaginal wall into a developed ovarian follicle through which, by suction, the egg is harvested.”).

combined in a culture dish, which is examined throughout the next twenty-four hours to determine if fertilization ensued.¹⁹⁶ Lastly, if the fertilization was successful, physicians attempt implantation of four or eight embryos after a two to three day waiting period.¹⁹⁷ The woman is then requested to administer a pregnancy test within ten to fourteen days to see if the procedure was successful.¹⁹⁸

Another infertility treatment option available is Gamete Intrafallopian Transfer (GIFT), which is a variant of IVF.¹⁹⁹ GIFT involves direct placement of an unfertilized egg and viable sperm into the fallopian tubes instead of into the uterus, resulting in the fertilization inside of the woman's body.²⁰⁰ Conversely, Zygote Intrafallopian Transfer (ZIFT) involves the direct placement of a pre-fertilized egg into the fallopian tubes instead of the uterus; thus, fertilization is already complete prior to implantation.²⁰¹

Alternatively, Intracytoplasmic Sperm Injection (ICSI) involves a minor procedure where a physician utilizes a micro-needle to inoculate a solitary sperm into the middle of the unfertilized egg.²⁰² The now-fertilized egg is then left to develop in a laboratory for a period of one to five days before it is ultimately implanted into a woman's uterus.²⁰³ Another option is Artificial Insemination (AI) or Intrauterine Insemination (IUI), which encompasses any method of manual sperm insertion into the uterus to facilitate fertilization.²⁰⁴

196. *See id.* ("Third, sperm is introduced into individual culture dishes, each of which contains a culture medium and one egg with the culture dish monitored after the first day to determine if fertilization occurs.").

197. *See id.* ("Finally, if fertilization occurs, the preembryos are allowed to mature in the medium, usually for two to three days after egg retrieval, until the preembryos reach the four or eight cell stage when some or all of them are transferred into the woman's uterus to attempt implantation.").

198. *See id.* ("Ten to fourteen days after transfer, the woman will undergo a pregnancy test to determine if the transfer was successful."). Frozen eggs can be used in IVF as well. *See id.*

199. *See* Baron & Bazzell, *supra* note 177, at 58-59.

200. *See id.* ("In GIFT, unfertilized eggs and sperm are placed in the fallopian tube and fertilization occurs inside of the body.").

201. *See id.* ("ZIFT, on the other hand, involves placement of a pre-fertilized egg in the fallopian tubes.").

202. *See id.* ("In ICSI, a doctor uses a small needle to inject a single sperm into the center of an egg").

203. *See id.* ("[T]he fertilized egg grows in a laboratory for one to five days before being placed in the woman's uterus.").

204. *See id.* AI is a broad term that denotes the general method of manual insertion of sperm into a woman. *See id.*; *see also* *Infertility FAQs*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), <http://www.cdc.gov/reproductivehealth/infertility/> [<https://perma.cc/KN8Y-9TS7>] (last visited Oct. 9, 2017).

Yet another infertility treatment option is surrogacy.²⁰⁵ There are two methods of surrogacy—traditional and gestational.²⁰⁶ Traditional surrogacy involves a female who serves as the egg donor and carrier and undergoes insemination with the intended father’s sperm.²⁰⁷ Conversely, gestational surrogacy involves a female who serves as the carrier for a third-party and uses the third-party’s egg instead of her own.²⁰⁸ Therefore, the main difference hinges upon whether there is a genetic tie between the carrier and the embryo.²⁰⁹

The cost associated with ART varies depending on the elected procedures.²¹⁰ Infertile individuals are faced with a vast array of out-of-pocket expenses that cause some to sink into debt.²¹¹ Illustratively, a single round of IVF ranges from \$12,000 to \$12,400.²¹² GIFT and ZIFT procedures range from \$15,000 to \$20,000,²¹³ while ICSI is an additional \$1,500 to the cost of IVF, thus totaling \$13,500 to

205. See Baron & Bazzell, *supra* note 177, at 58.

206. See *id.* at 59.

207. See *id.* Traditional surrogacy, which is commonly known as donor egg or embryo IVF, involves a female egg donor who is inseminated with sperm from the intended father, and if fertilization ensues, that female egg donor carries the pregnancy to term. See *id.*

208. See *id.* (“In gestational surrogacy, the gestational mother carries a donated, fertilized egg, sometimes from a donor different from the gestational mother and sometimes from the woman who intends to raise the child.”); see also Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL’Y 353, 360 (2011) (“Surrogacy is a method of childbearing that can be used to circumvent . . . structural infertility for gay . . . men.”).

209. See Baron & Bazzell, *supra* note 177, at 59 (“The distinction between the two types of surrogacy is that in traditional surrogacy, the woman carrying the fertilized embryo uses her own egg and also carries the baby. A gestational surrogate has no genetic link to the child.”).

210. See *infra* notes 211-216 and accompanying text.

211. See Kimberly Leonard, *Who has the Right to Build a Family?*, US NEWS (Aug. 15, 2016, 12:01 AM), <http://www.usnews.com/news/articles/2016-08-15/same-sex-infertility-case-exposes-lack-of-access-to-reproductive-treatment> [https://perma.cc/Q3K2-8MY2] (last visited Oct. 9, 2017).

212. See Cohen & Chen, *supra* note 170, at 486. However, the average total cost projection for In-vitro fertilization is estimated to be \$66,667 to \$114,286, as producing a live birth through the IVF treatment requires multiple cycles. See *id.*; see also *Fertility Treatment: Getting Started*, BABYCENTER, http://www.babycenter.com/0_fertility-treatment-getting-started_4089.bc [https://perma.cc/S93C-KR7W] (last visited Oct. 9, 2017).

213. See *Gamete and Zygote Intrafallopian Transfer (GIFT and ZIFT) for Infertility*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/gamete-and-zygote-intrafallopian-transfer-gift-and-zift-for-infertility> [https://perma.cc/2REU-W9F2] (last visited Oct. 9, 2017).

\$13,900.²¹⁴ The least expensive procedure is AI where a partner's sperm versus donor sperm is used.²¹⁵ The estimated range for gestational and traditional surrogacy is between \$50,000 and \$100,000, but the costs associated with surrogacy vary significantly depending on corresponding legal fees, contract fees, medical fees, monthly surrogate stipends, and other miscellaneous variables.²¹⁶ Additionally, donor eggs can cost an additional \$15,000 to \$20,000, so that additional cost must be factored in to procedures where a third-party egg is necessary.²¹⁷ Therefore, since all ART procedures carry an associated cost, many who seek ART treatments also seek alternative financing, like insurance.²¹⁸

C. Applicable Infertility Insurance Legislation and Statutes

The federal government and various states have recognized the financial impact that infertility treatments have on individuals and families.²¹⁹ In response, some enacted mandates for insurance companies to provide for or offer infertility insurance coverage.²²⁰

214. See *Fertility Treatment: Intracytoplasmic Sperm Injection (ICSI)*, BABYCENTER, http://www.babycenter.com/0_fertility-treatment-intracytoplasmic-sperm-injection-icsi_4097.bc [<https://perma.cc/4ATU-E3WP>] (last visited Oct. 9, 2017).

215. See *Fertility Treatment: Intrauterine Insemination (IUI)*, BABYCENTER, http://www.babycenter.com/0_fertility-treatment-intrauterine-insemination-iui_4092.bc [<https://perma.cc/G4G5-79H5>] (last visited Oct. 9, 2017).

216. For a detailed breakdown of the potential costs associated with surrogacy, see *Services and Fees*, SIMPLE SURROGACY, <https://www.simplesurrogacy.com/service-fees/> [<https://perma.cc/Z6JS-726K>] (last visited Oct. 9, 2017); see also Cohen & Chen, *supra* note 170, at 486; Leonard, *supra* note 211 (stating that couples face legal issues when they use sperm or eggs from friends or acquaintances). See generally Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1137 (2004) (discussing the financial implications of ART procedures, like surrogacy).

217. See Pratt, *supra* note 216, at 1136. Adoption is an alternative to natural procreation that allows individuals to achieve parenthood. See Cohen & Chen, *supra* note 170, at 493. However, adoption is not a form of ART and is therefore beyond the scope of this Comment.

218. See Jacoby, *supra* note 10, at 152-53. However, the majority of people do not have access to infertility insurance. See *id.* at 152.

219. See *id.* And if more states provided coverage, more couples could be parents. See *id.*

220. See generally *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. ST. LEGISLATURES (NCSL), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> [<https://perma.cc/64UW-282G>] (last visited Oct. 9, 2017) (summarizing the state statutes that mention any degree of infertility insurance coverage). Also, the federal government enacted the ACA,

However, not all states have removed the heteronormative language within their statutes to broaden the range of qualified recipients.²²¹

The inclusion of infertility insurance coverage in a private health insurance plan hinges upon whether governing state law requires insurers to provide some form of infertility coverage.²²² Fifteen of fifty states currently require insurance coverage, or at least the offering of coverage for infertility services, generally.²²³ However, only two of those fifteen states—California and Maryland—have amended their statutes to include language allowing same-sex couples the ability to obtain coverage as well.²²⁴ The remaining states denote either heterosexual exclusivity or create an ambiguous statutory construction that neither mentions nor excludes homosexuals or heterosexuals.²²⁵

1. *The Homosexually Inclusive State Statutes: California and Maryland*

California and Maryland explicitly provide for infertility insurance in their state statutes; thus, they are the only two homosexually inclusive states out of the fifteen that provide for infertility insurance.²²⁶ Particularly, in 1990, California passed a bill to amend its current insurance statute to include a mandate that all

which mandates that insurance coverage and available medical treatments that are offered to heterosexual couples must also be offered to same-sex couples. *Health Care Coverage Options for Same-Sex Couples*, *supra* note 18. The ACA is commonly referred to as “Obamacare.” *See id.*; *see also* Leonard, *supra* note 211 (stating that infertility treatment was contemplated in the original drafting of the ACA but was eventually eliminated in the final draft).

221. *See generally* NCSL, *supra* note 220. This is notwithstanding the ACAs directive. *See id.*

222. *See generally* Jacoby, *supra* note 10, at 152. However, many are critical about insurance mandates. *See id.* at 152-53. It is difficult to get people on board with mandated infertility insurance coverage because of associated costs, but also because couples may employ ART where they otherwise would not. *See id.* at 153. Yet, many people who support providing infertility insurance consider it an aspect of the reproductive autonomy safeguarded by the Constitution. *See id.*

223. For a detailed synopsis of various state infertility statutes—Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas, and West Virginia—see Blake, *supra* note 11, at 663-64, 664 n.67.

224. *See generally* NCSL, *supra* note 220 (providing summaries of all state insurance statutes that mention infertility coverage).

225. *See id.*

226. *See id.*

insurance providers must offer infertility insurance coverage.²²⁷ As the law currently stands, all insurers must offer infertility treatment coverage, but IVF is exempt from the mandate.²²⁸ In 2013, the California legislature passed an amendment stating that individuals who elect to purchase the option of infertility insurance coverage shall be provided the insurance and the care without discrimination based on, among other characteristics, domestic partner status or sexual orientation.²²⁹ The inclusion of this subsection specifically disallows the exclusion of same-sex couples.²³⁰ Furthermore, California's insurance code provides for criminal consequences for anyone who willfully violates the insurance code; thus, denying coverage or care based upon domestic partner status or sexual orientation can constitute a crime under California law.²³¹

The definition of infertility denoted in the California statute, however, still reads like the common definition, as it requires a physician-verified condition as a cause of infertility or unsuccessful conception or live birth after at least one year of regular, unprotected sexual intercourse.²³² While this language is the familiar,

227. See A.B. 460, 2013 Gen. Assemb. (Cal. 2013); see also CAL. HEALTH & SAFETY CODE § 1374.55 (West 2013); INS. CODE § 10119.6(a).

228. See INS. CODE § 10119.6(a) (“On and after January 1, 1990, every insurer issuing, renewing, or amending a policy of disability insurance that covers hospital, medical, or surgical expenses on a group basis shall offer coverage of infertility treatment, except in vitro fertilization.”).

229. See INS. CODE § 10119.6(g).

Consistent with Section 10140, coverage for the treatment of infertility shall be offered and, if purchased, provided without discrimination on the basis of age, ancestry, color, disability, domestic partner status, gender, gender expression, gender identity, genetic information, marital status, national origin, race, religion, sex, or sexual orientation. Nothing in this subdivision shall be construed to interfere with the clinical judgment of a physician and surgeon.

Id.

230. See *id.*

231. See Assemb. B. 460, Reg. Sess. (Ca. 2013) (stating that a willful violation of the insurance code is a crime); see also HEALTH & SAFETY CODE § 1374.55. However, California's insurance code exempts IVF coverage. See *id.* Importantly, states that offer, instead of mandate, infertility insurance coverage could provide loopholes in employer-provided healthcare plans for the employer to select less-expensive plans that do not include infertility coverage. See generally Leonard, *supra* note 211.

232. See INS. CODE § 10119.6(b).

For purposes of this section, “infertility” means either (1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual

heteronormative language found in the majority of state insurance codes, the addition of the language in the 2013 amendment seemingly prevents same-sex discrimination, as it forbids discrimination based on sexual orientation or domestic partner status.²³³ While the definition of infertility included in the statute does not carve out an exception for same-sex couples or define homosexual intercourse, at least the elective coverage shall be offered for purchase and cannot be denied to individuals based upon their domestic partner status or sexual orientation.²³⁴ That being said, the infertility definition does require “regular sexual relations,” which offers two potential interpretations, since “regular” could mean consistent, or “regular” could mean conventional, heterosexual intercourse.²³⁵ However, upon examination of the legislative history, a committee report reveals that an example of infertility discrimination would be a denial of coverage grounded in an individual or a couple not having an opposite sex partner with whom they have regular sexual intercourse.²³⁶

Similarly, in 2015, Maryland amended its insurance code to forbid discrimination against same-sex couples in infertility insurance statutes.²³⁷ The amendment prohibits entities from

relations without contraception. “Treatment for infertility” means procedures consistent with established medical practices in the treatment of infertility by licensed physicians and surgeons, including but not limited to, diagnosis, diagnostic tests, medication, surgery, and gamete intrafallopian transfer. “In vitro fertilization” means the laboratory medical procedures involving the actual in vitro fertilization process.

Id.

233. See *id.*; see also INS. CODE § 10119.6(b), (g).

234. See INS. CODE § 10119.6(g).

235. See *Regular*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016).

236. See A.B. 460, 2013 Gen. Assemb. (Cal. 2013).

The author argues that an example of how the current nondiscrimination laws are not being adhered to is when an individual or couple are unable to conceive and attempt to access their infertility coverage and are denied based on not having an opposite sex married partner with whom to have one year of regular sexual relations without conception. The author concludes that there are many insurers who currently cover all their insured with infertility coverage in their plan and this bill does not affect insurers who are in compliance with existing nondiscrimination laws.

Id.

237. See Michelle Andrews, *Maryland Revamps Its In Vitro Coverage Mandate to Accommodate Same-Sex Couples*, KAISER HEALTH NEWS (July 10, 2015), <http://khn.org/news/maryland-revamps-its-in-vitro-coverage-mandate-to-accommodate-same-sex-couples> [<https://perma.cc/Y3TY-WQLM>] (“What we were interested in was parity and equality. If married opposite-sex couples were entitled

requiring same-sex patients to establish a pattern of unsuccessful conception through heterosexual sexual intercourse in order to qualify for infertility treatments.²³⁸ Maryland carriers²³⁹ are now prohibited from discriminating against same-sex couples for infertility insurance coverage for treatments other than IVF.²⁴⁰ Additionally, carriers may no longer impose conditions upon same-sex couples that essentially serve as a prerequisite for insurance coverage.²⁴¹ Prior to this amendment, carriers used the statutory ambiguities to continue to deny infertility services to same-sex couples.²⁴² However, the statute includes a caveat: Same-sex couples must attempt six rounds of unsuccessful AI²⁴³ for a period of not less than two years in order to qualify.²⁴⁴ Therefore, same-sex couples must expend at least some economic resources before qualifying for infertility insurance coverage in Maryland.²⁴⁵

California and Maryland have modified their infertility insurance statutes to align with the needs of their citizens.²⁴⁶ However, the other thirteen state statutes that provide for or at least

to the benefit, married same-sex married couples should be entitled to it as well.”); see also M.D. CODE ANN., INS. § 15-810(b) (West 2015).

238. See *id.*

Impermissible requirements – An entity subject to this section that provides coverage for infertility benefits other than in vitro fertilization may not require as a condition of that coverage, for a patient who is married to an individual of the same sex: (1) that the patient’s spouse’s sperm be used in the covered treatments or procedures; or (2) that the patient demonstrate infertility exclusively by means of a history of unsuccessful heterosexual intercourse.

Id.

239. See S. 416, Gen. Assemb., 2015 Sess. (Md. 2015) (analysis of Jennifer B. Chasse). Collectively, the term “carriers” encompasses insurers, nonprofit health service plans, and health maintenance organizations. See *id.*

240. See *id.* (“This bill alters required conditions for [carriers] . . . that provide coverage for infertility benefits *other than IVF*.”).

241. See *id.* (“Insurers . . . are prohibited from requiring certain conditions of coverage for same-sex married couples.”).

242. See *id.* The bill clarifies that pregnancy-related benefits can no longer be denied to “patient[s] whose spouse is of the opposite sex.” *Id.*

243. See *id.* Also, carriers are not required to cover costs for donor sperm. See *id.*

244. See *id.* at 2. Maryland’s fiscal and policy note states that same-sex married couples can show “six attempts of artificial insemination over the course of two years failing to result in pregnancy.” *Id.* However, this language exempts male same-sex couples, as they cannot be artificially inseminated.

245. See *id.* at 3.

246. See CAL. INS. CODE § 10119.6(g) (West 2013); M.D. CODE ANN., INS. § 15-810(b) (West 2015).

discuss infertility insurance coverage have not modified statutory language to account for homosexuals.²⁴⁷ Thus, some statutes implicitly exclude homosexuals from insurance coverage because of their infertility definition language.²⁴⁸

2. *The State Statutes Embodying Heterosexual Exclusivity*

In analyzing the pertinent state statutes that provide for infertility insurance coverage, no statute expressly excludes homosexual individuals.²⁴⁹ Rather, the states effectively do through statutory definitions that seem to require either heterosexual intercourse for a number of years, or the fertilization of a patient's egg with her spouse's sperm.²⁵⁰ For example, Connecticut's statute provides for infertility insurance coverage, and it expressly mentions, but does not limit, coverage to eight treatments—including IVF, GIFT, ZIFT, and IUI.²⁵¹ Connecticut defines infertility as a "condition of a presumably healthy individual who is unable to conceive or produce conception or sustain a successful pregnancy during a one-year period."²⁵² While this is not the common heteronormative language that mentions heterosexual intercourse, it has the effect of discriminating against same-sex couples because the one-year period is superfluous.²⁵³

247. See generally NCSL, *supra* note 220. However, states individually handle ACA enforcement, so it is up to the state to require insurers to comport with the federal directive. See Katie Keith & Kevin Lucia, *New Guidance: Federal Regulators Allow "Collaborative Arrangements" for ACA Enforcement*, COMMONWEALTH FUND BLOG (Apr. 5, 2013), <http://www.commonwealthfund.org/publications/blog/2013/apr/federal-regulators-allow-collaborative-arrangements> [<https://perma.cc/ZFJ4-4ZD9>].

248. See NCSL, *supra* note 220.

249. See Aloni & Daar, *supra* note 11, at 22-23. No state law expressly excludes same-sex coverage in its statutory language. See *id.*

250. See *id.* at 23. ("To the extent infertility is defined . . . as a failure to conceive after some period of unprotected heterosexual intercourse, this definition excludes those whose partnering does not include this activity.")

251. See CONN. GEN. STAT. § 38a-536 (2005).

252. *Id.* Coverage is implicitly limited to heterosexual couples only when language like Connecticut's is included in the statute. See Aloni & Daar, *supra* note 11, at 23.

253. See Aloni & Daar, *supra* note 11, at 23. By requiring a period of years of unsuccessful, unprotected sexual intercourse, same-sex couples are exempt because their sexual relations are non-procreative. See *id.*

The Massachusetts statute defines infertility similarly to Connecticut and imposes a minimum one-year requirement,²⁵⁴ but it only requires generalized insurance policies to include coverage for the “medically necessary expenses of diagnosis and treatment of infertility.”²⁵⁵ Similarly, Hawaii’s statute provides for a one-time benefit for outpatient expenses related to a single IVF procedure, so long as, among other requirements, the egg is fertilized with the male spouse’s sperm, there is a history of infertility, or there is a medically diagnosed infertility condition.²⁵⁶ While the statute’s use of “spouse” now encompasses same-sex couples because the only requirement is that the couple be legally married, the requirements have the effect of discriminating against same-sex couples.²⁵⁷ Meanwhile, the Illinois state statute restricts group policy renewals or issuances unless the policy provides for, among other treatments, IVF, GIFT, ZIFT, or AI.²⁵⁸ Furthermore, the Illinois statute requires insurance coverage for IVF, GIFT, and ZIFT only if pregnancy has been unsuccessful or unattainable, but, like other statutes, defines infertility heteronormatively.²⁵⁹

Alternatively, New Jersey mandates that group insurance policies include coverage for, among other services, IVF, AI, GIFT,

254. See MASS. ANN. LAWS ch. 175, §47H (West 2015). The statute does not apply if the female is over thirty-five years of age. See *id.*

255. *Id.*

256. See HAW. REV. STAT. § 431:10A-116.5 (2013).

257. See *id.* This is because the statutory language has the same superfluous requirements as the Connecticut statute. See *id.*; see also *supra* note 253 and accompanying text.

258. See 215 ILL. COMP. STAT. ANN. § 5/356m(a) (West 2016).

No group policy of accident and health insurance providing coverage for more than 25 employees that provides pregnancy related benefits may be issued, amended, delivered, or renewed in this State after the effective date of this amendatory Act of the 99th General Assembly unless the policy contains coverage for the diagnosis and treatment of infertility including, but not limited to, in vitro fertilization, uterine embryo lavage, embryo transfer, artificial insemination, gamete intrafallopian tube transfer, zygote intrafallopian tube transfer, and low tubal ovum transfer.

Id.

259. See *id.* at § 5/356m(c).

For purpose of this Section, ‘infertility’ means the inability to conceive after one year of unprotected sexual intercourse, the inability to conceive after one year of attempts to produce conception, the inability to conceive after an individual is diagnosed with a condition affecting fertility, or the inability to sustain a successful pregnancy.

Id.

ZIFT, and egg retrievals.²⁶⁰ Yet New Jersey also defines infertility in a heteronormative fashion, thus leaving no room for a same-sex couple loophole.²⁶¹ New York is proactively trying to increase infertility treatment access, passing a bill in 2002 that implemented funding for a grant program to make more services available to its citizens.²⁶² However, the state's insurance statute simply prohibits the denial of coverage for treatments or conditions resulting in infertility,²⁶³ and does not require coverage for, among other treatments, IVF, GIFT, or ZIFT.²⁶⁴ Moreover, the statute defines infertility in accordance with the American Society for Reproductive Medicine (ASRM), which uses the common definition of failure to achieve pregnancy after unprotected sexual intercourse for a specified period of time.²⁶⁵

Meanwhile, Texas requires health insurance companies who provide pregnancy-related benefits to offer or at least provide an option for obtaining coverage for outpatient expenditures resulting from an IVF procedure.²⁶⁶ However, a further reading of the code

260. See N.J. STAT. ANN. § 17:48-6x(a) (West 2017). However, egg retrievals are limited to four per lifetime. See *id.*

261. See *id.* (defining infertility as a “disease or condition that results in the abnormal function of the reproductive system” such that a person is not able to: impregnate another person; conceive after one year of unprotected intercourse if the female partner is under 35 years of age and her partner is male, or six months of unprotected intercourse if the female partner is 35 years of age or older and her partner is male; conceive due to involuntary medical sterility; or carry a pregnancy to live birth). For a summary of the statute, see NCSL, *supra* note 220.

262. See N.Y. PUB. HEALTH LAW § 2807-v1(jj) (Consol. 2017).

263. See INS. § 3216(i)(13)(A)-(B).

264. See § 3221(k)(6)(C)(v).

(I) in vitro fertilization, gamete intrafallopian tube transfers or zygote intrafallopian tube transfers; (II) the reversal of elective sterilizations; (III) sex change procedures; (IV) cloning; or (V) medical or surgical services or procedures that are deemed to be experimental in accordance with clinical guidelines referenced in clause (vi) of this subparagraph.

Id.

265. See *Infertility: An Overview*, AM. SOC'Y FOR REPRODUCTIVE MEDICINE (ASRM), https://www.asrm.org/Booklet_Infertility_An_Overview/ (last visited Oct. 9, 2017).

266. See TEX. INS. CODE ANN. § 1366.003(a) (West 2005).

Subject to this subchapter, an issuer of a group health benefit plan that provides pregnancy-related benefits for individuals covered under the plan shall offer and make available to each holder or sponsor of the plan coverage for services and benefits on an expense incurred, service, or prepaid basis for outpatient expenses that arise from in vitro fertilization procedures.

Id.

reveals that the coverage is conditioned upon the fertilization of the patient's eggs with her spouse's sperm and that the couple has a continuous five-year history of infertility due to specified medical conditions.²⁶⁷ Yet other state statutes do not mention or implicitly distinguish amongst heterosexual or homosexual individuals, thus leaving their state statutes open to interpretation.²⁶⁸

3. *The Vague and Indeterminate State Statutes*

Some state statutes present ambiguity, as they do not explicitly or implicitly address the question of coverage for same-sex couples.²⁶⁹ Some state statutes are unclear about the general offering of infertility insurance or create conditions upon the offering of coverage that pose the question on who the insurance may be offered to and to what extent it may be offered.²⁷⁰ Illustratively, Arkansas's statute provides a one-sentence mandate for insurance providers to cover IVF only and does not include a definition of infertility.²⁷¹ Montana simply requires Health Maintenance Organizations (HMOs), but not other insurers, to provide coverage for "basic health services," which by Montana's definition include infertility services.²⁷² However, like the Arkansas statute, a definition of infertility or an elaboration of infertility services is not provided.²⁷³ Likewise, West Virginia's statute requires HMOs to cover "basic

267. See § 1366.005(2)-(3)(A)-(D).

(2) the fertilization or attempted fertilization of the patient's oocytes is made only with the sperm of the patient's spouse; (3) the patient and the patient's spouse have a history of infertility of at least five continuous years' duration or the infertility is associated with: (A) endometriosis; (B) exposure in utero to diethylstilbestrol (DES); (C) blockage of or surgical removal of one or both fallopian tubes; or (D) oligospermia.

Id.

268. See NCSL, *supra* note 220.

269. See *id.*

270. See Blake, *supra* note 11, at 663-65 & n.67 (describing state statutes that discuss infertility coverage generally).

271. See ARK. CODE ANN. § 23-86-118(a) (West 2001) ("All accident and health insurance companies doing business in this state shall include, as a covered expense, in vitro fertilization.").

272. See MONT. CODE ANN. § 33-31-102(3)(h)(v) (West 2011).

273. See *id.* Since there are no parameters provided, a reasonable statutory interpretation or broad reading of the statute could create an inference that infertility treatment coverage for same-sex couples is included, especially since the ACA requires coverage to be equal for both heterosexual and homosexual persons. See *id.*

health care services,” which include infertility services, but does not provide further explanation.²⁷⁴

Similarly, Ohio requires health insurance corporations to provide “basic health care services,” which include preventative health care services that encompass infertility services.²⁷⁵ However, the mandate adds the caveat that the coverage shall only be provided when medically necessary, which leaves the statute open for interpretation in regard to its applicability to same-sex couples.²⁷⁶ Likewise, Rhode Island requires coverage for infertility-related coverage, but only when medically necessary.²⁷⁷ However, the statute defines infertility as the condition of a married individual who is otherwise healthy but who cannot conceive or sustain a pregnancy for at least one year.²⁷⁸ Rhode Island also caps off the mandatory coverage at \$100,000.²⁷⁹

Lastly, three states do not necessarily fit into any identifiable statutory category, but do discuss infertility or ART in their insurance statutes, while not necessarily mandating coverage or the offering of coverage.²⁸⁰ Louisiana’s statute explicitly prevents insurers from excluding coverage for the treatment and diagnosis of an otherwise insurable medical condition solely because the condition was the result of infertility.²⁸¹ However, the statute further specifies that it cannot be read to require coverage for certain infertility treatments.²⁸² Additionally, Minnesota explicitly excludes coverage for fertility drugs if the drugs are for the purpose of enhancing fertility.²⁸³ Moreover, Utah’s statute is unique, as it requires insurance providers to offer coverage for maternity benefits

274. See W. VA. CODE ANN. § 33-25A-2(1) (LexisNexis 2006).

275. See OHIO REV. CODE ANN. § 1751.01 (A)(1)(h) (LexisNexis 1991).

276. See *id.*

277. See 27 R.I. GEN. LAWS § 18-30-(a) (West 2017).

278. See § 18-30-(b).

279. See § 18-30-(g).

280. See NCSL, *supra* note 220.

281. See LA. STAT. ANN. § 22:1036(A)(1) (2001) (“Any health insurance policy, contract, or plan specified in Subsection B of this Section which is issued for delivery, delivered, renewed, or otherwise contracted for in this state on or after January 1, 2002, shall not exclude coverage for diagnosis and treatment of a correctable medical condition otherwise covered by the policy, contract, or plan solely because the condition results in infertility.”).

282. See § 22:1036(A)(2)(a)-(c) (“This Section shall not be construed to require coverage of the following: (a) Fertility drugs. (b) In vitro fertilization or any other assisted reproductive technique. (c) Reversal of a tubal ligation, a vasectomy, or any other method of sterilization.”).

283. See MINN. STAT. ANN. § 256B.0625(13)(a) (West 2017).

and for an adoption subsidy of \$4,000 if a child is placed for adoption within ninety days of its birth.²⁸⁴ However, the statute also provides the option to apply that \$4,000 subsidy to the cost of infertility treatments instead of reimbursement for adoption expenditures, if the insured so chooses.²⁸⁵

Of the fifteen state statutes examined, only California and Maryland neutralize their statutory language to eliminate infertility insurance discrimination.²⁸⁶ However, while the California and Maryland state statutes are similarly applicable to homosexuals, there is a nuanced difference—California’s statute requires the offering of infertility treatment insurance coverage, while Maryland obligates carriers to provide coverage.²⁸⁷ However, the other thirteen states whose insurance statutes provide for variations of infertility insurance coverage have yet to amend their language to account for a substantial number of ART utilizers—homosexual persons—or have a definitional aspect that exempts homosexuals from obtaining the coverage.²⁸⁸

Conclusively, infertility treatments are exceptionally costly, inaccessible to some, and yet in high demand by many.²⁸⁹ The

284. See *Insurance Coverage for Infertility Treatment*, UTAH ST. LEGISLATURE, <http://le.utah.gov/~2014/bills/static/HB0347.html> [<https://perma.cc/6QC3-U7UF>] (last visited Oct. 9, 2017); see also NCSL, *supra* note 220.

285. See NCSL, *supra* note 220 (“The law was amended to allow an enrollee to obtain infertility treatments rather than seek reimbursement for an adoption.”).

286. See *generally id.* (summarizing Maryland and California’s statutory language).

287. See *id.* See *generally Health Insurance 101*, RESOLVE, <http://resolve.org/what-are-my-options/insurance-coverage/health-insurance-101/> [<https://perma.cc/8D4Z-JRNG>] (last visited Oct. 9, 2017) (“Mandate to Cover: is a law requiring that health insurance companies provide coverage of infertility treatment as a benefit included in every policy (policy premium includes cost of infertility treatment coverage). Mandate to Offer: is a law requiring that health insurance companies make available for purchase a policy which offers coverage of infertility treatment (but the law does not require employers to pay for the infertility treatment coverage.”).

288. See Blake, *supra* note 11, at 665 (“For the most part, state insurance mandates based on external factors apply equally to all individuals. . . . [However], it is those laws that use internal factors to determine insurance coverage that are most significant with respect to the rights of gay . . . persons.”).

289. See *id.* at 658-61. “[T]here is a strong current of structurally infertile groups making use of ART.” *Id.* at 658. However, given the costly barriers for ART treatments, the system is “inherently inequitable” because “only a fortunate few can afford to spend [thousands] in order to have a chance at a baby [so] [m]any couples are forced out of the baby business from the outset.” *Id.* at 661. Yet, the high demand for ART persists. See *id.*

statutory definitions of infertility in the overwhelming majority of states that define it exclude same-sex couples from insurance coverage.²⁹⁰ While the majority of states do not provide for infertility insurance coverage, the states that do should not discriminate against same-sex couples.²⁹¹ Therefore, a redefinition of infertility is not only imperative in achieving procreative equality, but is also necessitated pursuant to *Obergefell* and the Fourteenth Amendment's Equal Protection and Due Process Clauses.²⁹²

III. THE NECESSITY OF REDEFINITION

The Constitution forbids sheer discrimination, especially when there is not a legitimate government interest justifying the inequality.²⁹³ Therefore, laws that hinder same-sex couples from acquiring infertility insurance to reduce the costliness of ART procedures should be deemed unconstitutional, as the laws effectively discriminate against same-sex couples without justification.²⁹⁴ Same-sex couples have the same compelling desire to have children; thus, without a valid, legal foundation for such discrimination—notwithstanding the untenable societal condemnation—laws that limit ART coverage to heterosexual couples are unconstitutional pursuant to the Equal Protection and Due Process Clauses.²⁹⁵ However, instead of requiring affected same-

290. See Aloni & Daar, *supra* note 11, at 24 (discussing the implicit definitional exclusions in state insurance statutes).

291. See Blake, *supra* note 11, at 662. Proposals for mandated insurance coverage to reduce the discriminatory impact of insurance statutes that exclude unpopular groups have been introduced, as the need for intervention is obvious and recognized. See *id.* at 661.

292. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Aloni & Daar, *supra* note 11. For a similar perspective regarding same-sex couples and biological parenthood, see generally Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260 (2017). However, Professor NeJaime states that equal protection and due process claims may not come to fruition for quite some time. *Id.* at 2270. (“[R]eform will likely require constitutional oversight. While scholars have addressed constitutional limitations on government regulation of family formation through ART, the issues of parental recognition uncovered in this Article gesture toward a set of constitutional questions in both equal protection and due process that will take years to fully emerge and develop.”).

293. See *Romer v. Evans*, 517 U.S. 620, 635 (1996); see also *supra* notes 88-91 and accompanying text.

294. See *Romer*, 517 U.S. at 634-35 (declaring laws that target the unpopular homosexual community are unconstitutional).

295. See *Obergefell*, 135 S. Ct. at 2597, 2604. The Supreme Court stated that both the Equal Protection and Due Process Clauses will continue to remedy

sex couples to bring a lawsuit to address the infertility insurance discrimination, states that offer infertility insurance coverage should amend their prejudicial statutory language to ensure compliance with the Fourteenth Amendment and with the underlying principle in *Obergefell*: that same-sex couples must be on equal footing with heterosexual couples generally,²⁹⁶ but especially in the institution of marriage.²⁹⁷

A. Existing Statutory Structure and Heteronormative Definitions Offend *Obergefell*

Obergefell dictates the transcendent importance of children within the institution of marriage; thus, statutory construction that exudes heteronormativity and inhibits same-sex couples from achieving biological parenthood runs afoul of the Supreme Court's directive for sweeping equality regardless of sexual orientation.²⁹⁸ By narrowly construing infertility as a medical issue, states ignore *Obergefell's* principle that fundamental aspects of personhood evolve as society changes.²⁹⁹ After the *Obergefell* decision, it is clear that the Supreme Court is moving towards unequivocal equalization of same-sex couples' rights.³⁰⁰ Justice Kennedy's powerful language proves that homosexual discrimination has no place in today's society.³⁰¹ Thus, current infertility definitions that denote heteronormativity are out of touch with twenty-first century norms.³⁰²

inequities within the institution of marriage. *See id.* at 2603. It is obvious that the Supreme Court considers childbearing and familial formation integral aspects of the institution of marriage, which is evidenced by their declaration that the constitutional right to marry has many aspects—one of which is childbearing. *See id.* at 2601.

296. *See id.* at 2608. The Constitution grants same-sex couples equal dignity in the eyes of the law. *See id.*

297. *See id.* at 2595 (stating that same-sex couples seek the privileges associated with the institution of marriage).

298. *See id.* at 2608 (declaring that family is a paramount paradigm within the institution of marriage); *see also supra* note 295 and accompanying text.

299. *See Obergefell*, 135 S. Ct. at 2597, 2603-04 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (stating that liberty “extend[s] to personal choices central to individual dignity and autonomy” and that “new insights and societal understandings can reveal unjustified inequality within . . . fundamental institutions” like marriage).

300. *See id.* at 2608 (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

301. *See, e.g., id.* at 2599 (“The four principles and traditions . . . demonstrate that the reasons marriage is fundamental under the Constitution apply

1. *The Outdated Heteronormativity of Infertility Definitions*

Heteronormative infertility definitions have the effect of excluding same-sex couples.³⁰³ While the definition of infertility may vary trivially across insurance statutes, the definition generally denotes infertility as a disease or medical condition that impacts a man or a woman's reproductive system and consequently impedes the ability of conception.³⁰⁴ The majority of states that provide for infertility insurance coverage implicitly or explicitly exempt same-sex couples through their heteronormative definition of infertility.³⁰⁵ While the language does not blatantly disallow homosexuals from obtaining insurance coverage, by requiring heterosexual intercourse for a period of years, the language can be interpreted to exclude same-sex couples because they will never be able to satisfy the definitional or medical thresholds; thus, such definitions are contrary to contemporary understandings of marriage and family.³⁰⁶

The vital role of families and children in the *Obergefell* decision evidences the Supreme Court's appreciation for the familial aspect of marriage.³⁰⁷ Particularly, by stating that childbearing is an

with equal force to same-sex couples.”). Other freedoms like expression and intimacy hold true for all individuals regardless of their sexual orientation. *See id.* “There is no difference between same- and opposite-sex couples.” *Id.* at 2601. “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” *Id.* at 2602.

302. *See* Aloni & Daar, *supra* note 11, at 23-24. Heteronormative ART definitions effectively preempt same-sex couples from desired family formation. *See id.* After the legalization of same-sex marriage, a multitude of laws need reform in order to fully accomplish *Obergefell's* central premise. *See id.*

303. *See id.*

304. *See, e.g.,* CONN. GEN. STAT. § 38a-536 (West 2015) (“[Infertility is] a presumably healthy individual who is unable to conceive or produce conception or sustain a successful pregnancy during a one-year period.”); MASS. ANN. LAWS ch. 175, § 47H (“[I]nfertility mean[s] the condition of an individual who is unable to conceive or produce conception during a period of one year if the female is under the age of 35, or during a period of six months if the female is over the age of 35.”); *see also* Pratt, *supra* note 9, at 1286-87; NCSL, *supra* note 220 (summarizing infertility insurance statutes).

305. *See* Aloni & Daar, *supra* note 11, at 24. The definitional aspect of infertility statutes excludes non-procreative partnering. *See id.*

306. *See id.* at 25 (“The legal battle over marriage equality produced a few opportunities for the creation of a more pluralistic structure of family law—one that offers several institutions for legal recognition of relationships that fit the needs of diverse family structures.”).

307. *See supra* notes 61, 67-73 and accompanying text.

integral part of a marriage, that marriage safeguards families and children, and that the marital union uniquely exemplifies the paradigms of love and family, it follows that any discriminatory barrier to the attainment of parenthood offends *Obergefell*.³⁰⁸

Namely, the fact that same-sex couples are structurally infertile cannot exempt them from biological parenthood, especially since alternative options—specifically ART—are available.³⁰⁹ However, astronomical costs accompany ART procedures.³¹⁰ Thus, same-sex couples who are not wealthy, or are without disposable income, are essentially prevented from employing ART procedures because most states do not afford them the option of obtaining infertility insurance to curb the financial impact.³¹¹ Hence, heteronormative language precludes most same-sex couples' procurement of biological parenthood, which is a privilege within the confines of marriage that *Obergefell* declares same-sex couples should enjoy equally.³¹²

The critics of *Obergefell* oppose conscripting states into same-sex marriage and disagree with extending the fundamental right to marry to same-sex couples, mostly because they focus on the archaic definition of marriage as a marital union between a man and a woman and on the non-procreative aspect of homosexual sex.³¹³ The dissent further implicates that children are better off if sexual

308. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015). Marriage involves protections and benefits to children that are so material and immeasurable that barring same-sex couples from capitalizing them is contradictory to children's best interest. See *id.*

309. See DAAR, *supra* note 177, at 474 (“Thus, ART opens up the prospect of parenthood . . . to those whose family structure is something other than a heterosexual couple. [S]ame-sex couples can look to ART to enable them to become parents, often fulfilling a dream of biological parenthood that was . . . unavailable a generation ago.”).

310. See *supra* notes 211-217 and accompanying text.

311. See Blake, *supra* note 11, at 659-62 (explaining the costs of certain ART procedures and how other countries improve ART access by financing treatments). Inability to receive ART treatments hinges upon financial access. See *id.* at 661.

312. See *Obergefell*, 135 S. Ct. at 2594. Furthermore, because of the immutability associated with homosexuality, same-sex marriage is the only avenue for same-sex couples to attain the associated benefits that follow from the commitment of marriage. See *id.*

313. See *id.* at 2613. (Roberts, J., Scalia, J., & Thomas, J., dissenting) (“Procreation occurs through sexual relations between a man and a woman.”). Interestingly, the dissent cites numerous definitions of marriage as a two-person union between a man and a woman, but most of the sources come from the 1800s or early 1900s. See *id.* at 2614.

relations only occur between a man and a woman.³¹⁴ However, the majority opinion cites psychological research that rebuts arguments that children who grow up with same-sex parents experience harm.³¹⁵ Furthermore, by the dissent focusing on the procreative aspect of marital relations, it implies that married couples have a duty to procreate.³¹⁶ The majority, however, correctly points out that childbearing is only *one* aspect of marital autonomy,³¹⁷ which is why the option should be afforded to all married couples equally.

Contemporary society no longer defines marriage as a union between a man and a woman, and family structure no longer denotes a heteronormative construction;³¹⁸ therefore, infertility can no longer hinge upon heterosexual connotations either.³¹⁹ This nation's highest court found that the marital union, which is now equally accessible to same-sex couples, safeguards childrearing and procreation, which lie at the core of the Fourteenth Amendment.³²⁰ Thus, the structural infertility associated with homosexuality cannot serve as a disqualifier for a same-sex couple to obtain the biological tie to their children that heterosexual couples enjoy.³²¹

Therefore, states that offer infertility insurance to heterosexual couples, but do not leave room for the inclusion of same-sex couples, run afoul of the Fourteenth Amendment and *Obergefell*.³²² Hence, redefining infertility and removing the associated medical necessity characteristics from the definition is imperative.³²³ Thus, states that

314. See *id.* at 2613. (“Therefore, for the good of children . . . sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.”).

315. See *supra* notes 69-74 and accompanying text.

316. See *Obergefell*, 135 S. Ct. at 2613 (discussing the importance of procreative sexual relations within the institution of marriage for continuing the human race).

317. See *id.* at 2600-01 (stating that childbearing is one of the four principles and decisions of marriage).

318. See *supra* notes 61, 67-73 and accompanying text (detailing the familial reasons for legalizing same-sex marriage).

319. See Aloni & Daar, *supra* note 11, at 26 (“Now that same-sex marriage rights have been secured, we could think again about how to make family law more pluralistic and accommodating for diverse types of families.”).

320. See *Obergefell*, 135 S. Ct. at 2600 (stating that the third principle—that marriage safeguards families and children—finds its legal basis in the Fourteenth Amendment’s Due Process Clause).

321. See DAAR, *supra* note 177, at 474; see also note 308 and accompanying text.

322. See generally *Obergefell*, 135 S. Ct. 2584; Aloni & Daar, *supra* note 11.

323. See, e.g., CAL. INS. CODE § 10119.6(g) (West 2013); MD. CODE ANN., INS. § 15-810(b) (West 2016) (allowing same-sex infertility insurance coverage).

do not offer infertility coverage should be compelled to do so, like California.³²⁴

2. *California Almost Got It Right—Follow California...With One Exception*

The California infertility insurance statute should be considered the model statute for all states,³²⁵ but especially those that currently provide infertility insurance coverage for heterosexual couples generally.³²⁶ The California statute does not mandate that insurers actually provide the coverage; rather, the statute mandates that insurers offer coverage for purchase as an addition to a preexisting health insurance plan.³²⁷ However, the statute exempts IVF coverage, which is the most successful and sought after ART procedure.³²⁸ Therefore, states should adopt California's statute without the IVF exemption.

Offering infertility insurance coverage allows same-sex couples, both gay and lesbian, to tailor their health insurance plans appropriately in order to satisfy their structural infertility needs.³²⁹ It is more likely that states will agree to a less intensive statutory proposal than one that conscripts them into providing the coverage.³³⁰ Thus, despite employer-provided plans locating a potential loophole—to select less expensive plans that do not include the infertility insurance coverage—at least individuals and couples will have the option to obtain the coverage within their state.³³¹ While this may be more expensive for the insured, it will undoubtedly be less expensive than paying for ART out-of-pocket, given the cost and added expenditures associated with each procedure.³³²

324. See CAL. INS. CODE § 10119.6(a).

325. See *id.*

326. See generally NCSL, *supra* note 220 (describing the state infertility statutes).

327. See INS. CODE § 10119.6(a).

328. See *id.*; see also Cohen & Chen, *supra* note 170, at 490. IVF is the most prevalent ART procedure. See *id.* However, individuals usually do multiple rounds of IVF, which compounds the financial burden. See *id.* at 492.

329. See Leonard, *supra* note 211 (discussing the massive debt individuals acquire in seeking ART treatments); see also Jacoby, *supra* note 10, at 152-53 (stating the variety of issues critics have regarding health insurance mandates).

330. See Jacoby, *supra* note 10, at 153 (discussing how mandating insurance will be costly and a “hard sell”).

331. See generally Leonard, *supra* note 211.

332. See Jacoby, *supra* note 10, at 154-64 (outlining the financing options and associated costs with financing ART). Furthermore, insurance companies and

Another positive highlight within the California statute is found in the absence of an insurance coverage ceiling on the amount of infertility insurance coverage that may be paid.³³³ Some statutes limit the amount of coverage to a total of \$100,000, which seems generous,³³⁴ but when analyzed beside the ART options and their respective costs, that amount only skims the surface of the cost of some ART procedures.³³⁵ Most ART treatments require multiple attempts before proving successful, which means that the cost of one procedure, which may seem financially attainable when isolated, can easily multiply and ultimately become unaffordable.³³⁶

Since ART procedure success is not guaranteed, and a given procedure may take multiple attempts before proving successful—which could easily absorb the allotted amount of coverage without ever obtaining a pregnancy that is carried to live birth—it follows that statutes should not limit insurance coverage to an amount that will not cover some of the most common ART procedures.³³⁷ At an increased price, insurance providers could tailor insurance plans to fit the insured's needs.³³⁸ However, the issue with the California statute is that it exempts IVF coverage,³³⁹ which is one of the most

employers should not be required to finance additional, overly burdensome elective insurance, because that could open doors to the inclusion of other elective procedures. *See id.* at 155. Even so, insurance never covers the entire cost of a procedure, so those with private health insurance plans will always incur costs to an extent. *See id.*

333. *See* CAL. INS. CODE § 10119.6(g) (West 2013).

334. *See, e.g.,* 27 R.I. GEN. LAWS § 18-30-(g) (West 2017); M.D. CODE ANN., INS. § 15-810(e) (West 2016).

335. *See, e.g.,* Cohen & Chen, *supra* note 170. This is because of the high cost associated with the more popular and successful procedures of IVF and surrogacy. *See* Jacoby, *supra* note 10, at 149-50 (“[O]ne round of IVF or related processes far exceeds what an average household of four spends out of pocket on health care for an entire year. Employing a gestational surrogate costs tens of thousands of dollars.”).

336. For example, statistics demonstrate that IVF and surrogacy can easily accumulate a total north of \$100,000. *See supra* notes 212-220 and accompanying text (discussing ART procedures, their success rates, and accompanying costs).

337. *See* Cohen & Chen, *supra* note 170; *Fertility Treatment: Getting Started*, *supra* note 212; *Services and Fees*, *supra* note 216; Sunderam, *supra* note 181.

338. *See Health Insurance 101*, *supra* note 287; *cf. supra* notes 186, 218-223 and accompanying text (discussing the downfalls of insurance mandates).

339. *See* Cohen & Chen, *supra* note 170, at 491 (stating that individuals usually do multiple rounds of IVF, which compounds the financial burden).

successful, yet expensive, ART procedures available.³⁴⁰ While it is understandable that a statutory mandate to offer IVF coverage could be burdensome, if the purpose of the statute is to provide individuals with the choice to purchase infertility insurance,³⁴¹ then all forms of ART should be available at the right price.³⁴²

B. Financial Implications of State Mandated Insurance Coverage

Providing infertility insurance coverage to both heterosexual and homosexual couples will be costly, which may deter some states from reforming their insurance statutes.³⁴³ Since cost is the main barrier to achieving biological parenthood, aside from the structural infertility component, it logically follows that wealthier same-sex couples that enjoy disposable income may have more accessibility to biological parenthood through ART treatments.³⁴⁴ However, that leaves less fortunate same-sex couples to either struggle to produce the necessary funds to achieve a biological tie to their children or relinquish the possibility altogether.³⁴⁵ Furthermore, male same-sex couples face a severer financial impact, as without the necessary female reproductive organs, their ART options are constrained to surrogacy.³⁴⁶

340. *See id.* at 492. The total cost of producing a live birth through IVF procedures ranges from \$66,667 to \$114,286. *See id.*

341. *See* CAL. INS. CODE § 10119.6(g) (West 2013); *see supra* notes 236-237 and accompanying text (discussing California's and Maryland's insurance statutes and their applicability to same-sex couples).

342. *See generally* *Health Insurance 101*, *supra* note 287 (discussing mandates to offer and mandates to cover).

343. *See id.*

344. *See generally* *Cohen & Chen*, *supra* note 170 (discussing the costliness of certain ART procedures). Since costs are so astronomical, individuals may be forced to employ less effective ART procedures to attempt to achieve biological parenthood. *See* *Pratt*, *supra* note 216, at 1137.

345. *See* *Baron & Bazzell*, *supra* note 177, at 57. While ART does provide same-sex couples with the ability to obtain biological parenthood, the associated monetary aspect is burdensome. *See id.*

346. *See* *Pratt*, *supra* note 216, at 1129 (“Infertility deprives would-be parents of an ‘experience that is central to . . . identity and meaning in life.’”); *see also* *Dana*, *supra* note 208, at 360 (discussing surrogacy and how it is the only ART option for male same-sex couples to achieve biological parenthood).

1. *Cost Versus Benefit: Does it Matter?*

Same-sex couples experience “direct and indirect barriers to ART.”³⁴⁷ The high cost associated with infertility insurance coverage is unquestionable and is why most insurers refuse to provide coverage.³⁴⁸ However, states recognize the astronomical costs of ART treatments; thus, they should utilize their regulatory powers over insurance companies and mandate the coverage.³⁴⁹

Insurance companies cite a few main arguments for their denial of infertility insurance coverage.³⁵⁰ The underlying reason, however, seems to revolve around the cost.³⁵¹ Mandating insurance coverage for ART will be pricey, so insurers may cross-subsidize the additional cost throughout all insured persons to curb their financial burden.³⁵² However, insurers also deny that infertility is an illness, which justifies their denial of ART insurance coverage,³⁵³ because

347. See Pratt, *supra* note 9, at 1337.

348. See Baron & Bazzell, *supra* note 177, at 77-78. (“Insurers often cite skyrocketing costs as a reason for not providing coverage for infertility treatments.”).

349. See Cohen & Chen, *supra* note 170, at 486-87 (suggesting that states should use their police powers to impose insurance mandates for ART coverage). However, the government does not recognize positive rights all that often, and to do so requires a showing of history of discrimination, political powerlessness, and immutability. See CHEMERINSKY, *supra* note 92, at 714. However, if reproduction or even ART were considered positive rights, “it would reinforce claims that a state mandate excluding groups with structural or medico-structural infertility from mandated insurance is a Fourteenth Amendment Due Process violation.” Blake, *supra* note 11, at 683.

350. See Baron & Bazzell, *supra* note 177, at 77-81 (elaborating on insurers main arguments for the denial of insurance coverage).

351. See *id.* at 77 (discussing the financial burdens of ART).

352. See Cohen & Chen, *supra* note 170, at 487 (“A number of states have attempted to improve access . . . through their regulatory powers over insurance, making IVF a mandated benefit such that health insurers are required to cover IVF in their plans, thus cross-subsidizing the costs across all insured individuals.”). If infertility insurance coverage was mandated, the estimated cost could increase to approximately \$105 to \$175 per year. See John C. Goodman & Merrill Matthews, Jr., *The Cost of Health Insurance Mandates*, NCPA (Aug. 13, 1997), <http://www.ncpa.org/pub/ba237> [<https://perma.cc/AX6M-MCYV>]. *But see* Cohen & Chen, *supra* note 170, at 507-08 (stating that IVF mandates may only increase insurance premiums by \$3.14 per year).

353. See Baron & Bazzell, *supra* note 177, at 78. (“One argument insurers make in defense of their denials of coverage is that, while improper function of reproductive organs may be an illness, infertility is not.”).

coverage is typically reserved for treating illnesses exclusively.³⁵⁴ Moreover, insurers argue that ART procedures are not of medical necessity and are elective, or alternatively that the procedures are experimental, and thus excluded from coverage.³⁵⁵ However, these arguments make a sweeping generalization about infertility and ignore the immutable structural infertility that same-sex couples experience—which belies that the procedures are unnecessary or elective.³⁵⁶ Also, structural infertility is not grounded in a medical diagnosis—it lies at the heart of the immutability of sexual orientation,³⁵⁷ which is why infertility can no longer be viewed strictly as a medical issue under the law. Thus, the remaining justification insurers provide is the associated cost.³⁵⁸ However, high costs cannot justify an outright denial of infertility coverage, especially where coverage is offered to heterosexual couples but denied to same-sex couples.³⁵⁹

State powers encompass regulating for the health of its people, which provides state governments with the power to regulate insurance as they see fit.³⁶⁰ However, a state's role in promoting for the health of its people involves ensuring equal access to opportunities that allow them to pursue their life goals of biological

354. *See id.* (“Therefore, because insurance plans only provide coverage for ‘illnesses,’ procedures used to change an infertile condition are not compensable.”). Insurance companies also deny that artificial insemination is a treatment for correcting infertility. *See id.*

355. *See id.* at 79. The argument is grounded in the fact that infertility treatments are not necessary to preserve an insured's health. *See id.* Also, insurers believe that “procedures that circumvent a problem area instead of permanently correcting underlying physical problems should not be considered medically necessary.” *Id.* A court determination that ART procedures are not simply elective is necessary. *See id.*

356. *See* CHEMERINSKY, *supra* note 92, at 714 (discussing that immutable characteristics warrant heightened scrutiny).

357. *See* Pratt, *supra* note 9, at 1286-87 (discussing the definition of infertility under the law); *see also* Jacoby, *supra* note 10, at 149 (defining structural infertility as encompassing individuals who do not participate in heterosexual intercourse).

358. *See generally* Cohen & Chen, *supra* note 170 (explaining the implications of additional insurance costs and why insurers ground their denial of insurance coverage in increased premiums).

359. *See id.* at 508 (“Whether an increase in premiums is a good reason not to adopt these insurance mandates might depend on where precisely in that range the cost increase falls.”).

360. *See* Jacoby, *supra* note 10, at 152 (discussing how states could use their regulatory powers to mandate insurance coverage).

parenthood.³⁶¹ Infertility is a departure from normal individual functioning because it impedes the basic function of procreation, so state insurance mandates that increased access to ART for same-sex couples to achieve biological parenthood would be a proper use of state regulatory powers.³⁶² However, male same-sex couples face a heightened barrier to ART, as their biological parenthood hinges upon surrogacy—the costliest procedure.³⁶³

2. *But, What About the Fathers?*

Perceptibly, ART options for male same-sex couples are more limited than those of female same-sex couples.³⁶⁴ An obvious issue with homosexual males and procreation is that their reproductive system does not enable them to carry a child.³⁶⁵ However, that immutability cannot discharge male same-sex couples' ability to achieve biological parenthood.³⁶⁶ While not discounting the tumultuous journey undertaken by female same-sex couples, their ability to obtain sperm to fertilize their eggs and enjoy a biological tie to their children is a more affordable and attainable endeavor than that of male same-sex couples.³⁶⁷

Male same-sex couples must resort to surrogacy to achieve biological parenthood, and surrogacy is one of the costliest ART

361. See Cohen & Chen, *supra* note 170, at 502 (“[A] state’s role in promoting health . . . [is] a matter of political justice, to ensure access to the ‘normal opportunity range’ to pursue the ‘array of life plans reasonable persons are likely to develop for themselves.’”).

362. See *id.* (“[I]nfertility is a departure from normal functioning that reduces an individual’s fair share of the normal opportunity range and gives rise to claims for assistance’ because infertility interferes with ‘basic functions of free and equal citizens, such as reproducing themselves biologically, an aspect of plans of life that reasonable people commonly pursue.’”). Moreover, state action is justified because human welfare warrants it. See *id.* at 503.

363. See Dana, *supra* note 208, at 360 (discussing the fact that surrogacy is the only ART option for gay men).

364. See *generally id.* (discussing male same-sex couples and their experiences with surrogacy).

365. See *id.*

366. The Krupas’ lawsuit advocated only for the women of New Jersey to obtain motherhood and left out the possibility for the men of New Jersey to obtain fatherhood. See *generally* Complaint, *supra* note 1.

367. See Dana, *supra* note 208. Gay couples have the same desire for biological parenthood and cannot be discriminated against in the context of ART. See *id.* at 372-73.

procedures.³⁶⁸ However, to add to the existing financial and structural infertility barriers, surrogacy requires male same-sex couples to locate a willing and able third-party female to serve as their surrogate—which is difficult because there are not necessarily an abundance of females lining up to carry someone else’s child.³⁶⁹ Consequently, the male same-sex couple must also economically support that gestational carrier at least throughout the term of her pregnancy, which compounds the already-existing financial burden.³⁷⁰

However, coverage that makes it more difficult for males to obtain biological parenthood versus females violates equal protection.³⁷¹ While on its face a law may not be discriminatory if it provides for same-sex couples’ ability to obtain infertility insurance, the law’s effect will discriminate against male same-sex couples and infringe upon their ability to obtain biological parenthood more than female same-sex couples.³⁷² Where the government confers benefits, it must do so equally.³⁷³ The issue with an equal protection challenge, though, is that the law’s purpose will not be to discriminate against male same sex couples; thus, the laws will probably not violate the Equal Protection Clause.³⁷⁴

368. See *supra* notes 214-215 and accompanying text (detailing surrogacy costs).

369. See generally Dana, *supra* note 208. However, some women agree to be surrogates because (1) “they like being pregnant,” (2) “they want the money, and” (3) “they view having a baby for a childless couple as providing an altruistic gift.” *Id.* at 364.

370. See Pratt, *supra* note 216, at 1156. The additional costs of using a surrogate include the surrogate’s fee, the surrogate’s medical expenses, and potential attorneys’ fees. *See id.*

371. See CHEMERINSKY, *supra* note 92, at 713. Equal Protection forbids discrimination on the basis of gender. *See id.*

372. See Blake, *supra* note 11, at 683-84 (“[V]iolations of Equal Protection do not always require that the law classify a group and discriminate on its face.”).

373. See *Equal Protection*, *supra* note 90 (explaining that Equal Protection requires states to treat similarly situated persons equally).

374. See Blake, *supra* note 11, at 684 (explaining that Equal Protection is violated if there is evidence of discriminatory intent). However, since private insurance is in play, insurers have free reign to formulate their policy inclusions as they see fit. *See id.* at 677-78. While a claim against an insurance company for not conferring benefits equally may pose a gender discrimination issue, it is difficult to argue that increased insurance coverage is necessary to ensure males can attain biological parenthood. *See generally id.* This is because the coverage amount will also have to be equally accessible to females or that may pose another gender discrimination issue. *See generally id.* However, since cost alone cannot justify not providing insurance benefits, insurance companies must formulate individual

Since surrogacy could cost a male same-sex couple over \$100,000, it is nonsensical that male same-sex couples should not be able to attain their goal of having a family and genetic ties to their children simply because the out-of-pocket expenditures are astronomical.³⁷⁵ Therefore, infertility insurance plans should offer coverage for surrogacy, or at least increase the coverage cap to allow same-sex couples, especially males, to achieve biological parenthood.³⁷⁶

C. Redefinition After *Obergefell*: Why Equal Protection and Due Process Dictate Redefinition

In *Obergefell*, Justice Kennedy enumerated four principles and traditions that establish the underlying reasons why marriage is a fundamental right.³⁷⁷ The third principle—that the fundamental right to marry protects children and families, which draws meaning from the related rights of childrearing and procreation—incorporates the core Equal Protection and Due Process principles relating to the liberties of marriage, the establishment of a home, and the rearing of children.³⁷⁸ Therefore, the Supreme Court realizes the significance of children and their importance in building a family unit,³⁷⁹ and same-sex couples and heterosexual couples alike consider children to be an important piece of marriage and family.³⁸⁰ Marriage equality finally

policies to accommodate the varying needs of both male and female same-sex couples. See generally Cohen & Chen, *supra* note 176. A way to do this is by offering male same-sex couples an option to purchase an insurance policy for surrogacy coverage specifically. See generally Jacoby, *supra* note 10. While this might require male same-sex couples to pay more for insurance coverage, the cost of their insurance premiums will still be less than it would be to pay for surrogacy out-of-pocket. See *supra* notes 214-215 and accompanying text. See generally Dana, *supra* note 208 (discussing surrogacy barriers for male same-sex couples).

375. See *supra* notes 215-216 and accompanying text. See generally Dana, *supra* note 208.

376. See *supra* note 374 and accompanying text.

377. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599-01 (2015) (explaining the four principles and traditions of marriage that justify extending the fundamental right to same-sex couples).

378. See *id.* at 2600. Same-sex couples want the privileges that accompany marriage—childbearing is one of them. See *id.*

379. See *id.*

380. See, e.g., Ikemoto, *supra* note 10, at 1055-56; see also Orentlicher, *supra* note 168, at 653 (“Gay couples have the same strong interest as heterosexual couples in raising children with whom they have biological ties.”).

came after many years of discrimination, oppression, and cruelty.³⁸¹ The right to marry, which encompasses familial properties, may no longer be denied to same-sex couples pursuant to the Equal Protection and Due Process Clauses,³⁸² so it follows that the associated right to procreate—which is a correlating privilege of marriage—cannot be infringed either.

1. *Equal Protection Necessitates Equal Opportunity for Infertility Insurance Coverage*

Equal protection prohibits laws from granting a right to some, but not to others, yet it also mandates that the government shall treat similarly situated persons equally.³⁸³ Same-sex couples are no longer discriminated against within the institution of marriage because of *Obergefell*, which positioned same-sex couples on equal footing with heterosexual couples.³⁸⁴ In *Obergefell*, Justice Kennedy explicitly stated that childbearing is an integral aspect of marriage.³⁸⁵ Furthermore, *Skinner* established in the 1940s that procreation is a fundamental right.³⁸⁶ Therefore, it can be inferred that those who are accorded the fundamental right to marry cannot have their ability to obtain biological parenthood disregarded.³⁸⁷

The argument under Equal Protection would be stronger if the Supreme Court declared sexual orientation a suspect classification.³⁸⁸ However, utilizing the reasoning from *Lawrence*, an argument can be formulated that sexual orientation *is* treated like a protected class under the law, thus equally deserving of the associated constitutional

381. See ABRAMS ET. AL., *supra* note 28, at 89 (detailing the evolution of homosexual rights).

382. See *Obergefell*, 135 S. Ct. at 2604 (holding that same-sex marriage is legal).

383. See CHEMERINSKY, *supra* note 92, at 712, 935 (discussing the requirements of Equal Protection).

384. See *Obergefell*, 135 S. Ct. at 2608. (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

385. See *id.* at 2600.

386. See *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942) (outlawing sterilizations and declaring procreation as a fundamental right).

387. See *id.*; *Obergefell*, 135 S. Ct. at 2600-01.

388. See CHEMERINSKY, *supra* note 92, at 712-14. This is because heightened scrutiny would be warranted and would make laws that infringed upon sexual orientation, like infertility laws requiring heterosexual intercourse, have to satisfy the most stringent level of scrutiny. See *id.*

protections and stringent scrutiny requirements.³⁸⁹ Conversely, an argument can be made that same-sex couples cannot be excluded from infertility insurance coverage based on sexual orientation as a general classification warranting no extra protection, as unpopular groups cannot be targeted and discriminated against per *Romer*.³⁹⁰

a. Utilizing *Lawrence*: Sexual Orientation as a Suspect Classification

If sexual orientation was a suspect classification, or if the reasoning from *Lawrence* was utilized to argue that it is at least protected under the law, then statutes that explicitly and implicitly discriminate against same-sex couples via heteronormative infertility definitions³⁹¹ could be unconstitutional on their face.³⁹² If a facial classification exists, heightened scrutiny automatically applies, and the government has the burden to prove the law is necessary or substantially important.³⁹³ Arguably, the government cannot withstand a heightened level of scrutiny because a genuine reason to disallow familial formation or the expansion of mankind is inconceivable.³⁹⁴ Even so, the potential exists that discriminatory infertility laws would also fail a rational basis analysis.³⁹⁵

b. Sexual Orientation as a General Classification

Sexual orientation is not currently a suspect classification; therefore, the argument pursuant to *Romer* is the sounder argument as the law stands today.³⁹⁶ For non-suspect classifications, the default

389. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); see also Hill, *supra* note 145, at 95.

390. See *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

391. See, e.g., CONN. GEN. STAT. § 38a-536 (West 2015); HAW. REV. STAT. § 431:10A-116.5 (2013); ILL. COMP. STAT. ANN. § 5/356m(a), (c) (West 2016); MASS. ANN. LAWS ch. 175, § 47H (West 2013); N.J. STAT. § 17:48-6x (West 2017); TEX. INS. CODE §§ 1366.003(a), 1366.005(2)-(3)(A)-(D) (West 2005).

392. See CHEMERINSKY, *supra* note 92, at 712-13.

393. See *id.* at 713. Depending on the classification, this would trigger intermediate or strict scrutiny. See *id.*

394. See *Romer*, 517 U.S. at 634-35 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

395. See *id.* at 635.

396. See *id.* *Romer* used rational basis to declare a Colorado law discriminating against persons based on their sexual orientation unconstitutional. See *id.* However, Justice Ginsberg’s oral arguments in *Obergefell v. Hodges* hinted that

level of scrutiny is rational basis.³⁹⁷ While extreme deference is given to the government pursuant to rational basis and the burden is on the challenger to prove that the law is not rationally related to a legitimate government interest, laws cannot simply target an unpopular group and discriminate against them.³⁹⁸ However, upon review of infertility insurance statutes that exempt same-sex couples from satisfying the threshold requirements of being medically infertile and participating in heterosexual intercourse for a period of years,³⁹⁹ the laws are inherently discriminatory against same-sex couples. Notwithstanding the government's interest in escaping the associated expenditures that would be required by offering infertility insurance for all married couples, there has to be an additional reason that is not economically grounded in order to deny the coverage.⁴⁰⁰ However, there does not appear to be a legitimate interest, aside from financial resources, that could justify denying coverage; thus, there is strong potential for a successful claim under Equal Protection.⁴⁰¹ However, there is also a claim under Due Process, as infringements on the fundamental rights to procreate and marry necessitate due process.⁴⁰²

this could also be a gender classification issue, which would require laws to pass intermediate scrutiny. *See* Transcript of Oral Argument at 85, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). However, this is beyond the scope of this Note.

397. *See* CHEMERINSKY, *supra* note 92, at 714.

398. *See Romer*, 517 U.S. at 635; *see also* CHEMERINSKY, *supra* note 92, at 714.

399. *See generally* NCSL, *supra* note 220 (summarizing the state infertility statutes).

400. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (“Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government’s interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.”).

401. *See generally Romer*, 517 U.S. 620.

402. *See* CHEMERINSKY, *supra* note 92, at 934; *see also* Blake, *supra* note 11, at 683 (“As notions of reproductive freedom continue to develop and as technologies like ART continue to become more mainstream, courts may more readily be willing to acknowledge a positive right of reproduction and even ART.”). *But see* NeJaime, *supra* note 292, at 2270 (stating that equal protection and due process claims for same-sex parental equality may take years to materialize).

2. Due Process Provides for Coverage Where it is Due

Pursuant to substantive due process, the government must show adequate reason for infringing upon a fundamental right.⁴⁰³ Procreation has been a recognized fundamental right since the early 1940s, and laws that infringe upon that right are only constitutional if they satisfy a strict scrutiny analysis.⁴⁰⁴ Additionally, marriage has been declared a fundamental right since 1976 and was extended to same-sex couples in 2015.⁴⁰⁵ Therefore, pursuant to the Due Process Clause, infertility statutes that impede insurance access for same-sex couples infringe upon their fundamental rights to procreate and marry.⁴⁰⁶

Since fundamental rights are infringed, strict scrutiny is triggered.⁴⁰⁷ The next question within a due process analysis requires a showing that the fundamental right is infringed.⁴⁰⁸ However, the law also requires that the infringement be substantial and direct.⁴⁰⁹ When same-sex couples cannot achieve biological parenthood because their access to insurance is restricted, thus preventing relief from the financial burden of ART, their right to procreate is substantially and directly infringed.⁴¹⁰ Similarly, when children are such a fundamental aspect of marriage as denoted by Justice Kennedy, laws that hinder that associated privilege substantially and directly infringe upon the fundamental right to marry.⁴¹¹ The third question in a due process analysis requires the government to prove that laws granting infertility insurance to heterosexual couples and not to same-sex couples are essential,⁴¹² but it is difficult to conceive

403. See CHEMERINSKY, *supra* note 92, at 935 (explaining procreation as a fundamental right that triggers strict scrutiny when a challenged law infringes on that right).

404. See *id.* at 933.

405. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (extending the fundamental right to same-sex couples); *Loving v. Virginia*, 388 U.S. 1, 12 (1976) (declaring marriage a fundamental right).

406. *Contra* Blake, *supra* note 11 (discussing Due Process and ART before the *Obergefell* decision).

407. See CHEMERINSKY, *supra* note 92, at 936.

408. See *id.* at 938.

409. See *id.*

410. See Jacoby, *supra* note 10, at 156-58.

411. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015) (illuminating the symbiotic relationship between marriage and children).

412. See CHEMERINSKY, *supra* note 92, at 938.

any potential reasons that are not ludicrous.⁴¹³ Lastly, the government must show that the insurance statute is sufficiently related to the statutory purpose—which is habitually to provide alternative access to parenthood to those who cannot achieve it.⁴¹⁴ Statutory purpose cannot only accommodate heterosexual couples’ desire for biological parenthood because same-sex couples have the identical desire to achieve biological parenthood.⁴¹⁵ Therefore, same-sex couples’ fundamental rights to marriage and procreation are severely infringed by laws that disallow ART coverage and establish barriers for their achievement of familial life.⁴¹⁶

Not surprisingly, given the symbiotic relationship of children and families, same-sex couples are employing alternatives to natural procreation—ART treatments—at an increasing rate as a means to fulfill their desire to have a family.⁴¹⁷ However, unjustness ensues when same-sex couples—and not heterosexual couples—are required to expend considerable capital in order to fulfill their desire for biological parenthood, their fundamental right to procreate, and their associated marital privilege to childbearing—which is both intolerable and unconstitutional.⁴¹⁸ At its core, equal protection forbids similarly situated persons—namely, married couples, both heterosexual and homosexual alike—from being discriminated against.⁴¹⁹ Thus, the heteronormative nature of state insurance mandates that exclude same-sex couples from receiving insurance coverage for the immutable infertility they face runs afoul of the

413. Cf. Blake, *supra* note 11, at 683-86. At the time of the writing, the fundamental right to marry was not extended to same-sex couples. Thus, the author’s argument that there is no Due Process violation for laws because “[r]egardless of whether these mandates result in unequal distribution of or costs for ART across differing marital statuses and sexual orientation,” can be refuted using the holding and reasoning in *Obergefell*. See *id.* at 681.

414. See *supra* notes 236-237 and accompanying text.

415. See Orentlicher, *supra* note 168, at 653; see also DAAR, *supra* note 177, at 474 (stating that same-sex couples want to achieve biological parenthood just as much as heterosexual couples and that ART is a way for them to achieve that goal).

416. See generally *Obergefell*, 135 S. Ct. 2584.

417. See *id.* (discussing how homosexual persons and same-sex couples have employed ART to start their desired families).

418. See Jacoby, *supra* note 10, at 150 (explaining that individuals will go into substantial debt to attempt to obtain biological parenthood, including taking out a second mortgage, selling assets, and siphoning savings and retirement accounts).

419. See Blake, *supra* note 11, at 686-92 (discussing Equal Protection as applied to ART and how the government must confer benefits equally where it confers them).

Fourteenth Amendment's Equal Protection and Due Process Clauses and of *Obergefell*.⁴²⁰

CONCLUSION

Equalizing same-sex couples' right to marry in *Obergefell* was a giant step toward awarding same-sex couples the fundamental rights they deserve.⁴²¹ However, it was only one of the necessary steps in the process.⁴²² For many marital couples, one of the most important aspects of marriage is procreation, and the subsequent opportunity to raise their biological children within their own family unit—so important that Justice Kennedy pronounced it as a fundamental aspect and associated privilege of marriage in *Obergefell*.⁴²³ Simply put, same-sex couples should not have to struggle to achieve biological parenthood purely because they are anatomically incapable of naturally conceiving a child.⁴²⁴ By virtually requiring same-sex couples to bankrupt themselves in order to obtain the family that they want and deserve is, by definition, unjust and unconstitutional.⁴²⁵ Ceasing the declaration of infertility solely as a medical issue and providing infertility insurance coverage for same-sex couples diminishes the disparate treatment that plagues the homosexual community—which *Obergefell* set out to do in 2015.⁴²⁶ While labeling same-sex couples infertile because of their homosexual immutability may be more unconventional than what many people are used to, that is of insignificant magnitude—as same-sex couples “ask for equal dignity in the eyes of the law [and] [t]he Constitution grants them that right.”⁴²⁷

420. See generally *id.* (discussing the implications of the Fourteenth Amendment with denying ART to homosexual persons, but concluding differently because at the time of the writing same-sex marriage was not utilized).

421. See *supra* Section I.B (discussing the *Obergefell* decision in depth).

422. See Aloni & Daar, *supra* note 11, at 22-23 (discussing the changes that need to be made post-*Obergefell*).

423. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (declaring childbearing a fundamental aspect of marriage).

424. See DAAR, *supra* note 177, at 474 (explaining same-sex couples' equal desire to obtain biological parenthood).

425. See generally Jacoby, *supra* note 10 (discussing the financial burdens imposed by financing ART out-of-pocket).

426. See Aloni & Daar, *supra* note 11, at 22 (explaining that *Obergefell* is a giant step towards an egalitarian family law regime).

427. See *Obergefell*, 135 S. Ct. at 2608.